

**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 982C RULING AND ORDER Defense Request to Suspend Military Commission’s Hearings and Contested Proceedings Pending Final Adjudication of Litigation Regarding Pretrial Agreements 19 September 2025
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1. Procedural History.

a. On 6 August 2025, Messrs. Mohammad, bin ‘Attash, and Hawsawi moved¹ the Commission to suspend “all hearings² until the litigation regarding the pretrial agreements (PTAs)³ has been finally adjudicated, including the expiration of time in which to petition for a writ of *certiorari* before the Supreme Court [of the United States] or the final adjudication of a petition for *certiorari* from that Court.”

b. On 31 July 2025, the Prosecution responded.⁴

c. On 25 August 2025, Messrs. Mohammad, bin ‘Attash, and Hawsawi replied.⁵

¹ See AE 982 (KSM WBA MAH), Defense Request to Suspend Military Commission’s Hearings and Contested Proceedings Pending Final Adjudication of Litigation Regarding Pretrial Agreements, filed 6 August 2025.

² See AE 953 Scheduling Order series.

³ See *In Re: United States of America*, 143 F.4th 411 (D.C. Cir. 2025), and *In Re: United States of America*, No. 25-1009 (D.C. Cir. 30 July 2025) (order granting motion for extension of time to file a petition for rehearing).

⁴ AE 982A (GOV), Government Response to AE 982 (KSM WBA MAH), Defense Request to Suspend Military Commission’s Hearings and Contested Proceedings Pending Final Adjudication of Litigation Regarding Pretrial Agreements, filed 18 August 2025.

⁵ AE 980B (KSM WBA MAH) *Corrected Copy, Defense Reply to Government Response to AE 982, Defense Request to Suspend Military Commissions Hearings and Contested Proceedings Pending Final Adjudication of Litigation Regarding Pretrial Agreements, filed 25 August 2025.

d. Mr. Ali (a.k.a. al Baluchi) is joined to this motion by operation of the Rules of Practice before Military Commissions.⁶

2. Facts.

a. On 6 November 2024, the Commission issued a Ruling in AE 955J / AE 956J / AE 957I⁷ holding that the PTAs signed by the Convening Authority and Messrs. Mohammad, bin ‘Attash, and Hawsawi were “valid and enforceable”⁸ and granting the Defense request to “schedule a hearing for the entry of pleas.”⁹

b. On 26 November 2024, the Prosecution appealed the Commission’s Ruling to the United States Court of Military Commission Review (U.S.C.M.C.R) by filing a request for extraordinary relief¹⁰ under 28 U.S.C. § 1651(a) (2024) (the All Writs Act).

c. On 13 December 2025, the Commission issued a docket order setting 6-31 January 2025 as the dates for Messrs. Mohammad, bin ‘Attash, and Hawsawi to enter pleas under the PTAs.¹¹

⁶ Because this is a joint accused commission, under Rule of Court (RC) 3.5.2.1, as published in the Rules of Practice before Military Commission (31 March 2025), co-accused are automatically joined to motions. Under RC 3.5.5.2, any co-accused who wishes to decline automatic joinder is afforded seven calendar days to file a notice and separate motion stating their position.

⁷ AE 955J / AE 956J / AE 957I Ruling, Defense Motions to Schedule Entry of Pleas, dated 6 November 2024.

⁸ AE 955J / AE 956J / AE 957I Ruling, Defense Motions to Schedule Entry of Pleas, dated 6 November 2024, at 17, ¶ 4.a.

⁹ AE 955J / AE 956J / AE 957I Ruling, Defense Motions to Schedule Entry of Pleas, dated 6 November 2024, at 29, ¶ 5.b.

¹⁰ AE 955N (GOV) / AE 956N (GOV) / AE 957M (GOV), Government Notice of Filing of Petition for a Writ of Mandamus and Prohibition with the U.S. Court of Military Commission Review, filed 26 November 2024.

¹¹ AE 970A, Docket Order, 6-31 January 2025 Hearing Session, dated 13 December 2024, as amended by AE 970A (Amend), Amended Docket Order, 6-31 January 2025 Hearing Session, dated 3 January 2025, AE 970A (2nd Amend), Second Amended Docket Order, 6-31 January 2025 Hearing Session, dated 15 January 2025, and AE 970A (3rd Amend), Third Amended Docket Order, 6-31 January 2025 Hearing Session, dated 23 January 2025.

d. On 30 December 2024, the U.S.C.M.C.R. denied the Prosecution’s request for extraordinary relief.¹²

e. On 2 January 2025, the Prosecution moved the Commission for a continuance of the hearing for the entry of pleas to “provide the Government the opportunity to determine whether to pursue relief” at the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Cir.) and “to submit appropriate filings, should the Government decide to pursue such relief.”¹³

f. On 3 January 2025, the Commission denied the Prosecution’s motion for a continuance.¹⁴

g. On 7 January 2025, the Prosecution appealed the U.S.C.M.C.R.’s decision to the D.C. Cir. by filing a request for extraordinary relief¹⁵ under the All Writs Act, and by filing an emergency motion for a stay¹⁶ of the hearing for the entry of pleas.

h. On 9 January 2025, the D.C. Cir. ordered an administrative stay precluding the Commission from holding proceedings concerning the PTAs “to allow the court time to receive full briefing on the [Prosecution’s] mandamus petition, to hear oral argument on an expedited basis, and to render a decision on the [Prosecution’s] petition and stay motion.”¹⁷

¹² *In re Mohammad*, 762 F. Supp. 3d 1183, 1199-1200 (USCMCR 2024).

¹³ AE 955Q (GOV) / AE 956Q (GOV) / AE 957P (GOV), Government Motion to Continue the Hearing for the Entry of Pleas, filed 2 January 2025, at 1.

¹⁴ AE 955T / AE 956S / AE 957Q Ruling, Government Motion to Continue the Hearing for the Entry of Pleas, dated 3 January 2025.

¹⁵ AE 955V (GOV) / AE 956T (GOV) / AE 957R (GOV), Government Notice Regarding *In Re United States*, No. 25-1009 (D.C. Cir.), filed 7 January 2025.

¹⁶ AE 955V(GOV) / AE 956T (GOV) / AE 957R (GOV), Government Notice Regarding *In Re United States*, No. 25-1009 (D.C. Cir.), filed 7 January 2025.

¹⁷ AE 955Z (GOV) / AE 956W (GOV) / AE 957V (GOV), Government Notice Regarding *In Re United States*, No. 25-1009 (D.C. Cir.), filed 9 January 2025, Attach. B.

i. On 7 February 2025, the D.C. Cir. dissolved the administrative stay and ordered a “full” stay¹⁸ precluding the Commission from holding proceedings concerning the PTAs “pending the court’s disposition of the [Prosecution’s] petition for a writ of mandamus.”¹⁹

j. On 11 July 2025, the D.C. Cir. issued an opinion²⁰ granting the Prosecution’s petition for extraordinary relief.

k. The D.C. Circuit’s 11 July 2025 opinion was accompanied by an order²¹ vacating the Commission’s Ruling in AE 955J / AE 956J / AE 957I and prohibiting the Commission from conducting hearings in which Messrs. Mohammad, bin ‘Attash, or Hawsawi would enter pleas or take any other action pursuant to the PTAs.

l. On 22 July 2025, Messrs. Mohammad, bin ‘Attash, and Hawsawi filed an unopposed motion²² with the D.C. Cir. asking that Court to grant a 30-day extension of time to petition that Court for a rehearing or rehearing *en banc*.

m. On 30 July 2025, the D.C. Cir. granted the Defendants a 30-day extension of time, until 24 September 2025, to file a petition for rehearing or rehearing *en banc*.²³

¹⁸ As authority for the stay, the D.C. Cir. cited *Nken v. Holder*, 556 U.S. 418, 434 (2009), which describes a federal appellate court’s “customary stay power.”

¹⁹ AE 955KK (GOV) / AE 956GG (GOV) / AE 957EE (GOV), Government Notice Regarding *In Re United States*, No. 25-1009 (D.C. Cir.), filed 10 February 2025, Attach. B.

²⁰ The D.C. Cir. opinion is available at AE 955NN (GOV) / AE 956JJ (GOV) / AE 957HH (GOV), Government Notice Regarding *In Re United States*, No. 25-1009 (D.C. Cir.), filed 11 July 2025, Attach. C; also available at *In re United States*, 143 F.4th 411 (D.C. Cir. 2025).

²¹ The D.C. Cir. order is available at AE 955NN (GOV) / AE 956JJ (GOV) / AE 957HH (GOV), Government Notice Regarding *In Re United States*, No. 25-1009 (D.C. Cir.), filed 11 July 2025, Attach. B.

²² Respondents’ Unopposed Motion for a 30-Day Extension to Petition for Rehearing and/or Rehearing *En Banc*, *In re: United States of America*, No. 25-1009, D.C. Cir. 22 July 2025.

²³ Order, *In re: United States of America*, No. 25-1009, D.C. Cir. 30 July 2025.

n. On 1 August 2025, the D.C. Circuit's 11 July 2025 order became effective, and the full stay was dissolved.²⁴

o. On 18 August 2025, in its written Response in this motion series, the Prosecution proffered, without evidentiary support, as follows:

The Prosecution has been specifically authorized by the Secretary of Defense; Brigadier General (Ret.) Susan Escallier; the Department of Justice, including the National Security Division, the Civil Division, and the Office of Solicitor General; and the Chief Prosecutor to represent that the United States will be bound by its representation that any Defense motions or other contested litigation occurring between 1 August 2025—the date the stay was dissolved and the D.C. Circuit ruling became effective—and any potential appellate court decision to resurrect the PTAs would not constitute grounds for the United States to withdraw from those agreements.

[. . .]

This representation from every entity that could have an official interest in the future litigation of this case reflects the United States' commitment to proceeding in good faith[.] [. . .] Under this representation the Accused can justifiably rely upon this commitment[.]

3. Law.

a. As the moving party, the Defense bears the burden of persuasion on this motion²⁵ and the burden of proof by a preponderance of the evidence on any factual issue necessary to decide this motion.²⁶

²⁴ The order and dissolution of the full stay had a delayed effective date pursuant to D.C. Cir. Rule 41(a)(3), *see* AE 955NN (GOV) / AE 956JJ (GOV) / AE 957HH (GOV), Government Notice Regarding *In Re United States*, No. 25-1009 (D.C. Cir.), filed 11 July 2025, Attach. B.

²⁵ R.M.C. 905(c)(2)(A).

²⁶ R.M.C. 905(c)(1).

b. The automatic stay provision found in Rule for Military Commission (R.M.C.) 908(b)(4) only applies to Prosecution appeals taken under 10 U.S.C. § 950d(a)(2).

c. There is no automatic stay provision for appeals taken under the All Writs Act.

d. Instead, the Commission's authority to grant a delay in proceedings pending the outcome of a Party's appeal under the All Writs Act is found in 10 U.S.C. § 949e, which provides that "a military commission [. . .] may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just."²⁷

e. The statute that is analogous to 10 U.S.C. § 949e, and which is used in the district courts, is 18 U.S.C. § 3161(h)(7)(A), which provides, in relevant part:

[A] continuance [may be] granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government[.] [. . .] [The] period of delay resulting from a continuance granted by the court [. . .] shall be excludable [. . .] [if] the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

f. Additionally, when deciding whether to grant a stay or continuance, district court judges consider *inter alia*, the following statutory factors:²⁸

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the [speedy trial] time limits established [by law].

²⁷ See also the same language, verbatim, in Rule for Military Commission (R.M.C.) 707(b)(4)(E)(i).

²⁸ 18 U.S.C. § 3161(h)(7)(B)(i)-(iv).

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

g. Further, district court judges are precluded from granting a continuance “because of general congestion of the court’s calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.”²⁹

h. It is a general rule that unsupported oral or written assertions by counsel do not constitute competent evidence.³⁰

²⁹ 18 U.S.C. § 3161(h)(7)(C).

³⁰ See *I.N.S. v. Phinpathya*, 464 U.S. 183, 188 n. 6 (1984) (unsupported assertions in a party’s brief do not establish a basis in the record upon which a court may draw conclusions); *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 20 (1st Cir. 1999) (statements by counsel are not competent evidence); *Fernandez v. Chardon*, 681 F.2d 42, 56 n.10 (1st Cir. 1982) (statements by counsel are no substitute for admissible evidence); *Jeon v. Holder*, 354 F. App’x 50, 53 (5th Cir. 2009) (Plaintiff’s arguments were advanced only through the statements of counsel, which are not evidence); and *United States v. Hayes*, 71 M.J. 112, 114 (C.A.A.F. 2012) (argument by trial counsel or statements by the military judge are not evidence).

i. There is a strict, but not an absolute, rule against applying estoppel against the United States.³¹

4. Findings.

a. There is no stay currently in effect with respect to Messrs. Mohammad, bin ‘Attash, or Hawsawi.

b. The question of whether there is a stay in effect with respect to Mr. Ali is a matter addressed in a separate motion series—AE 980.

c. The Prosecution’s assertion in its response to this Defense motion—that any Defense motions or other contested litigation occurring between 1 August 2025 and any potential appellate court decision to resurrect the PTAs will not constitute grounds for the United States to withdraw from those agreements—is presently unsupported by any evidence of record. Accordingly, the Commission declines to rely upon the Prosecution’s assertion in its response brief that the United States will not consider Defense participation in motions or contested litigation to be grounds to withdraw from the contested PTAs. Reliance on that assertion would be imprudent because there is no documentary or testamentary evidence of record to support that assertion. Additionally, given the general rule against applying estoppel against the Government,

³¹ See *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 426 (1990) (finding that “in past cases presenting claims of estoppel against the Government” courts have found a “strict rule against estoppel applied as early as 1813[.]” and “claims of estoppel could be dismissed on that ground without more.”) (internal citations omitted); *but see Podea v. Acheson*, 179 F.2d 306, 309 (2d Cir. 1950) (The Government was equitably estopped from asserting that Plaintiff was not a citizen when his actions, which the Government asserted constituted voluntary expatriation, were “primarily caused by the erroneous advice of the State Department and were farthest from his real purpose.”); and *see dicta in Montana v. Kennedy*, 366 U.S. 308, 315 (1961) [wherein the Supreme Court cites (neither favorably nor unfavorably) the 2d Circuit’s decision in *Acheson* (cited and described above) and declines to “inquire whether, as some lower courts have held, there may be circumstances in which the United States is estopped [. . .] because of the conduct of its officials.”]

it is unlikely that an appellate court would uphold a Commission decision to estop the Prosecution from taking a contrary position later.

d. There is no evidence of record to show that a denial of this motion would make it impossible to resume proceedings in the future as concerns Messrs. Mohammad, bin ‘Attash, or Hawsawi.

e. There is no evidence of record to show that a denial of this motion would result in a miscarriage of justice for any Party.

f. There is no evidence of record to show that a denial of this motion would deny counsel from any Party the reasonable time necessary for effective preparation for pretrial proceedings or for the trial itself.

5. **Analysis.** Under the facts, findings, and law described above, the Defense has failed to meet its burden to prove that a stay is warranted.

6. **Ruling.** AE 982 (KSM WBA MAH) is **DENIED**.

7. **Order.**

a. The Commission will proceed in due course with pretrial hearing sessions concerning Messrs. Mohammad, bin ‘Attash, and Hawsawi.³²

³² These proceedings will most likely deal with preliminary and/or administrative matters such as the *voir dire* of the Military Judge, excusal of counsel, *ex parte* hearings, issues relating to conditions of detention, and matters related to discovery (such as Prosecution requests for the approval of summaries and substitutions under Military Commission Rule of Evidence 505) and pending substantive issues such as the voluntariness of the Letterhead Memorandum Statements attributed by the Prosecution to Messrs. Mohammad, bin ‘Attash, and Hawsawi.

b. Proceedings concerning Mr. Ali shall be handled in accordance with the Commission's Ruling and Order in AE 980C.³³

So **ORDERED** this 19th day of September, 2025.

//s//

MICHAEL A. SCHRAMA, Lieutenant Colonel, USAF
Military Judge
Military Commissions Trial Judiciary

³³ AE 980C Ruling and Order, Mr. al Baluchi's Motion to Cancel Military Commission Sessions During Government Appeal of AE 942SSS Ruling, dated 19 September 2025.