MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI**	**AE 955J / AE 956J / AE 957I** **RULING** **Defense Motions** to Schedule Entry of Pleas **6 November 2024**

1. **Procedural History**.

a. On 1 August 2024, the Prosecution filed three pretrial agreements (PTAs) with the Commission.[1] The filings indicated that, on 31 July 2024, the Convening Authority, Brigadier General (United States Army, Retired) Susan Escallier, entered into three separate PTAs with Mr. Mohammad, Mr. bin 'Attash, and Mr. Hawsawi, respectively.[2] Mr. Ali (a.k.a. al Baluchi) was not party to a PTA.

b. On 2 August 2024, the Prosecution filed a Memorandum (SECDEF Memo) signed by Secretary of Defense, Secretary Lloyd J. Austin III, purporting to, *inter alia*, withdraw from the PTAs.[3]

[1] *See* AE 955 (GOV), Government Filing of Pre-Trial Agreement, filed 1 August 2024 (under seal) (Mohammad PTA); AE 956 (GOV), Government Filing of Pre-Trial Agreement, filed 1 August 2024 (under seal) (bin 'Attash PTA); AE 957 (GOV), Government Filing of Pre-Trial Agreement, filed 1 August 2024 (under seal) (Hawsawi PTA). Although the PTAs were filed under seal and remain under temporary seal, their contents are discussed within this Ruling to the extent they have been discussed on the record, described in a pleading, or otherwise necessary to resolve the Defense motions.
[2] *See id.*
[3] *See* AE 955B (GOV)/AE 956A (GOV)/AE 957A (GOV), Government Notice of Secretary of Defense Memorandum, Attach. B, filed 2 August 2024.

c. On 6 August 2024, Mr. Mohammad filed a motion requesting that "the Military Commission schedule an entry of plea hearing in accordance with Mr. Mohammad's pre-trial agreement (PTA) . . . ."[4]

d. On 8 August 2024, Mr. Hawsawi filed a motion requesting that "the Military Commission schedule a plea hearing in accordance with Mr. al Hawsawi's pre-trial agreement (PTA), which requires an entry of pleas within a prescribed timeframe from signature of the PTA."[5]

e. On 12 August 2024, the Commission issued a specified issue order directing the Prosecution, Mr. Mohammad, Mr. bin 'Attash, and Mr. Hawsawi to answer specific questions regarding a superior convening authority's legal authority to take certain actions in an ongoing miltiary commission, the answers being necessary to determine the enforceability of the PTAs and pending motions to schedule a hearing for the entry of pleas.[6] On 6 September 2024, the Prosecution,[7] Mr. bin 'Attash,[8] and Mr. Ali[9] separately responded. Mr. Mohammad and Mr. Hawsawi jointly responded.[10]

[4] AE 955C (KSM), Mr. Mohammad's Motion to Schedule Hearing for Entry of Plea, at 1, filed 6 August 2024.
[5] AE 957B (MAH), Defense Motion to Schedule Entry of Pleas, at 1, filed 8 August 2024 (under seal). Attachment B to Mr. Hawsawi's motion included an additional argument and request for relief under seal.
[6] *See* AE 955D / AE 956B / AE 957C, SPECIFIED ISSUE ORDER, Actions of a Superior Convening Authority Pursuant to the Military Commissions Act, dated 12 August 2024. Mr. Ali was permitted, though not required, to respond. *See id.* at 3, n.7.
[7] *See* AE 955F (GOV) / AE 956D (GOV) / AE 957F (GOV), Government Response To Specified Issue Order: Actions of a Superior Convening Authority Pursuant to the Military Commissions Act, filed 6 September 2024.
[8] *See* AE 956E (WBA), Mr. bin 'Atash's Response to Specified Issue Order, filed 6 September 2024.
[9] *See* AE 955E (AAA) / AE 956C (AAA) / AE 957D (AAA), Mr. al Baluchi's Response to AE 955D / AE 956B / AE 957C, Specified Issues Order Actions of a Superior Convening Authority Pursuant to Military Commissions Act, filed 6 September 2024.
[10] *See* AE 955H (KSM MAH) / AE 957G (KSM MAH), Mr. Mohammad and Mr. al Hawsawi's Response to Specified Issues In Accordance with AE 955D / AE 957C Specified Issue Order Actions of a Superior Convening Authority Pursuant to the Military Commissions Act, filed 6 September 2024.

f. On 6 September 2024, the Prosecution filed a consolidated response to the motions filed by Mr. Mohammad and Mr. Hawsawi to schedule a hearing for the entry of pleas, opposing both Defense motions.[11]

g. On 13 September 2024, Mr. bin ‘Attash filed a motion requesting that “the Military Judge enforce the pretrial agreement (“PTA”) signed by him on 29 July 2024 and accepted and approved by the Convening Authority (“CA”) on 31 July 2024 by scheduling this matter for a plea agreement inquiry . . . .”[12]

h. On 20 September 2024, Mr. Mohammad and Mr. Hawsawi separately replied to the Prosecution’s response to their motions to schedule a hearing for the entry of pleas.[13]

i. On 26 September 2024, the Prosecution filed a response to Mr. bin ‘Attash’s motion to schedule a hearing for the entry of pleas, requesting the Commission deny the motion.[14]

j. On 3 October 2024, Mr. bin ‘Attash replied to the Government response to his motion to schedule a hearing for the entry of pleas.[15]

k. The Commission did not hear oral argument on the motions.[16]

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[11] *See* AE 955G (GOV) / AE 957E (GOV), Government Consolidated Response To AE 955C (KSM) and AE 957B (MAH), Defense Motions to Schedule Entry of Pleas, filed 6 September 2024.
[12] *See* AE 956F (WBA), Mr. bin ‘Atash’s Motion to Schedule Entry of Pleas Pursuant to R.M.C. 910, at 1, filed 13 September 2024.
[13] *See* AE 955I (KSM), Mr. Mohammad’s Reply To Government Consolidated Response to AE 955C (KSM) and AE 957B (MAH), Defense Motions to Schedule Entry of Pleas, filed 20 September 2024; AE 957H (MAH), Mr. al Hawsawi’s Reply to AE 957E (GOV) Government Consolidated Response to AE 957B (MAH), Defense Motions to Schedule Entry of Pleas, filed 20 September 2024.
[14] *See* AE 956H (GOV), Government Response To AE 956F (WBA), Mr. Bin ‘Attash’s Motion to Schedule Entry of Pleas Pursuant to R.M.C. 910, filed 26 September 2024.
[15] *See* AE 956I (WBA), Mr. bin ‘Atash’s Reply to AE 956H (GOV), Government’s Response to Mr. bin ‘Atash’s Motion to Schedule Entry of Pleas Pursuant to R.M.C. 910, filed 3 October 2024.
[16] *See* Military Commissions Trial Judiciary Rules of Court, effective 1 September 2016 (including both Change #1, 2 March 2017, and Change #2, 21 December 2017), Rule 3.5.m. (“[T]he decision to grant oral argument on a written motion is within the sole discretion of the Military Judge.”); Rule for Military Commissions (R.M.C.) 905(h).

2. **Findings of Fact**.

a. On 25 March 2010, Secretary of Defense Robert Gates designated Vice Admiral (United States Navy, Retired) Bruce MacDonald as the Convening Authority for Military Commissions pursuant to 10 U.S.C. § 948h.[17]

b. On 4 April 2012, at the Convening Authority's direction, Ms. Donna Wilkins signed the referral documents to refer capital charges against all five named co-Accused to this Commission.[18]

c. Between 2012 and 2023, successor Secretaries of Defense designated various individuals to serve as the Convening Authority for Military Commissions. None of these individuals entered into a PTA with Mr. Mohammad, Mr. bin 'Attash, Mr. Ali, Mr. Hawsawi, or Mr. bin al Shibh. However, some of these Convening Authorities did enter into PTAs with the Accused in other Military Commission cases.[19] During this time, no Secretary of Defense ever designated himself as the Convening Authority responsible for *United States v. Mohammad et. al.*, or any other referred military commission case, in its entirety, nor did any of them withhold individual authorities or duties from the Convening Authority and reserve those actions to themselves as a "superior competent authority" or a "superior convening authority."

d. On 21 August 2023, Secretary Austin designated Ms. Escallier as Convening Authority for Military Commissions, effective 8 October 2023. Secretary Austin's appointment memorandum stated that her authorities as Convening Authority were to continue "until a new

[17] *See* AE 955G (GOV), at Attach. B.
[18] Mr. bin al Shibh's case has since been severed from those of his co-Accused due to lack of capacity to stand trial. *See* AE 914EE, RULING AND ORDER, Rule for Military Commissions 909 Competency Determination and Severance, dated 21 September 2023.
[19] *See, e.g., United States v. Majid Shoukat Khan*; *United States v. Ahmed Mohammed Ahmed Haza al Darbi*; *United States v. Abd al Hadi al-Iraqi*; *United States v. Mohammed Farik Bin Amin (a.k.a. Zubair) and Mohammed Nazir Bin Lep (a.k.a. Lillie).*

Convening Authority is designated."[20] No "new" Convening Authority has since been designated. The appointment memorandum further stated that "Ms. Escallier shall exercise her *independent legal discretion* with regard to judicial acts and other duties of the Convening Authority."[21]

e. When the Secretary of Defense appointed Ms. Escallier as Convening Authority, he did not reserve any individual authorities of the Convening Authority to himself as either a "superior convening authority" or "superior competent authority." In the appointment memorandum, the Secretary of Defense did not "withdraw," "withhold," or "reserve to himself" the authority to enter into a PTA. The Secretary of Defense cited the "Rules for Military Commissions, the Regulation for Trial by Military Commission, and judicial orders" as the sources of law governing Ms. Escallier's future decisions and actions.[22]

f. There is no evidence before the Commission that the Secretary of Defense curtailed, altered, or amended Ms. Escallier's authority as the Convening Authority for this Commission between 21 August 2023, and his attempt to do so via the SECDEF Memo on 2 August 2024. The Rules for Military Commissions (R.M.C.), published in 2019, have not been changed since. The Regulation for Trial by Military Commission (R.T.M.C.) was prescribed in 2011. The duties, responsibilities, and authorities of the Convening Authority described therein have not been changed since.[23]

[20] AE 955G (GOV), at Attach. C.
[21] *Id.* (emphasis added).
[22] *Id.*
[23] *See generally* R.T.M.C. Chapter 2. Chapter 9 of the R.T.M.C. pertaining to Defense Counsel, and not relevant here, was amended in 2016.

g. Prior to the Secretary's appointment of Ms. Escallier as Convening Authority, the Prosecution sought the Biden Administration's endorsement of "Policy Principles" for proposed PTAs, indicating the Secretary of Defense was likely aware PTA negotiations were ongoing.[24] Letters from members of Congress to the Secretary of Defense about the PTA negotiations, and news articles discussing them,[25] further indicate the Secretary of Defense was likely aware of the negotiations before August 2023, yet chose not to withhold the authority to enter into PTAs from Ms. Escallier at the time of her designation on 21 August 2023 or at any other time before she signed the three PTAs that are the subject of this Ruling.

h. As the Convening Authority, Ms. Escallier authorized the Prosecution to negotiate PTAs on her behalf.[26] The Prosecution and various Defense teams negotiated the terms of possible PTAs between October 2023 and July 2024. On 12 July 2024, in an email to various Defense Counsel, Chief Prosecutor, Rear Admiral (RDML) Rugh, recognized that everyone had worked "in good faith to find common ground on which to build an agreement."[27] He projected a "final opportunity to reach a negotiated settlement" was soon approaching.[28]

i. Mr. Mohammad, Mr. bin 'Attash, and Mr. Hawsawi reached agreements in principle for PTAs during the final weekend of July 2024.[29] Mr. Mohammed and Mr. bin 'Attash submitted Offers for Pretrial Agreements on 29 July 2024; Mr. Hawsawi submitted an offer on

[24] *See* AE 901G (GOV), Government Notice Of Status Update in Accordance with AE 901F, Interim Ruling and Order, at 1, filed 27 July 2023 (policy principles forwarded to the Department of Defense Office of General Counsel).
[25] *See* AE 926 (AAA), Mr. al Baluchi's Motion to Dismiss All Charges for Unlawful Influence by Members of Congress, filed 8 February 2024, at Attachs. X (pages 253-55) and EE (pages 292, 308).
[26] *See* AE 926A (GOV), Government Response To Mr. Ali's Motion to Dismiss All Charges for Unlawful Influence by Members of Congress, at 4, filed 22 February 2024.
[27] AE 956F, at Attach. B.
[28] *Id.*
[29] *See id.* at Attachs. C and D.

30 July 2024. Ms. Escallier signed all three offers as the Convening Authority on 31 July 2024.[30] There is no signed PTA between Mr. Ali and the Convening Authority.

j. When she signed the three PTAs, Ms. Escallier possessed the legal authority to do so.

k. In the three PTAs, the three co-Accused individually agreed to, *inter alia*, plead guilty to all charges and specifications.[31] As the Convening Authority, Ms. Escallier agreed to, *inter alia*, remove the death penalty as a possible punishment.[32]

l. Each of these three co-Accused agreed to enter,[33] and did in fact enter,[34] into a Stipulation of Fact with the Trial Counsel, which could be used to establish guilt and aid the Panel Members in adjudging an appropriate sentence. Each Accused agreed to waive certain objections to a number of Prosecution Exhibits, to include a Letterhead Memorandum (LHM), summarizing statements made by each Accused to the Federal Bureau of Investigation (FBI) in 2007.[35]

m. By its terms, each agreement became "binding" on the Parties upon the Convening Authority's acceptance of the offer (including the Convening Authority agreeing to the contents of the attached agreed-to Stipulations of Fact and "red-boxed" LHMs, which would be used against the Accused for findings and/or sentencing purposes)."[36]

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[30] *See* Mohammad PTA at 20; bin 'Attash PTA at 19; Hawsawi PTA at 19.
[31] *See* Mohammad PTA at 2, para. 5; bin 'Attash PTA at 2, para. 5; Hawsawi PTA at 2, para. 5.
[32] *See* Mohammad PTA at 13-14, para. 38; bin 'Attash PTA at 13, para. 38; Hawsawi PTA at 13-14, para. 37.
[33] *See* Mohammad PTA at 2-3, paras. 6-7; bin 'Attash PTA at 2-3, paras. 6-7; Hawsawi PTA at 2-3, paras. 6-7.
[34] *See* AE 955 (GOV), at 31-58; AE 956 (GOV), at 30-53; AE 957 (GOV), at 30-59.
[35] *See* Mohammad PTA at 5, para. 12.ii. and para. 13; bin 'Attash PTA at 4-5, para. 12.b. and para. 13; Hawsawi PTA at 4, para. 12.ii. and para. 13; *see also* footnotes in paragraph 12 of each PTA related to the "red-boxed" LHMs. The admissibility of the LHMs has been the subject of contested pretrial litigation for several years and has been the primary focus for the last year and a half.
[36] Mohammad PTA at 19, para. 62; bin 'Attash PTA at 18, para. 56; Hawsawi PTA at 18-19, para. 59.

n. On the same day Ms. Escallier entered into the PTAs, the Prosecution sent a letter to victim family members of the 9/11 attacks.[37] The Prosecution described Ms. Escallier as "the United States Government official empowered by the Secretary of Defense with authority to, among other things, enter into pre-trial agreements on behalf of the United States government," and advised the victim family members that three separate deals had, in fact, been reached.[38]

o. On 1 August 2024, the Trial Counsel announced in open session that Ms. Escallier had signed and accepted the PTA offers from Mr. Mohammad, Mr. bin 'Attash, and Mr. Hawsawi.[39] The Trial Counsel sought to docket a hearing for the entry of pleas for Mr. Mohammad and Mr. bin 'Attash the next week, and Mr. Hawsawi to follow in September 2024.[40] That morning, pretrial proceedings continued as previously scheduled, with the Commission hearing testimony from a witness on a pending motion. Counsel for Mr. Mohammad, Mr. bin 'Attash, and Mr. Hawsawi abstained from questioning the witness.[41] Mr. Ali, not subject to a PTA, cross-examined the witness.[42]

p. On the morning of 2 August 2024, the Trial Counsel reiterated a "preferred plan" to schedule the entry of pleas before the culmination of the August hearings, due to a "genuine desire" to have pleas entered and to "insulate the proceedings from any unlawful influence."[43]

[37] *See* AE 926 (AAA 2nd Sup), Supplement to AE 926 (AAA) Mr. al Baluchi's Motion to Dismiss All Charges for Unlawful Influence by Members of Congress, at Attach. B, filed 14 August 2024.
[38] *Id.*
[39] *Unofficial/Unauthenticated Transcript, United States v. Mohammed et. al.*, (Tr.) at 49312.
[40] *See* Tr. at 49314.
[41] The Trial Counsel took the position that the waive all waivable motions provisions in the three PTAs would not permit Counsel for Mr. Mohammad, Mr. bin 'Attash, and Mr. Hawsawi to examine the witness. *See* Tr. at 49317-18 ("they can't actively continue to participate in any of the contested litigation based on the pretrial agreement.").
[42] *See* Tr. at 49324 (beginning of witness examination).
[43] Tr. at 49418.

He continued, "[t]here's obviously a lot of attention on this right now, and we do think that the faster that the pleas are entered, the better we're able to insulate the commission from that."[44]

q. Later on 2 August 2024, the Secretary of Defense issued a memorandum which stated, in full:

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

AUG 02 2024

MEMORANDUM FOR SUSAN ESCALLIER, CONVENING AUTHORITY FOR MILITARY COMMISSIONS

SUBJECT: Authority to Enter into Pre-Trial Agreements in *United States v. Khalid Shaikh Mohammad et al.* (*United States v. Khalid Shaikh Mohammad; United States v. Walid Muhammad Salih Mubarak Bin 'Attash; United States v. Mustafa Ahmed Adam Al Hawasawi; United States v. Ramzi Binalshibh; and United States v. Ali Abdul Aziz Ali*)

I have determined that, in light of the significance of the decision to enter into pre-trial agreements with the accused in the above-referenced case, responsibility for such a decision should rest with me as the superior convening authority under the Military Commissions Act of 2009. Effective immediately, I hereby withdraw your authority in the above-referenced case to enter into a pre-trial agreement and reserve such authority to myself.

Effective immediately, in the exercise of my authority, I hereby withdraw from the three pre-trial agreements that you signed on July 31, 2024 in the above-referenced case.

r. Since signing the PTAs, counsel for the three signatory Accused to the PTAs have refrained from filing motions (other than the instant motions to schedule a hearing for the entry of pleas pursuant to the PTA and motions related to scheduling matters), requesting discovery, examining witnesses, or arguing motions.

[44] *Id.*

s. The Defense represents that, from 2 August 2024 to date, Ms. Escallier has continued to act as the Convening Authority in this case.[45]

3. **Law**.[46]

a. "[T]he burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence."[47] The burden of persuasion rests with the moving party.[48]

Sources of Law Governing the Military Commissions System

b. The Military Commissions Act (M.C.A.) of 2009 "establishes procedures governing the use of military commissions to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission."[49]

c. Congress designated the Secretary of Defense as the principal Executive Branch official to govern the administration of the military commissions system. The Secretary of Defense has the power to prescribe procedures and rules governing military commissions.[50] He has done so in the Manual for Military Commissions (M.M.C.). The M.M.C. is "adapted from the Manual for Courts-Martial,"[51] which governs the military justice system. The M.M.C.

[45] *See* AE 956F (WBA), at 14. Although representations of counsel are not evidence, this representation has neither been contested nor contradicted by evidence offered by the Prosecution. Additionally, as the SECDEF Memo only discussed the authority to enter into PTAs in *United States v. Mohammad et. al.* and did not remove Ms. Escallier as the Convening Authority in this case or any other case, the Commission finds this fact by a preponderance of the evidence.
[46] This Ruling resolves the pending motions on legal grounds other than the prohibition against unlawful influence. *See* 10 U.S.C. § 949(b); R.M.C. 104; R.T.M.C. Chapter 1-4; *In Re Ali*, 558 F. Supp. 3d 1167, 1176 (C.M.C.R. 2021). Therefore, that body of statutory, regulatory, and case law is neither presented nor analyzed, except as necessary to support the Commission's interpretation of the law governing the scope of the Secretary of Defense's legal authority.
[47] R.M.C. 905(c)(1).
[48] R.M.C. 905(c)(2)(A).
[49] 10 U.S.C. § 948b(a).
[50] *See* 10 U.S.C. § 949a(a).
[51] 2019 M.M.C. Foreword.

contains the R.M.C., the Military Commission Rules of Evidence (M.C.R.E.), and a Crimes and Elements section. Pursuant to 10 U.S.C. § 949a(a), the then-Acting Secretary of Defense published the current version of the M.M.C. on 2 May 2019.[52] R.M.C. 705, which provides the rules governing PTAs, has not been amended since Ms. Escallier became the Convening Authority.

d. The 2009 M.C.A. also authorizes the Secretary of Defense to prescribe regulations governing military commissions generally.[53] The then-Deputy Secretary of Defense prescribed the current version of the R.T.M.C. on 6 November 2011.[54] The R.T.M.C "prescribes policies and provisions for the administration of military commissions . . . ."[55] Neither Chapter 2 ("The Convening Authority"), nor Chapter 12 ("Pretrial Agreements"), have been amended since Ms. Escallier became the Convening Authority.

The Convening Authority

e. "Military commissions . . . may be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose."[56] The M.C.A. refers to "*the person* designated under Section 948h as the 'convening authority.'"[57] The

[52] *See id.*
[53] *See, e.g.*, 10 U.S.C. § 948j(a) ("The Secretary of Defense shall prescribe regulations providing for the manner in which military judges are so detailed to military commissions.").
[54] R.T.M.C. Foreword.
[55] R.T.M.C. Chapter 1-1.a.
[56] 10 U.S.C. § 948(h); *see also* R.M.C. 504(b) ("A military commission may be convened by the Secretary of Defense or, unless otherwise limited by superior competent authority, any officer or official of the United States designated by the Secretary of Defense.").
[57] *Al Bahlul v. United States*, 967 F.3d 858, 863 (D.C. Cir. 2020) (emphasis added) (reviewing the statutory construct of military commissions as provided for in the M.C.A.). Although *Al Bahlul* analyzed the 2006 M.C.A., it is authoritative for this Ruling because the provisions regarding the convening authority's duties and responsibilities remained unchanged in the 2009 M.C.A.

"convening authority" means "the Secretary of Defense or any officer or official of the United States designated by the Secretary of Defense for that purpose."[58]

f. The term "convening authority" is used fifty-four times in the 2009 M.C.A. Almost every time that term is used, the article "the" precedes "convening authority."[59] Nowhere in the 2009 M.C.A. does Congress allocate the convening authority's responsibilities among multiple individuals, nor does it use the term "convening authorities."

Other Duties of the Convening Authority, "Superior Competent Authority," or "Superior Convening Authority"

g. The M.C.A. "vests the convening authority with significant powers and responsibilities other than convening military commissions,"[60] for example, disposing of charges. Only the convening authority or the Secretary of Defense may dispose of charges.[61] "Disposition of charges" means "dismissing any or all of them, forwarding any or all of them to another authority for disposition, or referring any or all of them to a military commission."[62] Entering or withdrawing from a PTA is not a method of disposing of charges. "A superior competent authority may withhold the authority of a subordinate to dispose of charges in individual cases, types of case, or generally."[63]

h. When in receipt of charges, "unless the authority to do so *has been* limited or withheld by a superior competent authority"[64] the convening authority may: (1) dismiss any charges or

[58] R.M.C. 103(a)(10); *see also* R.T.M.C. Chapter 2-2 (same).
[59] Where the article "the" does not precede "convening authority," the M.C.A. simply states "convening authority." *See, e.g.*, 10 U.S.C. § 950b(a) (NOTICE TO CONVENING AUTHORITY).
[60] *Al Bahlul*, 967 F.3d at 863; *see also* R.T.M.C. Chapter 2-3 (providing a list of twenty duties "directly related to military commissions").
[61] *See* R.M.C. 401(a).
[62] R.M.C. 401(b).
[63] R.M.C. 401(a).
[64] R.M.C. 401(b) (emphasis added).

specifications; (2) forward charges (or, after dismissing charges, the matter) to a subordinate convening authority for disposition; (3) forward any charges to a superior competent authority for disposition; or (4) subject to R.M.C. 601(d), refer any or all charges to a military commission.[65]

i. "Referral" occurs when a convening authority orders that "charges against an accused will be tried by a specified military commission."[66] Unless the authority to refer "*has been* withheld" by a superior competent authority, the charges may be referred to a military commission convened by that convening authority or by a predecessor.[67]

j. The term "superior convening authorities" is used once in the Rules, the title of R.M.C. 601(f), which states, "Except as otherwise provided in these rules, a superior competent authority may cause charges, whether or not referred, to be transmitted to the authority for further consideration, including, if appropriate, referral."[68]

k. "The convening authority or a superior competent authority may for any reason cause any charges or specifications to be withdrawn from a military commission at any time before findings are announced."[69] Withdrawal of charges should not be "unfair[] to the accused," and may only be accomplished at "the direction of the convening authority or a superior competent authority in the exercise of that authority's independent judgment."[70] Once charges have been withdrawn, they may be re-referred to another military commission "unless the withdrawal was

[65] R.M.C. 407(a).
[66] R.M.C. 601(a).
[67] R.M.C. 601(b) (emphasis added).
[68] R.M.C. 601(f). Though the Rule is titled "Superior convening authorities," the Rule itself only mentions a "superior competent authority." For consistency and clarity, the Commission refers to the Secretary of Defense as a "superior competent authority." The SECDEF Memo invokes this title as the basis for the actions contained within.
[69] R.M.C. 604(a).
[70] R.M.C. 604(a), Discussion.

from an improper reason."[71] Improper reasons for a withdrawal include "an intent to interfere with the free exercise by the accused of any rights to which he may be entitled, or with the impartiality of a military commission."[72]

l. A superior is not permitted "in a specific case and after-the-fact, to influence directly the action of a subordinate convening authority with respect to the latter's judicial acts already properly taken in that case . . . ."[73]

Pretrial Agreements

m. PTAs generally. A PTA is a contract between an accused and the convening authority.[74] R.M.C. 705 describes how a PTA is entered into, the nature of the agreement, permissible terms, impermissible terms, and withdrawal from a PTA.

n. Entering into a PTA.

(1) "Subject to such limitations as the Secretary may prescribe, an accused and the convening authority may enter into a pretrial agreement in accordance with this rule."[75] The Secretary of Defense did not change this default condition when prescribing the R.T.M.C.[76] While specifically referencing R.M.C. 705, the Secretary of Defense prescribed:

> *Unless such authority is withheld* by a superior competent authority, the Convening Authority is authorized to enter into or reject offers to enter into Pretrial Agreements (PTAs) with the accused. The decision to accept or reject a

[71] R.M.C. 604(b).
[72] R.M.C. 604(b), Discussion.
[73] *United States v. Hardy*, 4 M.J. 20, 22 (C.M.A. 1977).
[74] *See United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999).
[75] R.M.C. 705(a).
[76] *See* R.T.M.C. Chapter 2-3(a)(9) (listing authority to "[a]pprove or disapprove plea agreements with the accused" as a duty "directly related to military commissions.").

> PTA offer submitted by an accused is *within the sole discretion* of the Convening Authority who referred the case to trial.[77]

This paragraph combines the text of R.M.C. 705(a) and R.M.C. 705(d)(3). The Secretary of Defense chose to adopt, rather than modify, the R.M.C. language in the R.T.M.C. Prior to 2 August 2024, no document promulgated, prescribed, or signed by the Secretary of Defense withheld Ms. Escallier's authority to enter into PTAs.

(2) Rule for Courts-Martial (R.C.M.) 705(a), similar to R.M.C. 705(a), states, "Subject to such limitations as the Secretary concerned may prescribe, an accused and the convening authority . . . may enter into a plea agreement in accordance with this rule."[78] No "Secretary concerned" has prescribed a limitation of this authority, reserving the authority to enter into a plea agreement to themselves at Secretarial level.[79]

o. Withdrawing from a PTA.

(1) R.M.C. 705(d)(4)(B) presents bases for a convening authority to withdraw from a PTA:

> The convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a

[77] R.T.M.C. Chapter 12-1 (emphasis added). The Commission notes an ambiguity within Chapter 12-1. If a superior competent authority has withheld a convening authority's ability to enter into a PTA, the decision to "accept or reject a PTA offer" thereafter would no longer be in the "sole discretion" of the convening authority who "referred the case to trial."
[78] *Manual for Courts-Martial, United States* (2024 ed.) (emphasis added).
[79] *See* Air Force Instruction 51-201, *Administration of Military Justice*, 24 January 2024, at para. 17.5.1; Army Regulation 27-10, *Military Justice*, 20 April 2024, at paras. 5-27, 5-28; Manual of the Judge Advocate General of the Navy (JAGMAN), 1 December 2023, at para. 0137.

> material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.[80, 81]

Historically, an accused has enjoyed greater latitude to withdraw from a PTA than does the convening authority to afford an accused "additional measure of protection against prosecutorial abuse."[82]

(2) R.M.C. 705(d)(4)(B) is identical to the compatible R.C.M. 705(d)(4)(B) in effect when Congress created the military commissions system in 2009. Therefore, case law interpreting that provision is instructive. In *United States v. Dean*, the Court of Appeals for the Armed Forces (CAAF) held the convening authority was not permitted to withdraw under R.C.M. 705(d)(4)(B) when the accused began performance by requesting a military judge alone forum, entering a confessional stipulation of fact, and waiving the live appearance of several witnesses.[83] Performance may begin before the PTA is signed.[84]

(3) To "provide a clearer point at which the right of the convening authority to withdraw terminates," and in direct response to *Shepardson v. Roberts*, 14 M.J. 35 (C.M.A. 1983), the Drafters of R.C.M. 705(d)(4)(B) chose to use the "begin[ning] performance" as the time after which the convening authority may not withdraw from a PTA.[85] Based on a plain language interpretation of the Rule that the beginning of performance by an accused terminates the convening authority's ability to withdraw from a PTA, and that performance had in fact

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[80] R.M.C. 705(d)(4)(B); *see also* R.T.M.C. 12-3 (same).
[81] In this case, the three PTAs list nine permissible reasons for the Convening Authority to withdraw, some of which overlap with the R.M.C. *See, e.g.*, Mohammad PTA at 15, para. 46. For the purposes of this Ruling, the Commission assumes without deciding the Parties may contractually agree to conditions not in conflict with applicable law.
[82] *Manual for Courts-Martial, United States*, Analysis of the Rules for Courts-Martial app. 21 at A21-36 (1984 ed.).
[83] *See* 67 M.J. 224, 227-28 (C.A.A.F. 2009).
[84] *See id.* at 228 (election of military judge alone forum before PTA signed, stipulation of fact concurrent with PTA; amended witnesses requests after PTA signed).
[85] *Manual for Courts-Martial, United States*, Analysis of the Rules for Courts-Martial app. 21 at A21-41 (2005 ed.) (analysis of the Rule analyzed in *Dean*).

begun in Dean's case, the CAAF declined to answer the question whether detrimental reliance is required in a situation where performance has not begun.[86]

(4) Post-*Dean*, the current R.C.M. 705(e)(4)(B)(i) alters the "begins performance" language to read, "The convening authority . . . may withdraw from a plea agreement at any time before *substantial performance* by the accused of promises contained in the agreement."[87] However, R.M.C. 705(d)(4)(B) has not been so amended. The Commission has no legal basis to apply the current version of R.C.M. 705(e)(4)(B)(i) in lieu of R.M.C. 705(d)(4)(B).

4. **Analysis**.

a. Resolution of the Defense motions turns on whether Mr. Mohammad, Mr. bin 'Attash, and Mr. Hawsawi still have enforceable PTAs notwithstanding the Secretary of Defense's 2 August 2024 memorandum purporting to, *inter alia*, withdraw from the PTAs. For the reasons explained below, the Commission concludes the three PTAs remain valid and are enforceable.

b. The SECDEF Memo.

(1) The Parties have differing interpretations regarding what the SECDEF Memo actually accomplished. The Defense principally argues the SECDEF Memo had no legal effect because the Secretary of Defense did not have the authority to do what he did. Thus, the Defense concludes his actions were *void ab initio* and the PTAs signed by the Convening Authority are still intact and enforceable as if the SECDEF Memo never occurred. The Prosecution takes the opposite approach, arguing the Secretary of Defense acted within his lawful powers authorized

[86] *See* 67 M.J. at 228, n.3 (citing *Shepardson*, 14 M.J. at 358).
[87] *Manual for Courts-Martial, United States* (2024 ed.) (emphasis added).

by the M.C.A., the R.C.M., and the R.T.M.C. Thus, in the Prosecution's view, the SECDEF Memo resulted in the PTAs being properly rescinded.

(2) The Commission analyzes, as it must, the plain language of the SECDEF Memo itself. The Secretary of Defense announced he was taking three discrete actions. First, he purported to "withdraw" Ms. Escallier's authority as the Convening Authority in *United States v. Mohammad et. al.* to enter into PTAs. Second, he purported to "reserve" the authority to enter into PTAs to himself. Third, he announced he was "withdraw[ing]" from the three PTAs in "exercise of [his own] authority." These three distinct actions guide the Commission's analysis; there are legal, factual, and/or temporal defects with each.

c. <u>"Withdraw" the authority of Ms. Escallier to enter into PTAs</u>.

(1) The Secretary of Defense purported to "withdraw" Ms. Escallier's authority to enter into PTAs. He likely intended to "withhold" her authority do so. Each verb has a distinct legal meaning.[88] Charges can be withdrawn.[89] Authority can be withheld.[90] Word choice matters because the Secretary of Defense's actions must be tethered to a legal authority. The Prosecution did not cite, and the Commission did not find, any source of law authorizing the Secretary of Defense to "withdraw" Ms. Escallier's authority to enter into a PTA. Though some rules permit a superior competent authority to "withhold" the right to take certain actions from a convening authority,[91] the governing rules are devoid of any entitlement of a superior competent authority

[88] *See Russello v. United States*, 464 U.S. 16, 23 (1983) (when concluding that different terms must have different meanings, stating "We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.").
[89] *See, e.g.*, R.C.M. 604.
[90] *See, e.g.*, R.C.M. 407(a); R.M.C. 601(b); R.T.M.C. Chapter 12-1.
[91] *See, e.g.*, R.M.C. 401(a) ("A superior competent authority may withhold the authority of a subordinate to dispose of charges in individual cases, types of case, or generally.").

to "withdraw" a subordinate's authority to act.[92] Moreover, the use of the term "withdraw" authority instead of "withhold" authority may also be the Secretary's recognition that his actions came *after* he had already delegated Ms. Escallier the authority to act and after she, in fact, acted in accordance with that authority.

(2) None of the Parties dispute that Ms. Escallier had the authority to enter into the PTAs on 31 July 2024 when she did so. The facts and law support that conclusion. Her appointment memorandum instructed her to "exercise her independent legal discretion with regard to judicial acts and other duties of the Convening Authority."[93] As the Convening Authority, she authorized the Parties to engage in negotiations. The correspondence included her Legal Advisor. Ms. Escallier personally signed the PTAs. The Prosecution, in a letter to victim family members, characterized Ms. Escallier as the Government official authorized to sign a deal with the various Accused on behalf of the United States. No counsel for the Accused included the Secretary of Defense or his Office of General Counsel on any correspondence. No one negotiated with the Secretary of Defense. No one sought his signature or approval.

(3) R.M.C. 705(a) and R.T.M.C. Chapter 12-1, which each independently authorize a convening authority to enter into PTAs, were in effect when Ms. Escallier became the Convening Authority. No promulgation or prescription from the Secretary of Defense between 23 October 2023 and 1 August 2024 altered, amended, or curtailed Ms. Escallier's authority to enter into PTAs. Collectively, these circumstances indicate everyone—including the

[92] Whereas to "withhold" authority is a prospective action, "withdraw" is an after-the-fact action. *Compare Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/withhold (last visited November 6, 2024) (defining "withhold" as "to refrain from granting, giving, or allowing") *with Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/withdraw) (last visited November 6, 2024) (defining "withdraw" as to "take back or away"). *See also infra* at paras. 4.(c)(2)-(6) (discussing timing).
[93] AE 955G (GOV), at Attach. C.

Prosecution, all Defense teams, the Secretary of Defense, and Ms. Escallier herself— understood Ms. Escallier possessed legal authority to sign the Offers for Pretrial Agreement submitted to her and the agreements became binding upon her signature. It was appropriate and correct for each entity to understand that arrangement as the status quo.

(4) The timing of the SECDEF Memo is fatal to its enforceability. Assuming the Secretary of Defense had the authority to withhold Ms. Escallier's authority to enter into PTAs as a matter of law, the Secretary's new power would only be effective *prospectively*, not *retroactively*.[94] The fact that the Secretary of Defense gave himself exclusive authority to enter into PTAs on 2 August 2024, does not invalidate or somehow render the PTAs Ms. Escallier signed on 31 July 2024 void. The PTAs are enforceable contracts with the classic elements of offer, acceptance, and consideration. Those PTAs, by operation of contract law and the terms of the PTAs themselves, transformed into binding agreements when signed by the Convening Authority, who had authority to sign them when she did so.

(5) To consider the SECDEF Memo retroactively applicable is to give the Secretary an absolute veto over any discretionary act of the Convening Authority with which he disagrees. This prospect is wholly inconsistent with the delegation of independence in the performance of her duties—a delegation that the Secretary of Defense personally gave Ms. Escallier concurrent with her appointment as the Convening Authority—and the notion that a superior is not permitted "in a specific case and after-the-fact, to influence directly the action of

[94] The Secretary of Defense may prescribe limitations on a convening authority's authority to enter into a PTA with an accused. *See* R.C.M. 705(a). But the prescription must be written down, published, and made available to the Parties and/or relevant decision makers ahead of time so everyone may act in accordance with the prescribed limitation. Even if the 2 August 2024 SECDEF Memo was issued in furtherance of the R.M.C. 705(a) authority, its timing is fatal to its validity as applied to the PTAs entered into on 31 July 2024.

a subordinate convening authority with respect to the latter's judicial acts already properly taken in that case . . . ."[95] The Defense motions are not being resolved on unlawful influence grounds, but the idea that each of the Convening Authority's actions and decisions are immediately reversible if the Secretary of Defense disagrees potentially raises the specter of unlawful influence.

(6) There are certain things the Rules do allow. The Secretary of Defense, as superior competent authority, can have the case transmitted to his level.[96] He can withdraw the charges at any time before findings are announced.[97] With limited exceptions, he can refer the charges to a different military commission himself.[98] He could remove Ms. Escallier and make himself the Convening Authority in this case.[99] What the Secretary of Defense could not do, however, was delegate authority to Ms. Escallier, recognize her independent discretion, then reverse that discretion upon disagreeing with how that discretion was utilized.

d. "[R]eserve that authority" to himself.

(1) The Prosecution suggests that, as a superior competent authority and the principal Executive Branch official charged by Congress to implement and oversee military commissions, the Secretary of Defense derives inherent power from the M.C.A. to reserve certain convening authority duties and/or responsibilities to himself. By analogy, each of the convening authority's duties is a "stick" in a "bundle of sticks." The Prosecution's position is

[95] *Hardy*, 4 M.J. at 22.
[96] *See* R.M.C. 601(f).
[97] *See* R.M.C. 604(a).
[98] *See* R.M.C. 604(b).
[99] *See Al Bahlul*, 967 F.3d at 872 ("The long-standing rule relating to the removal power is that, in the face of congressional silence, the power of removal is incident to the power of appointment.") (internal citation omitted); *see also Edmond v. United States*, 520 U.S. 651, 664 (1997) (noting "the power to remove officers ... is a powerful tool for control.").

that the Secretary of Defense can take a stick from the bundle for himself and leave the rest of the bundle with the Convening Authority. The Commission disagrees.

(2) The Prosecution's position suggests there can be multiple convening authorities over the same case at the same time—concurrent convening authorities. The M.C.A. indicates the opposite. The fact that the term "convening authority" is used fifty-four times in the 2009 M.C.A., always referring to a singular entity and never multiple convening authorities, indicates Congress's intent that the convening authority of a particular military commission be a single individual. Nowhere in the 2009 M.C.A. does Congress allocate the convening authority's responsibilities among multiple individuals, nor does it use the term "convening authorities." This makes sense. It is difficult to foresee the functionality of a system of co-convening authorities over different aspects of the same case where one is the boss of the other, yet remain faithful to statutory, regulatory, and case law prohibitions against unlawful influence.[100]

(3) To the extent R.M.C. 705(a) or R.T.M.C. 12-1 provide a stand-alone exception as the only instance in which the Secretary of Defense may pull a "stick" from the bundle for himself, timing is key. As discussed *supra*, any prescribed "limitations" must be in effect before the convening authority acts. Otherwise, the convening authority enjoys no real

[100] Moreover, it is difficult to understand how the bundle of sticks argument would play itself out in practice. How many convening authorities could there be in a given case? One per duty/responsibility as set out in R.T.M.C. Chapter 2-3? Many convening authority responsibilities and duties overlap. For instance, it would be unmanageable for the Secretary of Defense to determine what investigative resources are necessary for the Defense and another convening authority to determine what experts are relevant and necessary for the Defense. Would this induce forum shopping or lobbying for particular convening authorities to preside over certain actions? In the event of a disagreement, how would a decision be made? Would the Secretary invoke a "veto?" Would the convening authority seek formal or informal approval of her decisions before acting? The answers to these questions do not matter as much as the existence of the questions themselves.

discretion to act in any circumstance without the fear of reversal, let alone with the "sole discretion" the Secretary had previously bestowed upon Ms. Escallier.[101]

(4) The Prosecution supported its position on the bundle of sticks argument by citing *O'Connell v. Shalala*, 79 F.3d 170, 177 (1st Cir. 1996) for the proposition that "[T]he statutory grant of a greater power typically includes the grant of a lesser power."[102] From *O'Connell*, the Government argues, "these interlocking authorities establish that, unless otherwise limited by law, the Secretary may exercise or otherwise reserve to himself any function of a military-commission convening authority."[103] That position is untenable. First, appellate courts have not well-received the "everything is permitted if not prohibited" argument in the face of clear unambiguous rules.[104] Second, it is unclear whether *O'Connell*, which would be persuasive to the Commission at best, remains good law. It relied on the *Chevron* Deference[105] principle, which the United States Supreme Court overruled last term.[106] Finally, the greater power/lesser power argument does not carry the day on the facts of this case. Just because the Secretary of Defense *could have* arguably withheld the power to enter into PTAs under R.M.C. 705(a), he did not actually do so in 2023 upon Ms. Escallier's appointment and failed to do so before she acted in 2024. The Secretary of Defense unequivocally, and without reservation, delegated full authority to Ms. Escallier to enter into PTAs. Once he did, that authority became hers and not his. Further, the Secretary of Defense was aware that Ms.

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[101] R.T.M.C. Chapter 12-1.
[102] AE 955F (GOV), at 3.
[103] *Id.*
[104] *See, e.g., United States v. Edwards*, 82 M.J. 243, 244 (C.A.A.F. 2022) (concluding the Air Force Court of Criminal Appeals' reliance on the principle that a victim unsworn statement was not obviously unreasonable in light of Article 6b, UCMJ, was "misplaced" when R.C.M. 1001A—which implemented Article 6b, UCMJ—was clear and "plain.").
[105] *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).
[106] *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

Escallier's predecessor was engaging in ongoing PTA negotiations for over a year, and that other military commission cases had been resolved by PTA, prior to appointing Ms. Escallier. He could have, but did not, withhold her authority to enter into PTAs upon her designation. The Secretary of Defense never, prior to Ms. Escallier accepting the three PTAs at issue in these motions, withheld her authority to enter PTAs or made himself the Convening Authority.

(5) Finally, the Commission notes that the Prosecution has not cited, nor has the Commission found, a military justice or military commissions appellate case where the Secretary of Defense or the "Secretary concerned" in a traditional military justice context withheld the authority to enter into PTAs to his or her level in a case referred by a subordinate convening authority. No service regulation withholds the authority to enter into PTAs (or now, plea agreements) pursuant to R.C.M. 705(a) to the Secretary level.[107] The Prosecution's argument presents a vision of a judicial system where the Secretary of Defense enjoys plenary authority to act in any ongoing cases referred by a duly appointed convening authority. This, of course, is antithetical to the military justice system as it has historically functioned. The 2009 M.C.A. is not sufficiently distinct from the Uniform Code of Military Justice to adopt such an expansive and unrestrained interpretation of the Secretary of Defense's authority.[108]

e. "Withdraw" from PTAs.

(1) Assuming *arguendo* the Secretary of Defense had the legal authority to withhold the Convening Authority's authority to enter into PTAs and reserve that authority to

[107] That no service regulation has done what the Secretary of Defense purports to do here is not dispositive, but it is at least a point for the Commission to consider. Had a service Secretary done so, it would have supported the Prosecution's argument.

[108] This vision of an unconstrained Secretary of Defense is also inconsistent with the statutory, regulatory, and case law prohibitions against unlawful influence. At the very least, those sources of law provide some constraint on his ability to act and is inconsistent with the position advanced by the Prosecution.

himself, even after the Convening Authority had already exercised her sole discretion to enter into the PTAs, he still did not possess the authority to withdraw from the PTAs.

(2) By the plain terms of the SECDEF Memo, the Secretary of Defense reserved the authority to *enter* PTAs to himself. He did not reserve to himself the authority to *withdraw* from a PTA that had already been entered into by someone with authority to do so. Nor is it clear he could have. R.M.C. 705(a) grants authority to prescribe limitations regarding the *entering* of PTAs. R.M.C. 705(d)(4)(B), which discusses withdrawal from PTAs, has no comparable provision. Under that Rule, withdrawal authority belongs to the convening authority alone and is not subject to a limitation as the Secretary may prescribe.[109] The Secretary of Defense did not purport to make himself the Convening Authority for this case. Thus, even if he possessed legal authority to enter into a PTA, the Rules reserved withdrawal authority to the Convening Authority, Ms. Escallier. This asymmetrical result that would ensue if the SECDEF Memo is given effect is further evidence that the roles of the convening authority cannot be so spliced as the Prosecution urges; the fair-handed, even administration of justice requires a singular entity with oversight over the case at large to be able to act on matters before him or her.[110]

(3) Further assuming, without deciding, that the reservation of power to enter into a PTA also necessarily encompasses the power to withdraw from that PTA,[111] which in this case would make the Secretary of Defense a "convening authority" for the purposes of R.M.C. 705 alone, the Secretary of Defense could not withdraw from the PTAs in this case because each of

[109] *Compare* R.M.C. 705(d)(4)(B) and R.T.M.C. Chapter 12-3 *with* R.M.C. 705(a) and R.T.M.C. Chapter 12-1.
[110] The Defense has represented that Ms. Escallier has continued to act as the Convening Authority after 2 August 2024 to date. *See* AE 956F (WBA), at 14.
[111] The Prosecution did not support this proposition with a citation to law.

the three individual Accused began performance. If an accused begins performance of the terms of a PTA, the convening authority loses the right to withdraw from the deal.[112] Here, Mr. Mohammad, Mr. bin 'Attash, and Mr. Hawsawi all began performance as that term is explained in *Dean*. The CAAF's reasoning from *Dean* is just as strong now as it was then. The version of R.C.M. 705(d)(4)(B) it analyzed is the same as the R.M.C. 705(d)(4)(B) at issue here. No intervening circumstance has changed the force of that decision. It has been neither overruled nor abrogated.

(4) Performance began in a number of ways. All three Accused signed lengthy confessional stipulations of fact, which could be used to establish their guilt and for the Panel Members to determine an appropriate sentence. All three Accused negotiated an acceptable version of their respective LHMs which can be offered against them in presentencing proceedings without certain objections.[113] All three Accused refrained from examining the witness(es) for pretrial motions while the Prosecution and Defense Counsel for Mr. Ali questioned those same witnesses. The Trial Counsel himself insisted upon that course of action so that the Defense teams did not violate a material term of their agreements.[114] Other than the

[112] *See* R.M.C. 705(d)(4)(B); *Dean*, 67 M.J. at 228.
[113] The admissibility of the LHMs has been the subject of contested pretrial litigation for several years. That these three Accused agreed to not lodge certain objections to versions of the LHMs is a dramatic change of litigation posture, one that was presumably precipitated by the Convening Authority's agreement to remove capital punishment as a sentencing consideration.
[114] *See* Tr. at 49317-18.

present motions to schedule a hearing for the entry of pleas, these three Accused have refrained from filing motions.[115]

(5) Per *Dean*, these acts, or intentional failures to act, qualify as "beginning performance." *Dean* is the most direct case law provided by the Parties in support of their arguments. Using a "plain language" analysis, the CAAF held the convening authority lost the right to withdraw because Dean had begun performance when he satisfied his obligation to enter a confessional stipulation of fact and elect a military judge alone forum. The CAAF rejected the argument presented by the Prosecution here that "beginning performance" can only occur after a PTA is signed. Just as in *Dean*, where entering into a confessional stipulation of fact and electing a military judge alone forum was sufficient to qualify as beginning performance, here all three co-Accused have begun performance simply by entering into a Stipulation of Fact as was required by each of the three PTAs. The timing of the entry of such stipulation is not the issue; the act of doing so is what begins performance. Such remains the state of law with R.M.C. 705(d)(4)(B).[116]

(6) The Prosecution also advances the position that performance has not begun because there has been no detrimental reliance by the three co-Accused.[117] In short, the Prosecution argues that any actions the three co-Accused have taken can be undone and all

[115] The Commission does not consider the Accused's motions to schedule a hearing for entry of pleas, a requirement under the PTA, to be a material breach of a separate PTA requirement to not file future motions. It would be logically inconsistent to designate a requirement of the contract to be a provision which could void the contract.
[116] The current R.C.M. 705(e)(4)(B)(i) alters the "begins performance" language to read, "The convening authority . . . may withdraw from a plea agreement at any time before *substantial performance* by the accused of promises contained in the agreement." (emphasis added). No comparable change was made to R.M.C. 705(d)(4)(B). From this, two conclusions may be drawn. First, the President intended to swing the pendulum away from the "begins performance" standard and provide a more liberal basis for the convening authority to withdraw from a PTA in military justice cases. Second, the Secretary of Defense chose not to do this and instead remain under control of a *Dean* analysis for PTA withdrawal purposes in military commissions cases.
[117] *See* AE 955G (GOV) / AE 957E (GOV), at 5-6.

Parties may be returned to *status quo ante*. For example, the witnesses the Defense Counsel have not examined can be recalled, any motions the Defense has not filed may be filed, any Stipulations of Fact or agreed-to LHMs can be disregarded, and any mention of stipulations or deals themselves can be excluded per M.C.R.E. 410. This argument fails. First, it stands in direct conflict with *Dean*. If performance has begun, no detrimental reliance analysis need be undertaken.[118] Second, the argument transposes the detrimental reliance concept onto the performance that has already begun. However, the detrimental reliance analysis discussed in *Shepardson* and in note 3 of the *Dean* opinion envisions a detrimental reliance analysis *only if* performance *had not* begun. The salient fact pattern in *Shepardson* is that performance had not begun *and* there had been no detrimental reliance; that is why the case resolved as it did.[119] Here, performance had begun, so it is immaterial whether or not any actions taken by the three co-Accused can be undone.[120]

(7) Further assuming performance had not begun, the Rules and the PTA collectively assign a list of reasons a convening authority may withdraw from a PTA.[121] None of those conditions apply and, therefore, the withdrawal amounts to a material breach of the PTAs.[122] The SECDEF Memo provides no explicit rationale for attempting to withdraw from the

[118] *Dean*, 67 M.J. at 228, n.3.
[119] 14 M.J. at 356 ("[N]one of the conditions precedent set out in the offer had occurred.")
[120] The Government also relies on *United States v. Villareal*, 52 M.J. 27 (C.A.A.F. 1999). That case is inapposite. The granted issue revolved around unlawful command influence when it appeared as if a superior pressured or suggested the convening authority withdraw from a PTA, a different set of facts than presented here. Moreover, though the CAAF used the phrase "the convening authority revoked his approval of a pretrial agreement, after all parties had signed it but before appellant exercised any reliance thereon," *id.* at 30, in context that statement is about the accused failing to begin performance rather than the contract principle of detrimental reliance. Finally, *Dean* is more recent in time and controlling.
[121] *See* R.M.C. 705(d)(4)(B); R.T.M.C. Chapter 12-3; Mohammad PTA at 15, para. 46; bin 'Attash PTA at 14-15, para. 43; Hawsawi PTA at 15, para. 44.
[122] The three PTAs have burden reassignment provisions in the event one party considers the opposing party to have committed a material breach, placing the burden on Prosecution to demonstrate either there was or was not a breach.

PTAs. One could surmise the reason for doing so may be his determination that the decision to enter into PTAs is "significant" and, thus, the decision to withdraw should also rest with him. The significance of a PTA is not one of the reasons the governing legal sources permit the Convening Authority to withdraw.[123]

5. **Ruling**.

a. The Defense motions at AE 955C (KSM), AE 956F (WBA), and AE 957B (MAH) are **GRANTED**.

b. Pursuant to the terms of three valid and enforceable PTAs, the Commission will schedule a hearing for the entry of pleas for Mr. Mohammad, Mr. bin 'Attash, and Mr. Hawsawi at a date to be determined by the Commission.

So **ORDERED** this 6th day of November, 2024.

//s//
MATTHEW N. MCCALL, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary

See, e.g., Mohammad PTA at 16, para. 50. Based on the Commission's Ruling that the Secretary of Defense's actions were *void ab initio*, there is no breach of the PTA, and thus, the Commission need not render any conclusions regarding whether there was a material breach in order to grant the Defense motions. If a reviewing authority determines the Secretary of Defense's actions were lawful and timely, and the question becomes whether he could withdraw from the PTA, the Commission concludes the evidence does not establish a legally permissible purpose to withdraw from the PTA, no matter which party owns the burden.

[123] Finally, the Commission notes that paragraph 40 of Mr. Mohammad's PTA and paragraph 39 of Mr. Hawsawi's PTA appear to have the effect of precluding capital litigation if the Convening Authority withdraws from the PTA for a purpose other than those specifically agreed to within their PTAs. None of those agreed-to bases for withdrawal apply. If a reviewing authority determines the Secretary of Defense's actions were lawful and timely, the Parties would need to engage in further litigation surrounding whether the Government is precluded from seeking the death penalty in the cases of Mr. Mohammad or Mr. Hawsawi. Mr. bin 'Attash does not have an identical provision in his PTA.