CHIEF PROSECUTOR MARK MARTINS
REMARKS AT GUANTANAMO BAY
22 FEBRUARY 2015

Good evening. Over the next two weeks, the Military Commission convened to try Abd Al Rahim Hussayn Muhammad Al Nashiri will hold another series of sessions without panel members present to resolve disputes regarding outstanding legal and evidentiary issues before trial. Mr. Al Nashiri is charged with serious violations of the law of war for his alleged role in attacking USS COLE (DDG 67) and MV *Limburg* and in attempting to attack USS THE SULLIVANS (DDG 68). The charges against Mr. Al Nashiri are only allegations. He is presumed innocent unless and until proven guilty beyond a reasonable doubt. I emphasize that matters under considerations by a military commission in this or any other particular case are determined by the presiding judge at the pre-trial stage.

The Second Amended Docketing Order listing the matters the Commission intends to consider over the next two weeks is Appellate Exhibit 331G. The Commission has indicated that, during the first week of pre-trial sessions, it intends to hear oral argument on some 18 motions, the first being a defense motion to dismiss the case for alleged unlawful influence (AE 332). The Commission also intends to take up motions regarding evidentiary hearings that will allow the government to lay a foundation for pre-admitting hearsay statements into evidence for trial. If these motions are resolved in a way that will allow the evidentiary hearings to take place, the Commission will begin to hold the hearings during the second week.

While I will not comment on the specifics of these evidentiary hearings or motions pending before the Commission, I will update you on the prosecution's discovery and other matters of common interest.

Review of the Full SSCI Study; Amendments to the Classified Information Protective Order

In January I mentioned the major milestones the prosecution has achieved in its compliance with the Commission's 24 June 2014 Order. That Order established a ten-category construct "to focus the Prosecution's analysis of information as it unilaterally fulfills its discovery obligations and responds to current and future discovery requests" for information regarding the CIA's former Rendition, Detention, and Interrogation ("RDI") Program. AE 120AA.

On Friday, the prosecution informed the Commission of another such milestone: after actively seeking to obtain it through appropriate Executive and Legislative Branch channels, on 18 February 2015, the Senate Select Committee on Intelligence authorized the Office of the Chief Prosecutor of Military Commissions to review the full "Committee Study of the Central Intelligence Agency's Detention and Interrogation Program." AE 206Q. The prosecution has begun its efforts to review the full Study for potentially discoverable information and will continue to work diligently—seven days a week—to fully comply with the June Order and report on further progress.

Also on Friday, the Commission granted the Prosecution's motion to issue a Second Amended Protective Order #1 governing RDI information. AE 13S. Last December the Senate Select Committee on Intelligence made public the Executive Summary of its Study on the RDI Program. Upon release, the unredacted portions of the Executive Summary that had been classified were declassified. The amendments to the Protective Order reflect these declassification decisions by removing restrictive-handling requirements for certain formerly classified information.

In particular, the amendments by the Commission remove two paragraphs from the Protective Order: (1) the paragraph regarding enhanced interrogation techniques that were applied to the Accused from on or around the specified capture date through 6 September 2006, including descriptions of the techniques as applied, the duration, frequency, sequencing, and limitations of those techniques and (2) the paragraph regarding descriptions of the Accused's confinement conditions from on or around the specified capture date through 6 September 2006. The remaining protections in the Order continue to apply and are binding.

Work Completed to Date and Planned for 2015 Reflects Methodical Implementation of Law

In addition to these major milestones, here are a few more examples of work that has remained underway in the *Al Nashiri* prosecution:

- More than 244,500 pages of material comprising the government's case against the Accused, as well as material required to be disclosed to the defense under the government's affirmative discovery obligations, have been provided to the defense under protective orders long in effect in this case.

- The parties have briefed in writing 411 motions and have orally argued some 299 motions in previous pre-trial proceedings.

- Of the 411 motions briefed, 44 have been mooted, dismissed, or withdrawn; 301 have been ruled on by the Commission; and an additional 14 have been submitted for and are pending decision.

- The Commission has now received testimony from 11 witnesses in more than 14 hours of testimony, with all witnesses subject to cross-examination, to assist it in decision pre-trial motions.

- The parties have filed 34 exhibits and 19 declarations alleging facts and providing references to inform the Commission's consideration of the issues.

These examples, which are proportionate with statistics from the *Khalid Shaikh Mohammad, et al*. and *Hadi al Iraqi* prosecutions but are never offered to suggest that justice can be reduced to mere numbers, serve as important indices of the less visible progress toward trial that occurs outside the courtroom.

The *Al Nashiri* Commission has scheduled pre-trial sessions every month (except June and July) from February through November. AE 203L. And two weeks ago, the U.S. Court of Appeals for the District of Columbia Circuit heard oral argument on Mr. Al Nashiri's constitutional challenges to the appointments of the military judges serving on the United States Court of Military Commission Review ("U.S.C.M.C.R."). The resolution of these challenges could permit the government to proceed in its appeal to the U.S.C.M.C.R. from the Commission's dismissal of the charges related to the attack on the MV *Limburg*. (The D.C. Circuit stayed the appeal so that it could consider the constitutional challenges.)

Meanwhile, in *United States v. Mohammad, et al*., the Commission held pre-trial sessions earlier this month, hearing oral argument from the parties on 11 motions. These included issues related to the Appellate Exhibit 292 series of pleadings inquiring into whether a conflict of interest exists between defense counsel and the Accused; a government motion to reconsider the order severing Ramzi Binalshibh's case from that of the other four Accused (AE 312C); and a government motion urging the Commission to compel and review, *in camera*, all documents in the Convening Authority's possession pertaining to the request for linguist services by Mr. Binalshibh's defense team and other translator support for that pre-trial session (AE 350B).

The latter issue arose when, on the first day of the week's pre-trial sessions, Mr. Binalshibh indicated to the Military Judge that he could not trust one of the defense team members, whom he identified as a former CIA interpreter. Upon hearing this, the Military Judge suspended the proceedings until the parties could gather additional information. The prosecution then filed its motion after reluctantly concluding the Commission needs to investigate the issue to (1) determine whether the defense fulfilled its obligations to provide representation that is competent, zealous, and effective, as well as conflict-free and (2) ensure the defense is able to fulfill these obligations in the future.

After addressing these issues, the Commission proceeded to address the following motions filed by Mustafa Ahmed Adam al Hawsawi alone:

- Appellate Exhibit 192, a defense motion to disqualify the legal advisor for alleged unlawful interference with the professional judgment of the Chief Defense Counsel and Detailed Military Learned Defense Counsel;

- Appellate Exhibit 196, a defense motion to disqualify the Chief of Operations, Office of Military Commissions, for alleged unlawful interference with the professional judgment of the Chief Defense Counsel and Detailed Military Learned Defense Counsel;

- Appellate Exhibit 214, a defense motion to compel Mr. al Hawsawi's access to the Government of Saudi Arabia;

- Appellate Exhibit 214A, a defense motion to compel discovery to support Appellate Exhibit 214;

- Appellate Exhibit 303, a defense motion for appropriate relief regarding conditions of confinement;

- Appellate Exhibit 332, a defense motion for appropriate medical intervention;
- Appellate Exhibit 333, a defense motion to compel discovery; and
- Appellate Exhibit 340, a defense motion to depose Mr. al Hawsawi's health-care providers.

The next pre-trial sessions are scheduled to occur in April. The Commission has also scheduled pre-trial sessions in June, August, September, October, and December. AE 325D.

Military Commissions Are an Important Part of Our Justice and Counterterror Institutions

On 26 March 2007, David Hicks pleaded guilty to providing material support to terrorism in violation of the Military Commissions Act of 2006 ("2006 M.C.A."). He did so upon voluntarily admitting, with advice of counsel, that he had trained at Al Qaeda's Farouq camp and Tarnak Farm complex in Afghanistan, met with Usama Bin Laden, joined Al Qaeda and Taliban forces preparing to fight United States and Northern Alliance forces near Kandahar in September 2001, and joined the ongoing fighting against Coalition forces in Konduz the following month before fleeing the battlefield. Opinion, *Hicks v. United States*, No. 13-004 (U.S.C.M.C.R. Feb. 18, 2015).

These admissions clearly established every day of his five-plus years of detention by the United States as an unprivileged belligerent to have been lawful within the 2001 Authorization for the Use of Military Force. Mr. Hicks acknowledged—again on advice of zealous and competent defense counsel and before an independent judge who had the duty to reject a plea not believed to be knowing, voluntary and intelligent—that "he has never been the victim of any illegal treatment at the hands of any personnel while in the custody or control of the United States." *Id*. Mr. Hicks was repatriated to Australia in May 2007. There is no indication that upon subsequent release from detention by Australian officials he has ever since returned to hostilities with al Qaeda.

Last Wednesday, Mr. Hicks successfully appealed his conviction before the United States Court of Military Commission Review on grounds that its reviewing court—the United States Court of Appeals for the District of Columbia Circuit—had ruled last year in *Al Bahlul v. United States* that providing material support for terrorism was not triable by military commission for conduct that occurred before Congress enacted the 2006 M.C.A. The government does not intend to appeal Wednesday's decision. While Mr. Hicks's public statements indicate no inclination to again travel overseas to wage jihad with a terrorist group, laws in Australia and the United States now expressly criminalize extraterritorial provision of material support to such groups.

Although the U.S.C.M.C.R.'s ruling is one that some have dramatically suggested portends demise of military commissions, the decision instead affirms that they are a resilient part of our justice and counterterror institutions. They are capable of confronting charging theories pursued in 2007 (*Hicks*) and 2008 (*Al Bahlul*) that ultimately proved improvident and of

correcting defects in the legal framework pursued by those who established original military commissions in November 2001 without congressional sanction (*Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)). Wednesday's decision reflects that our core legal principles of judicial independence, access to justice, and the rule of law endure in military commissions.

With the benefit of these judicial decisions on past cases, today military commissions continue moving toward trial in seven ongoing cases, six of them capital, for serious violations of the law of war. Two mid-level Al Qaeda officers, meanwhile, already have been convicted under the Military Commissions Act of 2009 for fully viable offenses and face long additional terms of confinement. As I mentioned last August, because of actions I have already taken within my purview as chief prosecutor, the *Al Bahlul* decision (and thus the *Hicks* decision, which relies on *Al Bahlul*) will have no negative impact on current and future prosecutions for pre-2006 conduct, notwithstanding uncertainties inevitable in litigation. I am confident that the charges for which current and future defendants will stand accused are sustainable. I reiterate that the Accused are presumed innocent unless and until proven guilty beyond a reasonable doubt.

If we are to successfully counter transnational terror networks, we must be able to use all lawful instruments of our national power and authority. To help achieve this goal, military commissions were chosen by two different administrations and Congress acting five times with guidance from the courts as the forum best suited to try a narrow but critically important category of cases. By law, military commissions are the only available forum for U.S. criminal trials of Guantanamo detainees. And for certain cases, they are also the most appropriate.

As the National Security Strategy for 2015 affirmed, "[w]here prosecution is an option, we will bring terrorists to justice through both civilian and, when appropriate, reformed military commission proceedings that incorporate fundamental due process and other protections essential to the effective administration of justice." Wednesday's decision shows that military commissions will answer the call with an abiding respect for the rule of law and by upholding the core legal principles of our founding.

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For their continued support this week and next, I thank the Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen of Joint Task Force Guantanamo and Naval Station Guantanamo Bay.