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

UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI	AE 480MMM RULING (U) Defense Motion to Suppress Custodial Statements Allegedly Made by Walid Muhammad Salih Mubarak Bin ‘Attash (aka Khallad) Noticed by the Government in AE 166B (AE 480) 23 July 2025
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1. ~~(S)~~ Procedural History.

a. ~~(S)~~ On 8 June 2022 the Defense filed AE 480, a motion to suppress statements made by Walid Muhammad Salih Mubarak Bin ‘Attash (Bin ‘Attash) as noticed in AE 166B. The Government responded in AE 480E on 9 September 2022. The Defense replied in AE 480R on 16 February 2023. The extensive additional procedural history described in AE 480S, AE 480Z, and AE 480QQ is hereby incorporated by reference.

b. ~~(S)~~ In 2014 the Government provided notice of the intent to offer into evidence at trial statements Mr. Bin ‘Attash made to law enforcement agents in January 2007.¹ Here, the Defense moves to suppress those statements, asserting they are inadmissible because they are not sufficiently attenuated from inadmissible statements Bin ‘Attash made in 2003 while he was subjected to torture or cruel, inhuman, or degrading treatment in Central Intelligence Agency (CIA) custody.



¹ ~~(S)~~ The Government’s notice was limited to the statements “as described in the [Letterhead Memorandum] LHM dated 27 January 2007.” AE 166B at 5; *see also* AE 480E at 1, n.1; AE 480E, Attach. D.

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c. ~~(U)~~ The parties have presented evidence related to AE 480 during at least ten sessions of the Commission from June 2022 until March 2025.² The Commission heard final argument on the motion on 13 March 2025 at U.S. Naval Station Guantanamo Bay, Cuba (NSGB).

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

3. ~~(U)~~ **Findings of Fact.**

a. ~~(U)~~ **Mr. Bin ‘Attash’s Treatment in CIA Custody**

1. ~~(U)~~ Mr. Bin ‘Attash was arrested in Pakistan on 29 April 2003.³

2. ~~(CU)~~ While remaining in Pakistani custody, Bin ‘Attash was “initially cooperative” in that he was answering questions and providing information.⁴ CIA personnel observed that “[h]e was very relaxed and ... remained smiling and comfortable.” AE 480W, Attach. B at 10.⁵

3. ~~(CU)~~ In May 2003 CIA interrogators grew frustrated that Mr. Bin ‘Attash, whom they considered “genuinely ‘hard core,’” had not yet made “significant admissions” and was “able to resist interrogation [] effectively.” *Id.* at 11.

² ~~(U)~~ See AEs 457G; 483; 526; 539; 545; 556; 566; 578; 598; 606. See also AE 556I.

³ ~~(U)~~ U.S. Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program*, Executive Summary at 299, 388, n.2190 (2014) (hereinafter SSCI). ~~(U)~~ Although the Government did not object to the Commission taking judicial notice of the existence of the Executive Summary, the Government only stipulates to “verifiable facts” found therein. AE 480BBB at 4.

⁴ ~~(U)~~ SSCI at 94; 188, n.1107; 244.

⁵ ~~(CU)~~ Attachment B to AE 480W is a 115-page set of “facts to which the government agrees regarding [Bin ‘Attash’s] time in the custody of the Central Intelligence Agency.” Many of the facts are drawn directly from CIA communications produced to the Defense in discovery. Additionally, AE 444G, Attachment C, is a 13-page exemplar of information that was produced in Mr. Bin ‘Attash’s own commission case. The Commission finds the factual representations contained within AE 480W and AE 444G to be relevant for purposes of this ruling and incorporates them here. The underlying facts are not in dispute. While AE 480W and AE 444G are marked CUI and contain (U//FOUO) markings, much of the information therein is unclassified.

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4. ~~(CUJ)~~ Seeking a “rapid break through,” they concluded that “fatigue may assist in cracking his resolve.” *Id.*

5. ~~(CUJ)~~ They told Bin ‘Attash “about the process of sending him to a yet undisclosed facility where life would be extremely difficult.” *Id.* at 12.

6. ~~(CUJ)~~ Interrogators noted that Bin ‘Attash “displayed a calm and confident demeanor” and “maintained his composure even when strongly provoked.” *Id.*

7. ~~(CUJ)~~ They then subjected him to standing sleep deprivation for up to 72 hours. AE 480W, Attach. B at 11; AE 444G, Attach. C at 1.

8. ~~(CUJ)~~ Thereafter, interrogators observed that Bin ‘Attash “lost some of the swagger.” AE 480W, Attach. B at 14; AE 444G, Attach. C at 1. He “was more subdued and less confrontational.” *Id.*

9. ~~(CUJ)~~ In May 2003 Mr. Bin ‘Attash was taken into U.S. custody and held in various CIA black sites during the Rendition, Interrogation, and Detention (RDI) program.⁶ AE 480W, Attach. B at 10-16. He was first held at Location 2. *Id.* at 16.

10. ~~(U)~~ The chief of interrogations described Location 2 as a “dungeon.” AE 444G, Attach. C at 2.⁷

⁶ ~~(U)~~ SSCI at 244.

⁷ ~~(CUJ)~~ “Another senior CIA officer stated that Location No. 2 was itself an enhanced interrogation technique.” AE 444G, Attach. C at 2. Other U.S. government personnel have described this location as: “dreadful,” “traumatic,” the “CIA Officer’s House of Pain,” “freezing,” “frigid cold,” having “squalid conditions,” “something out of a horror show,” a “slimy side of what we do,” “a primitive prison,” and [] “like an old Nazi concentration camp.” *Id.* “Detainees were observed at various times ‘rocking back-and-forth wrapped in a blanket in their cell,’ having a ‘stench that was like no other, enhanced by their fear,’” and “scurr[ying]” around their cells. *Id.*; AE 480W, Attach. B at 17. Debriefers made a point of ensuring the detainees knew females were observing them while they were naked. *Id.*; [REDACTED]

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11. ~~(U)~~ At Location 2 detainees were held in complete darkness and exposed to freezing temperatures. AE 444G, Attach. C at 2.

12. ~~(U)~~ Mr. Bin 'Attash's cell contained only a bucket. *Id.*

13. ~~(U)~~ Detainees at Location 2 including Mr. Bin 'Attash were subjected to prolonged standing sleep deprivation, loud music, sensory deprivation, extended isolation, reduced quantity and quality of food, nudity, and "rough treatment." AE 480W, Attach. B at 16.

14. ~~(U)~~ Detainees were often shackled to a bar on the ceiling with their hands overhead or chained to the wall. AE 444G, Attach. C at 2.

15. ~~(CUH)~~ "Bin 'Attash was told that all future privileges or punishments were entirely dependent upon his willingness to cooperate." *Id.* at 3.

16. ~~(U)~~ In May 2003 the RDI team submitted an interrogation plan and then sought and received approval to apply a round of enhanced interrogation techniques (EITs)⁸ to Mr. Bin 'Attash immediately upon his rendition.⁹ AE 480W, Attach. B at 21; AE 444G, Attach. C at 3.

17. ~~(CUH)~~ Although an official believed Bin 'Attash did not "warrant" EITs, another official "called ALEC Station and told them to 'go to the mat' in advocating for the use of [EITs] claiming that bin Attash was holding back information."¹⁰

18. ~~(CUH)~~ The interrogators' goal was to use the EITs to "displace his expectations and begin the conditioning."¹¹ AE 480W, Attach. B at 21; AE 444G, Attach. C at 3.

⁹ ~~(U)~~ SSCI at 105, 388, n.2190.

¹⁰ ~~(U)~~ SSCI at 122, n.724.

¹¹ ~~(CUH)~~ "OBJECTIVE: TO INDUCE IN BIN 'ATTASH A SENSE OF PSYCHOLOGICAL DEPENDENCE, LEARNED HELPLESSNESS, AND FOCUSED SHORT TERM THINKING IN ORDER TO REDUCE/ ELIMINATE BIN 'ATTASH'S SENSE OF HOPE, OVERCOME HIS RESISTANCE POSTURE, AND GAIN A

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19. ~~(S)~~ The CIA team applied the approved EITs to Mr. Bin ‘Attash on 17-18 May 2003, including facial attention grasp, facial insult slap, abdominal slap, walling, stress position standing with forehead against wall, stress position—on knees with back inclined towards feet, and water dousing. AE 480W, Attach. B at 20; AE 444G, Attach. C at 3; SSCI at 105.

20. ~~(CUI)~~ Interrogators also conducted full body cavity searches, stripped and forcibly shaved Mr. Bin ‘Attash, dressed him in only a diaper, and used photographs of his niece and nephew to threaten him. AE 480W, Attach. B at 14, 16, 22; AE 444G, Attach. C at 1, 3, 6-9, 11.

21. ~~(CUI)~~ Interrogators noted that these techniques “dramatically lowered [his] resistance posture.” AE 480W, Attach. B at 32; AE 631V, Attach. B at 49.¹²

22. ~~(CUI)~~ Cold water dousing was particularly effective with Mr. Bin ‘Attash; interrogators remarked that the threat of cold water dousing alone was sufficient to cause him to answer their specific questions. AE 480W, Attach. B at 24-27.

23. ~~(CUI)~~ Although the cold water baths “usually induce[d] cooperation,” interrogators nevertheless considered Bin ‘Attash to be “likely to engage in resistance behavior of stonewalling, denial, and minimization.” *Id.* at 23.

24. ~~(CUI)~~ Because the interrogators perceived a lack of cooperation on Bin ‘Attash’s part, they stopped giving him solid food. *Id.* at 25.

WILLINGNESS TO DISCUSS/REVEAL ELEMENTS OF VITAL INTELLIGENCE” AE 480W, Attach. B at 61.

¹² ~~(S)~~ AE 631V in Mr. Bin ‘Attash’s commission is the source document to AE 444G, Attachment C, and is cited by the Government in AE 444G at p. 5. *United States v. Mohammad, et al*, AE 631V, Attach. B at 49 (29 April 2020); see also AE 480W at 5.

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25. ~~(S)~~ After the initial application of EITs, interrogators observed that Mr. Bin 'Attash "was affected by his period of isolation and prolonged standing and had become more open." *Id.* at 26.

26. ~~(CUI)~~ The interrogators noted that his lowered resistance posture was "most likely the result of continuous interrogations as well as medical problems with his left leg."¹³ AE 480W, Attach. B at 28; AE 444G, Attach. C at 4.

27. ~~(CUI)~~ Interrogators "reminded [him] that any lies at this point would result in a return to his much harsher conditions." AE 444G, Attach. C at 4.

28. ~~(CUI)~~ They remarked that Mr. Bin 'Attash was "subtly and unsubtly reminded that his current improved status was a function of his behavior. He appeared very eager to please in order to avoid such a diminution in his living conditions." AE 480W, Attach. B at 31.

29. ~~(CUI)~~ Under those circumstances, interrogators believed "Bin 'Attash has turned the corner in terms of compliance. As long as he continues to cooperate, he will be allowed to keep his clothes and stay on solid food. Care will be exercised in moving him so that his left leg will be allowed to heal." *Id.* at 29.

30. ~~(CUI)~~ Subsequently, interrogators observed that Mr. Bin 'Attash "continue[d] to improve his level of cooperation. The team no longer has to pry the information from him, as was the case in the first few days. He now answers questions with full explanations and elaborates on the information without having to be admonished by interrogators." *Id.* at 35.

¹³ ~~(U)~~ Mr. Bin 'Attash is a below-the-knee amputee. AE 480E at 3; *see also* SSCI at 117, n.692.

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31. ~~(CUI)~~ Interrogators “strongly reiterated to Bin ‘Attash that no matter who spoke with him in the future, the team would be aware of [his] responses and that his current status would remain a function of his behavior.” AE 480W, Attach. B at 35, 36; AE 444G, Attach. C at 4.

32. ~~(CUI)~~ Interrogators told him that “[t]here were going to be different people that would see him in the future and [] the same attention and answers he had been providing should continue. He was told that another individual would see him later in the afternoon and he should be attentive and answer completely.” AE 480W, Attach. B at 43; AE 444G, Attach. C at 5.

33. ~~(CUI)~~ “It was stressed to Bin ‘Attash that he needs to bring additional items to the surface in order for it to be believed that he is in fact being cooperative and that this cooperation could result in his conditions improving.” AE 480W, Attach. B at 44.

34. ~~(CUI)~~ After Mr. Bin ‘Attash moved to Location 4 in June 2003,¹⁴ interrogators wrote that he “seems to take pleasure in engaging his debriefers in circular, laborious discussions. He subtly sabotages discussions by equivocating and providing, probably accurate, but vague and nonactionable details.” *Id.* at 37, 46.

35. ~~(CUI)~~ They believed he “utilized debriefing to attempt to mislead and withhold information.” Therefore, “interrogation will be continued until Bin ‘Attash’s realization that any resistance is futile and only complete cooperation will be accepted.” *Id.* at 51.¹⁵

36. ~~(CUI)~~ On 18 July 2003 the interrogation team sought approval to apply EITs to Mr. Bin ‘Attash a second time, including attention grasp, walling, facial hold, facial slap (insult slap),

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abdominal slap, cramped confinement, and water dousing, with the addition of waterboarding for the first time. *Id.* at 48-51.

37. ~~CUJ~~ They did not receive approval for advanced measures. *Id.* at 57 (“No enhanced measures were employed.”).

38. ~~CUJ~~ However, they continued to use stress positions, standing sleep deprivation, diapering, nudity, loud music and sensory deprivation, dietary manipulation, forced shaving, constant bright lights, and constant shackling. AE 480W, Attach. B at 50-51, 55-56; SSCI at 117.

39. ~~CUJ~~ One interrogator explained to Bin ‘Attash that “he had to provide some sort of information which was new, so that the interrogator could convince everyone that Bin ‘Attash should be allowed to sleep.” AE 480W, Attach. B at 56.

40. ~~CUJ~~ Interrogators wanted to “reinforce Bin ‘Attash’s decision to provide information and demonstrate that his decision [was] irreversible.” *Id.* at 52.

41. ~~CUJ~~ During this time, Mr. Bin ‘Attash was provided a weekly water-hose bath and a daily diaper change. AE 480W, Attach. B at 54-55; AE 444G, Attach. C at 7.

42. ~~CUJ~~ An interrogator “expressed the opinion that Bin ‘Attash was left in interrogation status at Location No. 4 for too long. He was naked for over 30 days, slept on the floor, denied minor comforts, etc.” AE 480W, Attach. B at 73; AE 444G, Attach. C at 9.

43. ~~CUJ~~ Interrogators then observed that Bin ‘Attash “displayed nervousness and concern at seeing the Interrogator manifested by trembling visibly. The Interrogator told Bin ‘Attash if he was telling the truth and not holding back, he had nothing to worry about.” AE 480W, Attach. B at 74-75.

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44. ~~(CUI)~~ They observed:

BIN 'ATTASH SAID HE KNEW HE COULD NOT HOLD OUT AGAINST THE INTERROGATION, SO HE HAD NO REASON TO TRY TO HOLD BACK. BIN 'ATTASH SAID THAT HE WAS SUFFERING THE WILL OF ALLAH, AND THAT ALLAH KNEW BIN 'ATTASH HAD ONLY THE STRENGTH OF A MAN AND COULD NOT HOLD OUT AGAINST UNRELENTING INTERROGATION. AT TIMES, PARTICULARLY WHEN DISCUSSING THE OPERATIONS OF THE SAUDI CELL, BIN 'ATTASH TREMBLED VISIBLY. AT OTHER TIMES, PARTICULARLY AT THE END OF THE INTERVIEW, HE SMILED VISIBLY AND APPEARED ALMOST TAUNTING IN Demeanor.¹⁶

45. ~~(CUI)~~ CIA interrogators believed Bin 'Attash was lying often enough that they could detect certain behavior patterns. For example, they believed "he begins his explanation in English, and then shifts to rapid Arabic; he has [a] nervous swallowing reflex; and, he provides rich details about unimportant topics." AE 480W, Attach. B at 65.

46. ~~(CUI)~~ They believed he "developed a successful strategy to avoid providing truthful details [and] was manipulative and, at times, openly untruthful." *Id.* at 67.

47. ~~(CUI)~~ In September 2003 Bin 'Attash was moved to Location 7.¹⁷ *Id.* at 74.

48. ~~(CUI)~~ During a medical intake evaluation at Location 7, a provider noted that "Bin 'Attash seemed to tolerate rendition well. He appears psychologically stable, and there is no current evidence of any severe or prolonged psychological disturbance. From a psychological perspective, Bin 'Attash appears to tolerate the rendition with no significant problems." *Id.*

49. ~~(CUI)~~ The interrogation team continued to "take advantage of his vulnerability and his apparent concern that failure to provide the complete truth [would] result in a return to his previous conditions." *Id.* at 76.

¹⁶ ~~(U)~~ Mohammad, AE 631V, Attach. B at 85.

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50. ~~(CUI)~~ During a psychological assessment in October 2003 at Location 7, CIA staff observed that Mr. Bin 'Attash "appears sociable, confident, and attempts to come across as being cooperative. He may appear compliant during debriefing. However, he may hinder discussion by circumventing and using deception to avoid giving specific details. It is expected he will continue to lie." *Id.* at 77.

51. ~~(CUI)~~ An updated psychological assessment found that Bin 'Attash was "genuinely interested in participating in the assessment" and that "[a]t the present time, there is no hopelessness. His mood was euthymic and affect was bright." The assessment found no evidence of anxiety, depression, psychosis, or any severe or prolonged psychological disturbance. *Id.*

52. ~~(CUI)~~ During an interview at Location 7 in January 2004, interrogators wrote that when "provided with tea and figs," "Bin 'Attash displayed a cooperative demeanor throughout the interview. Bin 'Attash was not only extremely cooperative, he was even friendly and helpful throughout the interview." *Id.* at 80-81.

53. ~~(CUI)~~ Several months later in May 2004, interrogators concluded Mr. Bin 'Attash's "bravado is a coping mechanism that justifies having provided substantial and useful information in the past. In other words, Bin 'Attash knows that he has in fact provided us with important and perhaps actionable information and resorts to comments to assuage his conscience." *Id.* at 84.

54. ~~(CUI)~~ However, observing nerves and anxiety, "[t]he interrogators assessed that Bin 'Attash [was] genuinely fearful that the interrogators intend to return him to an interrogation phase and he wishe[d] to avoid this in spite of his blustering." *Id.* at 87.

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55. ~~(CUJ)~~ “Well aware of Bin ‘Attash’s history of misleading and withholding,” the team “[could] not rule out at this point that Bin ‘Attash has fabricated or withheld during these sessions.”¹⁸ *Id.* at 88, 90.

56. ~~(CUJ)~~ Bin ‘Attash “display[ed] obvious anxiety when the interrogators enter or exit the room or ask questions during the debriefing sessions.” Nevertheless, he remained “respectful and somewhat composed.” *Id.* at 88.

57. ~~(CUJ)~~ A psychologist commented that Bin ‘Attash was “spirited” and “fully engaged in the process.” “He gave more thorough responses” and “appeared at ease ... [i]f he was experiencing anxiety, again he appeared comfortable. Bin ‘Attash continues to show coherent thought processes, alertness, full attention, and appropriate affect.” AE 480W, Attach. B at 91.

58. ~~(CUJ)~~ However:

IT IS WELL DOCUMENTED THAT BIN ‘ATTASH WAS COMPLETELY UNDONE AND OVERWHELMED DURING HIS INITIAL INTERROGATIONS. HIS BEHAVIOR SHIFTED FROM OPEN DEFIANCE TO APPARENT ANXIOUS COOPERATION IN THE COURSE OF ONE OR TWO DAYS. LATER IN HIS DETENTION HE AGAIN EXPERIENCED SIGNIFICANT FEAR AND APPREHENSION BECAUSE OF THE THREAT OF IMPENDING HARSH TREATMENT. REPORTS ON HIS BEHAVIOR DURING THIS PERIOD AND THROUGH THE COURSE OF HIS SUBSEQUENT DETENTION FROM PSYCHOLOGISTS, INTERROGATORS, AND DEBRIEFERS SHOW A PATTERN OF INCREASING SELF PREOCCUPATION.¹⁹

59. ~~(CUJ)~~ In August 2004 Mr. Bin ‘Attash was transferred to Location 5.²⁰ *Id.* at 100.

60. ~~(CUJ)~~ In October 2004 Mr. Bin ‘Attash was transferred back to Location 7. *Id.* at 103.

¹⁸ ~~(CUJ)~~ Here, “these sessions” references the experimental use of a polygraph. AE 480W, Attach. B at 90-92.

¹⁹ ~~(CUJ)~~ AE 480W, Attach. B at 96.

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61. ~~(CUH)~~ While he was detained at Location 7, interrogators conducted periodic assessments of Mr. Bin 'Attash. *Id.* at 105, 109-10.

62. ~~(CUH)~~ In late October 2004 interrogators observed that Bin 'Attash's "comportment has not varied significantly for the past year. He presents no security or administrative problems. His mood and health are stable." *Id.* at 105.

63. ~~(CUH)~~ On 7 December 2004 a psychologist noted that "Bin 'Attash continues to do well and seems to have experienced no negative effects from his move here. ... Overall, he continues to be psychologically stable and there is no evidence of any prolonged or significant psychological disturbance." AE 480W, Attach. B at 107-08.

64. ~~(CUH)~~ In March 2005 interrogators observed "Bin 'Attash seemed pleased to see the interrogators. At times he appeared to enjoy the discussion he was having with the interrogators, but several times he would seem to catch himself, briefly stiffen his posture." *Id.* at 110.

65. ~~(CUH)~~ On 14 April 2005 a psychologist noted that "Bin Attash continues to have a good adjustment to his detention environment. He successfully applies a range of positive coping behaviors including structuring his day, religious study, and exercise. He keeps a positive attitude and seems to do his best to put small issues in perspective." *Id.* at 111.

66. ~~(CUH)~~ On 2 July 2005 a psychologist noted "no significant difficulties coping with his current situation." *Id.*

67. ~~(CUH)~~ In November 2005 Bin 'Attash was transferred to Location 10, where he was in "full debriefing mode." He appeared to be "truly scared" about the move, though he was relieved that no rectal exam was required that time. *Id.* at 114.

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~~CUJ~~**b. ~~(U)~~ Mr. Bin 'Attash's Transfer to DoD Custody and 2007 Interviews**

1. ~~(U)~~ In September 2006 Mr. Bin 'Attash and other high-value detainees (HVDs) were transferred to NSGB. *Id.* at 115.

2. ~~(U)~~ The former commander of Camp 7 at NSGB stated his mission upon the transfer was to provide "safe, humane care and custody." He believed it was important and appropriate for the HVDs to know they were in DoD custody; he personally apprised them of this fact.

3. ~~(U)~~ The commander relied on Common Article 3 of the Geneva Conventions and the Detainee Treatment Act of 2005 to inform development of his procedures.²¹

4. ~~(U)~~ The former commander described the detainees' amenities, including a shower in the individual cell, towels, a sink with running water, a mirror, a table with a stool, a bed with a mattress, pillow, and blankets, toiletries, clothing, shoes and shower shoes, pen and paper, prayer items, and a Koran.

5. ~~(CUJ)~~ Standard procedure was for the HVDs to be shackled for movement, [REDACTED]

[REDACTED] The commander was unaware of the purpose behind this procedure.

6. ~~(CUJ)~~ [REDACTED]

²¹ ~~(U)~~ Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 87, Aug. 12, 1949, [1955] 6 U.S.T. 3316. Detainee Treatment Act, Pub. L. 109148 (2005) (codified at 42 U.S.C. 2000dd(d)); *see infra* note 32. *See also* Department of Defense Directive 2310.01E, *The Department of Defense Detainee Program*, <http://www.dtic.mil/whs/directives/corres/html/231001.htm>, September 5, 2006.

²² ~~(U)~~ "Khallad" is Mr. Bin 'Attash's preferred kunya. AE 480E, Attach. D at 1.

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7. ~~(U)~~ Detainees were able to select what to eat from biweekly menus.²³

8. ~~(U)~~ While at NSGB, HVDs including Bin 'Attash had 24/7 access to medical and psychological care and treatment.²⁴

9. ~~(U)~~ Camp 7 had its own medical facility and dedicated staff whose only mission was HVD care at Camp 7. Available medical personnel included a family physician, psychiatrist, and dentist and their respective corpsmen and techs.

10. ~~(U)~~ There was no limit on how many times an HVD could request medical or other assistance. Medical appointments took priority over other meetings, including law enforcement interviews. Tr. at 29260.

11. ~~(U)~~ HVDs also had access to necessary treatments at the NSGB Naval Hospital.

12. ~~(U)~~ Medical specialists such as cardiologists traveled to NSGB to treat detainees.

13. ~~(U)~~ "Mr. Bin 'Attash would go to the hospital additionally for prosthetic medical appointments." Tr. at 29248.

14. ~~(U)~~ "[T]he same technician who was fitting prosthetics for amputees, U.S. servicemembers returning from the battlefield in Afghanistan would on the weekends fly down

²³ ~~(U)~~ "[T]he detainee population throughout all the camps were offered three meals: a morning breakfast sort of meal, a noon lunch meal, and an evening supper meal consisting of about 4,200 calories. There were specific meals that were provided for detainees that had specific dietary issues, either vegetarian or meat but not red meat or, you know, whatever combinations. Low -- gluten-free, low sodium, you name it, there were meals prepared specifically based on medical staff input. Each one got their own -- what they needed." Tr. at 30430.

²⁴ ~~(U)~~ See testimony of Former Camp 7 Commander dated 23 January, 18 March 2025; testimony of RADM Mark H. Buzby (Ret.) dated 19 March 2025; Tr. at 29245-48, 30243, 30266-67, 30432, 30442-43; AE 569LL at 4.

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to Guantanamo and do the exact same treatment or exact same service with the same exact prosthetics to members of the detainee population.” Tr. at 30432-33.

15. ~~(U)~~ On 9 October 2006 Mr. Bin ‘Attash met with representatives from the International Committee of the Red Cross (ICRC) for the first time. He met with them again on 9 December 2006. *See* 480E, Attach. M; Tr. at 19017.²⁵

16. ~~(U)~~ On 24 – 27 January 2007 Mr. Bin ‘Attash participated in 25 hours of interviews with Federal Bureau of Investigation (FBI) Special Agent (SA) Stephen Gaudin²⁶ and two DoD investigators, SAs Robert McFadden of the DoD Counterintelligence Field Activity (CIFA), and Andrew Emley of the Naval Criminal Investigative Service (NCIS).²⁷ They were assisted by FBI Language Specialist John Elkaliouby.

17. ~~(U)~~ SAs Emley and McFadden had access to intelligence and law enforcement products and were able to review intelligence reporting about Mr. Bin ‘Attash prior to the interviews. Tr. at 17430, 22861-64.

18. ~~(U)~~ These interviews took place at a separate location at Camp Echo II.

19. ~~(U)~~ The room contained a small holding cell and a separate furnished area.

20. ~~(U)~~ During the interviews, Mr. Bin ‘Attash sat in a chair [REDACTED]
[REDACTED]

21. ~~(U)~~ The agents wore civilian clothes and were unarmed. Tr. at 19006–07.

²⁵ ~~(U)~~ Testimony of former Federal Bureau of Investigation (FBI) Special Agent (SA) Stephen Gaudin dated 11 August 2022.

²⁶ ~~(U)~~ SA Gaudin has been the subject of additional litigation in this Commission. *See, e.g.*, AE 551 series.

²⁷ ~~(U)~~ *See* AE 480E, Attach. D at 1; Tr. at 19244; *see also* testimony of NCIS SA Andrew Emley dated 3 March 2023; SA Robert McFadden dated 26 July 2022.

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22. ~~(U)~~ The agents, all Arabic-speaking, greeted Bin 'Attash in both Arabic and English. AE 480E, Attach. D at 1.

23. ~~(U)~~ The interviewing agents presented Mr. Bin 'Attash a box of dates which he declined because he was fasting. However, he said he would eat them the following day. *Id.*

24. ~~(U)~~ The agents explained that, regardless of whose custody he might have previously been in, Mr. Bin 'Attash was now in DoD custody and would not return to any of his previous custodians. AE 319RR; AE 480E, Attach. C, Attach. D at 2; Tr. at 19246.

25. ~~(U)~~ The agents also explained that remaining in DoD custody was not conditioned on his agreement to speak with them. AE 480E, Attach. D at 2.

26. ~~(U)~~ The interviewing agents further explained to Mr. Bin 'Attash that they were aware he had made statements in the past; that they were not interested in anything he may have said previously; and that they were only interested in his answers to their questions. AE 480E, Attach. C, Attach. D at 2; Tr. at 19012.

27. ~~(U)~~ The agents told Bin 'Attash that any further statements he made could possibly be used against him in a court of law. AE 480E, Attach. D at 4; Tr. at 19248.

28. ~~(U)~~ The agents stressed that participation was voluntary. AE 480E, Attach. D at 2; Tr. at 18998, 19012-13.

29. ~~(U)~~ They further explained that if he agreed to the interview, it would be conducted in a manner of his choosing, and he would control when they spoke and what they spoke about. AE 480E, Attach. D at 2; Tr. at 19013-14.

30. ~~(U)~~ Finally, they also told Mr. Bin 'Attash he could take a break for prayer or for any reason at any time. AE 480E, Attach. D at 2; Tr. at 19014.

31. ~~(U)~~ Before the start of each interview session, the interviewing agents specifically

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asked Bin 'Attash if he was willing to speak with them, and he said he was willing to do so. AE 480E, Attach. D at 4.

32. ~~(U)~~ Although Mr. Bin 'Attash made complaints of abuse suffered during his time in CIA custody, he made "no complaints" to the interviewing agents about his treatment at NSGB. AE 480E, Attach. D at 4; AE 480II, Attach. B; Tr. at 19016-17. The agents documented the complaints of abuse separately on a CIA-furnished laptop. AE 480II.

33. ~~(U)~~ At the end of the first day, Bin 'Attash "advised he was willing to speak to the interviewers tomorrow, and he specifically requested to begin that interview session earlier than the time today's interview session had started." AE 480E, Attach. D at 3.

34. ~~(U)~~ Later Mr. Bin 'Attash told the agents "he had already done the 'Istishar'²⁸ and decided he would speak to the interviewing agents," and "that he woke up around 03:00 so he could reflect and think about whether or not he should speak with the interviewing agents the next day. Khallad advised that he thought about this over night with a very clear mind and he decided that he did want to continue" AE 480E, Attach. D at 5.

35. ~~(U)~~ Throughout these interviews, Bin 'Attash and the agents both chose topics of discussion. When Bin 'Attash did not wish to discuss something, the agents moved on. *Id.* at 4.

36. ~~(U)~~ On at least one occasion, Mr. Bin 'Attash prepared a list of discussion topics. He "prepared this note while in his detention cell, not during one of the interview sessions ... of his own volition and not at the request of the interviewing agents." *Id.* at 5.

37. ~~(U)~~ Mr. Bin 'Attash also made comments the agents considered threatening:²⁹

²⁸ ~~(U)~~ The "Istishar" is a prayer asking for divine guidance. AE 480E, Attach. D at 5; Tr. at 16092 (testimony of SA Robert McFadden dated 27 April 2022).

²⁹ ~~(U)~~ AE 480E, Attach. D at 45.

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Khallad advised he had chosen to join the jihad and therefore, whatever happens to him he accepts. Khallad then said he still considers himself in the jihad now and will remain so in the future. Khallad advised that if he was out of jail now and saw interviewing agent SA Gaudin on the street he would immediately kidnap him and hold him until he (Khallad) could figure out what to do with him. Khallad commented, in a calm matter of fact manner, if he had no place to keep SA Gaudin he (Khallad) would perhaps kill SA Gaudin. ... The interviewing agents exchanged farewell pleasantries with Khallad and SA Gaudin stated perhaps we will meet again some day. Khallad replied, in a calm manner, "if the next time I see you is outside, it may be the last day of your life."

c. ~~(U)~~ Statements to Zubair

1. ~~(CU)~~ At the end of the first interview day, 24 January 2007, Mr. Bin 'Attash made several statements to a fellow detainee, Mohammed Farik bin Amin, also known as Zubair. AE 480E, Attach. O; AE 480RR, Attach. B. He also made similar statements on 26 January 2007. AE 480SS, Attach. B.

2. ~~(CU)~~ Mr. Bin 'Attash told Zubair that "people came—from the FBI, and Pentagon," and that "[t]here's a big difference between those people and CIA." "A very big difference. A good man, I mean good people." AE 480RR, Attach. B at 7.

3. ~~(CU)~~ Bin 'Attash also said, "you talk of your own accord. You don't want to talk, that's it! No problem, you go back to the cell." *Id.* at 8.

But until now I am not assured. [Laughs] ... I told him: 'I cannot trust any human being' ... for years I have been dealing with criminals ... CIA ... You come today like uh-I mean like an angel ... 'I cannot believe anyone, at all. At all. At all!' I told him ... There is a barrier between me and people ... He has a lot of files about me ... he said: 'I don't have-I don't know anything that is with the CIA.' ... 'We don't know what you said, or what they told you.' ... He said: '[There's] a big difference [UI] in uh-between us and them.' He said: 'I don't know anything that they did to you.'

Id. at 8-9. He continued, "[t]hey have very good manners. But the problem is that I don't know if they are truthful or lying. He wanted to know about me; my whole life, from beginning to end. It

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is not important to get military [*sic.*] information; or like about September [11th] or [USS] Cole.

He wanted something uh-he said about the history.” *Id.* at 10-11 (brackets in original). He said:

I told him: ‘The CIA—[laughs]³⁰ have a method by force ... I mean in a threatening way or under pressure; and you are the same thing! But you want to get something by doing some sweet talking; but in the end you want some information.’ He assured me, again and again and again. We used to repeat this-the same thing ten times.

AE 480RR, Attach. B at 11. Bin ‘Attash also said:

And I told them: ‘We can sit down for a long time, or we might sit down for a short time. I want time to think, and to pray, and know what I would say or will not say to you. Is there a need or not?’ ... I was very hesitant and I prayed. I prayed the guidance prayer. I don’t know, I mean . . . [Pause]. He wants things to write down, I mean things that I--anything that I will say to him, I have more or less told to the CIA. I don’t have anything new. Whether it is personal or family related matters. ... They do not have anything from the CIA.

Id. at 14.

They have good manners, but uh-[Laughs] I don’t trust them brother! I told him: ‘I am not going to trust any person anymore after all these years. All the people that you deal with uh-it must be that there is someone who is lying or cheating me.’ Even if he gives me something nice; gives me chocolate, there must be something behind that; you know what a trap is? ... We call this a trap. Do you know what a fox means? ... When you catch a fox, there is something that opens up and then [clap], it catches. ... You put this thing, and then you put some dirt over it and then put a piece of meat. ... Okay? The fox comes, he touches this [clap] he is caught. This is called a trap. You are walking on the street and I dig a hole for you. ... This is a trap. It’s called a trap. So I told him uh-so even if they do something good for us; this is a trap. They want to treat us nicely just to get information. They have been torturing us for years. Maybe the first year was hard for us. But then later they didn’t do it but we stayed under threats and fear and uh-I mean. . . [Pause] I told them: ‘I don’t-I don’t have any person that I trust. I might not even trust myself’ [Laughs]. So all people that I see in front of me are like this. But they uh-they have good manners uh-I mean. . . Sometimes I feel that he is truthful to me; and then sometimes- [laughs] sometimes I don’t know, I mean what he wants exactly.

³⁰ ~~CUH~~ The transcript of these statements is imperfect and at times difficult to discern. It includes many notations indicating something was unintelligible and attempts to note when Bin ‘Attash or Zubair are laughing. *See, e.g.*, AE 480RR, Attach. B at 6 (“During many parts of the conversation, Khallad chuckles and this was not continuously noted in the body of the translation for clarity and flow of conversation.”).

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Id. at 17. Zubair then asked Bin ‘Attash if he did the guidance prayer. Bin ‘Attash responded, “I prayed, there was not enough uh—no time, but I prayed and performed a guidance invocation after the prayer. ... I mean ... [Pause]. I had peace of mind....” AE 480RR, Attach. B at 20; *see* AE 480E, Attach. D at 5; para. 3(b)(34), *supra*.

4. ~~CUH~~ On 1 February 2007 Bin ‘Attash told Zubair, “If you go to court and you had done something against the Americans don’t be afraid, say ‘I did this’ ... this is something to be proud of. You say: ‘I did it.’ He gives you a sentence of 100, you tell him: ‘Give me 200.’ You understand?” AE 480RR, Attach. C at 31.

In the FBI, he told me: ‘I can possibly use this in court, possibly.’ I told him: ‘When you go to court, you tell the judge ‘Khallad, I am proud of what I did in September; I am proud.’ ... I was telling him: ‘You tell the judge this, everything. In court you can use this against me. I want that.’

Id. In contrast, regarding Zubair’s case, Bin ‘Attash advised:

You should say the things that pertains to you only. ... And uh-before you go to court, a group like this will come over, but not FBI. They will come to you having the information that the CIA got from you. When you say: ‘I didn’t say this.’ You create a problem for them. He will not be able to use it against you. Tell him: ‘They got this from me by torture. By force.’ You deny. You understand? ... A group will come and sit down with you, and show you all these, the charges that are against you. You will not go to court until this group sits down with you. But here, anything you say is without pressure, there is no pressure, on you. Or there is nothing by force. They will use this against you. If you had done something, don’t be afraid.

Id.

5. ~~CUH~~ On 26 January 2007 during the interview timeframe, Mr. Bin ‘Attash also told Zubair that he had threatened the agents. For example:

I told him: ‘Even if I kill you, until the last moment I like to respect the enemy, I mean if you tell me uh-I respect you but I will kill you. This does not prevent me from-I mean killing you. I can tell you like uh- ... ‘You dog, you pig and you are so and so. I don’t like that and I spit in your face, I don’t like to do that. ... It’s true that I hate you, ... and you know that I will kill you. You know that. But I also

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like to respect you. Even if I kill, it is that I like to be uh-I deal with the enemy with respect.'

AE 480SS, Attach. B at 11; *see also id.* at 14.

6. ~~(CUH)~~ Bin 'Attash was also confident in his ability to control the topic of the interview, comparing himself to a suspenseful movie getting cut off at the exciting part.

Tomorrow? I have put him in a situation uh ... You know how when you are watching a movie, very important movie, like an American movie. ... And you are like this, looking at the movie. Like this, you know, you are not speaking or knowing what is going on around you, and if someone talked to you, you might not hear him. All your feelings and eyes and ears are in the movie ... and then you get to a very important part and the electricity is cut off. What happens to you? Not at the end, before the ending but important ... in a scene-uh-picture, very critical. And the electricity is cut off, the TV. What happens to you? ... you are wondering. The movie has stopped. You are like ... I mean-that is what I did to them. Today. [Laughs]. ... I had told them before: 'We will stop at 1 o'clock today. I had said this earlier, six hours before that. ... So I said: 'There is something important,' and I was not lying, 'something important. Do you want to know about it?' It is a link with Gamash.³¹ ... 'Something important in regards to Gamash and Uranium.' [Laughs] ... I said: 'This is for tomorrow.' He said: 'Why do you mention Uranium at 1 o'clock.' I said: 'I did mean to do that, but I saw this picture and this picture is the link to Uranium. This man had given me a letter to Gamash in regards to Uranium. So tomorrow we will talk about this, but not tomorrow morning; in the last hour, [first] you give me all that is in the bag, the file; and when we are done I will tell you about this, at the end.

AE 480SS, Attach. B at 12-13.

4. ~~(U)~~ Law & Analysis.

a. ~~(U)~~ "Torture, and evidence obtained thereby, have no place in the American system of justice (or of any nation for that matter)." *United States v. Abu Ali*, 395 F.Supp.2d 338, 380 (E.D.Va. 2005). The universal prohibition against torture requires that our courts treat it with the utmost attention as a grave violation of national interest, particularly when that torture is

³¹ ~~(U)~~ Yemeni Political Security Organization General al-Qamish. *See* AE 480E, Attach. D at 17, 42-43.

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committed under the “color of official authority” of the U.S. government. *See Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 133 (2013) (Breyer, J., concurring).

b. ~~(U)~~ “No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment [] whether or not under color of law, shall be admissible in a military commission...” 10 U.S.C. § 948r(a); *see* M.C.R.E. 304(a)(1). The prohibition on statements obtained by torture also applies to statements made by someone other than the accused who was subject to torture or cruel, inhuman or degrading treatment. M.C.R.E. 304(a)(3) provides:

Statements from persons other than the accused allegedly produced by coercion. When the degree of coercion inherent in the production of a statement from a person other than the accused offered by either party is disputed, such statement may only be admitted if the military judge finds that— (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; (B) the interests of justice would best be served by admission of the statement into evidence; and (C) the statement was not obtained through the use of torture or cruel, inhuman, or degrading treatment as defined in section 1003(d) of the Detainee Treatment Act, Pub. L. 109148 (2005) (codified at 42 U.S.C. 2000dd(d)).³²

c. ~~(U)~~ The Government stipulates to the circumstances surrounding the 2003 interrogations of Mr. Bin ‘Attash. The evidence attached to the pleadings in the AE 480 series, including the facts agreed to by the Government in AE 480W, Attachment B, clearly and unequivocally establish that while in CIA custody from 2003 – 06, Mr. Bin ‘Attash was at

³² ~~(U)~~ 42 U.S.C. § 2000dd(a) provides that “[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment,” which “means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.” 42 U.S.C. § 2000dd(d). The Commission need not reach the question of the applicability of those provisions here.

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various times subjected to both torture and cruel, inhuman, or degrading treatment.³³ See AE 480Z at 4-6. Because they were obtained through torture, the Commission finds, as the Government concedes, that Mr. Bin ‘Attash’s 2003 – 06 statements made in CIA custody are inadmissible pursuant to 10 U.S.C. § 948r and M.C.R.E. 304.

d. ~~(U)~~ The issue in dispute in AE 480 is not whether Mr. Bin ‘Attash was subjected to torture or cruel, inhuman, or degrading treatment by the CIA—he most certainly was. Neither is the issue whether Mr. Bin ‘Attash was subjected to similarly harsh treatment in the months preceding the statements he made to the law enforcement agents in 2007—he most certainly was not. Instead, the core issue here is whether Mr. Bin ‘Attash’s 2007 statements were so tainted by the prior torture that they must be suppressed.

~~(U)~~ **Voluntariness**

e. ~~(U)~~ M.C.R.E. 304(a)(3) applies to “statements from persons other than the accused allegedly produced by coercion.” The existence of coercion goes hand-in-hand with whether a statement is voluntary. Although the test for voluntariness in M.C.R.E. 304(a)(4) by reference to M.C.R.E. 304(a)(2)(B)(ii) applies only to statements of an accused, the factors listed therein are nevertheless helpful in evaluating voluntariness of third-party statements such as these which were taken in the same manner as a statement of an accused. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (discussing factors).

f. ~~(U)~~ Whether a confession was voluntary is distinct from the question of whether the confession is accurate or reliable. *United States v. Karake*, 443 F.Supp.2d 8, 50 (D.D.C. 2006)

³³ ~~(U)~~ See AE 480W at 5 (“The Government concedes as fact the contents of Attachment B such that the Defense can rely on those facts to challenge the admissibility of Mr. Bin ‘Attash’s LHM as it chooses, and the Commission similarly has those facts available for consideration.”).

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(listing cases); *Jackson v. Denno*, 378 U.S. 368, 384–85 (1964). Indeed, the “probable truth or falsity” of a confession is not a permissible standard on the “question [of] whether the confession was voluntary and admissible.” 443 F.Supp.2d at 50 (quoting *Hutcherson v. United States*, 351 F.2d 748, 753 (D.C. Cir. 1965)). “[A]s a practical matter, resort to coercive tactics by an interrogator renders the information less likely to be true. Courts must therefore determine if the confession or testimony was given voluntarily.” *Mohammed v. Obama*, 704 F.Supp.2d 1, 24-25 (D.D.C. 2009) (citing *Linkletter v. Walker*, 381 U.S. 618, 638 (1965)).

g. ~~(U)~~ In *Lyons*, the defendant had given an initial confession under physical coercion. In assessing the admissibility of a subsequent confession, the Court observed, “the voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of ‘mental freedom’ to confess or to deny a suspected participation in a crime.” *Lyons v. Oklahoma*, 322 U.S. 596, 602 (1944) (citing *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944)). The Court also explained that due process principles do “not protect one who has admitted his guilt because of forbidden inducements against the use at trial of his subsequent confessions *under all possible circumstances*. The admissibility of the later confession depends upon the same test -- *is it voluntary*.” *Id.* at 603 (emphasis added).

h. ~~(U)~~ To evaluate voluntariness, a military judge considers the totality of the circumstances, including the details of the taking of the statement, the characteristics of the declarant, and the lapse of time, change of place, or change in identity of the questioners between the statement and any prior questioning. 10 U.S.C. § 948r(d); M.C.R.E. 304(a)(4). The Supreme Court has held that these factors all bear on whether coercion carries over into a subsequent statement. *Mohammed*, 704 F.Supp.2d at 25 (quoting *Oregon v. Elstad*, 470 U.S. 298, 310 (1985)); *see also Schneckloth*, 412 U.S. at 226. However, some factors are more significant than

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others in determining voluntariness. Whether there has been a sufficient break in the stream of events separating the coercion from the later challenged statement is particularly important in the context of the level of coercion at issue here. *Clewis v. State of Texas*, 386 U.S. 707, 710 (1967); *see also Al Rabiah v. United States*, 658 F.Supp.2d 11, 36–37 (D.D.C. 2009). Another prominent factor is whether the subsequent confession was proceeded by a cleansing warning.³⁴

i. ~~(U)~~ Here the Commission considered, among other factors, the following:

1. ~~(U)~~ *Youth*. Mr. Bin ‘Attash was approximately 25 years old when taken into custody in 2003 and therefore approximately 29 years old when he was interrogated at NSGB in 2007.³⁵ While not youthful at the time of the interviews, Mr. Bin ‘Attash was also not so old that he had significant adult life experience outside of U.S. custody. As such, this factor does not weigh heavily in the evaluation.

2. ~~(U)~~ *Education and intelligence*. Mr. Bin ‘Attash is an experienced world traveler, having traversed multiple countries across the Middle East and Asia. There is also evidence in the record suggesting that he may be of above-average intelligence. For example, he is knowledgeable about global events, religions, and politics, and fluent in multiple languages including Arabic, Farsi, English, Urdu, and Pashto. AE 480E at 4. This factor weighs towards admission as it demonstrates his intellectual capacity to understand his circumstances and to make a reasoned decision about participating in the interview.

³⁴ ~~(U)~~ If the first statement was unwarned, the absence of a “cleansing warning” before a subsequent statement is a factor to be considered in determining voluntariness. *United States v. Cuento*, 60 M.J. 106, 109 (C.A.A.F. 2004). However, the absence of a cleansing warning has generally not been fatal to voluntariness. *See, e.g., United States v. Brisbane*, 63 M.J. 106, 114 (C.A.A.F. 2006); *United States v. Lewis*, 78 M.J. 447 (C.A.A.F. 2019).

³⁵ ~~(U)~~ Mr. Bin ‘Attash stated he was 30 years old in June 2008; therefore, in January 2007, he was approximately 29 years old. AE 480E, Attach. U at 712.

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3. ~~(U)~~ *Lack of rights advisement.* As discussed previously, the U.S. agents who interviewed Bin 'Attash in 2007 were specifically directed not to advise him that he could consult an attorney. Likewise, the agents did not advise Mr. Bin 'Attash that his prior statements could not be used against him as would be required by a traditional cleansing warning. Therefore, although he was told that he did not have to speak to the agents, Bin 'Attash could not be sure whether his prior statements, made under the duress of torture, would not ultimately seal his fate in any future judicial proceedings and therefore leaving him no reason not to continue speaking with investigators. This weighs toward suppression.

4. ~~(U)~~ *Length of detention.* At the time of the 2007 statements, Mr. Bin 'Attash had been in U.S. government custody for nearly four years. For the vast majority of that time, he was held incommunicado and in solitary confinement. This weighs toward suppression.

5. ~~(U)~~ *Repeated and prolonged nature of the questioning.* Prior to his transfer to NSGB in 2006, Bin 'Attash had been interrogated or debriefed dozens if not hundreds of times. In those interrogations he was often observed to be evasive and misleading. The 2007 interviews took place over several days and lasted multiple hours each day, often covering the same ground multiple times; however, they were still significantly less arduous than what Bin 'Attash had previously experienced. During the interviews at NSGB, Mr. Bin 'Attash appeared personally engaged with the interviews, even taking it upon himself to create a list of topics to discuss. Moreover, his actions during the interviews and discussions with his fellow detainee demonstrate that he understood he could end a session at any time. This factor slightly favors admission.

6. ~~(U)~~ *Use of physical punishment such as the deprivation of food or sleep.* The Commission has previously addressed the horrific abuses inflicted upon Mr. Bin 'Attash during his years in CIA custody and need not belabor the point here. While he was no longer

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experiencing most of the abuses he had previously been subjected to by 2007, he was still under the complete control of the U.S. government under circumstances not entirely dissimilar to those he had experienced the previous several years. These circumstances included extended isolation in a cramped cell, limited interactions with others, and being moved in restraints [REDACTED]

[REDACTED] This factor weighs heavily toward suppression.

7. ~~(U)~~ *Circumstances of the statement.* These statements were made in early 2007, several months after Bin 'Attash was transferred out of CIA custody and years removed from EITs. Other than continued isolation, the circumstances of the interviews in 2007, evaluated on their own merit, were not coercive. While Bin 'Attash was brought into the small interview room in restraints, the agents acted professionally and worked to dissipate any perception of coercion. Mr. Bin 'Attash's discussions with his fellow detainee reflect that he viewed the agents as good people who treated him with respect but understood their objectives. He was also comfortable enough to try to manipulate them and threaten them. His general confinement conditions, while still difficult, had also significantly improved. This factor weighs towards admission.

8. ~~(CUH)~~ *Psychological impact.* Although the record clearly demonstrates that the entire goal of the RDI program and the psychological manipulation directed by Drs. Mitchell and Jessen was to condition Mr. Bin 'Attash to comply, his 2007 statements to the law enforcement agents and his fellow detainee seem to reflect that such conditioning did not have the same impact on him as it may have had on other detainees³⁶ and may have dissipated significantly

³⁶ ~~(U)~~ In AE 480KKK, the Defense filed a notice pleading asking the Commission to consider a recent decision in *United States v. Mohammad, et.al*, wherein the Commission (McCall, J.) granted Mr. al Baluchi's Motion to Suppress Alleged Statements as Involuntary and Obtained by Torture. Ruling at AE 942SSSS; see AE 480KKK at 1, n.1. The Government strenuously objected to the Commission's consideration of the decision. AE 480LLL. The Government's objection is noted and overruled. The Commission considered all applicable, relevant law.

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over the relatively short period of time since he left CIA custody. Although the treating psychiatrist at NSGB in the relevant timeframe had specific concerns about the mental health of approximately half of the HVDs, including the Accused, they did not report any specific mental health concerns about Mr. Bin ‘Attash. *See* AE 569G, Attach. X at 906-08. Mr. Bin ‘Attash repeatedly stated that he was proud of what he had done, that he understood the difference between the FBI and the CIA, that he wanted to tell his story—even directing the agents to relay his statements to the judge. He told them that he performed guidance prayers and woke up in the middle of the night when his mind was clear. After spending time to think it over, Bin ‘Attash concluded he had peace of mind about participating in the interviews. He personally described three stages of his detention from torture to fear to a better time when he was no longer afraid. Mr. Bin ‘Attash developed and practiced positive coping behaviors including structuring his day, religious study, and exercise. AE 480W, Attach. B at 111; *see supra* p. 12. He also described a clear understanding of the Combatant Status Review Tribunal process distinct from the FBI and CIA. *See supra* p. 20; AE 480RR, Attach. C at 31. The Commission considers this factor the most important because it demonstrates uniquely that the space between Bin ‘Attash’s torture and his 2007 statements had a greater impact than might otherwise be expected. This factor tips the otherwise equally balanced scales towards admission.

j. ~~(CUJ)~~ The statements Mr. Bin ‘Attash made to Zubair during the timeframe of the interviews are persuasive. His contemporaneous, unguarded statements demonstrate that there was a break in the stream of events sufficient to attenuate any remaining taint from the CIA torture. Bin ‘Attash clearly recognized the difference between the FBI, DoD, and the CIA.³⁷ He

³⁷ ~~(CUJ)~~ *See supra* pp. 18-20.

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acknowledged that “you talk of your own accord. You don’t want to talk, that’s it! No problem, you go back to the cell.” He called the interviewing agents “good people.” “But here, anything you say is without pressure, there is no pressure, on you. Or there is nothing by force.” AE 480RR, Attach. C at 31. Mr. Bin ‘Attash was consistent when he told Zubair the same thing he told the agents about his decision to pray the guidance invocation and prayer. He concluded that he “had peace of mind.” AE 480RR, Attach. B at 20.

k. ~~CUJ~~ Bin ‘Attash understood the effects of the program on the detainees:

They have been torturing us for years. Maybe the first year was hard for us. But then later they didn’t do it but we stayed under threats and fear and uh-I mean. . . [Pause] I told them: ‘I don’t—I don’t have any person that I trust. I might not even trust myself’ [Laughs]. So all people that I see in front of me are like this. But they uh-they have good manners uh-I mean. . . Sometimes I feel that he is truthful to me; and then sometimes—[laughs] sometimes I don’t know, I mean what he wants exactly.

AE 480RR, Attach. B at 18. Notwithstanding that recognition, rather than demonstrating fear, his statements reflect calm, detached deliberation. For example, he advised Zubair regarding Zubair’s court case that he should deny wrongdoing and claim that he made statements under torture. This stands in contrast to what Bin ‘Attash said about his own case: “I told him: ‘When you go to court, you tell the judge ‘Khallad, I am proud of what I did in September; I am proud.’” AE 480RR, Attach. C at 31. “I was telling him: ‘You tell the judge this, everything. In court you can use this against me. I want that.’” *Id.* All of these statements go against Bin ‘Attash’s penal interests and are exceedingly incriminating.

l. ~~CUJ~~ Bin ‘Attash also demonstrated his confidence in his new circumstances by threatening the agents in 2007 and later recounting those threats to Zubair. *See* AE 480SS, Attach. B at 11, 14; AE 480E, Attach. D at 45. Whether he meant the threats literally or metaphorically, he was comfortable that he would not suffer punishment for making them.

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Perhaps most strikingly, Bin 'Attash was also confident in his ability to control the topic of the interviews and manipulate the agents. For example, in one instance, he waited until the conclusion of the interview to make a passing comment about uranium designed to alarm the agents and then intentionally leave them in suspense until the next day. In bragging about this to Zubair, he compared his manipulation to an exciting movie getting cut off in cliff-hanger fashion. AE 480SS, Attach. B at 12-13. These statements in their entirety again demonstrate that Bin 'Attash voluntarily participated in the interviews and chose to make the statements at issue.

m. ~~(U)~~ On the facts presented, the Commission finds that Mr. Bin 'Attash believed his circumstances had substantially changed at NSGB and therefore made a reasoned choice to participate in the interviews with the clear understanding he could refuse without consequence. Accordingly, the Commission finds that the Government has met its burden under M.C.R.E. 304(3)(c) to establish that the statements made by Mr. Bin 'Attash in January 2007 were made voluntarily and were not obtained through (or derived from) torture or cruel, inhuman, or degrading treatment. *See* para. 4.b, *supra*.

n. ~~(U)~~ However, the above finding does not end the Commission's inquiry on the admissibility of the statements contained in the challenged Letterhead Memorandum (LHM). To admit the statements, the remaining factors in M.C.R.E. 304(a)(3) require the Commission to determine whether the totality of the circumstances renders the statements reliable and possessing sufficient probative value. If that finding is made, the Commission must then find that the interests of justice would best be served by admission of the statements into evidence.

~~(U)~~ **Reliable and Possessing Sufficient Probative Value**

o. ~~(U)~~ Although the rule contains no test for reliability, the Commission evaluates this factor based on the circumstances surrounding the making of the statements, internal

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consistencies within the statements themselves, and corroboration of the information in the statements by other evidence. First, the Commission finds that the agents' testimony establishes that they took careful notes during each session and then transcribed the notes after each session. Their testimony collectively reflects that although the LHM is not verbatim, it is a fair and accurate written record of what Mr. Bin 'Attash said during the interview sessions in January 2007. Bin 'Attash also recounted his interviews and statements to Zubair, and those statements accurately match the agents' recollections. *See* AE 480E, Attach. D at 5. All this evidence demonstrates the LHM and agent testimony are reliable reflections of the interviews.

p. ~~(U)~~ The statements are also internally consistent. For example, Bin 'Attash referred to the Accused as Bilal and explained his aliases several times. AE 480E, Attach. D at 7, 37-38, 53, 57, 62. The dates Mr. Bin 'Attash provided for events such as his arrival in Afghanistan and travels to Yemen formed a timeline that was ordinal and consistent over several days of questioning. He began the interviews by identifying the members of his family and relating where and when those who died or were in jail had been killed or arrested. Later in the interviews his references to those same family members, and their fates, remained consistent. Bin 'Attash's recounting of how he turned the boats operation over to Bilal remained consistent, as well as Bilal's responsibility for Al-Hudaydah. *Id.* at 13, 15-18, 22-23. He consistently described his proclivity and modus operandi for obtaining and using fraudulent identification. *Id.* at 6, 11, 14, 16, 24-25, 30, 37-38, 46. There were no instances where the interviewing agents identified inconsistency or impossibility within the statements.

q. ~~(U)~~ Additionally, during the course of the interviews, Mr. Bin 'Attash provided significant detail such as the number and type of weapons in a convoy across Afghanistan. He also drew several accurate images of physical places or items that related to his statements. *See*

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AE 480E, Attach. D at 408-15. This demonstrates strong internal consistency.

r. ~~(CUJ)~~ More importantly, the information conveyed in the LHM is consistent with Mr. Bin 'Attash's other contemporaneous, unguarded statements to Zubair³⁸ as well as other evidence in the record. For example, Bin 'Attash "discussed with Al-Badawi the purchasing of boats needed in order to carry out these attacks" and "called Al-Badawi, who was in Aden, and told him he now needed to work for Bilal." AE 480E, Attach. D at 15, 18; *accord* AE 480E, Attach. X at 2 ("Al-Harazi asked Al-Badawi to buy a boat for him ... Al-Badawi advised the reason he agreed to assist Al-Harazi in purchasing a boat was because Al-Harazi had delivered a letter from a dear friend of Al-Badawi's known as Khallad. Al-Badawi stated the letter asked him to help and assist Al-Harazi.").

s. ~~(CUJ)~~ Another example can be found at AE 480E, Attachment D at 7, where Bin 'Attash accurately describes the history of the Northern Group; this is consistent with the testimony of SA Ali Soufan dated 18 April 2023³⁹ and the testimony of SA Robert McFadden dated 21 April 2023.⁴⁰ Again, Bin 'Attash stated "he knew Bin Ladin⁴¹ was sending Bilal (whom Khallad also called Nashiri) to go to Al-Hudaydah for that portion of the plan." AE 480E, Attach. D at 13. This is also consistent with Al-Badawi: "later compared with the notes taken by Al-Harazi's (whom Al-Badawi also referred to as Bilal, and Bilal Al-Harazi) crew in Hudaydah, Yemen who were doing the same observations.)." AE 327, Attach. A at 9.

³⁸ ~~(CUJ)~~ *Accord* AE 480RR at 9-10; AE 480E, Attach. D at 1, 3, 23 (difference between FBI and CIA, Bin 'Attash's application for a visa from the embassy in Sana'a, not eating dates today due to fasting). *Accord* AE 480RR at 12-13; AE 480E, Attach. D at 22, 42 (uprising in Palestine, General Qamish). *Accord* AE 480RR at 14; AE 480E, Attach. D at 3, 5 (talking until 5:30 and coming back tomorrow). *Accord* AE 480SS at 8-10; AE 480E, Attach. D at 3 (Kuala Lumpur), 29-31 (Kuala Lumpur, contacting Hambali, Bangkok, and Nibras), 40 (Fahd al-Quso).

³⁹ ~~(CUJ)~~ Tr. at 24131-45.

⁴⁰ ~~(CUJ)~~ Tr. at 24769-82.

⁴¹ ~~(CUJ)~~ The LHM uses the spelling "Bin Ladin" instead of "bin Laden."

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t. ~~(U)~~ Another example of corroboration is that Bin ‘Attash “advised that Hadi Dilkum also aided Khallad in obtaining the explosives for this operation.” AE 480E, Attach. D at 13. “Al-Badawi stated that he knows Dilkum to be a trader in weapons and explosives.” AE 327, Attach. A at 11. Bin ‘Attash also recounted accurate facts, such as that he had met with the ICRC and they had told him that President Bush had moved a group of detainees to NSGB in a separate location from others. AE 480E, Attach. D. at 4. He accurately recounted that his brother ‘Abd Al-‘Aziz was in jail in Yemen and described a meeting at Al-Mihdhar’s house about which FBI SA Ali Soufan testified. *Id.* at 18. The Commission is satisfied that the LHM accurately reflects Bin ‘Attash’s statements, contains internal consistencies, and significant corroboration, all more than sufficient to demonstrate the requisite reliability.

u. ~~(U)~~ Finally, the Commission finds that the evidence has demonstrable probative value. Probative value is the degree to which a piece of evidence is useful at proving or disproving something important to the trial. “Evidence has ‘probative value to a reasonable person’ when a reasonable person would regard the evidence as making the existence of any fact that is of consequence to a determination of the commission action more probable or less probable than it would be without the evidence.” M.C.R.E. 401.^{42 43}

v. ~~(U)~~ For example, Bin ‘Attash indicated, among other things, that ‘Abd Al-Rahim Al-Nashiri (also referred to as Bilal or Mullah Bilal) was part of the Northern Group.⁴⁴ He

⁴² ~~(U)~~ *Accord* Military Rule of Evidence 401. “Test for relevant evidence[.] Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”

⁴³ ~~(U)~~ Probative value is part of relevance. “Relevant evidence is that which has a tendency to make a fact more or less probable. Relevancy has two components: (1) probative value, the relationship between the evidence and the proposition it is offered to prove; and (2) materiality, the relationship between the proposition the evidence is offered to prove and the facts at issue in the case.” *United States v. James*, 63 M.J. 217, 221 (C.A.A.F. 2006).

⁴⁴ ~~(U)~~ See AE 480E, Attach. D at 7, 13, 15-20, 22-23, 53.

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elaborated that bin Laden was sending Bilal to be responsible for the operation in Al-Hudaydah and Bilal was concentrating on the boats operation there. Bin 'Attash said he and Bilal found a house to store explosives in and were planning to move explosives from Sa'dah to Aden; Bilal devised a plan to disguise the movements of explosives. Bilal traveled back to Yemen with specific instructions from bin Laden for the boats operation; Bilal asked Bin 'Attash to send martyrs for the boats operation; Bilal told Bin 'Attash that bin Laden ordered Bin 'Attash to turn over the entire boats operation to Bilal because it was too dangerous for Bin 'Attash after he had been arrested. Bin 'Attash told Al-Badawi to work for Bilal; Bilal had worked with others on the failed attack on a U.S. Navy ship in Yemen. Bilal used Nibras and Hassan to help him continue the planning for the boats operation; Bilal called Bin 'Attash in September 2000 saying the operation was ready; Bilal decided to use Nibras and Hassan as the suicide operatives. Bin 'Attash provided all of his information, contacts, and explosives to Bilal; bin Laden told Bin 'Attash he wanted Bilal to return to Afghanistan; Bin 'Attash met Bilal in Karachi shortly before the attack on the USS Cole; Bilal carried out the final stages of the plan to attack the USS Cole; Al-Darbi worked with Bilal on using a large merchant ship in an attack.

w. ~~(C)~~ These statements are of direct consequence to a determination of the merits in this case. They have a tendency to make certain facts more or less probable than they would be without the evidence. These statements bear directly on the guilt or innocence of the Accused with regard to the charged offenses. Further, the Commission finds the statements are probative on the charged offenses related to the boats operation, demonstrating the Accused's alleged involvement in the conspiracy at all stages of planning.

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~~CUH~~~~(U)~~ The Interests of Justice

x. ~~(U)~~ Neither the statute nor the implementing rule provides guidance for determining how “the interests of justice would best be served” under M.C.R.E. 304. However, interests-of-justice standards in the law typically reflect “broad and flexible standards” applied by judges or prosecutors to the facts of specific cases. *See generally Gulf States Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Prods. Corp.)*, 896 F.2d 1384, 1391 (2d Cir. 1990). Interests-of-justice analysis generally requires weighing factors such as the efficient administration of justice and judicial economy and concepts of fairness. *Id.*

y. ~~(U)~~ “As its name betrays, the ‘interests of justice’ standard contemplates a peculiarly context-specific inquiry.” *Martel v. Clair*, 565 U.S. 648, 663 (2012). The Court expressed “doubt that any attempt to provide a general definition of the standard would prove helpful.” *Id.* The “interests of justice” standard provides the military judge with some discretion in determining whether a particular piece of evidence is admissible. *United States v. Quick*, 22 M.J. 722, 723 (A.C.M.R. 1986) (“The decision to admit evidence under this exception rests within the sound discretion of the trial judge.”). “The alert and experienced trial judge presiding over a criminal case has a grasp of how the interests of justice are best served in the case taking shape before him.” *Hood v. United States*, 365 F.2d 949, 951 (D.C. Cir. 1966).

z. ~~(U)~~ The “interests of justice” analysis generally requires that a statement be material, necessary, and reliable as prerequisites to admission.⁴⁵ *United States v. Haner*, 49 M.J. 72, 77 (C.A.A.F. 1998) (citing *United States v. Kelley*, 45 M.J. 275, 281 (C.A.A.F. 1996)); *see United*

⁴⁵ ~~(U)~~ *See United States v. Ruffin*, 12 M.J. 952, 954-55 (A.F.C.M.R. 1982) (1980); *United States v. Pollard*, 38 M.J. 41, 49 (C.M.A. 1993) (discussing the residual hearsay exception in M.R.E. 803(24) (1984), which required that “the interest of justice will best be served by admission of the statement into evidence.”).

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States v. Pablo, 53 M.J. 356, 360 (C.A.A.F. 2000) (Crawford, J., dissenting). As such, the first two prongs of M.C.R.E. 304(a)(3) overlap significantly insofar as they require probative value and reliability. C.A.A.F. “has generally treated hearsay statements solicited by police officers, particularly when they are elicited in private conversations, with caution.” *United States v. Donaldson*, 58 M.J. 477, 489 (C.A.A.F. 2003) (citing *United States v. Ureta*, 44 M.J. 290, 296 (C.A.A.F. 1995); *United States v. Pollard*, 38 M.J. 41, 49 (C.M.A. 1993)); see also *United States v. Lyons*, 36 M.J. 183, 187–88 (C.M.A. 1992); *United States v. Hansen*, 36 M.J. 599, 607 (A.F.C.M.R. 1992).

aa. ~~(U)~~ The Commission is satisfied in this case that the circumstances surrounding Mr. Bin ‘Attash’s January 2007 statements demonstrate sufficient reliability. The Commission therefore concludes that the interests of justice are best served by the admission of these statements into evidence so that the factfinder may have the fullest opportunity to weigh the evidence in its entirety. See *United States v. Scheffer*, 523 U.S. 303, 312–13 (1998) (“Determining the weight and credibility of witness testimony, therefore, has long been held to be the ‘part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.’”); *United States v. Knapp*, 73 M.J. 33, 34 (C.A.A.F. 2014) (quoting *United States v. Brooks*, 64 M.J. 325, 328 n. 3 (C.A.A.F. 2007) (“It is the ‘exclusive province of the court members to determine the credibility of witnesses.’”)); *United States v. Savala*, 70 M.J. 70, 78 (C.A.A.F. 2011) (“Issues of witness credibility and motive are matters for the members to decide.”).⁴⁶

⁴⁶ ~~(U)~~ See also *United States v. Alahmedalabdalkolah*, 94 F.4th 782, 822 (9th Cir. 2024); *United States v. Martinez-Hernández*, 118 F.4th 72, 83 (1st Cir. 2024); *United States v. Scheurer*, 62 M.J. 100, 111 (C.A.A.F. 2005); *United States v. Martinez*, 2022 WL 1831083, at *43 (A.F.C.C.A. 2022).

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bb. ~~(U)~~ In the context of M.C.R.E. 304(a)(3), the Commission finds the interests of justice require weighing the interests of the parties in the fair and efficient administration of justice in this case. Additionally, because justice is a broad concept that reflects the values of society as a whole, the Commission finds the standard also requires weighing the interests of broader society. Accordingly, regarding the challenged statements, the Commission finds that the Government has an interest in ensuring that all reliable and relevant evidence be available for consideration by the trier of fact, while the Accused has an interest in ensuring any evidence admitted against him be obtained in a manner that is both consistent with the law and fair. The Commission further finds that society has a similar interest in not allowing due process to be tainted by illegal or immoral conduct, such as the use of torture or cruel, inhuman or degrading treatment. Society also has an interest in ensuring those who violate the law do not escape punishment through the unnecessary exclusion of otherwise reliable evidence. These often-competing interests, along with the other factors of the M.C.R.E. 304(a)(3) analysis, must be weighed by the Commission in determining what statements from persons other than the Accused may be admitted.

cc. ~~(U)~~ In this case, the Commission has found that the challenged statements were not obtained through Mr. Bin 'Attash's prior torture or other abuse. The Commission has also found that the statements reflect the mental freedom necessary to demonstrate they were voluntary and are sufficiently reliable to meet the basic standard for admission. At trial, the Accused will be free to challenge the statements with evidence demonstrating the circumstances surrounding their making. The trier of fact will be free to accord the statements whatever weight they feel is appropriate based on the evidence presented. Under all of these circumstances and weighing the

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interests of the parties and broader society, the Commission finds that the interests of justice are best served by admission of Mr. Bin ‘Attash’s statements into evidence.

dd. ~~(S)~~ The United States’ interest in this prosecution is “that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935). “[T]he twofold aim” of justice “is that guilt shall not escape or innocence suffer.” *Id.* M.C.R.E. 304(a)(3)(B) requires that the Commission determine whether the interests of justice would best be served by admission of the statements into evidence. The Military Commission Rules of Evidence “shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, the protection of national security, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” M.C.R.E. 102. The Commission finds that the interests of justice would not be served if alleged violations of the law of war could be committed with impunity due to a practical inability of the United States to produce cobelligerents for testimony at trial. The Commission is satisfied that admission of these statements would not deprive the Accused of a fair opportunity to defend himself or to challenge the reliability of the statements in issue. Neither would it lead to an unjust result in this case. The Commission therefore finds that, if Mr. Bin ‘Attash remains unavailable⁴⁷ for testimony at trial, the admission of the statements would be consistent with the general purposes of the rules of evidence and that the interests of justice would best be served by admission of the statements into evidence.

⁴⁷ ~~(S)~~ On 22 March 2023 in AE 480S, the Commission (Acosta, J.) ordered the production of Mr. Bin ‘Attash to testify as a witness on this motion. On 15 May 2023 in AE 480X, Mr. Bin ‘Attash, through counsel, invoked his right against self-incrimination. On 4 December 2024 in AE 480QQ, the Commission honored the invocation.

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~~CUH~~5. ~~(U)~~ **Conclusions of Law.**

a. ~~(U)~~ The Commission finds that Mr. Bin ‘Attash’s 2007 statements, under the totality of the circumstances, are reliable and possessing sufficient probative value.

b. ~~(U)~~ The Commission further finds that the interests of justice would best be served by admission of the statements into evidence.

c. ~~(U)~~ Finally, the Commission finds that these statements were not obtained through the use of torture or cruel, inhuman, or degrading treatment. Therefore, 10. U.S.C. § 948r(a) and M.C.R.E. 304(a)(1) do not prohibit their admission into evidence.

d. ~~(U)~~ Although 10 U.S.C. § 948r(a) and M.C.R.E. 304 do not require the suppression of these statements,⁴⁸ the Government must still demonstrate that the statements constitute admissible hearsay, including a final showing of unavailability.⁴⁹

6. ~~(U)~~ **Ruling.** The defense motion set forth in AE 480 is **DENIED**.

So **ORDERED** this 23rd day of July 2025.

//s//

MATTHEW S. FITZGERALD
COL, JA, USA
Military Judge

⁴⁸ ~~(U)~~ If these statements are admitted into evidence at trial, the Commission will grant the Defense wide latitude in challenging or impeaching the statements, the full record of Mr. Bin ‘Attash’s time in CIA custody, and any connection between the two. Also, the Commission will likely give an instruction on accomplice testimony. *See United States v. Bigelow*, 57 M.J. 64, 65 n.1, 67 (C.A.A.F. 2002); M.C.R.E. 304(d)(2).

⁴⁹ ~~(U)~~ Following Mr. Bin ‘Attash’s invocation of his right not to testify on this motion, the Defense obtained and submitted for Commission review an affidavit by Mr. Bin ‘Attash, dated 28 July 2023. *See* AE 480CC; AE 480QQ at 3. In the exercise of discretion, the Commission admitted the affidavit for purposes of resolving AE 480 and gave it due weight, which was ultimately very little as it was largely self-serving. *See Nehad v. Mukasey*, 535 F.3d 962, 968 (9th Cir. 2008) (“Given the self-serving nature of this declaration, it seems, at best, deserving of minimal weight.”); *Egan v. Weiss*, 119 F.3d 106, 108 (2d Cir. 1997); *see also A. B. Leach & Co. v. Peirson*, 275 U.S. 120, 128 (1927); *United States v. Polanco*, 37 F.Supp.2d 262, 264 (S.D.N.Y. 1999). The Commission has not ruled on the admissibility of that affidavit in the merits case.

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