

**CHIEF PROSECUTOR MARK MARTINS**  
**REMARKS AT GUANTANAMO BAY**  
**17 MARCH 2017**

Good afternoon. Yesterday, the Military Commission convened to try Abd Al Rahim Hussayn Muhammad Al Nashiri completed another pre-trial session to resolve disputes regarding outstanding legal and evidentiary issues. Before I briefly summarize these matters, I emphasize that the charges against the Accused are only allegations. The Accused is presumed innocent unless and until proven guilty beyond a reasonable doubt. Matters under consideration by a Military Commission in this or any other particular case are authoritatively dealt with by the presiding Judge. Any comments addressing systemic issues that are the subject of frequent questions by interested observers should always be understood to defer to specific judicial rulings, if applicable.

***Matters Addressed by the Commission during This Pre-Trial Session***

Over the past two weeks, the Commission addressed several matters by examining the parties' written briefs, hearing oral argument, and taking substantive testimony from 13 witnesses in 26 hours of testimony. During this session the government began the process of admitting evidence through the live testimony of eleven witnesses—an important milestone on the path towards bringing this case to trial. The government has admitted 41 photographs into evidence and has begun laying the foundation for the admission of 57 pieces of physical evidence. In addition, the Commission continued to resolve pre-trial motions. Specifically, the Commission:

- Heard a status update from the defense, but no argument, concerning a defense request for linguist support for the translation of audio recordings the government produced in discovery for which it provided notice in Appellate Exhibit 045LLL.
- Heard argument on Appellate Exhibit 092HH, a defense motion to compel discovery related to Appellate Exhibit 092AA (government supplement to Appellate Exhibit 092U, government response to defense motion to abate proceedings and for appropriate relief due to alleged destruction of evidence referenced in Appellate Exhibit 092).
- Granted a defense motion to compel the production of four witnesses in support of Appellate Exhibit 354, a defense motion to abate proceedings due to alleged destruction of videotapes of Mr. Al Nashiri's interrogations.
- Received testimony, heard argument, and partially decided various requests for relief attendant to Appellate Exhibit 359, a defense motion that the Accused be housed near the courtroom while the Commission is in session; these attendant matters included AE 359H, a defense motion to compel production of writings used by the Senior Medical Officer (SMO) to refresh his recollection; Appellate Exhibit 359I, a defense objection to the government's request that examination of the Senior Medical Officer be conducted in a manner protective of national security information; Appellate

Exhibit 359J, a defense motion to permit defense consultant Dr. Sondra Crosby to testify and become part of the provision of the Accused's medical care; and Appellate Exhibit 359K, a defense motion to limit the scope of the government's cross-examination should the Accused testify in support of Appellate Exhibit 359. As the Military Judge had previously heard, in December 2016, testimony from the detention facility commander and had indicated, following the SMO's testimony this session, that he did not doubt the Accused's motion sickness, the defense declined to call the Accused as a witness. From the bench, the Military Judge indicated that the defense motion in Appellate Exhibit 359 would be denied, with written ruling to follow.

- Heard argument on Appellate Exhibit 365C, a government motion by special trial counsel for an interim order prohibiting defense browsing of classified systems in a session not attended by the normal prosecution trial team.
- Heard argument on Appellate Exhibit 367, a defense motion to compel Joint Task Force-Guantanamo to allow defense counsel, as well as defense expert Dr. Crosby, access to Accused's current medical records and current medical team.
- Heard argument on and granted Appellate Exhibit 369, a government motion to conduct a deposition of Ahmed Mohammed Ahmed Haza Al Darbi, indicating that he would schedule the deposition for the week of 31 July to 4 August.
- Heard argument on Appellate Exhibit 369D, a defense motion to compel production of discovery related to Darbi, a motion the government in substantial part did not oppose.
- Received testimony and heard argument on Appellate Exhibit 371, a defense motion for an order requiring specific procedures for government disclosure of Mr. Al-Nashiri's medical and psychological records; witness testimony comprised that of Captain Hsienjan Huang, who had been appointed Special Trial Counsel to review psychological records and had produced such records to the defense, along with a detailed log, on 3 March. Having taken the overall motion under advisement, the Commission did deny Appellate Exhibit 371D, a corollary defense motion to compel production of evidence regarding governmental use of the Accused's psychological records.

In addition to the rulings noted above, the Commission ruled that Appellate Exhibit 372, a motion from members of the press objecting to the Commission taking testimony from Mr. Al Nashiri in a closed hearing, was moot in light of the defense declining to call the Accused as a witness on Appellate Exhibit 359. As mentioned earlier, the Military Judge indicated that he would deny that defense motion. While not objecting per se to the Accused testifying in open session—and in fact having actively worked to enable public litigation of the Accused's conditions of detention—the government had on 15 December 2016 opposed the Accused testifying without proper use of the Commission's classified information procedures. As of that date, the defense had not submitted the required Military Commission Rule of Evidence (M.C.R.E.) 505(g) notice, and the government had maintained that the use, relevance, and

admissibility of the prospective evidence needed further consideration by the Commission so as to protect national security information prior to the Accused testifying in public.

In other business this session, the Commission ruled that Appellate Exhibit 358, a defense motion to compel production of the Accused's medical and psychiatric or psychological records from 1 January 2016 through 20 August 2016 was moot. Meanwhile, on Tuesday, 7 March 2017, the Commission met with defense and prosecution lawyers for an *in camera* hearing under M.C.R.E. 505(h) to make a determination regarding the use, relevance, or admissibility of classified information that defense counsel sought to use. Once a commission grants a request to hold an M.C.R.E. 505(h) hearing about classified material that may relate to a motion to be litigated, the parties will not litigate the merits of the underlying motion itself—that takes place in a session later, and such sessions are to be as open as possible. One purpose of such a hearing, which in cases involving fewer defense lawyers and prosecutors can often be held in a judge's chambers, is to isolate and minimize that portion of proceedings that truly may need to be closed.

After holding the *in camera* hearing, the Commission determined that there was a need to conduct a closed session under R.M.C. 806 regarding Appellate Exhibit 369, relating to the deposition of al Darbi. The Commission had previously ruled in December 2016 that it would hear argument regarding Appellate Exhibit 92S in closed session as well. *See* Appellate Exhibit 92X. The Commission ruled on 8 March 2017, in Appellate Exhibit 369J, that pursuant to M.C.R.E. 505 and Rule for Military Commissions (R.M.C.) 806, it would conduct proceedings on these matters in closed session, but that following the closed session, a redacted unclassified transcript would be prepared and provided to the public. As I have previously mentioned, a closed session must meet the same strict criteria demanded in federal civilian criminal trials as well as courts-martial, and thus must be narrowly tailored and must preserve on the record the rationale and basis for appellate court review. This means that the proceedings must be open unless (1) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (2) closure is no broader than necessary to protect the overriding interest; (3) reasonable alternatives to closure were considered and found inadequate; and (4) the judge makes case specific findings on the record justifying closure.

The commitment to this standard has not changed. The closed session held Thursday, 9 March, lasted 34 minutes. Of the more than 41 hours on the record over the past two weeks, only 1.3 percent of that time was closed. This percentage will decrease when the Commission releases the transcript of the closed session, excising only classified information. To date, the Commission has held eight closed sessions. Total closure comprising these eight closed sessions amounts to 4.9 percent of the proceedings to date. This means that even for a pre-trial process involving several challenges and other matters implicating classified information, 95.1 percent of that process has been open to the public. The closed portions relate only to interlocutory matters, meaning that they do not deal with the ultimate questions of guilt or innocence of the accused or, if convicted, of punishment. Moreover, the government is committed to ensuring that all of its evidence presented in the case-in-chief at trial will be in open court.

### ***Work Completed Reflects Methodical Implementation of Law and Progress Toward Trial***

To date, the parties have briefed in writing 436 substantive motions and have orally argued 327 motions. Of the 436 motions briefed, 54 have been mooted, dismissed, or withdrawn; 335 have been ruled on by the judge; and an additional 17 have been submitted and are pending a decision. The Commission has received testimony from 33 witnesses in more than 58 hours of testimony, with all witnesses subject to cross-examination to assist it in deciding pre-trial motions and consider the admissibility of evidence. The parties have filed 29 declarations. The government has provided over 265,930 pages of discovery to the defense.

During the session, the Military Judge rescheduled a week of proceedings from July to September. He thus directed that the Commission would be in session 31 July to 4 August, 11 to 29 September, and 6 to 17 November 2017. He also stated that he planned to soon issue a final discovery order as well as a trial order for 2018.

### ***Upcoming Proceedings in United States v. Mohammad, et al.***

On Monday, 20 March 2017, the Commission convened to try Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin ‘Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi will hold another series of pre-trial sessions without panel members present. These five Accused stand charged with plotting the attacks of September 11th, which resulted in the deaths of nearly 3,000 persons. Like before, I emphasize that the charges are only allegations. The Accused are presumed innocent unless and until proven guilty beyond a reasonable doubt. Matters under consideration by a military Commission in this or any other particular case are authoritatively dealt with by the presiding Judge. Any comments addressing systemic issues that are the subject of frequent questions by interested observers should always be understood to defer to specific judicial rulings, if applicable.

We will be joined by the family members of Michael Baksh, Deora Bodley, John D’Allara, and Brady Howell. We will also be joined by survivor Frank Favilla. September 11, 2001 was Michael Baksh’s first day as an insurance executive at Marsh & McLennan, on the 94th floor of the North Tower. Michael loved all kinds of music, and in a previous career he was an artist, band member, and producer. Deora Bodley, at age 20, was the youngest passenger aboard United Airlines flight 93. She was a student at Santa Clara University studying French and psychology. She was a dedicated volunteer, working as a tutor in an afterschool program and as a peer counselor to troubled teens. John D’Allara was a detective and rescue specialist with the New York Police Department. John’s twin brother says they were complete opposites, John being more academically driven. He was a teacher before starting with NYPD.

Brady Howell was a Presidential Management Intern at the Pentagon on September 11, 2001. He had recently obtained a master’s degree in public administration from Syracuse University. Frank Favilla was a NYPD detective, injured while working at the World Trade Center site in September 2001. Frank retired from NYPD in 2004 after a 20-year career. We honor these individuals and their families, and their inspiring examples provide inexhaustible determination to move these cases to trial.

During this session, the Commission will consider 40 pretrial motions. *See* Appellate Exhibit 495. I would like to highlight a number of motions that represent the prosecution's efforts to comply with our ongoing discovery obligations, our efforts to progress towards trial, and motions that raise important legal issues. Appellate Exhibit 478, the government's renewed motion for a trial scheduling order, is our latest effort to obtain a trial date. Appellate Exhibits 177, 310, 330, 333, 336, 394, 404, 444, 493, 494, and 496 are defense discovery motions seeking production of various types of documents and information. Appellate Exhibit 014L is a defense motion to amend Protective Order # 2 to allow disclosure of sensitive information to defense experts and consultants without prior authorization from the Commission. Appellate Exhibit 018PP is a defense motion to compel the government to show cause for an alleged violation of Appellate Exhibit 018U relating to the alleged improper handling of privileged attorney-client information. A few of the motions raise legal arguments, including Appellate Exhibit 475, a defense motion to dismiss for a structural conflict of interest, Appellate Exhibit 488, a defense motion to dismiss for lack of subject matter jurisdiction due to the alleged absence of hostilities, and Appellate Exhibit 492, a defense motion to dismiss Charges IV, V, and the Additional Charge as unconstitutionally vague. Again, this is only a sample of the motions that the Commission will consider during this session. The full docket order is in Appellate Exhibit 495 and can be found on the Commissions website.

### ***Methodical Movement Toward Trial***

To date, the parties have briefed in writing some 287 substantive motions and have orally argued some 136 motions. Of the 287 motions briefed, 20 have been mooted, dismissed, or withdrawn; more than 200 have been ruled on by the Judge; and 38 have been submitted for and are pending decision. The Commission has received testimony from 37 witnesses in more than 93 hours of testimony, with all witnesses subject to cross-examination to assist it in deciding pretrial motions. The parties have filed 234 exhibits and more than 111 declarations alleging facts and providing references to inform the Judge's consideration of these issues. Meanwhile, the government has provided more than 384,370 pages of discovery to the defense.

As part of the discovery process, the Military Judge has also recently granted ten government motions to provide substitutions to the defense in discovery pursuant to Military Commission Rule of Evidence 505, which protects national security information while ensuring that the Accused receive all information that is noncumulative, relevant, and helpful to legally cognizable defenses, rebuttal of the prosecution's case, and sentencing. The Commission's rulings can be found in Appellate Exhibits 308V, 308ZZ, 308AAA, 308BBB, 308GGG, 308HHH, 308KKK, 308JJJ, 308NNN, and 308VVV. While the Military Judge did recently deny two other motions requesting substitutions, these are being resubmitted, and the government remains committed to completing the discovery process underway.

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For their continuing support to these proceedings, I commend and thank the Soldiers, Sailors, Airmen, Marines, Coast Guardsmen, and government civilians of Joint Base Andrews, Joint Task Force Guantanamo, and Naval Station Guantanamo Bay.