

**CHIEF PROSECUTOR MARK MARTINS**  
**REMARKS AT GUANTANAMO BAY**  
**27 APRIL 2014**

In my remarks two weeks ago, I highlighted one woman's bewilderment at how the open military commission trial encompassing the attack that killed her brother was being portrayed by certain private advocacy groups and members of the media as overly secretive. Today, I want to highlight related feelings of frustration and anger conveyed to me a few days ago by another surviving family member whose beloved brother died in a terror attack. In this most recent instance, the family member—also a longtime observer of commission proceedings—told me of her dismay at how the usual critics of military commissions have once again resorted to labeling them “a legal farce” and to describing the courtroom process as in “chaos,” or as having been “derailed.”

It is important to emphasize that her dismay was *not* directed at the military commission process, whatever the real or imagined shortcomings claimed by its detractors. She knows for herself that the military commissions system is the only national security and justice institution that can lawfully try those charged in her brother's death. She appreciates that the accused are securely and humanely detained while facing charges at Guantanamo, even as these drawn-out capital proceedings sorely test her patience and that of other victims. She understands also that the accused are presumed innocent, and that the charges are only allegations unless and until proved guilty under law, a standard fundamental to our values. And she sees cruel irony in the position of those few but vocal and stubborn holdouts who apparently would prefer to restart yet again from the beginning in a civilian court, where they unselfconsciously presume there would be a swift march toward a guilty verdict, notwithstanding the presence of legal and practical issues that no genuine forum of justice, civilian or military, could sidestep.

Her dismay, rather, was at what she feels is a thinly disguised eagerness in some to generate spectacle out of the pre-trial phase, which is always methodical but can appear intermittent—almost as if lampooning these proceedings were a sport. I admit that I couldn't fully comfort her on this point, even as I explained the steady but unsensational progress being made, much of it out of court; offered my assessment that our government continues to commit the resources and personnel necessary to seeing the military commissions underway through to trial; and pledged that none of us assigned to this mission would fail to complete our share of the task, however long that takes. I advised that time would expose those whose opinions torment her to be unburdened by fact, dismissive of evidence undercutting their positions, and contradicted by the readily available public record of trial.

And I could report that many Americans have confidence that their military will, in the end, hold trials that ascertain the truth and achieve justice, even though law-of-war trials are not the primary mission of our armed forces. At least that is what I take from those I have spoken with in small and large groups during the once-a-month teaching invitations I try to accept, work permitting. But this longer view, as much as I deeply believe in it, did not fully assuage her anger on this matter. That is because despite my sense that most supporters and detractors of commissions have sincere motives, I frankly cannot disprove what she firmly holds to be true: that there are commentators who have deliberately set out to engender suspicion of, and even

disrespect for, the work that hundreds of dedicated and law-revering public servants, military and civilian, are dutifully carrying out in these military commission trials. Ma'am, we feel your anger and pain, and we will always strive to be worthy of your, and of the public's, trust.

***A Full Week in the United States v. Al Nashiri Case, and Pending Consideration of How a Prior Prosecution Request for Declassification Will Impact Remaining Discovery***

Over five of the past six days, including the just-completed full Sunday session, the Military Commission convened to try the charges against Abd Al Rahim Hussayn Muhammad Al Nashiri made significant headway in its consideration of remaining pre-trial issues raised by the defense and the prosecution. While the Judge made clear that the current trial scheduling order—which calls for jury selection this fall and start of trial on the merits in December—was not set in stone and could yet be moved in the interests of justice, the end of this long pre-trial phase is coming into focus.

Still on the docket for the two-week session that begins next month is the “Government Motion To Reconsider AE 120C In Part So The Commission May Take Into Account Declassification Efforts Underway At Prior Prosecution Request, Clarify The Discovery Standard The Commission Is Applying, And Safeguard National Security While Ensuring A Fair Trial” (AE 120D), which we filed last Wednesday in response to the Commission’s discovery order of 14 April 2014 (AE 120C). That litigation is in part advanced by prosecution work begun more than a year ago to fulfill its ongoing obligation to seek declassification of all relevant evidence “to the maximum extent possible consistent with the requirements of national security,” M.C.R.E. 505(a)(3), and thus to assist the Commission in serving our national security and foreign relations interests as well as the interests of justice.

To date, the parties have briefed 289 motions and have orally argued some 198 substantive motions. Of the 289 motions briefed, 30 have been mooted, dismissed, or withdrawn; 230 have been submitted for decision; and 161 have been ruled on by the Judge. The Judge has taken nearly 13 hours of testimony from 10 witnesses.

This week, the Judge took testimony on Appellate Exhibit 205, a defense motion regarding the Accused’s medical care. He also examined the parties’ written briefs and heard oral argument on 56 motions. For 6 of these motions, the Judge issued oral rulings on the record.

- The Judge denied Appellate Exhibit 084E, a defense renewed motion to recuse the Judge.
- The Judge ruled that Appellate Exhibit 084I, a defense motion to compel the production of evidence to support Appellate Exhibit 084E, was moot.
- The Judge denied Appellate Exhibit 084H, a defense motion to compel witness testimony on Appellate Exhibit 084E.
- The Judge granted Appellate Exhibit 260, a defense motion to compel the Convening Authority to approve funding for an expert consultant to the defense on jury selection.

- The Judge ruled that Appellate Exhibit 260A, a defense motion to compel the production of a witness to support Appellate Exhibit 260, was moot.
- The Judge granted Appellate Exhibit 205N, a government motion to protect the identity of a witness on an interlocutory matter to protect his identity from disclosure to the public and the Accused as justified by law and the public interest.

For the 52 motions and supplements listed below, the Judge took the matters under advisement.

- Appellate Exhibit 045AA, a defense motion to extend the deadline for law motions by 120 days.
- Appellate Exhibit 045W, a defense motion to continue based on unavailability of counsel.
- Appellate Exhibit 092F, a defense motion to compel a version of AE 092 that is marked releasable to the Accused.
- Appellate Exhibit 178H, a defense supplement to Appellate Exhibit 178. Appellate Exhibit 178 is a defense motion for appropriate relief to grant the Accused access to an expert consultant or to abate the proceedings.
- Appellate Exhibit 178K, a defense supplement to AE 178C. Appellate Exhibit 178C is a defense motion to compel witnesses to testify at the session on AE 178.
- Appellate Exhibit 109D, a defense renewed motion to take judicial notice that the Confrontation Clause of the Sixth Amendment to the Constitution of the United States applies to these military-commission proceedings.
- Appellate Exhibit 205, a defense motion regarding the Accused's medical care.
- Appellate Exhibit 207, a government motion *in limine* for the Commission to admit 179 physical items into evidence.
- Appellate Exhibit 209, a defense motion to strike the prosecution's notice of intent to seek the death penalty, arguing that the Convening Authority did not refer the R.M.C. 1004 aggravators.
- Appellate Exhibit 210, a defense motion to strike the death penalty, arguing that the Military Commissions Act of 2009 does not narrow the class of death eligible offenders.

- Appellate Exhibit 211, a defense motion to strike the death penalty, arguing that Congress cannot delegate capital aggravators to the Secretary of Defense.
- Appellate Exhibit 212, a defense motion to strike the prosecution's notice of intent to seek the death penalty under R.M.C. 1004(c)(2), (6), (8), (11), arguing that the notice violates the Ex Post Facto and Due Process Clauses.
- Appellate Exhibit 222, a defense motion to compel the government to produce any information and facts that could support the argument that the Accused was acting in reprisal to a U.S. or coalition-led attack resulting in civilian casualties.
- Appellate Exhibit 223A, a government response to a defense notice of an *in camera* and *ex parte* submission for the Commission to consider the defense request for letters rogatory.
- Appellate Exhibit 224, a defense motion to compel the government to produce information about the circumstances surrounding the death of Abdul Aziz Bin Attash.
- Appellate Exhibit 225, a defense motion to compel the government to produce information about the arrest, trial, and sentencing of certain individuals by Kuwaiti authorities regarding the USS COLE and the MV *Limburg* attacks.
- Appellate Exhibit 226, a defense motion to compel the government to produce all information in the possession of the U.S. Attorney for the Southern District of New York or any other agency of the United States demonstrating the guilt and association of Saif al-Adel in the bombings of the USS COLE and the MV *Limburg* and events before or after these bombings relating to the charges against the Accused.
- Appellate Exhibit 227, a defense motion to sequester the members selected to hear the evidence and decide the Accused's innocence or guilt and penalty.
- Appellate Exhibit 229, a defense motion to compel the government to produce training and certifications of health professionals treating the Accused.
- Appellate Exhibit 230, a defense motion to compel the government to produce changes in JTF-GTMO policy regarding high-value detainees' access to medical care.
- Appellate Exhibit 231, a defense motion to dismiss Charge I (Perfidy) for multiplicity.
- Appellate Exhibit 232, a defense motion to dismiss Charge III (Attempted Murder), Specification 2 for multiplicity.

- Appellate Exhibit 233, a defense motion to dismiss Charge IV (Terrorism), Specification 1 for multiplicity.
- Appellate Exhibit 234, a defense motion to dismiss Charge VII (Attacking Civilians) for multiplicity.
- Appellate Exhibit 235, a defense motion to dismiss Charge VIII (Attacking Civilian Objects) for multiplicity.
- Appellate Exhibit 236, a defense motion to compel evidence of attorney-client privilege safeguards for the “need to know” determination in the 18 July 2013 Office of the Secretary of Defense (“OSD”) memorandum.
- Appellate Exhibit 237, a defense motion to compel evidence of input relied upon by the OSD in creating its 18 July 2013 memorandum.
- Appellate Exhibit 238, a defense motion to compel evidence of Office of the Chief Prosecutor’s and the Office of the Director of National Intelligence’s (“ODNI’s”) cooperation in creating the 18 July 2013 memorandum.
- Appellate Exhibit 239, a defense motion to compel evidence of the ODNI’s concern over defense counsel’s access to classified information.
- Appellate Exhibit 241, a defense motion to dismiss Charges VII-IX for lack of jurisdiction under international law.
- Appellate Exhibit 244, a defense motion to dismiss Charge II, Charge III (Specification 2), and Charge VI as unreasonably multiplying the charges and specifications in Charge I and Charge IV (Specification 1).
- Appellate Exhibit 245, a defense motion to dismiss Charge IV (Specification 2), Charge V, Charge VII, and Charge VIII as unreasonably multiplying the charge and specification in Charge IX.
- Appellate Exhibit 246, a defense motion to strike Aggravator #1 from Charge I, arguing that the government failed to charge facts in aggravation under R.M.C. 1004(c)(1).
- Appellate Exhibit 247, a defense motion to strike Aggravator #1 from Charge II, arguing that the government failed to charge facts in aggravation under R.M.C. 1004(c)(1).

- Appellate Exhibit 248, a defense motion to strike Aggravator #1 from Charge IV (Specification 1), arguing that the government failed to charge facts in aggravation under R.M.C. 1004(c)(1).
- Appellate Exhibit 249, a defense motion to strike Aggravator #1 from Charge IV (Specification 2), arguing that the government failed to charge facts in aggravation under R.M.C. 1004(c)(1).
- Appellate Exhibit 250, a defense motion to strike Aggravator #1 from Charge IX, arguing that the government failed to charge facts in aggravation under R.M.C. 1004(c)(1).
- Appellate Exhibit 251, a defense motion to strike Aggravator #1 from Charge IV, Specification 2 based on alleged duplicity.
- Appellate Exhibit 252, a defense motion to strike Aggravator #1 from Charge VII based on alleged duplicity.
- Appellate Exhibit 253, a defense motion to strike Aggravator #1 from Charge IX based on alleged duplicity.
- Appellate Exhibit 254, a defense motion to strike Aggravator #4 from Charge IX, arguing that the government failed to charge facts in aggravation under R.M.C. 1004(c)(8).
- Appellate Exhibit 255, a defense motion to strike Aggravator #4 from Charge IV (Specification 2), arguing that the government failed to charge facts in aggravation under R.M.C. 1004(c)(8).
- Appellate Exhibit 256, a defense motion to strike Aggravator #5 from Charge I, arguing that the government failed to charge facts in aggravation under R.M.C. 1004(c)(11).
- Appellate Exhibit 257, a defense motion to strike Aggravator #5 from Charge II, arguing that the government failed to charge facts in aggravation under R.M.C. 1004(c)(11).
- Appellate Exhibit 258, a defense motion to strike Aggravator #5 from Charge VII, arguing that the government failed to charge facts in aggravation under R.M.C. 1004(c)(11).
- Appellate Exhibit 259, a defense motion to strike Aggravator #5 from Charge IX, arguing that the government failed to charge facts in aggravation under R.M.C. 1004(c)(11).

- Appellate Exhibit 261, a defense motion to compel the government to produce information from the Department of Defense relevant to a determination of the appropriateness of the jury panel.
- Appellate Exhibit 262, a defense motion to compel funding for a particular investigator to remain on the Accused’s defense team.
- Appellate Exhibit 264, a defense motion to strike the death penalty, arguing that it violates due process.
- Appellate Exhibit 265, a defense motion to strike the allegedly discriminatory application of the death penalty under the Eighth Amendment.

On 23 April 2014, the Commission held an *in camera* hearing under M.C.R.E. 505(h) to make a determination regarding the use, relevance, or admissibility of classified information the parties sought to discuss during a future session on the merits of Appellate Exhibit 240, a defense motion for a finding that Fahd al-Quso is not unavailable under M.C.R.E. 803, and Appellate Exhibit 242, a defense motion to compel the government to produce the identity of high-value detainees held in CIA custody with the Accused. Once the Judge 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 motions themselves—that takes place in a session later, and such sessions are to be as open as possible.

After holding the *in camera* hearing, the Judge ordered supplemental argument on those two motions in a closed session that took place on 25 April 2014 in accordance with R.M.C. 806. R.M.C. 806 provides that a judge may close the proceedings to the public “only upon making a specific finding that such closure is necessary to” either “protect information the disclosure of which could reasonably be expected to damage national security, including intelligence or law enforcement sources, methods, or activities” or “ensure the physical safety of individuals.” The closed session lasted 50 minutes. To date, the Commission has held four closed sessions. Even if we were to assume that the entire 50-minute session were closed—which it will not be because the Judge will make available to the public the entire transcript of the closed session, excising only classified information—total closure to date would comprise less than five percent of the proceedings.

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For their untiring support to these commissions, including the all-night preparations to hold more than six hours of sessions on the record on a Sunday, I commend the professionalism of the Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen of Joint Task Force Guantanamo.