CHIEF PROSECUTOR MARK MARTINS
REMARKS AT GUANTANAMO BAY
27 JANUARY 2013

Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi stand charged with serious violations of the law of war in connection with the deadliest attacks against civilians on United States soil in our nation's history. These attacks resulted in the murder of 2,976 persons.

Tomorrow is the first of four days of pre-trial sessions in this case. I emphasize that the charges are only allegations, and the accused are presumed innocent until proven guilty beyond a reasonable doubt. The Military Judge's order providing the sequence of the motions the Judge will hear is available on the military-commissions website (Appellate Exhibit 113, along with four supplemental filings using that number designation, providing slight changes requested by the parties), as are all the parties' pleadings for the issues the Judge will consider. The Commission released these pleadings to the public. To further aid their assessment of the contested issues raised, the government has made available binders containing written copies of all the pleadings to the media and non-governmental organizations attending the sessions in Guantanamo.

We welcome those in the press and non-governmental organizations who traveled here to attend the sessions. We also welcome members of the viewing public in the United States who will watch these proceedings from a closed-circuit television site in Maryland. This site is open to all, and one need only present a valid form of identification for admittance.

As you watch the sessions, please resist the temptation to make judgments about the accused, the parties' positions, and the proceedings before hearing all sides of the contested issues. I invite the media in particular to scrutinize the parties' positions. Examine the briefs and listen to oral arguments so that you, as the "Fourth Estate," may engage in what Supreme Court Justice Potter Stewart called an "organized, expert scrutiny of government." As you appreciate, yours should not be scrutiny merely for scrutiny's sake, but expert scrutiny that can serve as a formidable source of accountability.

We extend a special welcome to the victim family members who are gathered in Guantanamo and in the United States to bear witness to these proceedings. We honor those whom they have lost, and we appreciate their abiding confidence in the administration of justice through fair, open, and accountable trials, however long it takes. Time is no match for our determination.

As we proceed toward trial, we, like parties in all courts, continue to litigate matters that the prosecution and the defense have called upon the Judge to consider in this week's pre-trial sessions. This week the Judge will consider motions raising issues about the protection of classified information, attorney-client communications, and the production of discovery and witness testimony. I will not comment on the specifics of these motions, but I will comment briefly on recent developments in this case.

Conspiracy as a Separate, Stand-Alone Offense

The accused in this case have filed a motion to dismiss all charges (Appellate Exhibit 107). The most current scheduling order indicates that this is, at the defense's request, no longer due to be heard in this or the February session and will likely be heard during the session in April. Still, the frequency of questions on this topic makes it appropriate to remark on its status and procedural posture. In response to the defense motion, the government strongly opposed the dismissal of seven of the eight charges, which include the offenses of attacking civilians, attacking civilian objects, murder in violation of the law of war, destroying property in violation of the law of war, hijacking or hazarding an aircraft, terrorism, and intentionally inflicting serious bodily injury. All seven of these offenses are well-established violations of the international law of war and are among the gravest forms of crime recognized and condemned by all civilized peoples. Four of the offenses include a maximum punishment of the death penalty. Because they violate the law of war, these seven offenses may be tried by military commission, a conclusion that is reinforced by the analysis of the United States Court of Appeals for the District of Columbia Circuit in its decision last October in the *Hamdan II* case.

The government acknowledges, however, that the conspiracy charge for pre-2006 conduct fails under the *Hamdan II* analysis, and in fact Friday's decision by the Court of Appeals in the *Bahlul* case underscores that fact. The Justice Department has informed the Court of its intention to preserve its position for further review of the *Bahlul* decision. Still, to avoid introducing additional uncertainty and appellate risk into this capital case, and to ensure that the case continues to proceed without unnecessary delay, the government did not oppose the defense motion to dismiss conspiracy *as a separate, stand-alone offense*, so long as the Commission agrees to approve minor conforming changes to the charge sheet. These proposed changes to the charge sheet preserve the existing co-conspirator theory of liability for the remaining seven substantive offenses in a manner that has been upheld in military law, federal law, and international law under the doctrine of "joint criminal enterprise." The proposed changes are all described and explained in a separate motion filed by the government (Appellate Exhibit 120). In order to ensure the issue was ripe for the Commission, I had previously communicated to the Convening Authority—in accordance with my duty under the law—why I determined that continued prosecution of conspiracy as a stand-alone offense was inadvisable and how I would exercise my authorities to eliminate it as a source of uncertainty and distraction. My memorandum recommending that the Convening Authority join me in and thus simplify the effort, and the Convening Authority's response declining to do so at this time, are available as attachments to Appellate Exhibit 107A and 107A (Gov Supp).

I will not comment on the media coverage of internal deliberations between my office and officials in the Department of Justice and Department of Defense over how to proceed on the conspiracy charge after *Hamdan II*. But I reject the premise that government officers with distinct duties should be expected to move in lockstep on difficult issues, or that the failure to move in lockstep somehow indicates that the military commission system is unfair. Every official—whether the Attorney General, the Convening Authority, or the Chief Prosecutor—has a unique, statutorily-defined role in this institution, and I would submit that a vigorous fulfillment of those different roles serves the public's best interest. The fact that officials within

this system make independent decisions within their purview, if anything, bolsters rather than undermines confidence in the military commission system.

The Pace of the Legal Proceedings

The prosecution and defense have made significant strides toward trial since the five accused were first arraigned. To date, the parties have briefed over 70 motions and have argued 17 motions, and the Judge has ruled on nearly 20 motions. Another four motions have been withdrawn (Appellate Exhibits 45, 48, 61, and 65), and seven further motions will be either mooted or provided a procedure for consideration when the Judge decides the motion regarding Rule for Military Commissions 703 (Appellate Exhibit 36).

In an important milestone stemming from the last pre-trial sessions in October, the Judge has issued two protective orders establishing procedures for handling certain types of information. One governs classified information and another governs sensitive, yet unclassified, information. Together these protective orders facilitate defense counsel's communication with the accused, as well as the formation of an effective attorney-client relationship with the accused, if he chooses to do so. Note that in the American system of justice, an accused cannot be compelled to be represented by an attorney; rather, he may knowingly and voluntarily waive counsel, so long as he has been comprehensively advised by the Judge of his right to counsel and of the possible adverse consequences of representing himself.

The protective orders also ensure that each accused has a meaningful opportunity to challenge the prosecution's case, while also providing an open trial and protecting our national security interests. Although the defense has asked the Judge to amend the protective order governing classified information, the protective order governing sensitive, yet unclassified, information is firmly in place. Discovery of that information is underway. The protective order has given the defense access to large amounts of government information from the investigation and other related materials. As of today, the government has provided the defense with approximately 80,000 pages of unclassified discovery with which to challenge the prosecution's case. Recall that the attacks of September 11th resulted in the largest investigation undertaken in our nation's history, so the methodical consideration of that information in the course of this trial is necessary and appropriate.

Openness of the Proceedings

National security requires a balance. On one hand, our democracy and our system of justice demand openness. On the other hand, certain information must be protected from public disclosure for the sake of personal privacy (like medical records) or our security where lives are at stake (like the movement of U.S. troops or intelligence gathering)—not where disclosure would lead to embarrassment or reveal violations of law. Some are puzzled by this balance, retreating into what I respectfully offer is a lazy "military commissions pick and choose transparency" narrative. Sober and fair assessments of this process discredit such claims.

On issues related to the disclosure of classified and otherwise sensitive information, no simple formula exists to resolve them. These issues are complex, often requiring tough calls,

implicating competing concerns, and requiring a surgical approach so that openness is maximized. Because of their complexity and because different public servants are involved in implementing myriad duties related to this task, inconsistencies can sometimes become apparent, and we work to identify, disclose, and eliminate such inconsistencies. But the polestar guiding our decisions is simple: we safeguard the information we must to protect national security, and we also ensure that each accused has a meaningful opportunity to challenge the prosecution's case and that the administration of justice functions in the open. Military Commissions Rule of Evidence 505(h) is one of the ways in which military commissions achieve this balance.

This week the Judge may hold a hearing pursuant to Rule 505(h), an evidentiary rule that governs classified information. The procedure governing classified information is also set forth in our statute, the Military Commissions Act of 2009. These rules are the same as those that govern classified information in federal court. The Classified Information Procedures Act of 1980 (CIPA), which is the statute that governs classified information in federal court, served as the basis for the military commissions statute and rules, and the latter in fact incorporate CIPA and codify federal case law regarding CIPA that has been decided by our Article III courts since 1980.

Rule 505(h) permits any party to ask the military judge to hold a hearing for the judge to make a determination "concerning the use, relevance, or admissibility of classified information." The Judge may not close a session of the Commission arbitrarily or without cause, and one of the main purposes of a Rule 505(h) hearing is to ensure that any closed session is well-justified under law and is narrowly tailored. The hearings themselves often occur with counsel for prosecution and defense in judges' chambers, though if the number of parties makes a chambers location logistically infeasible, these hearings may occur in the courtroom itself. The Judge may hold a chambers or other hearing *in camera*, or closed to the public, where a public proceeding may otherwise result in the disclosure of classified information. To prevent disclosure of classified information, federal courts—including, for example, the U.S. District Court for the Southern District of New York in *United States v. Ghailani* and the U.S. District Court for the Eastern District of Virginia in *United States v. Rosen*, *United States v. Smith*, and *United States v. Moussaoui*—have closed similar hearings concerning use, relevance, and admissibility of evidence as well as subsequent sessions of the court on the record. Before the Judge can hold a 505(h) hearing *in camera*, a knowledgeable U.S. official must submit a declaration to the military judge that holding a public proceeding may result in the disclosure of classified information. And trial counsel may submit a statement to the Judge regarding the damage to national security if the classified information is disclosed.

The prosecution has not sought to hold any closed pre-trial sessions and is committed to proving the defendants guilty beyond a reasonable doubt using unclassified evidence that the public may assess. But, as is their right, defense counsel have notified the Judge of their intention to raise matters that may delve into classified information, and when this occurs, the government has sought Rule 505(h) hearings in order to identify and minimize the amount of closure necessary to protect the classified information. Of the seven completed military commission trials, none involved classified evidence at trial, and only one of those trials (*United States v. Hamdan*) had closed sessions, at the defense's prompting, that remained classified after trial. And in the last 100 hours of commission sessions, zero minutes have been closed to the

public, in part because Rule 505(h) hearings have helped ensure the arguments fully presented by all parties remained public.

It is important to note the distinction between a *hearing* and a *session*. If the Judge grants the defense's request to hold a Rule 505(h) *hearing*, the parties will not litigate the merits of the underlying motions themselves—that will take place in a session later, and such sessions will be as open as possible. One reason to gather in advance is in fact to determine how to handle any classified information that may touch on the issues raised by the motions later this week. The rules permit the Judge to hold a closed hearing so the parties can determine what to do in advance, all without revealing the classified information. Any time the Judge decides that classified information may not be disclosed, the record of the hearing is fully preserved for use on appeal. The tested procedural protections provided by the rules governing these proceedings satisfy the demands of fairness and openness.

I reiterate that these national-security issues are no different from those that federal courts adjudicating complex criminal trials must grapple with. Congress created military commissions by statute, integrating them into the U.S. legal system. Military commissions have taken their place within our national security institutions, providing a methodical process for resolving controversies and vindicating rights through the fair administration of the law. Although most crimes and precursor acts of international terrorism can and should be prosecuted in civilian courts, there is a narrow category of cases in which two different administrations and Congress acting five times, with guidance from the Supreme Court, have recognized military commissions should be the forum selected. For this narrow but important category of cases, proceedings such as those you will witness this week represent the pragmatic and principled choice among the lawful means available to protect the American people and serve the interests of justice.

In closing, I commend the daily professionalism of the Sailors, Soldiers, Marines, Airmen, and Coastguardsmen of Joint Task Force Guantanamo who make these proceedings possible.

Thank you.