

CHIEF PROSECUTOR MARK MARTINS
REMARKS AT GUANTANAMO BAY
8 DECEMBER 2016

Good afternoon. Today the Military 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 completed another series of pre-trial sessions 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 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.

Matters Addressed by the Commission during These Pre-Trial Sessions

Over the past week, the Commission addressed some 31 matters on the record, again exhausting all active requests for relief on the docket that had been fully briefed and were prepared for judicial consideration, as well as addressing some five additional matters after clearing the original docket. These matters comprised the following:

- Mr. Hawsawi’s counsel sought a continuance to provide more time for his client to recuperate from surgery that Mr. Hawsawi had in mid-October. The judge granted Mr. Hawsawi’s counsel four hours to review medical records and then took testimony from one witness and heard oral argument on Appellate Exhibit 362P. The judge denied the motion for a continuance.
- The parties discussed the possible redesignation of filing numbers for matters pertaining to litigation concerning special trial counsel. The judge requested a written plan from the prosecution. See generally the Appellate Exhibit 460 series.
- The Judge heard oral argument on Appellate Exhibit 14I, Mr. Hawsawi’s motion to clarify or amend Protective Order AE 014H. Protective Order #2 is the judge’s order addressing the handling of unclassified discovery material where disclosure is detrimental to the public interest. Mr. Hawsawi seeks the ability to give copies of medical records to pro bono experts not vetted by the government. Because the various defense counsel had different interpretations of the Protective Order, the judge established a briefing schedule for proposed amendments to Protective Order #2.
- The parties discussed the various filings related to Appellate Exhibit 112, a defense motion to compel discovery related to White House and Department of Justice (DOJ) consideration of the Central Intelligence Agency’s (CIA’s) former rendition, detention, and interrogation (RDI) program.

- The parties agreed to the handling provisions in Appellate Exhibit 18ZZZZ, Mr. Ali's notice of an agreed second interim order for handling privileged written communications. The Judge accepted the proposed order.
- The parties discussed oral arguments on Appellate Exhibit 18PP and other filings in the 18 series, but because they were also connected to the classified matters to be argued under Appellate Exhibit 18VVV, the Judge heard oral argument in the closed session on Appellate Exhibit 18VVV.
- The Judge heard oral argument for additional discovery on Appellate Exhibit 425L, a defense motion to compel discovery or in the alternative to abate and dismiss. The Judge took the matter under advisement.
- The Judge heard oral argument on a motion to compel discovery of medical records for Mr. Ali in Appellate Exhibit 330. Although indicating again that the prosecution has provided all medical records to the defense, the prosecution agreed to meet with the defense to go through the records in the government's possession.
- The Judge granted the parties' requests for additional time to brief the filings or defer arguments on Appellate Exhibits 197, 308PP, 394, and 465.
- The Judge heard oral argument on Appellate Exhibit 434, a defense motion to compel production of discovery concerning Mohammed al Qahtani. The Judge took the matter under advisement.
- The defense requested that Appellate Exhibit 403, a motion to compel discovery of CIA oral histories, remain on the docket and the prosecution gave a status update to the discovery efforts on the matter, confirming that it had reviewed relevant oral histories and submitted them to the Judge with a request for substitutions and other relief in order to protect information that remains classified.
- The Judge heard oral arguments on Appellate Exhibit 286J, a defense motion to order the government to produce the full, unredacted Senate Select Committee on Intelligence (SSCI) study of the RDI program, or, in the alternative, to file the report with the Commission to be maintained ex parte and under seal pending further rulings. Having taken the motion under advisement, the Judge later the same day ordered the prosecution to notify the Commission whether the Department of Defense is currently in possession of a copy of the SSCI Report. The notice is due to the Commission on 16 December 2016.
- The Judge heard oral argument on Appellate Exhibit 315, which is Mr. bin Attash's motion to amend the charge sheet to reflect an accepted spelling of his name. The Judge took the matter under advisement.

Also, on Thursday, 8 December 2016, the Judge met with defense and prosecution lawyers for an *in camera* hearing under M.C.R.E. 505(h) to make determinations regarding the use, relevance, or admissibility of classified information that defense counsel sought to discuss during a future session on the merits regarding Appellate Exhibits 18TT, 18VVV, 112Q, 118, 120, 310, 328, 350, 404, and 425 and 434. 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 later, 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 Rule for Military Commissions 806 regarding Appellate Exhibit 255 and Appellate Exhibit 18VVV. As I have previously mentioned, a closed session must meet the same strict criteria demanded in federal civilian criminal trials—namely, the *Press-Enterprise II* factors—and thus must be as narrowly tailored as possible, preserving on the record the rationale and basis for civilian 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 today lasted 30 minutes. Of the more than 10 hours of sessions over the past week, only five percent were 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 about 2.65 percent of the proceedings to date. This means that even for a pre-trial process involving several challenges and other matters implicating classified information, approximately 97.35 percent of that process has been open to the public. This percentage will increase when the Commission releases transcripts from other closed sessions. 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 to Date Reflects Methodical Implementation of Law

To date, the government has provided more than 362,000 pages of discovery to each defense team and, as of the 30th of September of this year, many thousands of pages to the Judge for provision to the defense once appropriate Judge-approved substitutions are made so as to protect classified information. See generally Appellate Exhibit 397G (Government Notice of Compliance with Order Compelling Discovery Relating to the CIA’s Former RDI Program and with Affirmative Discovery Obligations). The parties have briefed in writing several hundreds of substantive motions, have orally argued more than a hundred of those, and have received rulings from the Judge on, again, about a hundred motions. The Commission has received testimony from 36 witnesses in more than 92 hours of testimony, with all witnesses subject to cross-examination to assist it in deciding pre-trial motions. The parties have filed hundreds of exhibits and declarations alleging facts and providing references to inform the Judge’s

consideration of these issues. This information, while never meant to imply that justice can be quantified, nonetheless reflects methodical and deliberate movement toward trial.

To the family members of the Fallen who were in attendance today and who may be able to hear these words: we know that viewing these proceedings can be difficult for you. But we hope that *you* know your country will never forget what happened and will never cease to pursue justice until justice is done. In the meantime, the Accused are and will be lawfully, securely, and humanely detained under Geneva Conventions Common Article 3 at Guantanamo Bay.

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The proceedings this week were only possible because of extraordinary efforts of so many technicians, logistical support staff, and security personnel. I commend and thank you, as I also comment and thank all of the Soldiers, Sailors, Airmen, Marines, Coast Guardsmen, and government civilians of Joint Base Andrews, Joint Task Force Guantanamo, and Naval Station Guantanamo Bay.