

**CHIEF PROSECUTOR MARK MARTINS**  
**REMARKS AT GUANTANAMO BAY**  
**30 JULY 2017**

Good evening. The upcoming week's sessions in the military commission of *United States v. Abd Al Rahim Hussayn Muhammad Al Nashiri* will be the second proceedings for the case thus far this year. We know the families of those killed and injured in the charged attacks, as well as those who survived the attacks themselves, are anxious for the trial to begin and for justice to be done, and the Commission continues to make important progress towards those goals. Because the primary effort this week is scheduled to be the deposition of Mr. Ahmed Mohammed Haza al Darbi (hereinafter al Darbi), and because the Military Judge directed that the deposition will be closed, we do not have any USS COLE family members with us this trip. Nevertheless, we are honored to pursue justice on their behalf. Their continued interest and usual presence at Commission proceedings remind us of the human toll of terrorism and other violations of the laws of war. While this trial process has taken a long time, we want veterans and shipmates of the fallen to know that the United States will not rest until justice is done.

***Developments and Upcoming Proceedings in United States v. Al Nashiri***

Al Nashiri is charged with conspiracy, murder, terrorism, and other violations of the law of war relating to the bombing of the USS COLE, the attempted bombing of the USS THE SULLIVANS, and the bombing of the MV *Limburg*. The charges against the Accused are only allegations. The Accused is presumed innocent unless and until proven guilty beyond a reasonable doubt. He is represented by a zealous and well-resourced defense team, including an experienced lead counsel who has been representing al Nashiri since before he was arraigned in 2011. Although I will not comment on the specifics of any motions pending before a military commission, I am able to provide legal context and background. Matters under consideration by a military commission in this or any other particular case are authoritatively dealt with by the presiding Judge.

Since the last sessions in March 2017, the Military Judge has issued a number of rulings and orders on a variety of issues. The Military Commissions website includes a complete listing of all defense and government motions, responses, and replies, as well as Commission orders and rulings. The Military Judge's orders and rulings since our last session have included the following:

- Appellate Exhibit 44E—the Commission denied a defense motion to reconsider the Commission's previous denial of Appellate Exhibit 44, the Defense Motion to Compel the Government to Produce Un-Redacted Versions of Classified Discovery. Although the defense cited a change in the Freedom of Information Act, the Commission found the change inapplicable to these proceedings and to the discovery sought.
- Appellate Exhibit 49I—the Commission denied a 2013 defense motion to dismiss the charge of terrorism. Citing a 2016 holding in the case of *Al-*

*Bahlul v. United States*, the Commission denied the defense motion and declared moot a 2014 government request for an evidentiary hearing.

- Appellate Exhibit 92KK—the Commission denied several related defense motions in this single ruling. The Commission denied Appellate Exhibit 92S—Defense Motion to Abate Proceedings and for Appropriate Relief Due to Destruction of Evidence Referenced in Appellate Exhibit 92; it denied Appellate Exhibit 92BB—Defense Notice of Classified Filing, Defense Motion for Preservation Order: Defense Motion to Abate Proceedings and for Appropriate Relief Due to Destruction of Evidence Referenced in Appellate Exhibit 92; and it denied a defense motion to compel discovery related to Appellate Exhibit 92AA—Government Supplement to Appellate Exhibit 092U, Government Response to Defense Motion to Abate Proceedings and for Appropriate Relief Due to Destruction of Evidence Referenced in Appellate Exhibit 92.
- Appellate Exhibits 120RRRRRR, 120SSSSSS, 120UUUUUU, 120VVVVVV (Amend), 120WWWWW, 120XXXXXX, 120YYYYYY, 120ZZZZZZ, 120AAAAAAA, and 120BBBBBBB—pursuant to the Military Commissions Act of 2009 (M.C.A.), 10 U.S.C. §§ 949p-3 and 949p-4, Rule for Military Commission (R.M.C.) 701(f), and Military Commission Rule of Evidence (M.C.R.E.) 505(e) and (f), the Commission granted the Government’s *ex parte, in camera*, under seal requests for substitutions and other relief from ordered discovery of classified information so as to comply with Appellate Exhibit 120AA and other general discovery obligations.
- Appellate Exhibit 177B—the Commission denied the Defense Motion For Appropriate Relief: To Prohibit Capital Punishment for Intentional Murder or Conduct Evincing a Wanton Disregard for Human Life as Required By Ex Post Facto Clause, finding that death was an authorized punishment for war crimes and grave breaches of the Geneva Conventions and that the charged offenses would have qualified as such offenses at the time of the conduct alleged.
- Appellate Exhibit 179B—the Commission denied the Defense Motion for Appropriate Relief: To Apply The Capital Sentencing Scheme Set Forth In R.C.M. 1004 and the 2002 M.C.M. as Required By The Ex Post Facto Clause, finding that the capital sentencing scheme in the M.C.A. and R.M.C.s does not constitute an ex post facto law.
- Appellate Exhibit 203Q—the Commission issued a scheduling order for 2018.
- In Appellate Exhibits 249C, 250C, 254C, 255C, and 258C, the Commission addressed a series of defense motions to strike capital aggravating factors (aggravators) for which the government had provided notice as required under R.M.C. 1004(b)(1), but which the government did not allege specifically in

the several relevant specifications. In 2014, the Commission dismissed these charges and specifications on other grounds and declared moot the defense motions to strike because the affected charges and specifications had been dismissed. However, those charges and specifications were reinstated by the United States Court of Military Commission Review (U.S.C.M.C.R.) in 2016. Pursuant to that U.S.C.M.C.R. ruling, the Commission rescinded its earlier rulings that the defense motions to strike were moot. The Commission then denied the defense motions because even if the Commission assumed for the sake of argument that the defense was correct and the government should have alleged the aggravating factors in the affected specifications, the Commission found that the notice provided by the government under R.M.C. 1004(b)(1) was sufficient to prevent the accused being misled or prejudiced in any way in its preparation for trial.

- Appellate Exhibits 251D, 252D, and 253D—the Commission addressed several defense motions to strike aggravators in Charge IV Specification 2, Charge VII, and Charge IX, respectively, based on duplicity with another aggravator. These were the same charges that had been reinstated by the U.S.C.M.C.R., and these motions had originally been deemed moot by the Commission. After rescinding the earlier findings that the defense motions were moot, the Commission denied the defense motions, determining it would provide an appropriate instruction to the panel during the sentencing phase and may consider other remedies at that time.
- Appellate Exhibit 256L—the Commission denied Appellate Exhibit 256I, the Defense Motion to Strike Aggravator #5 As Overbroad and/or Motion in Limine to Limit Scope of Aggravator #5 to the Accused’s Specific Intent to Intimidate or Terrorize the Civilian Population of the United States, finding that Aggravator #5 was neither overbroad nor vague.
- Appellate Exhibits 296D, 297D, 299D—on its own motion for reconsideration, the Commission ordered re-briefing of its decisions on three defense motions to dismiss various charges on claims that the statute of limitations had run. Specifically, the Commission ordered re-briefing in Appellate Exhibit 296D, Defense Motion to Dismiss Charge III, Specification 1; Appellate Exhibit 297D, Defense Motion to Dismiss Charge III, Specification 2, and Appellate Exhibit 299D, Defense Motion to Dismiss Charge VI. After re-briefing and upon review of a recent applicable U.S.C.M.C.R. opinion in the case of *United States v. Khalid Shaikh Mohammad et al.*, the Commission again denied the three defense motions to dismiss, ruling that the UCMJ Article 43 statute of limitations did not apply.
- Appellate Exhibits 298D, 300D, and 301D—the Commission dealt with several additional defense motions to dismiss charges on claims that the statute of limitations had run. In 2014, the Commission had dismissed the affected charges and specifications on other grounds, assuming these motions

to have been rendered moot. However, the charges and specifications that had been the focus of these motions were reinstated by the U.S.C.M.C.R. in 2016. Pursuant to that U.S.C.M.C.R. ruling, the Commission rescinded its earlier rulings that the defense motions to dismiss were moot and addressed the motions on the merits. Specifically, the Commission denied Appellate Exhibit 298, the Defense Motion to Dismiss Charge IX, ruling that Article 43 of the UCMJ does not apply to these military commissions and because Charge IX (Hazarding a Vessel), as a capital charge, would not have been subject to the UCMJ Article 43 five-year statute of limitations. Likewise, in Appellate Exhibit 300D, the Commission denied the Defense Motion to Dismiss Charge VII because, like Charge IX, Charge VII (Attacking Civilians) is also a capital charge. In Appellate Exhibit 301D, the Commission denied the Defense Motion to Dismiss Charge VIII. As in its rulings in Appellate Exhibits 296D, 297D, and 299D, the Commission determined Charge VIII (Attacking Civilian Objects) was not subject to the UCMJ Article 43 statute of limitations.

- Appellate Exhibit 342C—the Commission denied Appellate Exhibit 342, the Defense Motion to Compel the Convening Authority to Grant Testimonial Immunity to Mr. Abdul Al Salam Al-Hilah or to Abate the Proceedings. The Commission found the defense failed to meet its burden to show the three-prong test under R.M.C. 704(e) was satisfied because there was no evidence that the Government engaged in discriminatory use of immunity to gain a tactical advantage.
- Appellate Exhibit 355—the Commission issued an interim order on the Defense Motion to Suppress Custodial Statements Made by Mr. Ahmed Mohammed Ahmed Haze (al-Darbi) to Federal Law Enforcement Agents Between 24 August—3 September 2002 And Derivative Evidence, as Required By 10 U.S.C. § 948r and The Fifth Amendment. The Commission ordered the government to provide notice of which of al Darbi's statements, including al Darbi's deposition, it intends to admit at trial, and what evidence, if any, it intends to offer to establish the admissibility of such statements pursuant to M.C.R.E. 304(a)(3).
- Appellate Exhibit 356B—the Commission amended the scheduling order for the remainder of 2017.
- Appellate Exhibit 358C—the Military Judge rescinded the rulings in Appellate Exhibit 358B and Appellate Exhibit 358 B (Corrected Copy) and replaced them with Appellate Exhibit 358D, which ruled moot the Defense Motion To Compel Production Of Accused's Medical And Psychiatric or Psychological Records From 1 January 2016 Through 20 August 2016 based on the Government's reported compliance with its discovery obligations and the Defense's acknowledgment they received the records.

- Appellate Exhibit 359X—the Commission denied the Defense Motion Requesting the Accused Be Housed at the ELC During Hearings because the defense failed to meet its burden. The Commission found that there was a valid, rational connection between the Joint Detention Group policy prohibiting housing the accused at the Expeditionary Legal Complex (ELC); there are alternative means available to the accused which will preserve his right to be present and meaningfully participate in his defense; accommodating the accused’s request would adversely impact the guard force and constitute a strain on government resources; and the Defense failed to show a ready alternative that accommodates the accused’s rights at de minimis cost to stated valid penological interests.
- Appellate Exhibit 369M—the Military Judge granted the prosecution motion to depose a witness (al Darbi); stated that the judge would serve as the deposition officer; directed that the deposition will be audio- and video-recorded as well as transcribed; directed discovery and related motions deadlines; and ordered the deposition to occur during this coming week (31 July—4 August).
- Appellate Exhibit 369N—the Commission ordered the government to submit a filing identifying the location of all remaining al Darbi-related discovery materials contained in pending Appellate Exhibit 120-related summary/substitution requests in order to assist the Commission in its review of the materials previously referenced in Prosecution oral argument.
- Appellate Exhibit 369FF and 369JJ—the Commission ordered the deposition of al Darbi be closed, ruled that the accused would attend the direct examination as the Government did not intend to use any classified information in its direct examination of al Darbi, and set the schedule for direct- and cross-examination at the deposition.
- Appellate Exhibit 369OO—the Commission denied Appellate Exhibit 369HH, the Defense Motion to Advise the Accused of Potential Government Intrusions into Attorney-Client Communications, stating the Commission did not have authority to grant the defense request to disclose classified information.
- Appellate Exhibit 374A—pursuant to the M.C.A., 10 U.S.C. §§ 949p-3 and 949p-4, R.M.C. 701(f), and M.C.R.E. 505(e) and (f), the Commission granted Appellate Exhibit 374, the Government’s *Ex Parte, In Camera* Under Seal Motion for Protective Order Pursuant to the Military Commissions Act of 2009, 10 U.S.C. § 949p-4, And Military Commission Rule of Evidence 505.
- Appellate Exhibit 374C—pursuant to the M.C.A., 10 U.S.C. §§ 949p-3 and 949p-4, R.M.C. 701(f), and M.C.R.E. 505(e) and (f), the Commission granted Appellate Exhibit 374B and Appellate Exhibit 374B (AMEND), the

Government's *Ex Parte, In Camera* Under Seal Motion for Protective Order Pursuant to the Military Commissions Act of 2009, 10 U.S.C. § 949p-4, and Military Commission Rule of Evidence 505.

- Appellate Exhibits 376 and 377—Docketing Orders—the Commission issued these docketing orders for the July/August 2017 and September 2017 hearings, respectively.
- Appellate Exhibit 379—the Commission issued an order abating the proceedings, basing the order on how a new JTF-Guantanamo policy was being implemented. Specifically, the Military Judge determined that a policy establishing a structured approval process for use of operational assets would result in unacceptable comingling between the Military Judge's contingent and counsel for the parties, victim family members, witnesses, non-governmental organizations, and media. The Military Judge subsequently rescinded this order when separate transportation was provided for the Military Judge from the leeward airfield to the windward side of the installation.

### ***Methodical Movement, Unfinished Work***

Although several months have passed since the last sessions in this case, significant forward progress has been made that moves this case closer to trial on the merits. To date, the government has provided more than 270,217 pages of discovery to the defense. Also, as of the 30th of September of last year, the government had furnished many thousands of proposed pages of information to the Judge for provision to the defense, once appropriate Judge-approved substitutions are made, so as to protect classified information. This discovery milestone is a critical one, facilitating firmer scheduling of additional trial milestones by the military judge.

Yet despite this progress, we remain mindful that our work is not done. In the meantime, al Nashiri is being securely and humanely held under the Geneva Conventions.

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