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UNITED STATES COURT OF MILITARY COMMISSION REVIEW

*In re:*

ABD AL-RAHIM HUSSEIN  
AL-NASHIRI,

*Petitioner.*

) Case No. 26-002  
)  
)  
) **PETITION FOR A WRIT OF**  
) **MANDAMUS AND PROHIBITION AND**  
) **APPLICATION FOR STAY OF**  
) **PROCEEDINGS**  
)  
)  
) Date: 14 September 2026  
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**UNITED STATES COURT OF MILITARY COMMISSION REVIEW**

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|                      | )                                     |
|                      | )                                     |
|                      | ) Date: 14 September 2026             |
|                      | )                                     |

~~(U)~~ **TO THE HONORABLE, THE JUDGES OF  
THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW**

~~(U)~~ Abd Al-Rahim Hussein Al-Nashiri (“Petitioner”) petitions this Court to issue a writ of mandamus and prohibition to enforce the categorical prohibition on the use of torture-borne statements in the military commission and remand to the military commission judge for appropriate further action.

~~(U)~~ The doctrine of judicial estoppel weighs strongly in favor of prompt intervention by this Court and a stay of proceedings. In a prior related action, *In re Al-Nashiri*, No. 21-001, this Court, and, subsequently, the D.C. Circuit Court of Appeals, dismissed a writ petition after Respondent expressly committed to a legal position—at oral argument and in writing—that

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torture-borne statements of third parties are inadmissible at all stages of a military commission. In the order dismissing that petition, this Court explicitly “ordered that Petitioner may refile a petition with this court if the military judge relies upon evidence that is inadmissible under 10 U.S.C. § 948r(a).” An eleventh-hour disclosure by Respondent now renders the issue ripe for this Court’s consideration.

~~(U)~~ Petitioner’s capital trial is scheduled to begin on 19 October 2026, with allegations centering on his alleged role in the bombing of the U.S.S. Cole in Aden, Yemen in October 2000. Just months ago, Respondent revealed that a critical third-party confession—long ago admitted as a “statement against interest” and found to be so “material” and “exculpatory” it could not be excluded—was elicited in Location No. 2, a notorious CIA Black Site. During the thirteen-year period that Respondent withheld this information, other avenues of discovery were denied or effectively foreclosed. Respondent transferred the declarant to Oman in January 2025.

~~(U)~~ This case presents a serious due process violation engineered by Respondent’s own conduct. Respondent rendered material, exculpatory evidence permanently inadmissible under 10 USC § 948r(a) by eliciting the statements at a CIA Black Site. Faced with this issue, the military commission judge was obligated to enforce the absolute ban on torture-derived statements and fashion appropriate relief for the resulting prejudice. Instead, he bypassed the categorical prohibition entirely, fashioning an *ultra vires* solution: simply admit the torture-borne statements

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while denying remedial measures or sanctions. This unlawful workaround nullifies the strict mandate of Section 948r while stripping Petitioner of evidentiary substitutes.

~~(U)~~ Moreover, the military commission judge has imposed new, strict constraints on *Petitioner's* use of this information at trial, constraints so restrictive as to extinguish any exculpatory value at all. Petitioner is left with a Hobson's choice: forgo any mention of highly compelling evidence of third-party guilt and Yemeni government complicity in his death penalty trial, or yield to the strict conditions imposed by the military commission judge, i.e. eliciting government-authored summaries of the torture-borne statements from law enforcement witnesses for the prosecution, who must then, in turn, discredit them in order to carry their own burden at trial. The military commission judge separately endorsed the use of torture-borne statements for impeachment and mitigation purposes, opening the door for other flagrant violations of Section 948r at trial.

~~(U)~~ As set forth below, Petitioner therefore asks this Court to enforce the statutory bar on the admission of torture-borne statements and vacate all judicial orders relying on such statements—a remedy consistent with the relief afforded by this Court in *In re Al-Nashiri*, No. 21-001. Petitioner also requests that this Court order the military commission judge to undertake appropriate remedial measures to address the inadmissibility of torture-borne statements at trial, and additionally to consider whether sanctions are appropriate for successive misrepresentations by Respondent on this issue in trial and appellate courts.

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~~TOP SECRET//ORCON/NOFORN//LES~~**(U) JURISDICTION**

~~(U)~~ The Court may grant this relief pursuant to the All Writs Act, 28 U.S.C. § 1651(a); the Military Commissions Act, 10 U.S.C. § 950f (2009) (“MCA”); Rule for Military Commission 1201(c) of the Manual for Military Commissions (2019) (“R.M.C.”); and Rule 2(b) of the Court of Military Commission Review (“CMCR”) Rules of Practice (2016). *See also In re Al-Nashiri*, 791 F.3d 71, 74-75 (D.C. Cir. 2015).

**(U) RELIEF SOUGHT**

~~(U)~~ Petitioner asks this Court to issue a writ of mandamus and prohibition barring the admission of torture-borne statements of third parties under 10 U.S.C. § 948r(a) and ordering certain relief, to include: vacatur of military commission rulings relying on torture-borne statements of third parties, including, but not limited to, AE 342, AE 429, AE 686F, and AE 689E (rulings wherein military commission judges relied on torture-borne statements or explicitly sanctions their use at trial); and remand for consideration of appropriate remedial measures to address the inadmissibility of torture-borne statements at trial, to include a determination as to whether sanctions are appropriate for successive misrepresentations by Respondent on this issue in trial and appellate courts.

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~~TOP SECRET//ORCON/NOFORN//LES~~~~(U)~~ STATEMENT OF FACTS

~~(U)~~ The Government recently disclosed that a critical third-party confession long ago preliminarily admitted for trial as a “statement against interest” was elicited in a notorious CIA Black Site shortly after that individual’s admission into the RDI Program—information withheld from successive military commission judges and Petitioner for thirteen years. As set forth below, rather than wrestling with the application of the statutory bar on admission of torture-borne statements to the confession, the military commission judge asserted his authority to ignore the statute in view of the powerful exculpatory and mitigating import of the statements. He also effectively declined to reconsider pretrial rulings based on the torture-borne statements—rulings that would have yielded critical direct evidence of the declarant’s significant role in the U.S.S. Cole bombing, as opposed to a watered-down government-written “summary” or “stipulation”.

- I. ~~(U)~~ This Court and the D.C. Circuit dismissed prior writ petitions addressing the application of the statutory bar on the admission of torture-borne statements based on representations by the Government that such statements by Petitioner and third parties are inadmissible at all stages of these military commission proceedings.

~~(U)~~ In March 2021, the Government submitted a brief to the military commission judge in response to an order to disclose discovery concerning Muhsin al-Fadhli, a senior al-Qaida facilitator suspected of being involved in the attacks on the U.S.S. Cole and the M/V Limburg—the offenses for which Petitioner is charged—who was killed by the United States in a 2015 drone

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strike.<sup>1</sup> Respondent's pleading "attached a classified addendum, which was filed *in camera*, but not *ex parte*, that included two statements made by Petitioner" while he was in the RDI Program.<sup>2</sup> Petitioner filed a motion to strike the statements as violative of 10 U.S.C. 948r(a), the categorical prohibition on the admission of torture-borne statements in the Military Commission Act of 2009.<sup>3</sup> Respondent admitted that the two statements were torture-borne, but argued that Section 948r(a) only barred the admission of such statements at trial, not pretrial proceedings.<sup>4</sup> Denying the motion to strike, the military commission judge (Acosta, J) agreed, "10 U.S.C. § 948r(a) does not bar the Commission from considering the statements referenced in [the original ruling] on relevant interlocutory issues."<sup>5</sup>

~~(U)~~ Petitioner then filed a Petition for Writ of Mandamus & Prohibition in this Court asking to "(1) vacat[e] the Commission's ruling that the Government could use the two statements obtained by torture; and (2) direct[] the Commission to reconsider any other *ex parte* order that relied on statements obtained by torture."<sup>6</sup> In response to the Petitioner's filing of that petition,

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<sup>1</sup> ~~(U)~~ *In re Al-Nashiri*, No. 21-001, at \*4-5 (CMCR Sept. 20, 2021) (order vacating commission order on admissibility of coerced admissions in discovery dispute and denying petition as moot).

<sup>2</sup> ~~(U)~~ *Id.* at \*2 (quoting the Petitioner's brief, citing AE 353V, Attach. E).

<sup>3</sup> ~~(U)~~ *In re Al-Nashiri*, No. 21-001 (Pet'r's Br. 5-6).

<sup>4</sup> ~~(U)~~ *Id.*

<sup>5</sup> ~~(U)~~ *Id.* at 6 (quoting AE 353AA at 6).

<sup>6</sup> ~~(U)~~ *In re Al-Nashiri*, 47 F.4th 820, 823 (D.C. Cir. 2022).

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Respondent filed a motion requesting that the military commission judge reconsider his ruling, omitting any reliance on the torture-borne statements at issue.<sup>7</sup> The military commission judge granted Respondent's motion over defense protestations, stating "that petitioner's statements obtained in violation of 10 U.S.C. § 948r(a) would not be considered in the context of the discovery relating to Al-Fadhli."<sup>8</sup> Respondent then moved to dismiss the then-pending petition before this Court.<sup>9</sup>

~~(U)~~ Ultimately, this Court "found the issue moot but vacated the Commission's order to include the statements. It also found the factual record too sparse to support a vacatur of the *ex parte* orders."<sup>10</sup> However, in denying that Petition, this Court expressly "further ordered that petitioner may refile a petition with this court if the military judge relies upon evidence that is inadmissible under 10 U.S.C. § 948r(a)."<sup>11</sup>

~~(U)~~ Petitioner subsequently petitioned the D.C. Circuit Court of Appeals to "(1) enjoin the Government from offering any statements obtained by torture; (2) enjoin the Commission from considering the same; and (3) vacate all orders based on pleadings or arguments containing such

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<sup>7</sup> ~~(U)~~ *In re Al-Nashiri*, No. 21-001, at \*2-3 (CMCR Sept. 20, 2021).

<sup>8</sup> ~~(U)~~ *Id.* at \*3.

<sup>9</sup> ~~(U)~~ *Id.* at \*1.

<sup>10</sup> ~~(U)~~ *In re Al-Nashiri*, 47 F.4th at 823.

<sup>11</sup> ~~(U)~~ *In re Al-Nashiri*, No. 21-001, at \*6 (CMCR Sept. 20, 2021).

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statements.”<sup>12</sup> In its briefing, Respondent “change[d] its position on the use of the statements obtained by torture” by “conced[ing] that no such statements are admissible at any phase of a trial, including in the pre-trial discovery stages.”<sup>13</sup> Petitioner, for his part, argued that Respondent’s maneuver was a “textbook example of ‘voluntary cessation,’ which [did] nothing to moot a case or controversy that was ripe for decision when it was brought.”<sup>14</sup> Petitioner also filed multiple Federal Rule of Appellate Procedure 28(j) (“Rule 28(j) letter”) letters attesting to the ongoing use of torture-borne statements in the military commission, in spite of Respondent’s representations to the contrary.<sup>1516</sup>

~~(U)~~ Respondent subsequently made several affirmative representations to the D.C. Circuit panel in support of its request to dismiss the petition. At oral argument, in a colloquy with Judge Wilkins, counsel for Respondent confirmed that “the Government’s position with respect to Section 948r(a) is that statements obtained through torture of anyone, whether it is the defendant

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<sup>12</sup> ~~(U)~~ *In re Al-Nashiri*, 47 F.4th at 823-24.

<sup>13</sup> ~~(U)~~ *Id.* at 824.

<sup>14</sup> ~~(U)~~ *Id.* at 825.

<sup>15</sup> ~~(U)~~ Citations to filings and rulings of the military commission below are designated by their Appellate Exhibit (“AE”) number and are reproduced in the Unclassified Appendix (“Appx.”), Classified Appendix (“Class. Appx.”), and Top Secret Appendix (“TS Appx.”) to this Petition at the pages indicated. Transcript references are also reproduced in the Appendix at the pages indicated.

<sup>16</sup> ~~(U)~~ See also FRAP 28(j) Letter, Michel Paradis to CADC Clerk of Court, May 3, 2022 (Appx. 236); FRAP 28(j) Letter, Michel Paradis to CADC Clerk of Court, May 5, 2022 (Appx. 242).

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or a third party, are inadmissible under Section 948r(a) at any stage of the proceedings.”<sup>17</sup> In demanding certainty as to Respondent’s representations, Judge Wilkins explained:

~~(U)~~ “I asked the question the way that I did for a purpose because you are asking us to rule in a certain way based on representations. *My view of that is that if I’m going to take you up on that, then you should be estopped from acting contrary to the representations that you make to this Court that caused us to grant you the relief or to decline to grant Petitioner the relief.* You said the Government has every incentive to take certain action, but you didn’t say that the Government is going to take that action. And yet, you are representing to the Court that that is the course that the Government is going to undertake. You understand my question?”<sup>18</sup>

~~(U)~~ After clarifying the question, counsel for Respondent also stated that “we do not dispute and will not oppose a review by the Military Commission judge to conduct a review to identify whether any *ex parte* orders exist that contain Section 948r(a) errors. We agree that that process should take place in the Military Commission.”<sup>19</sup>

~~(U)~~ Judge Henderson also specifically asked counsel for Respondent:

~~(U)~~ “Well, Mr. Palmer, you’ve -- in your brief at 25, you’re pretty categorical. You say, and I quote, ‘The Government has now concluded that Section 948r(a) prohibits the admission of statements obtained through torture or cruel, inhuman, or degrading treatment at all phases of a military commission.’ Are we now supposed to take that categorical statement and read into it so long as the torture or cruel, inhuman, or degrading treatment concerned only the detainee who’s on trial?”<sup>20</sup>

<sup>17</sup> ~~(U)~~ Transcript of Oral Argument at 28:1-6 (Appx. 28), *In re Nashiri*, Case No. 21-1208, D.C. Circuit Court of Appeals, May 4, 2022.

<sup>18</sup> ~~(U)~~ *Id.* at 26:9-20 (Appx. 26)(emphasis added).

<sup>19</sup> ~~(U)~~ *Id.* at Tr. 27:11-16 (Appx. 27).

<sup>20</sup> ~~(U)~~ *Id.* at Tr. 28:24-29:7 (Appx. 28-29).

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~~(U)~~ Counsel for Respondent answered: “No, Your Honor. The Government’s position is that the statute -- the statute bars admission of statements obtained through torture of any person, whether it was the defendant or a third party.”<sup>21</sup>

~~(U)~~ Shortly thereafter, the Government filed a Rule 28(j) letter stating: “Under Section 948r(a), statements obtained by the use of torture, or by cruel, inhuman, or degrading treatment, are inadmissible regardless of whether the defendant or another person made the statement. That is the position of the United States, and we have recently made clear that this bar applies at any stage of the proceedings, not just at trial. Nothing in the transcripts petitioner submitted conflicts with that position. Indeed, the prosecution expressly acknowledged that, as to any statements obtained by torture, Section 948r(a)’s exclusionary rule ‘[c]learly applies to third parties.’”<sup>22</sup>

~~(U)~~ The Government also appended a declaration by a military commission prosecutor to its motion to dismiss the writ petition.<sup>23</sup> He attested that after reviewing “over 100,000 pages” that

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<sup>21</sup> ~~(U)~~ *Id.* at 29:8-11 (Appx. 29).

<sup>22</sup> ~~(U)~~ FRAP 28(j) Letter, Joseph Palmer to CADC Clerk of Court, May 20, 2022 (Appx. 254)(clarifying government legal position). Respondent provided another Rule 28(j) letter to the D.C. Circuit appending a military commission ruling excluding the torture-borne statements of a third party. FRAP 28(j) Letter, Joseph Palmer to CADC Clerk of Court, July 6, 2022 (Appx. 256).

<sup>23</sup> ~~(U)~~ *In re Nashiri*, Case No. 21-1208, D.C. Circuit Court of Appeals, Docket #1933124 – attachment only (Decl. of LCDR Charles M. Roman)(Appx. 285).

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he “found no instances where the Prosecution sought an order from the Commission predicated on Petitioner’s CIA statements.”<sup>24</sup>

~~(U)~~ In view of those representations, the D.C. Circuit dismissed the petition, stating that “[t]hree jurisdictional doctrines bar Al-Nashiri’s petition in this case: mootness, ripeness, and standing.”<sup>25</sup> The ruling explicitly rested its ruling on “assur[ances]” by Respondent to the D.C. Circuit “in briefing, oral argument, and in subsequent letters submitted to us under Federal Rule of Appellate Procedure 28(j) that it will not seek to introduce any evidence obtained by the torture of Al-Nashiri or any third party in any stage of the proceedings.”<sup>26</sup>

~~(U)~~ In its ruling, the D.C. Circuit rejected Petitioner’s argument that Respondent’s commitments amounted to “voluntary cessation,” noting that under that doctrine even though “voluntary cessation of challenged activity does not moot a case,” “an issue may still be considered moot if ‘(1) ‘there is no reasonable expectation that the alleged violation will recur,’ and (2) ‘interim relief or events have completely or irrevocably eradicated the effects of the alleged violation.’”<sup>27</sup> In rejecting the application of that doctrine to the petition, the D.C. Circuit noted that “[b]oth elements are present in this case—(1) the Government has assured this Court it will not

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<sup>24</sup> ~~(U)~~ *Id.*

<sup>25</sup> ~~(U)~~ *In re Al-Nashiri*, 47 F.4th at 824.

<sup>26</sup> ~~(U)~~ *Id.* at 825 (cleaned up).

<sup>27</sup> ~~(U)~~ *Id.*

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offer any statements obtained by the torture of anyone at any stage of the proceedings, thus relieving Al-Nashiri's contention that the Government's practice 'likely to have prospective effect is unlawful;' and (2) the Government has withdrawn the statements identified to have been made under torture."<sup>28</sup>

- II. ~~(U)~~ ~~(S//OC/NF)~~ The Government originally disclosed Lt Col Al-Hilah's confession to a direct role in the U.S.S. Cole bombing in 2013, but withheld the fact that it was torture-derived until January 2026—across years of discovery litigation.

~~(U)~~ In May 2013, Respondent discovered to the defense a short MCRE 505 summary detailing a "late 2002" confession made by Abdulsalam Al-Hilah, a former lieutenant colonel with the Yemeni Political Security Organization ("PSO").<sup>29</sup> According to the MCRE 505 Summary, Lt Col Al-Hilah purportedly stated the following:

- ~~(S//OC/NF)~~ In September 2000, Lt Col Al-Hilah was contacted by "Ja'yul," who told him that a "significant attack was being planned against the British and the Americans."
- ~~(S//OC/NF)~~ He knew the attack would be in the Port of Aden, and Ja'yul paid him \$20,000 USD to "gain[] permission for a fishing boat to enter a restricted area of the port without being detained."
- ~~(S//OC/NF)~~ Using his connections to the Yemeni government, Lt Col Al-Hilah then called Karim Al-Ansi, a Major in the Yemeni Coast Guard stationed near the Al-Burayqah bridge, and secured entrance into the port for a "fishing boat two days' hence." Major Al-Ansi was paid \$3,000 USD to do so.
- ~~(S//OC/NF)~~ One month after the attack, Lt Col Al-Hilah worked with Abu Ali Al-Harithi to procure four passports "to expedite four Arabs out of Yemen." Lt Col

<sup>28</sup> ~~(U)~~ *In re Al-Nashiri*, 47 F.4th at 825.

<sup>29</sup> ~~(U)~~ AE 689, p. 3 (Class. App. 374); AE 342, Att. H (Class. App. 329-30).

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Al-Hilah admitted that the terrorist cell responsible for the USS COLE bombing consisted of Ja'yul, Ahmad Mas'ud, Abu Ali Al Awleki, Nabil, and others.

- ~~(S//OC/NF)~~ The funds used to facilitate the bombing of the USS COLE came from Lt Col Al-Hilah, who then reimbursed himself from PSO funds. Lt Col Al-Hilah stated that PSO officials, including General Qamish, knew he was funding Ja'yul's terrorism with PSO money.
- ~~(S//OC/NF)~~ Lt Col Al-Hilah was willing to sign a statement to document his involvement with the USS COLE attack, even though it would incriminate him.<sup>30</sup>

~~(U)~~ No specific date, location, identity of participants or author of the underlying product from which the summary was made appears in this summary, and no signed statement has ever been discovered to the defense.<sup>31</sup>

~~(U)~~ In March 2022, Respondent reproduced a more fulsome and detailed MCRE 505 substitution for the previously disclosed confession.<sup>32</sup> The document appears in simulated cable format.<sup>33</sup> The updated summary still does not reflect a location or interrogator name or affiliation but does reflect the date of the statement as 10 October 2002.<sup>34</sup> The summary, again presumably

<sup>30</sup> ~~(U)~~ AE 342, Att. H (Class. App. 329-30).

<sup>31</sup> ~~(U)~~ *Id.*

<sup>32</sup> ~~(U)~~ AE 689, p. 8 (Class. App. 379); AE 478, Att. B (Class. App. 349-351).

<sup>33</sup> ~~(U)~~ AE 689, p. 8 (Class. App. 379); AE 478, Att. B (Class. App. 349-351).

<sup>34</sup> ~~(U)~~ AE 689, p 8 (Class. App. 379).

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judicially approved via the MCRE 505 process, appears in cable format, and includes the following additional details:

- i. ~~(S//NF)~~ The summary notes that “[d]uring ongoing interrogations of ‘Abd Al-Salam Al-Hilah, Al-Hilah provided information regarding his direct involvement in the attack on the USS COLE.”
- ii. ~~(S//NF)~~ The summary identifies other Yemeni officials who knew that Lt Col Al-Hilah was financing Ja’yul with PSO funds, to include PSO Officer #2 and “‘Ali Massam,” probably a transliteration of Ali Mohsen Al-Ammar.
- iii. ~~(U)~~ The updated summary does not reflect a location or interrogator name but does reflect the date of the statement as 10 October 2002.<sup>35</sup>

~~(S//NF)~~ On 29 January 2026, Respondent remitted additional classified discovery: a more detailed reproduction of an MCRE 505 summary of an earlier interrogation of Lt Col Al-Hilah.<sup>36</sup> The original one-paragraph summary of the 9 October 2002 interrogation—first disclosed to the defense in April 2017—indicates that Respondent had information about Lt Col Al-Hilah’s direct role in the U.S.S. Cole bombing before the date of his more detailed confession.<sup>37</sup> The original summary did not include a location, date or identify anything about the interrogators involved.<sup>38</sup>

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<sup>35</sup> ~~(U)~~ *Id.*

<sup>36</sup> ~~(U)~~ AE 689, Att. C (Class. Appx. 406-07).

<sup>37</sup> ~~(S//NF)~~ AE 689, Attach. B. (Class. Appx. 404)(“Al-Hilah claimed the photo does not match the individual whom he recruited to facilitate the fishing boat into Al-Boragh to attack the USS COLE.”).

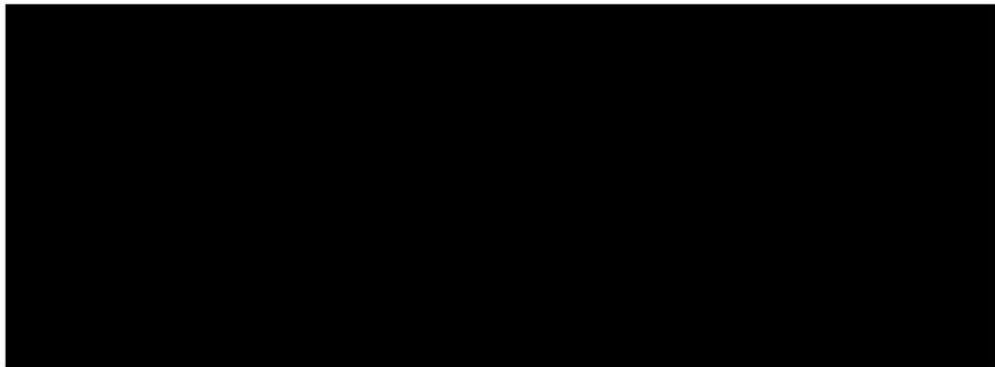
<sup>38</sup> ~~(U)~~ Though the original MCRE 505 summary did not include a date, an index produced in November 2019 revealed that this statement was taken on 9 October 2002.

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~~(S//NF)~~ The new MCRE 505 summary of Lt Col Al-Hilah's earlier statement—disclosed to Petitioner just six months ago—establishes that he was being held at Location No. 2 on 9 October 2002—just *one day* before his detailed confession. The new summary identifies one of Lt Col Al-Hilah's interrogators by Unique Functional Identifier (“UFI”) for the first time; it also includes a reference to another, unidentified interrogator, but fails to include that individual's UFI despite a judicial order mandating that information be produced.<sup>39</sup> Respondent framed the new summary as a CIA cable and contains substantially more detail than the MCRE 505 summary it replaced.<sup>40</sup>

~~(U)~~ Location No. 2 is a notorious CIA Black Site. A former military commission judge (Acosta, J), described the conditions there in the following manner:



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<sup>39</sup> ~~(U)~~ AE 689, Att. C (Class. Appx. 406-07).

<sup>40</sup> ~~(U)~~ *Id.*

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~~(U)~~ Gul Rahman died in Location No. 2 in November 2002, one month after Lt Col Al-Hilah's confession.<sup>42</sup> The Senate Select Committee on Intelligence described conditions in Location No. 2 in stark terms. One CIA interrogator said "some of the CIA detainees" at Location No. 2 "looked like a dog that had been kenneled," noting that one detainee "had been chained to the wall in a standing position for 17 days."<sup>43</sup> It also notes that the "chief of interrogations" said the site was "good for interrogations because it is the closest thing he has seen to a dungeon, facilitating the displacement of detainee expectations."<sup>44</sup> Another analyst "told the CIA OIG" that Location No. 2 itself "is an EIT."<sup>45</sup>

~~(U)~~ On 15 June 2026, Respondent produced a wholly unclassified "Statement Admitting Relevant Facts Regarding Abdul Al-Salam Al-Hilah".<sup>46</sup> The government-authored proposed stipulation avers Lt Col Al-Hilah "was taken into custody by U.S. authorities and entered CIA's [sic] Rendition, Detention, and Interrogation program" "[i]n September 2002"—disclosing, for

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<sup>42</sup> ~~(U)~~ AE 689, pp. 14-15 (Class. App. 385-86).

<sup>43</sup> ~~(U)~~ *Id.*

<sup>44</sup> ~~(U)~~ *Id.*

<sup>45</sup> ~~(U)~~ *Id.*

<sup>46</sup> ~~(U)~~ AE 703B, Att. C (Tab 4(i)) (Proposed Statement of Admitted Facts)(Appx. 234).

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the first time, the month that Lt Col Al-Hilah entered in the RDI program, i.e. a month before he confessed to a significant, direct role in the U.S.S. Cole bombing.<sup>47</sup>

a. ~~(U)~~ *Summary of relevant military commission litigation.*

~~(S//NF)~~ Over the past ten years, Lt Col Al-Hilah's role in the U.S.S. Cole bombing was the subject of significant litigation before successive military commission judges. As noted above, Respondent first disclosed the fact of Lt Col Al-Hilah's confession in a barebones MCRE 505 summary in March 2013 (hereinafter, "October 10<sup>th</sup> Statement"). On 24 December 2014, the defense requested that the prosecution produce Lt Col Al-Hilah as a defense witness for the litigation regarding a government motion for the admission of hearsay statements purportedly made by lay witnesses in Yemen.<sup>48</sup> At the time, Lt Col Al-Hilah was also detained at Naval Station Guantanamo Bay. The government agreed to produce Lt Col Al-Hilah on 12 January 2015.<sup>49</sup>

~~(U)~~ On 13 March 2015, the defense filed a motion to compel the Convening Authority to grant Lt Col Al-Hilah immunity so that he could testify openly and fully during the defense's evidentiary presentation.<sup>50</sup> In that motion, the Defense repeatedly cited to the "late 2002" confession—referencing the same barebones document produced by the Government in March

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<sup>47</sup> ~~(U)~~ AE 703B, Att. C (Tab 4(i)) (Proposed Statement of Admitted Facts at 2)(Appx. 235).

<sup>48</sup> ~~(U)~~ AE 342, Attach. A (Class. Appx. 301-02).

<sup>49</sup> ~~(U)~~ AE 342, Attach. B (Class. Appx. 301-02).

<sup>50</sup> ~~(U)~~ AE 342 (Class. Appx. 286).

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2013.<sup>51</sup> On 7 July 2017, the military commission judge (Spath, J) denied the motion to compel immunity on the grounds that he found “no evidence to support the Government engaged in the discriminatory use of immunity to gain a tactical advantage.”<sup>52</sup> In 12 September 2022, after a D.C. Circuit Court of Appeals ruling vacating that ruling, another military judge again denied the motion to compel immunity.<sup>53</sup>

~~(U)~~ On 26 March 2021, the defense moved to compel discovery related to Lt Col Al-Hilah.<sup>54</sup> The requested discovery fell into two distinct categories: (1) the discovery, factual returns, and testimony from Lt Col Al-Hilah’s federal habeas case, and (2) the circumstances and conditions surrounding Lt Col Al-Hilah’s statements to U.S. authorities, to include the 10 October 2002 confession. The Defense repeatedly sought discovery of the circumstances of the confession because, even based on the limited information at the time, the defense recognized the incredibly exculpatory nature of Lt Col Al-Hilah’s statements. If admissible, Lt Col Al-Hilah’s October 10<sup>th</sup> statement is the centerpiece of a powerful defense theory of third-party guilt: a confession by a senior Yemeni government official to being the but-for cause of the crimes for which Petitioner

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<sup>51</sup> ~~(U)~~ See *id.* at 4-6 (Class. Appx. 289-91).

<sup>52</sup> ~~(U)~~ See AE 342C at p. 2 (Appx. 71).

<sup>53</sup> ~~(U)~~ AE 342G (Appx. 72).

<sup>54</sup> ~~(U)~~ AE 429 (Appx. 86).

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stands capitally charged.<sup>55</sup> On 9 November 2021, the military commission judge ordered the Government to disclose the requested habeas material but denied discovery on the circumstances surrounding the taking of Lt Col Al-Hilah's statements as "untimely" and "counterintuitive"—given that information could negatively impact its admissibility.<sup>56</sup> The military commission judge did direct the government, however, "to produce any information currently in the possession of Trial Counsel or of which Trial Counsel is currently aware that provides context to the statements made by Lt Col Al-Hilah . . ."<sup>57</sup>

~~(U)~~ On 20 July 2021, the Defense moved for a deposition of Lt Col Al-Hilah pursuant to R.M.C. 702(b), seeking to preserve his testimony under oath in case he became unavailable for trial.<sup>58</sup> On 25 September 2021, the military commission judge (Acosta, J) ordered that the deposition take place,<sup>59</sup> and it was ultimately scheduled for 6 May 2022.<sup>60</sup> At the deposition, Lt Col Al-Hilah invoked his right to not incriminate himself and declined to testify; the military commission judge determined that the invocation was valid and declared Lt Col Al-Hilah to be

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<sup>55</sup> ~~(U)~~ See AE 689, Attach. F. (Class. Appx. 416) & Attach. G (Class. Appx. 418).

<sup>56</sup> ~~(U)~~ See AE 429H (Appx. 114).

<sup>57</sup> ~~(U)~~ AE 429H, p.5 (Appx. 118).

<sup>58</sup> ~~(U)~~ AE 451 (Appx. 119).

<sup>59</sup> ~~(U)~~ AE 451D (Appx. 129).

<sup>60</sup> ~~(U)~~ AE 451K (Appx. 132).

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unavailable.<sup>61</sup> Thereafter, on 22 May 2022, Petitioner filed a motion requesting a pretrial determination that Lt Col Al-Hilah's confession met the requirements for admissibility as a "statement against interest" pursuant to M.R.E. 804(b)(3).<sup>62</sup>

~~(U)~~ The military commission judge held a hearing on 5 August 2022 to address the admissibility of Lt Col Al-Hilah's October 10<sup>th</sup> statements. At oral argument, the military commission judge repeatedly asked both parties whether the October 10<sup>th</sup> statements implicated MCRE 304, a military commission evidentiary rule codifying the statutory prohibition of the admission of torture-borne statements. He began by asking defense counsel, "Can I – can I ask you another question that might send us on a tangent, but I think it's important. Do I have a – do I have an MCRE 304 issue here first on these statements? Who were these statements given to, under what conditions, and can I even consider them at all?"<sup>63</sup> Defense Counsel responded by emphasizing that based on the limited information available via the MCRE 505 summary, "nothing that would suggest to me that you have a 304 issue with these statements. But again, that has been summarized away from the defense, and so we're here to offer it under [M.R.E.] 804(b)(3)."<sup>64</sup>

~~(U)~~ The military commission judge then turned to the prosecutor, asking:

~~(U)~~ Military Commission Judge: Do I have a [MCRE] 304 issue?

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<sup>61</sup> ~~(U)~~ Tr. at 17253-54 (Appx. 39-40).

<sup>62</sup> ~~(U)~~ See AE 478 (Class. Appx. 340).

<sup>63</sup> ~~(U)~~ Tr. at 18237-38 (Appx. 40-41).

<sup>64</sup> ~~(U)~~ *Id.*

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~~(U)~~ Prosecutor: Your Honor, the defense didn't raise one. The government ---

~~(U)~~ Military Commission Judge: No.

~~(U)~~ Prosecutor: -- is not raising one.

~~(U)~~ Military Commission Judge: I'm not -- here's the issue. The rule is clear. Statements made under torture can't come in. Would it not be in your interest to go, ooh, this was -- he was tortured here. You can't consider that one way or the other. I'm trying to make sure that I don't consider evidence that was gained under torture.

~~(U)~~ Prosecutor: Your Honor, at this time the government has no reason to raise that issue. We have nothing -- no reason to raise that or -- or suggest that you consider that as -- as a reason to deny the defense request.

~~(U)~~ Military Commission Judge: Okay. So it was not.

~~(U)~~ Prosecutor: Sir, at this time the government is not offer -- not raising that issue.

~~(U)~~ Military Commission Judge: Okay.

~~(U)~~ Prosecutor: We're not --

~~(U)~~ Military Commission Judge: You keep saying a different phrase at the end of the -- at the end there. It doesn't completely eliminate from the commission's mind the concern that this was a statement obtained by torture. Because if it was a statement that -- obtained under torture, can I even consider it, yes or no?

~~(U)~~ Prosecutor: No. You would have an issue of 304 if it was a statement obtained under torture, but that is not an

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issue that either the defense or the government is raising with regard to these statements.<sup>65</sup>

~~(U)~~ On 13 January 2023, the Commission (Acosta, J) found Lt Col Al-Hilah's October 10<sup>th</sup> statement to be admissible as a statement against his interest.<sup>66</sup> In the ruling, the military commission judge referenced his colloquy with the prosecutor at the 5 August 2022 hearing: "The Government represented to the Commission during oral argument that the Government has no reason to believe the evidence in question would be barred by MCRE 304(a)(1)."<sup>67</sup>

~~(U)~~ Respondent transferred Lt Col Al-Hilah to Oman in January 2025.<sup>68</sup>

b. ~~(U)~~ *Summary of current litigation.*

~~(U)~~ In January 2026, following the Government's disclosure that Lt Col Al-Hilah was detained at a CIA Black Site when the statements at issue were obtained, and realizing this new disclosure rendered Lt Col Al-Hilah's October 10<sup>th</sup> Statement statutorily inadmissible, defense counsel promptly raised the matter on the record with the military commission judge in an *ex parte* hearing, and, subsequently, sought appropriate relief.<sup>69</sup> On 12 March 2026, Petitioner filed a classified motion to dismiss the charges, or, in the alternative for dismissal of the capital referral

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<sup>65</sup> ~~(U)~~ Tr. at 18253-54 (Appx. 42-43).

<sup>66</sup> ~~(U)~~ AE 478H (Appx. 184).

<sup>67</sup> ~~(U)~~ AE 478H, p. 4, n.5 (Appx. 187).

<sup>68</sup> ~~(U)~~ AE 626, Att. B. at 1 (Appx. 188).

<sup>69</sup> ~~(U)~~ AE 689 (Class. Appx. 368).

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or credit towards Mr. Al-Nashiri's sentence, if a sentence were to be imposed.<sup>70</sup> Petitioner highlighted the statutory inadmissibility of Lt Col Al-Hilah's October 10<sup>th</sup> Statements, and highlighted repeated misrepresentations by Respondent to successive military commission judges about the circumstances of Lt Col Al-Hilah's confession.<sup>71</sup> Petitioner also requested that the Commission conduct fact-finding on the conditions of Lt Col Al-Hilah's confession, identifying the interrogators identified on 9 October 2002 as witnesses.<sup>72</sup>

~~(U)~~ Petitioner, in his pleading, recited record evidence of the appalling conditions at Location No. 2 during the period that the CIA detained Lt Col Al-Hilah there.<sup>73</sup> Both pleadings by Petitioner and Respondent appended testimony from Lt Col Al-Hilah's federal habeas proceedings that included direct evidence of his claims of torture.<sup>74</sup> Lt Col Al-Hilah testified that "[t]he dark prison is only for torture, for degrading human beings, for dirty things that happen. All the crimes of the world, you know, they said that I have something to do with them. After 15 years, I still have marks of the torture on my hand, on my leg; and bad psychology effects are still here."<sup>75</sup> His

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<sup>70</sup> ~~(U)~~ *Id.*

<sup>71</sup> ~~(U)~~ *See id.*

<sup>72</sup> ~~(U)~~ *See* AE 689 at ¶9 (Class. Appx. 399).

<sup>73</sup> ~~(U)~~ AE 689, pp. 14-15 [REDACTED] (Class. Appx. 385-86).

<sup>74</sup> ~~(U)~~ *See* AE 689, Att. E (Class. Appx. 385-86); AE 689A, Atts. C-D (Class. Appx. 445, Class. Appx. 471).

<sup>75</sup> ~~(U)~~ AE 689A, Att. D (10015-00236321)(Class. Appx. 491).

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attorney proffered that Lt Col Al-Hilah said “he was held in the dark prison for long periods of time in complete darkness with loud noises 24 /7. When he was questioned, he was subjected to extremely bright lights. He was hung from the ceiling. He would -- often, at night, he would sleep on a cold, cement floor with no mattress, with his hands shackled to the wall.”<sup>76</sup>

~~(U)~~ Respondent, for its part, did not contest that Lt Col Al-Hilah was held in Location No. 2 on 10 October 2002, nor did Respondent contest the conditions at Location No. 2. Indeed, Respondent only included one paragraph in the “facts” section of its brief, stating “Al-Hilah was a detainee who spent some time in the CIA’s former Rendition, Detention, and Interrogation (“RDI”) Program, before being transferred to DoD custody. Al-Hilah was never classified as a “High Value Detainee,” and he was never subjected to Enhanced Interrogation Techniques (“EITs”).”<sup>77</sup>

~~(U)~~ Indeed, instead of contesting the allegation that Lt Col Al-Hilah’s statement was torture-derived, Respondent argued that the Defense should have already surmised that Lt Col Al-Hilah’s confession was elicited in Location No. 2 based on other disclosures and publicly available information. Respondent first pointed to four statements disclosed in October 2021 and March 2022 that purportedly reflected that Lt Col Al-Hilah was being held at Classified Black Site<sup>78</sup>—

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<sup>76</sup> ~~(U)~~ AE 689A, Att. D (10015-00236318)(Class. Appx. 488).

<sup>77</sup> ~~(U)~~ AE 689, p. 3 (Class. Appx. 374).

<sup>78</sup> ~~(U)~~ AE 689A, p. 13 (Class. Appx. 433).

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though, as Petitioner replied, only one such disclosure included a location and that document was dated over three months after Lt Col Al-Hilah's confession.<sup>79</sup> Second, Respondent pointed to the fact that the SSCI Report includes Lt Col Al-Hilah on a list of "CIA Detainees from 2002-2008"<sup>80</sup>—though, as Petitioner replied, the SSCI report (which mentions Al-Hilah only once) includes only Lt Col Al-Hilah's year of capture, and otherwise includes no information about the duration of his inclusion in the RDI Program.<sup>81</sup> Third, Respondent referenced its disclosure of information and statements from Lt Col Al-Hilah's habeas proceedings in 2017.<sup>82</sup> Though that material includes direct testimony of Lt Col Al-Hilah's claim that he was tortured at Location No. 2, it did not identify *when* he was held at "the dark prison," nor what black site location "the dark prison" corresponds to.<sup>83</sup> In fact, the material does not establish any clear timeline of his capture by U.S. authorities or his admission into the RDI program.<sup>84</sup>

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<sup>79</sup> ~~(U)~~ AE 689C, pp. 2-3 (Appx. 209-10).

<sup>80</sup> ~~(U)~~ AE 689A, p. 14 (Class. App. 434).

<sup>81</sup> ~~(U)~~ AE 689C, p. 4 (Appx. 211).

<sup>82</sup> ~~(U)~~ AE 689, p.10 (Class. App. 381).

<sup>83</sup> ~~(U)~~ See AE 689A, Att. D (Class. Appx. 471). The government has never confirmed nor disclosed that "the dark prison" is Location No. 2.

<sup>84</sup> ~~(U)~~ Nor would testimony by Lt Col Al-Hilah constitute confirmation by Respondent that Lt Col Al-Hilah was held at Location No. 2 on 10 October 2002.

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~~(U)~~ On 25 June 2026, the military commission judge denied Petitioner's motion for relief. Recognizing the powerful exculpatory and mitigating import of Lt Col Al-Hilah's confession, he notes:

~~(U)~~ "Al-Hilah's statement made on 10 October 2002 implicates himself directly in the principal offense for which the Accused is charged. It also necessarily implicates the Yemeni government in supporting terrorist operations in that country. Clearly, evidence of that nature has significant probative value to the Accused on the merits and on pre-sentencing, if it becomes necessary."<sup>85</sup>

~~(U)~~ The military commission judge also makes a finding that there is "ample additional evidence" to corroborate the information in Lt Col Al-Hilah's confession, highlighting evidence of "Al-Hilah's specific connections or sympathies to al Qaeda, as well as that of the Yemeni government in general."<sup>86</sup>

~~(U)~~ In the ruling, the military commission judge notes that while "it is true Al-Hilah was held in a location where other detainees were subjected to torture or cruel, inhuman, and degrading treatment"—citing to record evidence—he "[found] that the statements at issue here were not obtained by torture."<sup>87</sup> The military commission judge buttressed this erroneous finding with an

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<sup>85</sup> ~~(U)~~ AE 689E, p. 8 (Appx. 225).

<sup>86</sup> ~~(U)~~ AE 689E, p. 9 (Appx. 226).

<sup>87</sup> ~~(U)~~ *Id.*

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additional one, stating that “Al-Hilah has never personally claimed to have been tortured”—ignoring Lt Col Al-Hilah’s testimony.<sup>88</sup>

~~(U)~~ The military commission judge also cites to the fact that “through decades of discovery, the Government has produced no direct evidence of any such treatment”<sup>89</sup>—though a previous military judge denied a motion to compel this very discovery as to Lt Col Al-Hilah’s conditions of confinement. Instead, the military commission judge appends a classified addendum explaining his speculation that “there are significant reasons to believe Al-Hilah may have been treated more favorably than other detainees”—citing to the fact [REDACTED]

[REDACTED] In reaching his ruling, the military commission judge did not permit Lt Col Al-Hilah’s newly-identified interrogators—requested by defense counsel—to testify in an evidentiary hearing.<sup>91</sup>

~~(U)~~ Even after finding the October 10<sup>th</sup> Statement was not obtained by torture, the military commission judge goes on to weigh the application of 10 U.S.C. § 948r anyway, determining that “a strict application of the rule which would deprive the Accused of material, exculpatory

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<sup>88</sup> ~~(U)~~ See, e.g., AE 689A, p. 71 (Class. Appx. 491).

<sup>89</sup> ~~(U)~~ AE 689E, p. 9 (Appx. 226).

<sup>90</sup> ~~(U)~~ AE 689E, p. 9 (Appx. 226)(citing to AE 689F (Class. Appx. 418)).

<sup>91</sup> ~~(U)~~ See AE 689E (Appx. 218).

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evidence.”<sup>92</sup> The judge rejects the statute’s categorical prohibition as to this evidence, examining instead the constitutional due process concerns underlying the exclusionary rule.<sup>93</sup> In doing so, he finds that barring torture-borne evidence which is helpful to the Petitioner “would be arbitrary and disproportionate to the purpose the rule is designed to serve, which is to prevent the Accused from being convicted on the basis of such evidence.”<sup>94</sup>

~~(TS)~~ In more recent rulings, the military commission judge continues to rely on the admissibility of both the October 9<sup>th</sup> and October 10<sup>th</sup> Statements as a basis for denying trial witnesses to Petitioner—denying all percipient witnesses to Lt Col Al-Hilah’s October 2002 statements—on the basis they could be offered by “appropriate sponsoring witnesses and/or an alternate format”.<sup>95</sup> He identifies three FBI agents—all noticed witnesses for Respondent—as appropriate sponsoring witnesses, despite the fact that Lt Col Al-Hilah minimized his role in the U.S.S. Cole bombing in later statements to the FBI.<sup>96</sup>

~~(TS//OC/NF)~~ For example, in his October 10<sup>th</sup> Statement, Lt Col Al-Hilah admits, in great detail, that he was contacted by “Ja’yul,” who told Al-Hilah that a “significant attack was

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<sup>92</sup> ~~(U)~~ AE 689E, p. 12 (Appx. 229).

<sup>93</sup> ~~(U)~~ AE 689E, p. 12-15 (Appx. 229-32).

<sup>94</sup> ~~(U)~~ AE 689E, 12 (Appx. 229).

<sup>95</sup> ~~(U)~~ AE689E, p. 16 (Appx. 233).

<sup>96</sup> ~~(U)~~ *Id.*

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being planned against the British and the Americans,” and Lt Col Al-Hilah further confessed that “he knew the attack would be in the Port of Aden, and that Ja’yul paid him \$20,000 USD to “gain[] permission for a fishing boat to enter a restricted area of the port without being detained.”<sup>97</sup> By 2003, when questioned by the FBI, the only details offered by Lt Col Al-Hilah about the bombing of the USS COLE are that he “was approached by ABU BAKR JA’YUL who claimed that attacks against British and the American interests would happen soon,” and that “others (NFI) would conduct the attack against the Americans.”<sup>98</sup> He concluded by saying that “his only connection to the USS COLE attack is that after the bombings, he provided three passports to ABU AL-HARETHI that AL-HILAH believes they [sic] were used to smuggle AL-QA’EDA operatives who were involved in the USS COLE attack out of Yemen.”<sup>99</sup> Petitioner objected to the admissibility of Lt Col Al-Hilah’s torture-borne statements in a recent closed

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<sup>97</sup> ~~(U)~~ AE 342, Att. H (Class. App. 329-330).

<sup>98</sup> ~~(U)~~ AE 478E, Att. B (Class. App. 354).

<sup>99</sup> ~~(U)~~ *Id.*

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hearing.<sup>100</sup> Rather than joining that objection, Respondent answered by noting “that’s resolved by the commission”.<sup>101</sup>

~~(U)~~ Additionally, in another recent ruling, the military commission judge authorized the use of torture-borne statements for impeachment purposes at trial, finding that “[h]ad Congress intended to prohibit all uses of statements taken in violation of [Section 948r] including, for example, impeachment, they could have expressly done so but did not.”<sup>102</sup> He similarly forecast permitting the use of torture-borne statements for mitigation purposes during presentencing proceedings.<sup>103</sup>

## ~~(U)~~ REASONS FOR GRANTING THE WRIT

### I. ~~(U)~~ Standard of Review.

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<sup>100</sup> ~~(TS//OC/NF)~~ Unauth. Tr., 8/20/26, 58:6-20 (TS Appx. 51)(“[A]s courts have limited jurisdiction established by Congress, military commissions are not permitted to admit evidence that is violative [sic] of the Military Commissions Act of 2009. The government does not contest that the substitution and SARFs that talk about statements from Mr. Alhilah while he was in the RDI program that that contains torture born evidence and frankly, that evidence is categorically barred by the Military Commissions Act. And for that reason any substitution, any portion of the SARF that deals with statements made by Mr. Alhilah during the RDI program are of no utility to the defense because this commission does not have the authority to admit them.”)

<sup>101</sup> ~~(U)~~ Unauth. Tr., 8/20/26, 66:1-17 (TS Appx. 59).

<sup>102</sup> ~~(U)~~ AE 686F, pp. 4-5 (Appx. 203-04).

<sup>103</sup> ~~(U)~~ AE 686F, p. 6 (Appx. 205).

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~~(U)~~ The D.C. Circuit relies on a three-part test to determine whether mandamus relief is warranted: “First, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires . . . Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.”<sup>104</sup>

~~(U)~~ The facts of this case satisfy that exacting standard, particularly in view of this Court’s earlier invitation Petitioner “to refile a petition with this court if the military judge relies upon evidence that is inadmissible under 10 U.S.C. § 948r(a)” —the current posture of the proceedings.<sup>105</sup>

**II. ~~(U)~~ Petitioner has a clear and indisputable right to relief because military commission judges relied on a torture-derived confession in denying access to important exculpatory evidence, and, instead, propose to admit torture-borne statements at trial in violation of 10 U.S.C. § 948r(a).**

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<sup>104</sup> ~~(U)~~ *Al-Nashiri*, 791 F.3d 71, 78 (D.C. Cir. 2015)(quoting *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380-81 (2004)). See also *Khadr v. United States*, 820 F. Supp. 3d 1276, 1284 (CMCR. 2025)(“We may issue a writ of mandamus only if three conditions are satisfied: Petitioner ‘must have no other adequate means to attain the relief he desires . . . his right to issuance of the writ is clear and indisputable . . . [and] the writ is appropriate under the circumstances.’”)(quoting *In re Al-Nashiri*, 791 F.3d 71, 78, (D.C. Cir. 2015) (quoting *Cheney v. U.S. District Court*, 542 U.S. 367, 380-81 (2004)); *Ali v. United States*, 398 F. Supp. 3d 1200, 1211 (CMCR 2019) (same (quoting *Cheney*)).

<sup>105</sup> ~~(U)~~ *In re Al-Nashiri*, No. 21-001, at \*6 (CMCR Sept. 20, 2021).

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~~(U)~~ Section 948r of the Military Commissions Act of 2009 categorically bars the use of evidence obtained by torture. The statute “dictates that ‘[n]o statement obtained by the use of torture or by cruel, inhuman, or degrading treatment . . . 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.’”<sup>106</sup> The only exception to this categorical prohibition—permitting the use of torture-derived statements against persons accused of torture—is drawn from the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 15), Dec. 10, 1984, 1465 U.N.T.S. 85 (“Torture Convention”).

~~(U)~~ Here, Section 948r(a) clearly articulates the standard governing a military commission judge’s authority to admit torture-borne statements—unless the evidence fits one narrow exception, he is not authorized to admit it. “This case begins and ends with the plain language of the statute.”<sup>107</sup> “It is a fundamental tenet of statutory construction to construe a statute in accordance with its plain meaning.”<sup>108</sup>

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<sup>106</sup> ~~(U)~~ *In re Al-Nashiri*, 47 F.4th 820, 823 (D.C. Cir. 2022) (quoting 10 U.S.C. § 948r(a)).

<sup>107</sup> ~~(U)~~ *Polfliet v. Cuccinelli*, 955 F.3d 377, 380-81 (4th Cir. 2020); *United States v. Matthews*, 68 M.J. 29, 37 (C.A.A.F. 2009) (“When the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”).

<sup>108</sup> ~~(U)~~ *Loving v. United States*, 62 M.J. 235, 240 (C.A.A.F. 2005); *Centro de Trabajadores Unidos v. Bessent*, 167 F.4th 1218, 1230 (D.C. Cir. 2026) (“When the statute’s language is plain, the sole function of the courts is to enforce it according to its terms.”)(citations and quotation marks omitted).

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~~(U)~~ This Court declined to weigh the application of this bar on torture-borne evidence in pretrial proceedings in 2021, determining that the Government’s “withdrawal of the contested language render[ed] the matter moot.”<sup>109</sup> However, in so doing, this Court noted that “[a] broad ruling on admissibility now without the “context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.”<sup>110</sup> In its ruling, this Court ordered that Mr. Al-Nashiri “may refile a petition with this court if the military judge relies upon evidence that is inadmissible under 10 U.S.C. § 948r(a).”<sup>111</sup>

- a. ~~(U)~~ *The military commission judge clearly erred by ignoring undisputed record evidence that Lt Col Al-Hilah’s statements were torture-borne.*

~~(U)~~ This Court should not defer to the trial judge’s clearly erroneous determination that the October 10<sup>th</sup> statement was not torture-derived. Though appellate courts typically afford significant deference to trial courts in conducting findings of fact, those findings may be set aside in view of clear error.<sup>112</sup> The D.C. Circuit recently set aside erroneous findings of fact in *In re*

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<sup>109</sup> ~~(U)~~ *In re Al-Nashiri*, No. 21-001, at \*5 (CMCR Sept. 20, 2021).

<sup>110</sup> ~~(U)~~ *See id.*, at 5 (quoting *Cause of Action Inst. v. U.S. Dep’t of Just.*, 999 F.3d 696, 705 (D.C. Cir. 2021) (quoting *Texas v. United States*, 523 U.S. 296, 301 (1998)).

<sup>111</sup> ~~(U)~~ *In re Al-Nashiri*, No. 21-001, at \*6 (CMCR Sept. 20, 2021).

<sup>112</sup> ~~(U)~~ *In re United States*, 143 F.4th 411, 428-29 (D.C. Cir. 2025); *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008) (“We review a military judge’s decision to suppress or admit evidence for an abuse of discretion. A military judge abuses his discretion when his findings of fact are clearly erroneous, the court’s decision is influenced by an erroneous view of the law, or the military judge’s decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.”) (internal citations and quotations omitted).

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*United States*, granting mandamus relief to Respondent, after a military commission judge determined that the accused had begun “performance of a promise” under revoked pretrial agreements. “Given the plain text of the pretrial agreements and the undisputed facts in this case,” the Circuit found “straightforward error.”<sup>113</sup>

~~(U)~~ Here, as in that case, the critical facts are undisputed: the confession was elicited by CIA interrogators at Location No. 2—a notorious CIA Black Site known as “the dark prison”—shortly into Lt Col Al-Hilah’s tenure in the RDI Program. In its briefing, Respondent never contested that Lt Col Al-Hilah’s statements at Location No. 2 were obtained by torture or cruel, inhuman, or degrading treatment. The military commission judge erred by crediting his own *supposition* that Lt Col Al-Hilah received better treatment in the CIA Black Site over direct and undisputed record evidence about detainee treatment at Location No. 2 in the relevant time period. Furthermore, the military commission judge incorrectly concluded that Lt Col Al-Hilah “has never personally claimed to have been tortured”—ignoring direct evidence to the contrary, i.e. testimony by Lt Col Al-Hilah himself.

- b. ~~(U)~~ *Given that his authority was constrained by the statutory bar on torture-borne statements, the military commission judge is required to remediate the harm to Petitioner.*

~~(U)~~ A military commission judge does not have the authority to simply override Section 948r because he finds that evidence is “material” and “exculpatory”. As Article I courts, military

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<sup>113</sup> ~~(U)~~ *In re United States*, 143 F.4th 411, 428-29 (D.C. Cir. 2025).

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commissions possess only those powers specifically granted to them by statute.<sup>114</sup> As the D.C. Circuit noted in *In re Baluchi*, 952 F.3d 363, 369-70 (2020), “[i]n the context of military commissions, those constitutional safeguards are codified by statute and regulation. The 2009 Military Commissions Act provides that ‘the procedures and rules of evidence’ in such proceedings ‘shall include, at a minimum . . . [the accused’s right] to examine and respond to all evidence admitted against the accused on the issue of guilt or innocence and for sentencing.’” 10 U.S.C. § 949a(b)(2)-(b)(2)(A). The Rules for Military Commissions breathe further life into this directive.”<sup>115</sup>

~~(U)~~ Though Petitioner agrees with the finding that proof of Lt Col Al-Hilah’s direct role in the U.S.S. Cole bombing is “material, exculpatory evidence” in this case, any remaining exculpatory value is eradicated by the format in which it will be offered. Respondent never provided Petitioner with Lt Col Al-Hilah’s raw “confessions” themselves, and the military commission judge already denied testimony from all percipient witnesses to the disclosures. Instead, Petitioner is only permitted to present barebones, government-authored summaries of Lt Col Al-Hilah’s statements as elicited from three noticed prosecution FBI witnesses.

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<sup>114</sup> ~~(U)~~ *In re Ali*, 558 F. Supp. 3d 1167, 1176 (CMCR 2021) (“Article I courts are established by Congress, and they ‘exercise[] a portion of the judicial power of the United States.’”) (quoting *Freytag v. Comm’r*, 501 U.S. 868, 891 (1991) (discussing powers of tax court). See also *United States v. Al Qosi*, 28 F. Supp. 3d 1198, 1204 (CMCR 2014).

<sup>115</sup> ~~(U)~~ *In re Baluchi*, 952 F.3d 363, 369-70 (2020).

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~~(U)~~ The harm of this approach is apparent: vital, exculpatory information is now only available to Petitioner in watered-down form from the mouths of prosecution witnesses. That harm is compounded by the fact that the FBI is the law enforcement agency that bore primary responsibility for investigating the U.S.S. COLE bombing with case agents at counsel table with prosecution attorneys. Such constraints effectively eliminate the exculpatory import of the statements themselves—allowing the government’s own witnesses to offer their recitation of these exculpatory statements in one breath, only to discredit them in the next. Similarly, any exculpatory value gained by an FBI agent uttering these “statements” regarding PSO complicity would be undercut by the fact that the very same agents are recommending that panel members heavily rely on PSO-gathered evidence in rendering a guilty verdict. The defense is also forced into the untenable position of, on one hand, arguing the credibility and reliability of Lt Col Al-Hilah’s October 10<sup>th</sup> Statement while, on the other hand, impeaching the credibility and motivations of the agents testifying to those statements.

~~(U)~~ Military commission judges are constrained to act in strict compliance with the authorizing statutes, and here the Military Commissions Act of 2009 outlines the precise limits of that judicial authority with respect to the admission of torture-borne statements.<sup>116</sup> Having determined that evidence of Lt Col Al-Hilah’s direct role in the U.S.S. Cole bombing and Yemeni complicity was necessary to a fair trial, the military commission judge should have

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<sup>116</sup> ~~(U)~~ 10 USC § 948r(a).

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sought to remediate the impact on Petitioner, not simply bulldoze through a clear statutory limitation.<sup>117</sup>

~~(U)~~ This issue cannot be side-stepped by ignoring uncontroverted evidence that previously-admitted statements were torture-borne. Here, it was incumbent on the military judge to undertake a searching inquiry, by meaningfully considering whether it would be possible to remediate the harm to Petitioner in conformity with the law.<sup>118</sup> At a minimum, this Court should order vacatur of all past rulings that relied on torture-borne statements so that they can be meaningfully reconsidered—a disposition supported by this Court’s previous ruling on this issue, and a course of action Respondent already agreed to undertake in the D.C. Circuit. The military

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<sup>117</sup> ~~(U)~~ See *B.M. v. United States*, 84 M.J. 314, 317 (C.A.A.F. 2024) (“the military judge did not abuse her discretion when she abated the trial in light of information learned while reviewing the records over which Petitioner asserted a privilege. . . [W]e find that the military judge’s decision was within the range of choices reasonably arising from the applicable facts and the law.”); *J.M. v. Payton-O’Brien*, 76 M.J. 782, 790-91 (N-M Ct. Crim. App. 2017) (“The military judge needs more precise remedial measures than merely abatement to fashion an appropriate remedy when she concludes privileged records or communications are necessary and the victim elects not to waive the privilege. . . Using the remedies in Mil. R. Evid. 505(j)(4)(A) as our guide, there are several possible options when a victim elects to preserve the psychotherapist-patient privilege after a military judge deems disclosure constitutionally necessary. The military judge may: (1) strike or preclude all or part of the witness’s testimony; (2) dismiss any charge or charges, with or without prejudice; (3) abate the proceedings permanently, or for a time certain to give the witness an opportunity to reconsider; or (4) declare a mistrial.”).

<sup>118</sup> ~~(U)~~ See *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (“We have long held that dismissal is a drastic remedy and courts must look to see whether alternative remedies are available. When an error can be rendered harmless, dismissal is not an appropriate remedy. This Court explained in *United States v. Green*, 4 M.J. 203, 204 (C.M.A. 1978), that dismissal of charges is appropriate when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings.”)(internal citations and quotations omitted).

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commission judge simply cannot evaluate the scope of possible evidentiary stand-ins when Respondent never collected discoverable material to begin with.

~~(U)~~ Remedial measures are available to military commission judges facing such quandaries. Rule 703 of the Rules for Military Commission provides that “if the testimony of a witness determined to be unavailable is of central importance to the resolution of an issue essential to a fair trial, and there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness’ presence, or shall abate the proceedings, if the military judge finds that the reason for the witness’ unavailability is within the control of the United States.” The military commission judge could, for example, consider abating proceedings until Respondent procures Lt Col Al-Hilah’s immunized testimony.

~~(U)~~ Section 949p-6(f) of the Military Commissions Act of 2009 also offers a model for military judges when faced with such an absolute bar on the use of exculpatory evidence based on an assertion of the National Security Privilege:

~~(U)~~ “Whenever an accused is prevented by an order under paragraph (1) from disclosing or causing the disclosure of classified information, the military judge shall dismiss the case, except that, when the military judge determines that the interests of justice would not be served by dismissal of the case, the military judge shall order such other action, in lieu of dismissing the charge or specification, as the military judge determines is appropriate. Such action may include, but need not be limited to, the following: (A) Dismissing specified charges or specifications. (B) Finding against the United States on any issue as to which the excluded classified information relates. (C) Striking or precluding all or part of the testimony of a witness.”

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~~(U)~~ In *J.M. v. Payton-O'Brien*, 76 M.J. 782, 790-91 (N-M Ct. Crim. App. 2017), the appellate court cited the analogous provision from the Military Rules for Evidence as an appropriate model for fashioning other “precise remedial measures than merely abatement to fashion an appropriate remedy” when a military judge “concludes privileged records or communications are necessary and the victim elects not to waive the privilege.”

~~(U)~~ The Commission considered none of this. Instead of relying on any remedial mechanisms, the Commission simply declared the evidence admissible. By doing this, the Commission also failed to even act on the prejudice resulting from Respondent’s extreme dilatory disclosure of critical information—i.e., withholding the fact that the confession was torture-borne for thirteen years—and its repeated misstatements to the tribunal.

~~(U)~~ Critically, this is not Respondent’s first brush with malfeasance with respect to the availability of exculpatory evidence in this military commission. In September 2022, a military commission judge determined that the CIA destroyed two videotapes of Petitioner’s interrogation, interrogations of the accused which “involved the use of EITs such as water boarding, slapping, ‘walling,’ and confining the Accused to large and small boxes, among other harsh and physically painful measures.”<sup>119</sup> Where, as here, discovery violations are of such

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<sup>119</sup> ~~(U)~~ AE 354T, pp. 3-4 (Appx. 77-78) (denying defense motion to abate the proceedings, or to provide alternative relief, for the destruction of critical evidence based on a finding that Petitioner has at its disposal an adequate substitute for the destroyed tapes, for the full range of issues for which the tapes would be relevant at trial). In October 2024, a federal district court judge imposed sanctions for the destruction of videotapes of another Guantanamo Detainee’s interrogations in the RDI Program. *Zayn Al Abidin Muhammad Husayn v. Austin*, Civil Action No. 08-1360 (EGS), 2024 U.S. Dist. LEXIS 183377, at \*45 (D.D.C. Oct. 8, 2024) (“the CIA has

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profound magnitude, military commission judges—like military judges—are authorized to take corrective measures by dismissing charges, removing the possibility of the death penalty, or taking other corrective actions.<sup>120</sup> Such corrective measures are warranted here.

**III. ~~(U)~~ Mandamus relief is appropriate under the circumstances in view of the doctrine of judicial estoppel, and necessary to clarify the application of Section 948r(a) in all commissions.**

~~(U)~~ In this instance, the doctrine of judicial estoppel strongly favors granting mandamus relief. “The Supreme Court has recognized three considerations that ‘typically inform the decision whether to apply the doctrine in a particular case’: 1) ‘a party’s later position must be clearly inconsistent with its earlier position’; 2) whether the party ‘succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was

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conceded ‘that the tapes were not destroyed because of an inadvertent routine or automatic document retention process’ but because ‘Mr. Rodriguez intentionally authorized destruction of the videotapes with awareness that senior government officials had expressed opposition to or reservations about the destruction’”).

<sup>120</sup> ~~(U)~~ R.M.C. 703(f)(2); *see also United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015) (military judge did not abuse his discretion in finding discovery violations and dismissing charges with prejudice)(“the military judge found ‘continual and egregious discovery’ violations by [trial counsel]. After considering ‘all possible remedies in this case’ and the requirement ‘to craft the least drastic sanction,’ the military judge dismissed the case with prejudice based on ‘the nature, magnitude, and consistency of the discovery violations’ in the case.”); *United States v. Bowser*, 74 M.J. 326, 326 (C.A.A.F. 2015)(military judge did not abuse his discretion in dismissing all charges and specifications with prejudice following the Government’s refusal to comply with the military judge’s order to produce trial counsel’s witness interview notes for an in camera inspection).

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misled'; and 3) 'whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.'" <sup>121</sup>

~~(U)~~ This is the rare case in which judicial estoppel can be readily proved. Respondent's "current position" is that torture-borne statements of third parties are admissible at trial. <sup>122</sup> Respondent recently assured the military commission judge that it had not committed to refrain from seeking the admission of third-party torture statements in litigation before the D.C. Circuit. Rather, it explained that "[t]he Government also stated that it 'will not seek admission, at any stage of the proceedings, of any of *petitioner's* statements while he was in CIA custody'"—adding emphasis to the word "petitioner" in its brief. <sup>123</sup> In the same brief, the Government averred that "the Government's prior concessions are silent regarding whether the Defense may seek admission of statements of persons *other than the Accused*." <sup>124</sup>

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<sup>121</sup> ~~(U)~~ *United States v. Morse*, 613 F.3d 787, 792 (8th Cir. 2010) (*New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (internal quotations and citations omitted).); *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 798 (D.C. Cir. 2010) ("There are at least three questions that a court should answer in deciding whether to apply judicial estoppel: (1) Is a party's later position clearly inconsistent with its earlier position? (2) Has the party succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled? (3) Will the party seeking to assert an inconsistent position derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped?") (citing *New Hampshire v. Maine*, 532 U.S. at 750-51).

<sup>122</sup> ~~(U)~~ See, e.g., AE 689A (Class. App. 421).

<sup>123</sup> ~~(U)~~ AE 689A, p. 15 (Class. App. 435) (emphasis in original).

<sup>124</sup> ~~(U)~~ AE 689A, p. 16 (Class. App. 436) (emphasis added).

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~~(U)~~ That position is “clearly inconsistent” with its position before the D.C. Circuit that “[u]nder Section 948r(a), statements obtained by the use of torture, or by cruel, inhuman, or degrading treatment, are inadmissible *regardless of whether the defendant or another person made the statement*. That is the position of the United States, and we have recently made clear that this bar applies at any stage of the proceedings, not just at trial.”<sup>125</sup> The Government also represented to the D.C. Circuit that “the prosecution expressly acknowledged that, as to any statements obtained by torture, Section 948r(a)’s exclusionary rule “[c]learly applies to third parties”.<sup>126</sup>

~~(U)~~ It is also clear that the Government “succeeded in persuading a court to accept [its] earlier position,” as evidenced by the fact that the D.C. Circuit explicitly rested its dismissal of the 2022 mandamus petition explicitly on “assurances” made by the Government in its written pleading, oral argument, and Rule 28(j) letters:

~~(U)~~ Now, the Government has assured this Court in briefing, oral argument, and in subsequent letters submitted to us under Federal Rule of Appellate Procedure 28(j) that it will not seek to introduce any evidence obtained by the torture of Al-Nashiri or any third party in any stage of the proceedings. **See Resp. 3–4; Oral Argument Tr. 27:21–25; see also Response to 28(j) Letter, Joseph F. Palmer to CADC Clerk of Court, May 20, 2022; see also 28(j) Letter, Joseph F. Palmer to CADC Clerk of Court, July 6, 2022.**<sup>127</sup>

<sup>125</sup> ~~(U)~~ FRAP 28(j) Letter, Joseph Palmer to CADC Clerk of Court, May 20, 2022, p.1 (Appx. 254)(emphasis added).

<sup>126</sup> ~~(U)~~ *Id.*

<sup>127</sup> ~~(U)~~ *In re Al-Nashiri*, 47 F.4th at 825.

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~~(U)~~ Indeed, in his colloquy with government counsel, Judge Wilkins expressly noted his “view of that is that if I’m going to take you up on that, then you should be estopped from acting contrary to the representations that you make to this Court that caused us to grant you the relief or to decline to grant Petitioner the relief.”<sup>128</sup> After repeated assurances from government counsel during oral argument and in writing, the D.C. Circuit ruled in the their favor.

~~(U)~~ Finally, Respondent “would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”<sup>129</sup> By withholding discovery on the true circumstances of the Lt Col Al-Hilah’s statements, successive military commission judges limited discovery on his direct role in the U.S.S. Cole bombing. With an earlier disclosure, the defense could have attempted to find corroborating witnesses or moved to compel interviews of the CIA interrogators to determine the circumstances of that statement. Instead, the defense’s complete reliance on the government’s assertions from the August 2022 hearing, coupled with the eleventh hour disclosure of this information, prevented the defense from doing any of the above. Now, on the eve of trial, the military commission judge obliges Petitioner to use FBI agents as sponsoring witnesses for prosecution-authored summaries of Lt Col Al-Hilah’s statements.

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<sup>128</sup> ~~(U)~~ Transcript of Oral Argument at 26:9-20, *In re Nashiri*, Case No. 21-1208, D.C. Circuit Court of Appeals, May 4, 2022 (Appx. 26).

<sup>129</sup> ~~(U)~~ *Morse*, 613 F.3d at 792.

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~~(U)~~ The government withheld discovery until it was too late for the defense to find or preserve independent and untainted evidence of Lt Col Al-Hilah's role. Had the disclosure come prior to Lt Col Al-Hilah's resettlement to Oman, the defense would have moved for reconsideration of the immunity ruling so as to question Lt Col Al-Hilah himself about the circumstances of that very statement.

~~(U)~~ Mandamus is also appropriate here to "eliminate uncertainty" as to this important provision of the Military Commissions Act of 2009 before trial. Beyond requiring Petitioner to rely on torture-borne statements in its merits case, the military commission judge also authorizes the use of torture-borne statements as impeachment, seemingly endorses its use as sentencing mitigation—opening the door to its use by Respondent.<sup>130</sup> As interpreted, the exceptions to the prohibition on torture-borne evidence swallow the prohibition itself. It is certainly appropriate to clarify the application of the statutory bar on torture-borne statements before trials begin in any capital military commissions so as to eliminate uncertainty.<sup>131</sup> What confidence can the public have in the legitimacy of these proceedings if evidence is repeatedly elicited in flagrant violation of a clear congressional mandate?

**IV. ~~(U)~~ There are no other adequate means of relief because the effects of this issue will be impossible to determine on direct appeal.**

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<sup>130</sup> ~~(U)~~ See AE 686F (Appx. 200).

<sup>131</sup> ~~(U)~~ *In re United States*, 143 F.4th 411, 440 (D.C. Cir. 2025) (citing *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C. Cir. 1975) (finding mandamus appropriate to "forestall future error in trial courts" and "eliminate uncertainty" in important areas of law)).

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~~(U)~~ Ordinary appellate review is inadequate because the parties' longstanding reliance on the availability of this tainted evidence infected the proceedings over a decade ago, and successive judges have continued to rely on the admissibility of this tainted evidence in rendering rulings.

~~(U)~~ Government misrepresentations foreclosed other avenues of critical discovery on Lt Col Al-Hilah to substantiate defense theories.<sup>132</sup> And the harm to Petitioner continues to compound in pretrial rulings granting and denying trial evidence based on its relative "cumulativeness" and "helpfulness" vis a vis Lt Col Al-Hilah's torture-borne confession. And, while the military commission judge's reliance on the torture-borne statements for admissibility determinations may sometimes be apparent in the Record of Trial, too often, these brief analyses would hide that reliance from the view of appellate courts.

#### **V. ~~(U)~~ Petitioner's Case Warrants a Stay of Proceedings**

~~(U)~~ Petitioner asks this Court to preserve the status quo by staying the proceedings below until this Court confirms that the statutory bar on torture-borne statements applies to military commissions.

~~(U)~~ This Court has the authority to grant that relief. The power to hold a matter in abeyance while its legality is assessed is "inherent," and it is "preserved in the grant of authority to federal courts to issue all writs necessary or appropriate in aid of their respective

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<sup>132</sup> ~~(U)~~ AE 429H (Appx. 114).

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jurisdictions.”<sup>133</sup> “The authority to grant stays has historically been justified by the perceived need to prevent irreparable injury to the parties or to the public pending review.”<sup>134</sup> Courts exercise that authority in military commission proceedings. In January 2025, the D.C. Circuit stayed military commission proceedings pending its decision on a mandamus petition—on Respondent’s motion.<sup>135</sup>

~~(U)~~ The factors governing a stay are “(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.”<sup>136</sup> The movant bears the burden; the first two factors are the most critical; and the third and fourth merge where the Government is the opposing party.<sup>137</sup> Here, every factor favors a stay.

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<sup>133</sup> ~~(U)~~ *Nken v. Holder*, 556 U.S. 418, 426 (2009) (internal citations omitted); *see also Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9-10 (1942) (stay is considered “traditional equipment for the administration of justice”).

<sup>134</sup> ~~(U)~~ *Nken*, 556 U.S. at 432 (citing *Scripps-Howard*, 316 U.S. at 9) (internal citations omitted).

<sup>135</sup> ~~(U)~~ *In re United States*, No. 25-1009, 2025 U.S. App. LEXIS 479 (D.C. Cir. Jan. 9, 2025) (staying military commission proceedings concerning the pretrial agreements “pending further order of the court” to permit briefing, expedited argument, and decision on the mandamus petition), *mandamus granted*, *In re United States*, 143 F.4th 411 (D.C. Cir. 2025).

<sup>136</sup> ~~(U)~~ *Cuomo v. United States NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985).

<sup>137</sup> ~~(U)~~ *Nken*, 556 U.S. at 434 (movant “bears the burden of showing that the circumstances justify an exercise of that discretion” and “first two factors of the traditional standard are the most critical.”); *id.* at 435 (harm to the opposing party and the public interest “merge when the Government is the opposing party”).

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~~(U)~~ First, Petitioner is likely to prevail. He need not show that his “right...be absolutely certain, wholly without doubt.”<sup>138</sup> Instead, it is enough that the Petitioner makes “a substantial case on the merits” in order to obtain a stay.<sup>139</sup> Petitioner has made far more than that here. The facts that matter are not in dispute: Lt Col Al-Hilah entered the RDI Program in September 2002; he was held at the CIA Black Site in October 2002; and he confessed while captive there. Respondent does not contest any of these facts. Nor does Respondent contest that detainees at that site were tortured during that period. Respondent has already represented to the D.C. Circuit that the Section 948r prohibition is categorical and prohibits third party torture-borne statements at all stages of these proceedings. And this Court has already granted Petitioner relief for the same issue, vacating a “clarifie[d]” ruling grounded in a torture-borne evidence,<sup>140</sup> ordering that Petitioner “may refile a petition with this court if the military judge relies upon evidence that is inadmissible under 10 U.S.C. § 948r(a).”<sup>141</sup> That is what has occurred, and it is why Petitioner is here.

~~(U)~~ Second, Petitioner will be irreparably harmed absent a stay. The harm is not speculative. Successive military commission judges denied Petitioner discovery and other relief based on an incorrect contention—proffered by the Respondent—that Lt Col Al-Hilah’s statements

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<sup>138</sup> ~~(U)~~ *Wash. Metro. Area Transit Com. v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (1977) (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)).

<sup>139</sup> ~~(U)~~ *Holiday Tours*, 559 F.2d at 843 (observing that a court “may exercise its discretion to grant a stay if the movant has made a substantial case on the merits” and “court not required to find that ultimate success...is a mathematical probability”).

<sup>140</sup> ~~(U)~~ *In re Al-Nashiri*, No. 21-001, at \*5 (CMCR Sept. 20, 2021).

<sup>141</sup> ~~(U)~~ *In re Al-Nashiri*, No. 21-001, at \*6 (CMCR Sept. 20, 2021).

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were not torture-borne.<sup>142</sup> The current military commission judge continues to issue pretrial rulings, including rulings denying defense-requested trial witnesses, on the assumption that those statements by Mr. Al-Hilah are admissible. In fact, he has calendared an *ex parte* M.C.R.E. 505 hearing for 15 September 2026 on discovery concerning Lt Col Al-Hilah.<sup>143</sup> Trial is set to begin on 19 October 2026. Absent relief from the Court, each interim ruling perpetuates the harm across the record. And, once trial begins the Defense will be forced to rely on statutorily inadmissible evidence—tainting the proceedings—which no appellate remedy can meaningfully fix after the fact. Let alone the un rebutted evidence that the trial itself threatens Petitioner with grave and lasting harm.<sup>144</sup>

~~(U)~~ *Third*, a stay will not harm Respondent. The Government has held Petitioner in custody for nearly twenty-four years. It did not swear the charges on which he now stands trial until 2011, more than eight years after it took him into custody.<sup>145</sup> It then withheld from Petitioner and from successive military commission judges the single fact that determines the admissibility of Lt Col

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<sup>142</sup> ~~(U)~~ See *supra* Statement of Facts, Section II(a); see also AE 429H (denying discovery into the circumstances of Lt Col Al-Hilah's statements) (Appx. 114); AE 478H (Appx. 184) (admitting the confession as a statement against interest); AE 689E (Appx. 218) (denying relief).

<sup>143</sup> ~~(U)~~ See AE 634V (Appx. 198), addressing relief requested by Respondent in AE 634U (Draft Order)(Appx. 193-194).

<sup>144</sup> ~~(U)~~ *In re Al-Nashiri*, 835 F.3d 110, 143-44 (D.C. Cir. 2016) (Tatel, J., dissenting) (crediting un rebutted expert declaration that trial by military commission would be "stressful on a different order of magnitude" for Petitioner and could produce "permanently disabling effect[s]").

<sup>145</sup> ~~(U)~~ *In re Al-Nashiri*, 791 F.3d 71, 75 (2015) (observing that in "2011, the Defense Department convened a military commission to try Nashiri on these charges").

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Al-Hilah's confession for thirteen years.<sup>146</sup> A stay of months, to permit this Court to correct an error of Respondent's own making, is not a burden by comparison. Indeed, all parties stand to benefit from clarity as to the scope and applicability of the torture ban.

~~(U)~~ Finally, the public interest weighs strongly in favor of a stay. Congress enacted a categorical bar on torture-borne evidence, and it applies to every stage of a military commission.<sup>147</sup> A military commission judge has now held that he may set that bar aside when he sees fit. If that ruling stands without review, the first capital trial to reach verdict in these commissions will proceed on evidence Congress declared categorically inadmissible. There is a strong public interest in resolving that question before trial rather than after, and in "eliminat[ing] uncertainty" about the reach of Section 948r while the answer matters.<sup>148</sup> The legitimacy of these proceedings depends on it. Petitioner respectfully requests that this Court stay the proceedings below pending resolution of this Petition.

### ~~(U)~~ CONCLUSION

~~(U)~~ For the foregoing reasons, this Court should enforce the statutory prohibition against torture-borne statements and remand for the relief requested herein.

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<sup>146</sup> ~~(U)~~ See *supra* Statement of Facts, Section II (Respondent disclosed the "late 2002" confession in May 2013 but did not disclose that Lt Col Al-Hilah entered the RDI Program in September 2002 until 15 June 2026).

<sup>147</sup> ~~(U)~~ See 10 U.S.C. § 948r(a).

<sup>148</sup> ~~(U)~~ *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C. Cir. 1975) (mandamus appropriate to "forestall future error in trial courts" and "eliminate uncertainty" in important areas of law).

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~~(U)~~ CERTIFICATE OF COMPLIANCE

1. ~~(U)~~ This brief complies with the type volume limitation of U.S.C.M.C.R. Rule of Practice 15(g), as moved for by Respondent in its Motion for Leave to File an Oversized Brief on 14 September 2026, because:

~~(U)~~ This brief contains 12,832 words.

2. ~~(U)~~ The brief complies with the typeface and type style requirements of U.S.C.M.C.R. Rule of Practice 15(e) because:

~~(U)~~ This brief is written in 12-point Times New Roman font.

Respectfully submitted,

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~~(U)~~ CERTIFICATE OF SERVICE

~~(U)~~ I hereby certify that on 14 September 2026, I caused copies of the foregoing to be served on counsel for Respondent via hand delivery.

Respectfully submitted,

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