

CHIEF PROSECUTOR MARK MARTINS
REMARKS AT GUANTANAMO BAY
10 AUGUST 2014

Good evening. On the eve of continuing pre-trial sessions this week, I wish to take a moment to remember the September 11th fallen and their loved ones who long for justice and some measure of peace. I remember in particular one gentleman who was at a business meeting on the 17th floor of the South Tower of the World Trade Center when United Airlines Flight 175 struck the tower. His oldest son called him after the first plane hit the North Tower, urging him to leave. He replied that he was evacuating people and promised to leave soon. He was last seen rushing into the tower to get two-way radios to stay in touch with others just before the South Tower collapsed. Of the eleven employees from his company working there that day, ten survived because of his sacrifice. To his wife, other family members, and survivors who have traveled to Guantanamo Bay or to closed-circuit television sites in the United States to bear witness to these proceedings, I know that no words I offer today can match the depths of your loss. But you have the humble gratitude of your nation's armed forces for sharing your generosity of spirit and enduring strength, which revive us all.

Tomorrow morning, in *United States v. Ramzi Binalshibh*, a proceeding is scheduled to enable the Commission to hear argument on the government's emergency motion to reconsider the order severing Mr. Binalshibh's case from that of the other four Accused (AE 312A). Those Accused are Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin 'Attash, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi. Although things could well change, Tuesday morning is then currently projected to commence with proceedings involving all five Accused or merely the latter four—depending upon how the Commission rules on the motion to reconsider—with the first order of business on Tuesday being the defense request for an inquiry into the existence of potential conflicts of interest in the defense teams (AE 292 series). Other items on the docket for the week include a motion of Mr. Hawsawi to sever his case (AE 299), a motion alleging defective referral of the charges for trial (AE 8), and a motion alleging unlawful influence upon the military commission (AE 31).

All five Accused are charged with identical serious violations of the law of war for their alleged roles in the September 11th attacks. I emphasize that the charges 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, and 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.

Continued Modest Progress Despite In-Court Pause

Notwithstanding the pause in court proceedings to enable the Commission to address the conflict-of-interest claim, work has remained underway out of court since the last pre-trial sessions in June. Examples of work completed to date include the following:

- The government has provided approximately 295,000 pages of unclassified discovery to defense counsel for each Accused so the Accused may meaningfully confront the charges against them. The government has also provided over 7,000 pages of classified documents and nearly two terabytes of classified information to Mr. Ali's defense counsel, who has signed the Amended Memorandum of Understanding Regarding the Receipt of Classified Information. This material includes information comprising the Prosecution's case against the Accused, as well as information the Prosecution must disclose to the Defense under the government's affirmative discovery obligations.
- The parties have briefed in writing 162 substantive motions and have orally argued some 43 substantive motions in previous pre-trial sessions.
- Of the 162 substantive motions briefed, 8 have been mooted, dismissed, or withdrawn; 92 have been ruled on by the Commission; and an additional 36 have been submitted for and are pending decision.
- The Commission has now received testimony from 22 witnesses in more than 65 hours of testimony, with all witnesses subject to cross-examination, to assist it in deciding pre-trial motions.
- The parties have filed 190 exhibits and 76 declarations alleging facts and providing references to inform the Commission's consideration of the issues.

These examples, which are never meant to imply that justice can be quantified, serve as important indices of the less visible work the parties continue to accomplish between sessions and reflect methodical and deliberate movement toward trial, however unsatisfying the pace may be to observers.

Lawful and Humane Detention in Armed Conflict Protects Both Security and Liberty

Those responsible for running detention facilities must take reasonable steps to guarantee the safety of the detainees while also safeguarding others in their charge. This requires policies to be made and decisions to be taken in the considered and experienced judgment of commanders and wardens at the scene. As the United States Supreme Court has recognized, such duties are "an inordinately difficult undertaking that requires expertise, planning, and commitment of resources." *Turner v. Safley*, 482 U.S. 78, 85 (1987). Given such difficulty, and aware that detention administrators are better positioned to perform the task, courts are reluctant to second-guess those who must actually run detention facilities day-to-day; accordingly, courts grant them the latitude to adopt practices as the particular conditions in each facility might demand. *Id.*

Judges nonetheless play an imperative role in reviewing challenges to the reasonableness of security policies and decisions. They also examine whether policies impermissibly infringe on detainees' access to courts. Individuals detained at Guantanamo Bay under the law of armed conflict may challenge their detention and conditions of confinement through a petition for

habeas corpus in federal court. *Aamer v. Obama*, 742 F.3d 1023, 1030, 1038 (D.C. Cir. 2014). In recently denying certain Guantanamo detainees’ challenges to two detention policies, the U.S. Court of Appeals for the District of Columbia Circuit upheld the policies as reasonable, acknowledging the very real security threats that exist in the detention facility evidenced by “the discovery of shanks, a wrench, and other weapons in the housing camps that had evaded the searches.” *Hatim v. Obama*, Nos. 13-5218, 13-5220, 13-5221, 2014 WL 3765701 (D.C. Cir. Aug. 1, 2014). Observers may recall witness testimony in the ongoing Commission proceedings that similarly recounted how the guard force had found a metal pen refill in the binding of a book in a detainee’s cell. Unofficial/Unauthenticated Transcript at 4029-4030.

While detainees pursue their claims through the courts, they remain humanely detained. Detainees may communicate with their counsel through legal mail and couriers and at in-person meetings. It is perhaps not well known that Joint Task Force Guantanamo grants more than ninety percent of requests for meetings between military-commission defendants and their counsel or that detainees with active habeas cases may communicate with their counsel over the telephone. It is also perhaps not well known that Guantanamo Bay facilities are held to the standards of humane treatment required by Common Article 3 of the Geneva Conventions or that in 2009, the Secretary of Defense tasked a Defense Department team to review the confinement conditions at Guantanamo Bay, and, after “considerable deliberation and a comprehensive review,” the team concluded that those conditions conform with Common Article 3. U.S. Dep’t of Def., Review of Department Compliance with President’s Executive Order on Detainee Conditions of Confinement 4 (Feb. 20, 2009). Such treatment complies with the law and affirms our values while also distinguishing us from adversaries who scorn both.

And now, I have time for a few questions.

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For their support to these proceedings last week and in the week to come, I thank and commend the Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen of Joint Task Force Guantanamo and Naval Station Guantanamo Bay.