

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

<b>UNITED STATES OF AMERICA</b>  <b>v.</b>  <b>KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED ADAM AL HAWSAWI</b>	<b>AE 955G (GOV) / AE 957E (GOV)</b>  <b>Government Consolidated Response</b> To AE 955C (KSM) and AE 957B (MAH), Defense Motions to Schedule Entry of Pleas  6 September 2024
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**1. Timeliness**

The Prosecution timely files this Consolidated Response pursuant to AE 955-6 (RUL)(GOV) / AE 957-6 (RUL)(GOV).

**2. Relief Sought**

The Prosecution respectfully requests that the Commission deny the pending motions to schedule entry of pleas pursuant to the pretrial agreements signed by the Convening Authority on 31 July 2024, because the Secretary of Defense has lawfully withdrawn from those pretrial agreements.

**3. Burden of Proof**

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. *See* Rule for Military Commissions (“R.M.C.”) 905(c)(1)–(2).

**4. Facts**

On 25 March 2010, Vice Admiral (Retired) Bruce MacDonald, U.S. Navy, was designated by a prior Secretary of Defense as the Convening Authority for Military Commissions. *See* Attach. B.

Vice Admiral (Retired) MacDonald, acting as the designated convening authority, referred this case to a capital commission on 4 April 2012. *See* Referred Charge Sheet; Convening Order No. 12-02.

On 21 August 2023, after a series of other designated subordinate convening authorities had served in the position, the Secretary of Defense designated Brigadier General (Retired) Susan Escallier, U.S. Army, as the Convening Authority for Military Commissions, effective 8 October 2023. *See* Attach. C.

On 31 July 2024, Ms. Escallier entered into a signed pretrial agreement with Mr. Mohammad.

On 31 July 2024, Ms. Escallier entered into a signed pretrial agreement with Mr. Bin ‘Attash.

On 31 July 2024, Ms. Escallier entered into a signed pretrial agreement with Mr. al Hawsawi.

On 2 August 2024, the Secretary of Defense withdrew from Ms. Escallier, and reserved to himself, the authority over pretrial agreements in this case, then withdrew from the three above-referenced pretrial agreements. *See* Attach. D.

## **5. Legal Argument**

Consistent with the Secretary of Defense’s (the “Secretary”) memorandum filed on the record at AE 955B (GOV) / AE 956A (GOV) / AE 957A (GOV), Attach. B, and based on the legal authorities set forth below, the Prosecution opposes Mr. Mohammad’s and Mr. al Hawsawi’s motions to schedule entry of pleas.

### **I. The Motions Should Be Denied Because There Are No Operative Pretrial Agreements in this Case**

The Secretary lawfully withheld and reserved to himself, and then exercised, his authority over pretrial agreements to withdraw from the agreements at issue here on 2 August 2024. Those agreements form the sole basis of the pending motions. *See* AE 955C (KSM) at 3 (seeking to “enter his plea in accordance with his [pretrial agreement]”); AE 957B (MAH) at 1

(seeking “a plea hearing in accordance with [his] pre-trial agreement”). Because those agreements are no longer in effect, the motions should be denied.

**A. The Secretary Lawfully Withheld Responsibility Over Pretrial Agreements and Reserved It to Himself**

The Secretary had ample authority under the relevant statutes, rules, and regulations to withhold responsibility over pretrial agreements from Ms. Escallier and reserve that responsibility to himself.

As a general matter, the Secretary exercises authority, direction, and control over the Department of Defense. *See* 10 U.S.C. § 113(a), (d); *Schwalier v. Hagel*, 776 F.3d 832, 837 (Fed. Cir. 2015). His responsibilities extend to the military commissions process under the Military Commissions Act of 2009 (“M.C.A.”). The Secretary has principal statutory authority over this process from beginning to end. He has the power “to prescribe procedures and rules of evidence governing military commissions.” *Al-Bahlul v. United States*, 967 F.3d 858, 872 (D.C. Cir. 2020) (citing 10 U.S.C. § 949a(a)). He has the sole power under the M.C.A. to either convene commissions himself or to “designate[.]” “any officer or official” to serve as a subordinate convening authority. 10 U.S.C. § 948h. And he has the power to remove such subordinate convening authorities “at will.” *Al-Bahlul*, 967 F.3d at 872. Together, 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, including responsibility over pretrial agreements with accused. The “statutory grant of a greater power”—here, power over the Department and the convening of military commissions—“typically includes the grant of a lesser power.” *O’Connell v. Shalala*, 79 F.3d 170, 177 (1st Cir. 1996); *see also, e.g., Nuvio Corp. v. FCC*, 473 F.3d 302, 311 (D.C. Cir. 2006) (Kavanaugh, J., concurring) (noting that “greater authority” under statute “necessarily includes” a “lesser power”).

The relevant R.M.C. and provisions of the Regulation for Trial by Military Commission (“R.T.M.C.”), moreover, give the Secretary explicit authority to withhold from a subordinate

convening authority and reserve to himself all responsibility over pretrial agreements and disposal of charges. R.T.M.C. ¶ 12-1 permits him, as the “superior convening authority,” to “with[hold]” responsibility for pretrial agreements. R.M.C. 705(a) similarly provides the Secretary overall authority over “pretrial agreements.” R.M.C. 401(a), too, expressly permits the Secretary to take back the authority to “dispose of charges in individual cases, types of cases, or generally.” Entry of a pretrial agreement is a potential way to dispose of charges and specifications. *See* R.M.C. 705(b)(2) & Discussion.

The Secretary’s action on 2 August 2024 to withhold responsibility over pretrial agreements from Ms. Escallier and reserve it to himself was thus authorized by the governing statutes, by R.M.C. 401(a) and 705(a), and by R.T.M.C. ¶ 12-1.

### **B. The Secretary Lawfully Withdrew from the Pretrial Agreements at Issue Here**

Having properly withheld responsibility over pretrial agreements in this Commission and reserved it to himself, the Secretary’s subsequent action to withdraw from the three pretrial agreements that had been entered on 31 July 2024 in this case, including those with Mr. Mohammad and Mr. al Hawsawi, was likewise a permissible exercise of his authority under R.M.C. 705(d)(4)(B).

R.M.C. 705 sets forth the conditions under which a convening authority may withdraw from a pretrial agreement. Subsection (d)(4)(b) permits a convening authority—in this case, with respect to this issue, the Secretary—to withdraw from a pretrial agreement “at any time before the accused begins performance of promises contained in the [pretrial] agreement.” And here, neither Mr. Mohammad nor Mr. al Hawsawi (nor Mr. Bin ‘Attash)<sup>1</sup> began performance of the promises set forth in their pretrial agreements in the brief two-day period between 31 July 2024, when the agreements were entered, and 2 August 2024, when the Secretary withdrew from them. The three Accused’s pleas had not been entered, and they had not withdrawn pending

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<sup>1</sup> While Mr. Bin ‘Attash has not filed a motion to schedule pleas, these arguments apply equally to the Secretary’s withdrawal from Mr. Bin ‘Attash’s pretrial agreement.

motions, answered questions presented by victim family members, or taken any other action to perform any promises in the agreements. In other words, they had not relied on the agreements to their detriment in the litigation. Such “detrimental reliance” is the key factor for determining whether withdrawal by a convening authority is permissible. *United States v. Villareal*, 52 M.J. 27, 31 (C.A.A.F. 1999); *cf.* Manual for Courts-Martial, A21-40–41 (2008 Edition) (observing, in court-martial context, that performance requirement is “consistent with” detrimental reliance approach). As a result, the Secretary’s withdrawal from the pretrial agreements two days after they were entered fell squarely within the bounds of R.M.C. 705(d)(4)(B).

Mr. Mohammad and Mr. al Hawsawi each appear to argue that two “actions” they took in that two-day period might constitute “performance” within the meaning of R.M.C. 705(d)(4)(B), and accordingly assert that withdrawal under that provision is unavailable to the Secretary.<sup>2</sup> Neither purported action qualifies as “performance.”

***Stipulations of Fact.*** Mr. Mohammad and Mr. al Hawsawi begin by pointing to their stipulations of fact, suggesting that by signing those stipulations, they had performed a promise in their pretrial agreements. This argument fails for multiple reasons.

First, R.M.C. 705(d)(4)(B) refers to an accused’s forward-looking “performance of promises contained in the agreement.” But the stipulations of fact here were signed on 29 and 30 July 2024, *before* the pretrial agreements were entered on 31 July 2024. *See* AE 955 (GOV), AE 956 (GOV), & AE 957 (GOV), Government Notice of Filing Under Seal, filed 1 August 2024. The stipulations thus cannot have been signed in performance of any promise in the later-

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<sup>2</sup> Mr. al Hawsawi, in cursory fashion, also suggests that he performed under his pretrial agreement by “becoming limited in his ability to withdraw from the agreement” under R.M.C. 811(d). *See* AE 957B (MAH) at 3. This argument has no merit. R.M.C. 811(d) applies only once this Commission has “accepted” a stipulation of fact, which did not occur before the agreements here were withdrawn. And in any event, no provision in Mr. al Hawsawi’s withdrawn pretrial agreement contains a “promise” to be bound by R.M.C. 811(d); nor could it, as Mr. al Hawsawi was *already* obligated—as a party before this Commission—to comply with the R.M.C. “A promise to perform an existing legal obligation is not valid consideration to provide a basis for a contract.” *Goncalves v. Regent Int’l Hotels, Ltd.*, 58 N.Y.2d 206, 220 (1983); *see Lutcher S.A. Celulose e Papel v. Inter-Am. Dev. Bank*, 382 F.2d 454, 460 (D.C. Cir. 1967) (“[P]erformance of a preexisting obligation is not consideration.”).

dated pretrial agreements. Indeed, it is black-letter contract law that actions taking place before a contract was signed cannot be used to satisfy a promise in that contract. *See Murray v. Lichtman*, 339 F.2d 749, 752 n.5 (D.C. Cir. 1964) (“It is, of course, well settled that past consideration is no consideration.”); *see also Braude & Margulies, P.C. v. Fireman’s Fund Ins. Co.*, 468 F. Supp. 2d 190, 196–97 (D.D.C. 2007) (“[P]ast consideration is not adequate to support a present promise.”).

Second, the pretrial agreements expressly provide that any stipulations of fact may not be used against the Accused if the government later withdraws from the agreements. *See, e.g.*, AE 955 (GOV), Attach. B ¶ 47; AE 956 (GOV), Attach. B ¶ 45; AE 957 (GOV), Attach. B ¶ 44. Now that the government has withdrawn from the agreements, the stipulations—to the extent they had any effect prior to entry of plea, which the government contends they did not—are nullities. Mr. Mohammad and Mr. al Hawsawi can therefore make no argument that they relied on the pretrial agreements to their detriment in signing the stipulations, for the straightforward reason that those stipulations cannot now or in the future be used against them. At least one court has held in similar circumstances that there was no detrimental reliance on a pretrial agreement where any “incriminating admissions” made by the accused in connection with the agreement would be “exclude[d]” at trial. *Shepardson v. Roberts*, 14 M.J. 354, 358 (C.M.A. 1983). The result should be the same here.

Third, and relatedly, the two-day period between entry of the agreements and the Secretary’s withdrawal from them was simply too short for Mr. Mohammad or Mr. al Hawsawi to have detrimentally relied on the agreements. As another court held in a nearly identical context, a five-day “interval between entry into the pretrial agreement and notice of the withdrawal therefrom was so brief” that the accused’s “trial preparation” cannot have been “substantially or irremediably affected” sufficient to constitute detrimental reliance. *Id.*; *see also Villareal*, 52 M.J. at 31 (holding that convening authority may withdraw plea agreement three days after entry where accused had taken no action in that period). Mr. Mohammad and Mr. al Hawsawi do not provide any basis to believe that their preparation for trial or other

proceedings in this case was affected at all by the entry and withdrawal from the agreements, much less “substantially or irretrievably” affected. *Shepardson*, 14 M.J. at 358.

Against all of this, Mr. Mohammad and Mr. al Hawsawi rely for support on only a single case: *United States v. Dean*, 67 M.J. 224 (C.A.A.F. 2009). See AE 955C (KSM) at 4 n.19; AE 957B (MAH) at 5–6. *Dean* cannot bear that heavy load. As an initial matter, *Dean* arose in the courts-martial context and is not binding on the Commission. See 10 U.S.C. § 948b(c) (“The judicial construction and application of [the Uniform Code of Military Justice] . . . is . . . not of its own force binding on military commissions.”). More importantly, *Dean* bears almost no resemblance to this case. There, nearly a month had passed between entry into a pretrial agreement and the convening authority’s subsequent withdrawal. See *Dean*, 67 M.J. at 227–28. During that time, the accused took several actions in performance of his promises, including “submitting a request to be tried by military judge alone” and “waiving the personal appearance of certain witnesses.” *Id.* at 227. Although the *Dean* court does observe that the accused had signed a stipulation of fact, nothing in the decision suggests that the stipulation was the dispositive factor. Indeed, other courts faced with more analogous cases to the one here, involving a stipulation of fact alone, have concluded that the “sign[ing]” of a “stipulation of fact . . . [is] not equivalent to commencement of performance of the agreement.” *United States v. Pruner*, 37 M.J. 573, 577 (A.C.M.R. 1993).

Moreover, Mr. Mohammad’s and Mr. al Hawsawi’s maximalist position—that the mere act of signing a stipulation of fact before entry of a pretrial agreement constitutes performance—would, if accepted, render the first clause of R.M.C. 705(b)(4)(D) superfluous, contrary to fundamental principles of interpretation. See *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (noting that a “cardinal principle” of interpretation is that a text should not be read in a way that leaves a “clause, sentence, or word . . . superfluous, void, or insignificant”); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 174–79 (2012) (explaining that “every word and every provision” in a legal text “is to be given effect”). It is overwhelmingly common in military-justice practice and especially in military-commission

practice for a stipulation of fact to be signed before a pretrial agreement is entered—and that has been the case for decades. *See, e.g., Pruner*, 37 M.J. at 577. If signing a stipulation were enough to constitute performance, then every pretrial agreement entered under this practice would be impossible to withdraw from the minute it was entered, and the first clause of R.M.C. 705(b)(4)(D) would have no effect. That bizarre result cannot have been the R.M.C.’s drafters’ intent.

***Failure to Participate in Hearing.*** Mr. Mohammad and Mr. al Hawsawi each also summarily suggest, without support, that their failure to “actively participate” in a recent hearing, AE 955C (KSM) at 4; *see* AE 957B (MAH) at 6, somehow constitutes performance of their promises to “move to withdraw all pending motions.” Not so. Performance of those promises would require Mr. Mohammad and Mr. al Hawsawi to, as the pretrial agreements state, actually “move to withdraw” their pending motions. Neither of them did so at any point between 31 July and 2 August 2024—or, for that matter, have they done so since. Mr. Mohammad even acknowledges that he has not withdrawn any motions yet but apparently “intends” to do so at an unspecified time. AE 955C (KSM) at 4. Furthermore, the witnesses whose testimony Mr. Mohammad and Mr. al Hawsawi elected not to question could easily be recalled for further examination. Because no motions have been filed to withdraw any pending motions, Mr. Mohammad and Mr. al Hawsawi have not performed their promises to “move to withdraw all pending motions.”

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For these reasons, the Secretary properly and lawfully exercised his authority to withdraw from the pretrial agreements. The Commission should therefore deny the Defense’s motions to schedule entry of pleas, which are based entirely on the withdrawn pretrial agreements.

## **6. Oral Argument**

The Prosecution requests oral argument.



**7. Witnesses and Evidence**

The Prosecution will not rely on any witnesses or additional evidence in support of this pleading.

**8. Additional Information**

The Prosecution has no additional information.

**9. Attachments**

- A. Certificate of Service, dated 6 September 2024.
- B. Designation of Vice Admiral (Ret) Bruce MacDonald as the Convening Authority for Military Commissions, dated 25 March 2010.
- C. Designation of Susan Escallier as Convening Authority for Military Commissions (Corrected Copy), dated 21 August 2023.
- D. Memorandum from Secretary of Defense Withholding Pretrial Agreement Authority of the Convening Authority, dated 2 August 2024.

Respectfully submitted,

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Clay Trivett  
Managing Trial Counsel  
Office of the Chief Prosecutor  
Office of Military Commissions

# ATTACHMENT A



# ATTACHMENT B



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

MAR 25 2010

MEMORANDUM FOR DEPUTY SECRETARY OF DEFENSE  
SECRETARIES OF THE MILITARY DEPARTMENTS  
CHAIRMAN OF THE JOINT CHIEFS OF STAFF  
UNDER SECRETARIES OF DEFENSE  
ASSISTANT SECRETARIES OF DEFENSE  
GENERAL COUNSEL OF THE DEPARTMENT OF  
DEFENSE

SUBJECT: Designation of Vice Admiral (Ret) Bruce MacDonald as the Convening  
Authority for Military Commissions

Pursuant to Chapter 47A of Title 10, United States Code, Section 948h, Vice  
Admiral (Ret) Bruce MacDonald, Director, Office of the Convening Authority, is hereby  
designated as the Convening Authority for Military Commissions.

FOR THE JOINT CHIEFS OF STAFF

cc:  
Legal Advisor to the Office of Military Commissions  
Chief, Prosecutor, Office of Military Commissions  
Chief Defense Counsel, Office of Military Commissions

OSD 03216-10



# ATTACHMENT C



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

CORRECTED COPY\*

AUG 21 2023

MEMORANDUM FOR DEPUTY SECRETARY OF DEFENSE  
SECRETARIES OF THE MILITARY DEPARTMENTS  
CHAIRMAN OF THE JOINT CHIEFS OF STAFF  
UNDER SECRETARIES OF DEFENSE  
CHIEFS OF MILITARY SERVICES  
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE  
ASSISTANT SECRETARIES OF DEFENSE

SUBJECT: Designation of Susan Escallier as Convening Authority for Military Commissions

Pursuant to chapter 47A of title 10, U.S.C., section 948h, Susan Escallier is designated as Convening Authority for Military Commissions. This designation is effective October 8, 2023, and will continue until a new Convening Authority is designated. As Convening Authority, and in accordance with applicable Rules for Military Commissions, the Regulation for Trial by Military Commission, and judicial orders, Ms. Escallier shall receive legal advice relating to these military commissions solely from an appropriately designated Legal Advisor to the Convening Authority and members of the appropriately designated Legal Advisor's staff as necessary. Ms. Escallier shall exercise her independent legal discretion with regard to judicial acts and other duties of the Convening Authority.

The designation of Colonel Jeffrey D. Wood as Convening Authority dated April 17, 2020, is rescinded effective October 8, 2023, due to Colonel Wood's voluntary departure from this position.

cc:  
Legal Advisors to the Convening Authority  
for Military Commissions  
Chief Prosecutor, Office of the Chief Prosecutor  
Chief Defense Counsel, Military Commissions  
Defense Organization  
Chief Judge, Military Commissions Trial Judiciary

\*Corrected Copy changes "Lieutenant Colonel" to "Colonel" twice in the second paragraph.



# ATTACHMENT D





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.

A handwritten signature in black ink, appearing to read "Stephen J. Best", is located in the lower right quadrant of the page.