CHIEF PROSECUTOR MARK MARTINS
REMARKS AT GUANTANAMO BAY
20 DECEMBER 2013

Good afternoon, and warm tidings during this holiday season—a deeply meaningful season for so many peoples around the globe—to all of you. For us to be here over winter solstice on the shortest weekday of our year in the northern hemisphere, and when many we know are using every minute of that short day in order to set aside time for loved ones in family meals and community celebrations over the coming fortnight, is noteworthy in itself. We prosecutors, defense attorneys, and commission personnel are of course obligated to spend as much time here as necessary, with the judge and supervisors capable of requiring all to remain on site once proceedings in a case have begun. And certainly in recent years military personnel are often away from home over holidays. But for those of you who have chosen to travel long distances in order to observe or report on this pre-trial legal process, to be here this week has inevitably caused you to forego other things you might wish to be doing, and to forego those other things while in an environment that is more austere and less convenient than that to which you are accustomed. From this soldier's point of view, the fact that you are willing to do so is heartening, because even as our legal system can be both exhaustive and exhausting to watch, the stakes in this case could not be higher for much that we hold dear.

In particular, we are privileged to have been joined here this week by a survivor of the September 11th attack on the Pentagon, as well as by family members of four who were killed that day in the World Trade Center towers. Their stories are heart wrenching, and yet their journeys to this place and time also nevertheless inspiring. Gina Cayne met Jake Cayne on a blind date in 1986 at a Baskin-Robbins ice cream store in Marlboro, New Jersey, and married him four years later. She recalls how they dedicated their lives to their three precious daughters and were surrounded by family and friends. On September 11th, Jake, a bond trader at Cantor Fitzgerald, began his day, like any other, at his desk on the 104th floor of the North Tower when the first plane hit. He was 32. Gina's best friend. Her first boyfriend. Her beloved husband. The father of her children. And now, twelve years later, Gina and her father—as well as five others still mourning their own personal losses on 9/11—are here, demanding justice under law, with dignity and with resolve.

Summary of Twenty-One Commission Rulings and Other Proceedings Reveal Substantial Progress This Week

This week, the Military Commission convened to try the charges against Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi continued its consideration of various pre-trial issues raised by the defense and the prosecution. The Judge examined the parties' written briefs, heard oral argument, took witness testimony, and issued numerous written rulings.

The Commission considered four motions and heard from two witnesses comprising some four hours of testimony. Since the arraignment in May 2012, the Commission has now received nearly 66 hours of testimony from a total of 21 witnesses to assist it in deciding pre-trial motions. The parties have briefed 137 substantive motions and have orally argued some 36

substantive motions. Of the 137 substantive motions briefed, 8 have been mooted, dismissed, or withdrawn; 30 have been submitted for decision; and 76 have been ruled on by the Judge. Motions argued, once ruled upon, will settle outstanding disputes regarding, among other issues, the charges against the Accused and will continue to move the case forward toward trial. Below is a summary of the orders issued and motions litigated this week:

- The Judge issued Appellate Exhibit 200II (1) denying the defense motion to dismiss the charges and remove the death penalty as a possible punishment on the ground that Amended Protective Order #1 violates the Convention Against Torture; (2) denying the defense motion to strike paragraphs 2(g)(3) and 2(g)(4) of Amended Protective Order #1; and (3) granting the defense motion to strike paragraph 2(g)(5) of Amended Protective Order #1 as superfluous to another provision already in the protective order.

- The Judge issued Appellate Exhibit 013DDD, the Second Amended Protective Order #1 to protect against disclosure of national security information.

- The Judge issued Appellate Exhibit 013CCC, a second supplemental ruling regarding the government motion to protect against disclosure of national security information. In it, the Judge

    - ordered defense counsel to execute the Memorandum of Understanding attached to the Second Amended Protective Order by January 24, 2014, "[i]n order to be provided access to classified information in connection with this case";

    - granted an unopposed defense motion to amend the protective order to clarify control over the courtroom (AE 013CC);

    - granted an unopposed defense motion to amend the protective order regarding defense team information (AE 013DD);

    - granted an unopposed defense motion to amend the protective order to clarify the "secure area" requirement (AE 013FF);

    - denied a defense motion to amend the protective order to protect materials of the International Committee of the Red Cross (AE 013GG);

    - granted in part and denied in part the defense motion to amend the protective order to secure privileged classification review (AE 013HH);

    - granted in part and denied in part the defense motion to amend the protective order to clarify open-source handling requirements (AE 013II);

- granted in part and denied in part the defense motion to amend the protective order regarding the accused's participation in his defense (AE 013JJ);

- granted the defense motion to amend the protective order to make conforming changes (AE 013KK);

- determined that the defense motion to compel the production of the author of a memorandum regarding open-source handling requirements is moot (AE 013MM); and

- denied the defense motion to dismiss based upon inhibitions placed on seeking alternative sources of mitigation information (AE 200).

- The Judge issued Appellate Exhibit 164C denying the defense motion to stay all review under 10 U.S.C. § 949p-4 and to declare 10 U.S.C. § 949p-4(c) and Military Commission Rule of Evidence ("M.C.R.E.") 505(f)(3) unconstitutional and in violation of the Uniform Code of Military Justice and the Geneva Conventions.

- The Judge issued Appellate Exhibit 206I denying Mr. Mohammad's motion to recuse the Judge from hearing and deciding defense motion Appellate Exhibit 206 to cease daily searches.

- The Judge issued Appellate Exhibit 200HH denying Mr. Aziz Ali's motion to compel discovery of communications with the governments of Kuwait and Pakistan.

- The Judge issued Appellate Exhibit 034B determining that the defense motion to compel the production of Jose A. Rodriguez to testify at the June 12-15, 2012 sessions is moot.

- The Judge issued Appellate Exhibit 073J/AE 156J permitting the defense to submit their theory of defense to the Judge *ex parte* by February 7, 2014.

- The Judge issued Appellate Exhibit 186A determining that the emergency defense motion to issue a court order governing the classification review of privileged attorney-client materials is moot.

- The Judge issued Appellate Exhibit 152H granting a government motion for inquiry into Ramzi Binalshibh's mental capacity to stand trial pursuant to Rule for Military Commissions 706.

- The Judge issued Appellate Exhibit 209E denying a defense motion requiring JTF-GTMO to facilitate attorney-client meetings or phone calls after every R.M.C. 802 conference.

- The Judge issued Appellate Exhibit 167B granting a defense motion to compel discovery of un-redacted copies of four CIA reports obtained through the Freedom of Information Act.

- The Judge issued Appellate Exhibit 248C regarding a motion filed by Mr. Hawsawi *ex parte* and under seal.

- The Judge heard oral argument on Appellate Exhibit 046C, a defense motion to reconsider Appellate Exhibit 046 (defense motion to compel witnesses in support of Appellate Exhibit 031, which is a defense motion to dismiss for alleged unlawful influence). The Judge denied the motion.

- The Judge heard oral argument on Appellate Exhibit 029C, a defense motion to reconsider Appellate Exhibit 029 (a defense motion to compel a witness in support of Appellate Exhibit 008, which is a defense motion to dismiss the charges for alleged defective referral). The Judge denied the motion.

- The Judge heard oral argument and took witness testimony on Appellate Exhibit 254, a defense motion regarding attorney-client meetings.

- The Judge heard oral argument on Appellate Exhibit 008, a defense motion to dismiss the charges for defective referral. In August 2013, the Judge took testimony from two witnesses regarding Appellate Exhibit 008.

Also, on Monday the Judge held an *in camera* M.C.R.E. 505(h) hearing to make a determination regarding the use, relevance, or admissibility of classified information the defense or prosecution sought to discuss during a future session on the merits of a particular motion. This hearing was not a "secret session," as some mistakenly reported. Rule 505(h) hearings typically occur in the judge's chambers, but because the number of parties in this case makes a chambers location logistically infeasible, the hearing took place in the courtroom itself. Once the judge grants a request to hold a Rule 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 issued Appellate Exhibits 008GGG and AE 031SS, denying Mr. Mohammad's requests to disclose classified information during a session in which the parties will litigate the merits of the underlying motions. The Judge determined that the classified information Mr. Mohammad's defense counsel seeks to disclose "is not relevant and is unnecessary for a fair determination of the issue before the Commission." The Judge also issued Appellate Exhibits 32BBB, 008FFF, 108Y, 070B, 133LL, and 133KK, ordering supplemental argument in a closed session on Appellate Exhibits 008, 018, 031, 032, 108, 133AA, and 133J. The Judge determined that closing a portion of the proceedings to the public is necessary—and will be narrowly tailored—to protect only information the disclosure of which could reasonably be expected to damage national security. The Judge ordered a transcript

of the closed session to be provided, excising only classified national security information. To date, less than 1% of the case proceedings have been closed to the public.

I will not comment on the specifics of any of these or other motions pending before the Commission. But I will discuss three broader issues regarding military commissions that have been the subject of recent questions by interested observers.

An Inquiry into an Accused's Mental Capacity To Stand Trial Under Rule 706 Is Sometimes a Prudent Course

The Rules for Military Commissions carefully guard an accused's right to a fair trial. Rule 706, for example, imposes an obligation on the parties, including the government, to notify the Commission if "it appears . . . that there is a reason to believe that an accused . . . lacks the capacity to stand trial." This is not a high threshold. When a party so notifies the Commission, the Commission may order an inquiry into the mental capacity of the accused. Yesterday, the Judge granted a government motion for an inquiry into the mental capacity of Ramzi Binalshibh. AE 152H.

Although an accused is presumed to be competent to stand trial, when a good-faith basis exists to question an accused's competency, halting the proceedings pending an inquiry into the accused's mental capacity is the most prudent way to proceed. Fundamental to our adversarial system of justice is the requirement that each accused whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial. Proceeding without an inquiry to confirm competency could thus interpose a serious legal error.

Federal Courts and Military Commissions Have Been and Will Be Successful in Incapacitating and Punishing Terrorists

Congress established military commissions under the M.C.A. as an important part of our justice and counterterror institutions. The commissions are not a substitute for civilian trials. Rather, they provide a forum for a narrow but critically important set of cases within the broader category of national security cases the government prosecutes. By law, military commissions have jurisdiction only over (1) non-citizen (2) "unprivileged belligerents" who are (3) captured abroad and (4) chargeable with violations of the law of war. Since 2002, twenty (20) persons who have satisfied all four of these criteria have been convicted—thirteen (13) in federal courts, and seven (7) in military commissions. Some commentators point to a much larger number of convictions than 13 for federal courts, citing nearly 500 terrorism-related convictions. *See, e.g.*, http://www.humanrightsfirst.org/wp-content/uploads/DOJ-Terrorism-Related-Convictions.pdf (invoking the number of 494 terrorism-related convictions contained in Dep't of Justice, Nat'l Sec. Div. Statistics on Unsealed Int'l Terrorism and Terrorism-Related Convictions (June 6, 2012)). But, as I explained in detail this past June, while every successful federal conviction is commendable, ***only 13*** over the relevant time period satisfy all four criteria and thus fall within the narrow jurisdiction Congress granted to commissions.

Sometimes Article III courts and military commissions have concurrent jurisdiction over

a case, including cases against suspected terrorists. In those cases, the decision to prosecute the case in an Article III court or a military commission may turn on the same type of strength of interest and efficiency factors that prosecutors use to guide them in choosing a forum where two federal courts, or a federal court and state court, have concurrent jurisdiction.

But for trials of Guantanamo detainees, military commissions have been the only legally available forum since 2011. Important partners in justice and counterterrorism, federal courts and military commissions have served the American people well by successfully incapacitating and punishing convicted terrorists under the rule of law. Although the numbers of convictions may seem small, and much more remains to be done, the record of these twenty trials reflects favorably on the American justice system, as such trials often involve difficult issues and complicated measures to balance sometimes competing values.

Even when confronted with the correct number, some commentators still favor civilian trials, claiming the sentences of those tried in commissions are more lenient than those tried in federal courts. The data do not support this conclusion, particularly when supplemented with information from still ongoing proceedings. Since 2011, seven additional Accused have been arraigned before military commissions. One of these Accused has already pleaded guilty for an aiding and abetting role in a terrorist attack that killed 11 persons. He agreed to cooperate in future prosecutions in return for a sentence of confinement that will run another 19 to 25 years from the date he was convicted. Mr. Al-Nashiri and those accused of plotting the September 11th attacks are facing capital charges.

The sentences and potential sentences before military commissions are comparable to those in federal court. For example, among the 13 persons convicted in federal court, the effective sentences of five who have been released must be taken into account. One of those five is Wesam al Delaema, who was convicted of conspiring to kill Americans in Iraq and sentenced to 25 years in prison. He was then extradited to the Netherlands because he was a Dutch citizen, and a Dutch court decided to commute his sentence. Other examples are Mohammed Al-Moayad and Mohammed Zayed, who received sentences of time served and were deported to Yemen after pleading guilty to providing material support for terrorism by raising money for al Qaeda, and Muhammed Afridi, who served his sentence of 57 months for plotting to trade drugs for four Stinger missiles for al Qaeda.

Beyond the 13 federal convicts who could have been tried by military commission, one can also look to the 67 individuals captured abroad and convicted of terrorism offenses in federal court to see that the notion of stiffer sentences in federal court is mistaken, and I encourage fair-minded observers to study, in particular, the punishments that were meted out to the 31 of those 67 who have now been released after serving their sentences. An honest and careful study of the numbers actually shows that purported *differences* between military commission and federal court trials are overborne by their *similarities*.

Moreover, facile contrasts based on mere numbers of convictions do not and cannot convey the relative size and complexity of trials involving members of al Qaeda, the scale and magnitude of the crimes, the effects the crimes have had on the victims and our society, or the procedures found by the judge to be necessary in conducting the trials. The present commissions

cases deal, in many respects, with unprecedented alleged network crimes of enormous complexity that would take time to prosecute in any court.

The facile and apparently selective data-mining by some private advocacy groups also ignores important facts. For instance, while federal courts have relentlessly pursued accountability for the deaths of some 234 innocent persons inflicted by al Qaeda, military commissions have and continue to pursue accountability for at least 3,012 such deaths.

Clearly, setting the 494 federal court convictions up against the progress of military commissions is not a fair, apples-to-apples comparison. Treating it as such does a disservice to both federal courts and military commissions. The data, fairly analyzed and properly understood, make clear that federal courts and military commissions, working in concert, have both been successful in incapacitating and punishing alleged terrorists.

Narrow, but Important, Evidentiary Differences Between Military Commissions and Civilian Courts Make the Former an Important Forum Option for National Security and Justice

I have previously noted that the procedural similarities between military commissions and civilian courts are more numerous and striking than the differences. And yet the narrow procedural differences can nevertheless be decisive in certain circumstances. To quote at length from one recent and distinguished commentator:

> While some details in the shape of commissions continue to be challenged, today commissions satisfy the fundamental fairness guarantees of the Geneva Conventions and the structural commands of the Constitution.
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> After an intense review [the President] concluded in 2009 that commissions were useful and necessary, and he charged his administration with improving their legitimacy. In his speech [at the National Defense University in May of this year], the President insisted that suspected terrorists can be prosecuted in either civilian courts or military commissions, and he announced that he had asked the Department of Defense to designate a site in the United States for commission trials. On the heels of his speech, news reports suggest that the administration plans to use commissions to prosecute new detainees not already in Guantanamo Bay.
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> President Obama obviously did not embrace military commissions lightly. He did so because, as he explained in May 2009, they "allow for the protection of sensitive sources and methods of intelligence-gathering; they allow for the safety and security of participants; and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts." Commissions have jurisdiction over a narrow class of defendants: non-citizen "unprivileged belligerents" who are captured abroad and charged with violations of the laws of war. In acknowledgment that the special nature of the defendants

> and the circumstances of their alleged crimes create practical evidentiary difficulties at trial, commissions depart from the usual civilian court procedures a bit for issues like hearsay, disclosure of sources and methods of intelligence-gathering, and the admissibility of confessions. These small but real differences are consonant with—and indeed, more defendant-friendly than—analogous departures from civilian standards in international criminal courts or in U.S. military commissions historically.
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> Moreover, the differences with civilian trials are swamped by the similarities. These similarities include, among many other things, the presumption of innocence, the requirement to prove guilt beyond a reasonable doubt, the right to counsel and to be present during proceedings, the right to be free from self-incrimination, the right to cross-examine government witnesses, the right to compel the witnesses for one's defense, the right to see exculpatory evidence, the right to an impartial decisionmaker, the right to the suppression of unreliable or non-probative or unduly prejudicial evidence, the right to self-representation, protection against double jeopardy and ex post facto laws, and the right to appeal.

Jack Goldsmith, *The Continuing Importance of Military Commissions* (June 14, 2013), *available at* http://www.advancingafreesociety.org/the-briefing/the-continuing-importance-of-military-commissions/.

Some who are distant from the trials and lack familiarity with how evidence has been and is being gathered claim that the differences in procedure enable improperly obtained evidence to be admitted in commissions. This claim is mistaken, and the open proceedings witnessed in the months ahead will demonstrate that these small but important differences properly and lawfully enable the best evidence from circumstances of armed conflict to be put before judge and jury.

And now, I'll be happy to take questions.

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Strong procedural safeguards and court sessions that are as public and open as possible ensure that justice, regardless of the forum providing it, is done consistent with our values and in accordance with the rule of law. And all of the instruments of our national power and authority, including fair and open trials, must be used to confront modern, irregular, nonstate threats that purposely attack civilian populations and evade traditional means of holding them accountable. As Justice Robert Jackson once said, "Where crime leaves the beaten path, the law must be strong enough to follow."

I commend the Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen of Joint Task Force Guantanamo for the hard work, logistical support, and daily professionalism they exhibit throughout these proceedings, often without thanks or recognition.