UNITED STATES COURT OF MILITARY COMMISSION REVIEW

BEFORE THE COURT
RICHARDSON, PRESIDING JUDGE
SCHENCK AND KIRKBY, APPELLATE JUDGES

IN RE KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK bin 'ATTASH, AND MUSTAFA AHMED ADAM AL HAWSAWI

CMCR 24-001

December 30, 2024

Colonel James L. Pohl, U.S. Army, military commission judge, arraignment; and *Colonel Matthew N. McCall*, U.S. Air Force, military commission judge, presiding.

On briefs for petitioner were *Michael J. O'Sullivan*; *Haridimos V. Thravalos*; *Bryce G. Poole*; *Clay Trivett*; and *Rear Admiral Aaron C. Rugh*, JAGC, U.S. Navy.

On brief for respondent Mohammad were *Gary D. Sowards*; *Nicholas W. McCue*; *Gabriela M. McQuade*; *Melanie T. Partow*; and *Major Michael P. Leahy*, JA, U.S. Air Force.

On brief for respondent Hawsawi were *Walter B. Ruiz*; *Suzanne M. Lachelier*; *Sean M. Gleason*; *Major Kerry A. Mawn*, JA, U.S. Air Force; and *Major Patrick C. Tipton*, JA, U.S. Air Force.

On brief for intervenor Ali Abdul Aziz Ali also known as Ammar al Baluchi were *James G. Connell*, *III*; *Alka Pradhan*; *Rita J. Radostitz*; *Defne Ozgediz*; *Major Jessica Casciola*, JA, U.S. Army; and Lieutenant *Jennifer Joseph*, JAGC, U.S. Navy.

On brief for *amicus curiae* was *Colonel (Ret.) James A. Young*, U.S. Air Force.

PUBLISHED OPINION OF THE COURT

Opinion for the court filed by SCHENCK, J., in which RICHARDSON and KIRKBY, JJ., concur.

Opinion for the court

SCHENCK, JUDGE:

Respondents Khalid Shaikh Mohammad (KSM or Mohammad), Walid Muhammad Salih Mubarak Bin 'Attash (WBA or Bin 'Attash), and Mustafa Ahmed Adam al Hawsawi (MAH or Hawsawi) are three of four co-accused being tried by military commission at Guantanamo Bay, Cuba, in *Khalid Shaikh Mohammad et al.* The other co-accused, Ali Abdul Aziz Ali, also known as Ammar al Baluchi, moved to join as an intervenor in the writ petition that was filed in this court by petitioner, the United States Government. Ali Mot. to Intervene (Dec. 6, 2024). In September 2023, the military commission severed from *Mohammad et al.*, the fifth defendant, Ramzi Binalshibh, because he lacked capacity to stand trial. Pet'r's App. 628 (Nov. 26, 2024).

Petitioner seeks a writ of mandamus and prohibition and asks our court to vacate the military judge's rulings in AE 955J (KSM), AE 956J (WBA), and AE 957I (MAH). Pet'r's Br. 1–2 (Nov. 26, 2024). The military judge ruled that the Secretary of Defense (Secretary) did not have authority to "withdraw" Brigadier General (BG) (Retired) [hereinafter (Ret.)] Susan Escallier's authority to enter into pretrial agreements (PTA)[1] and retroactively replace the convening authority with himself as the convening authority authorized to make PTAs in the case of *Mohammad et al.*, and to vacate existing PTAs[2] between these accused and the convening authority.

We deny the writ of mandamus and prohibition for two reasons. First, we conclude that although the Secretary had authority to replace BG (Ret.) Escallier with himself as the convening authority for *future* PTAs, the Secretary has not taken any actions on future PTAs. Advisory decisions on writs of mandamus and prohibition are not permitted. And second, we agree with the military judge that the Secretary did not have authority to revoke respondents' existing PTAs because the respondents had started performance of the PTAs.

Respondents are charged with multiple violations of the law of war under the Military Commissions Act of 2009 (M.C.A.), 10 U.S.C. §§ 948a–950t, for their alleged roles in the planning and execution of the September 11, 2001, attacks on the United States. *See In re Ali*, 558 F. Supp. 3d 1167, 1170 (CMCR

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[1] In military commissions, the term "pretrial agreement" refers to "terms or conditions requested by the accused, within the power of the convening authority, and not otherwise prohibited," which the convening authority may agree to as a step in the disposition of offenses. Rule for Military Commissions (R.M.C.) 705(b), Manual for Military Commissions, United States (MMC) (2019 ed.). In courts-martial, the term "plea agreement" is the same as pretrial agreement (PTA). *See* Rule for Courts-Martial (R.C.M.) 705(b), Manual for Courts-Martial, United States (MCM) (2024).

[2] The pretrial agreements are filed under and remain under seal except as indicated in this decision. Pet'r's App. 912–14 (Nov. 26, 2024).

2021). The charges allege that respondents aided, abetted, and conspired with 19 al Qaeda hijackers to commit attacks, which resulted in the deaths of 2,976 people. Pet'r's Br. 1 (citing Pet'r's App. 774 (charge sheet, referred April 4, 2012)); *see United States v. Mohammad*, 280 F. Supp. 3d 1305, 1308 (CMCR 2017) (listing charges). Their capital charges were referred to trial by military commission, pursuant to the 2009 MCA. Pet'r's App. 775; *see* 10 U.S.C. § 948b. Our court has resolved twelve writs or government appeals in this case. *See Ali*, 558 F. Supp. 3d at 1170–71 (detailing writ and appellate history).

I. Statement of facts

On August 21, 2023, the Secretary appointed BG (Ret.) Escallier as the convening authority for respondents' military commission effective on October 8, 2023. Pet'r's App. 670. The appointment memorandum stated that "Ms. Escallier shall exercise her independent legal discretion with regard to judicial acts and other duties of the Convening Authority." *Id.* at 401. On July 29 and 30, 2024, petitioner and respondents signed stipulations of fact and respondents signed PTAs. *Id.* at 29, 149, 280, 298; *see also id.* at 402–03. The resulting three PTAs contained numerous requirements, including that the respondents enter into stipulations of fact, accept admissibility of Letterhead Memoranda (LHM) summarizing statements made by each accused to the Federal Bureau of Investigation (FBI) in 2007, and also in 2008 for Bin 'Attash, and not litigate or contest motions in respondents' case. *Id.* at 12–13, 15, 20 (KSM PTA); 133–36, 140 (WBA PTA), 281–83, 289 (MAH PTA); *see also id.* at 403, 404 n.41. The PTAs included stipulations of fact and partially redacted LHM statements as Attachments A and B. *See, e.g.*, *id.* at 680–81 (WBA PTA) (citing AE 956 (GOV), Attach. B, at 53–148). Petitioner and each respondent signed that respondent's stipulation of fact on July 29 or 30, 2024. *Id.* at 58, 174, 328. "Paragraph 56 of the PTA provides that 'the Convening Authority's acceptance of this Offer, including Attachments A and B[,] will transform this Offer into an Agreement binding upon the Accused and the Government.'" *Id.* at 681 (WBA PTA) (alteration in original). On July 31, 2024, the convening authority signed each PTA. *Id.* at 30, 50, 298, 403 & n.30

The next day, on August 1, 2024, petitioner notified the military judge at a hearing that "the convening authority has reached pretrial agreements in this case" with respondents. *Id.* at 912; *see id.* at 404. That same day, during a discussion with the judge about severing Mohammad, Bin 'Attash, and Hawsawi (the individuals who had PTAs) from the trial of Ali (who did not have a PTA), trial counsel stated: "But at this point, with the waiver of all motions from three of the four accused, they can't actively continue to participate in any of the contested litigation based on [their] pretrial agreement[s]." *Id.* at 917–18. An FBI special agent testified later that same day. *Id.* at 926. Ali's counsel cross-examined the witness; counsel for the three respondents did not ask any questions. *Id.* at 404; *see id.* at 926.

On August 2, 2024, the Secretary issued a memorandum to the convening authority, 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 Hawsawi*; *United States v. Ramzi Binalshibh*; and *United States v. Ali Abdul Aziz Ali*), which states:

> 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.

Id. at 405, 636. Prior to issuing his memorandum, the Secretary did not issue or place any limitations on BG (Ret.) Escallier's authority to enter into PTAs that are relevant to the mandamus petition before the court. *Id.* at 401, 411.

Counsel for Hawsawi noted on the record that if Hawsawi's PTA was "to be somehow revoked or removed, that [] would be a breach of [the] agreement" because specific performance on Hawsawi's agreement had already begun because he had abstained from examining witnesses. *Id.* at 684 (citation omitted). The parties briefed the issues. *See id.* at 644.

After the PTAs were signed, respondents did not file motions (other than for scheduling matters), request discovery, examine witnesses, or argue motions. *Id.* at 405. The military judge found that BG (Ret.) Escallier had continued to act as the convening authority in this case. *Id*. at 406. She did not, however, take any actions with respect to the three PTAs in respondents' case—there is no evidence of changes to those PTAs. Nor is there any evidence of a PTA between Intervenor Ali and the convening authority, BG (Ret.) Escallier.

On November 6, 2024, the military judge ruled in AE 955J (KSM), AE 956J (WBA), and AE 957I (MAH) that the Secretary's memorandum was *void ab initio*. *Id.* at 424 n.122. He further determined that the Secretary could not *withhold* ex post facto the authority already given and exercised to make PTAs. *See id.* at 419–20. Regarding *withdrawal* from the PTAs, the military judge stated:

> R.M.C. [Rule for Military Commissions] 705(a)[, Manual for Military Commissions, United States (MMC),] 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. The Secretary 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.

Id. at 421 (footnotes omitted). The military judge also cited practical difficulties involved in parsing responsibilities between two convening authorities, and the absence of legal precedent for two convening authorities on the same case. *Id.* at 417–21.

Petitioner said in its petition that there is ample precedent for superior convening authorities granting or limiting the authority of subordinate convening authorities.[3]

Additionally, the military judge suggested that the Secretary could not appoint himself as the convening authority for future PTAs, and determined he could not withdraw from the PTAs because respondents' performance had begun. *Id.* at 417–20. The military judge stated:

> 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. All three

[3] Petitioner quotes from The Judge Advocate General's Legal Center & School, U.S. Army, Criminal Law Deskbook, at 1-6 (Jan. 2019), noting it states, "[b]y policy, the Secretary of Defense has withheld the disposition authority for all sexual offenses." Pet'r's Br. 22 (Nov. 26, 2024) (alteration in original) (quoting Pet'r's App. 1115). Petitioner quotes from The Judge Advocate General's Legal Center & School, U.S. Army, Commander's Legal Handbook, Misc. Pub. No. 27-8, at 18 (2019), noting it states that a superior commander may "[w]ithhold authority over types of offenses, types of offenders, or certain commanders." *Id.* (alteration in original) (quoting Pet'r's App. 1102). Petitioner also compares Rule for Military Commissions 401(a) with Rule for Courts-Martial 306(a)(2), and 10 U.S.C. § 837(d)(1), and cites to paragraph 12-1 of the Regulation for Trial by Military Commission. ¶ 12-1. *Id.*

> 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.

Id. at 422 (footnotes omitted). The military judge noted: "That these three Accused agreed to not lodge certain objections to versions of the LHMs is a dramatic change of litigation posture. . . ." *Id.* at 422 n.113.

II. Law and analysis

This court has jurisdiction over mandamus petitions for extraordinary relief under the All Writs Act, 28 U.S.C. § 1651(a) (2024). *See In re Al-Nashiri* (*Al-Nashiri III*), 921 F.3d 224, 227, 233 (D.C. Cir. 2019). A writ of mandamus may only be granted when a petitioner demonstrates

> that [his] right to issuance of the writ is clear and indisputable, the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires, and the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Id. at 233 (alterations in original) (internal quotation marks omitted) (quoting *Cheney v. U.S. District Court*, 542 U.S. 367, 380–81 (2004)).

A. The Secretary's decision to appoint himself as the convening authority for future PTAs

The parties and intervenor do not cite any authority explicitly authorizing a superior convening authority to withdraw authority from a subordinate convening authority to make PTAs or explicitly prohibiting a superior convening authority from withdrawing the authority of a subordinate convening authority to enter into PTAs, without withdrawing all convening authority responsibilities. *See* Resp'ts Mohammad & Hawsawi's Br. 24–26 (Dec. 11, 2024); Resp't 'Attash's Br. 9–19 (Dec. 11, 2024); Intervenor Ali's Br. 7–25 (Dec. 11, 2024). The Secretary's action results in two convening authorities in respondents' case with different responsibilities, which may potentially overlap or conflict.

The military judge ruled that, in these circumstances, the Secretary lacked authority to reserve for himself the authority to enter into PTAs. Pet'r's App. 421. The judge provided three reasons for his ruling that the Secretary could not be the convening authority for PTAs with respondents. First, the Secretary did not "reserve" to himself the authority to *withdraw* from PTAs or to withhold BG (Ret.) Escallier's authority to withdraw. *Id.* at 411–12 (quoting R.M.C.

705(d)(4)(B)), 421.[4] Second, respondents had already begun their performance, and third, the Secretary was not specifically authorized under the PTAs or Rule for Military Commissions 705 to be the convening authority for PTAs. *Id.* at 414–15, 422–23; *see* sealed AEs (Pet'r's App. vols. 1–3). We agree with the military judge's observations about the absence of authority in the PTAs and Rule for Military Commissions 705 for the Secretary's actions, and that respondents had already begun performance under the PTAs.

We agree with petitioner that powerful "interlocking authorities" give the Secretary of Defense supervisory authority to replace BG (Ret.) Escallier as convening authority for PTAs without taking all convening authority responsibilities from her. Pet'r's Br. 15. The Secretary "is the principal assistant to the President in all matters relating to the Department of Defense." 10 U.S.C. § 113(b). "[H]e has authority, direction, and control over the Department of Defense." *Id.* "Unless specifically prohibited by law, the Secretary [of Defense] may, without being relieved of his responsibility, perform any of his functions or duties or exercise any of his powers through, or with the aid of, such persons in, or organizations of, the Department of Defense as he may designate." 10 U.S.C. § 113(d). In *United States v. Khadr*, 717 F. Supp. 2d 1212, 1213 (CMCR 2007), the court stated, "The plain language of 10 U.S.C. § 113(d) provides the Secretary broad authority to delegate his powers as he sees fit, subject only to the limitation that he may not do so when it is "*specifically prohibited by law*." In *Khadr*, we "appl[ied] the ordinary meaning of the terms 'specific' and 'prohibit' in analyzing this provision and [found] no 'explicit or definite' provision of law" that prohibited the action taken by the Secretary of Defense in *Khadr*; we denied the challenge to the Secretary's authority to "delegat[e]" his "authority to appoint appellate judges to this court." *Id*. at 1213–14.

The Secretary has authority under the Military Commissions Act to prescribe "[p]retrial, trial, and post-trial procedures, including elements and modes of proof, for cases triable by military commission under this chapter." 10 U.S.C. § 949a(a). He also has authority to convene trials by military commissions or to appoint "any officer or official of the United States" to be a convening authority. 10 U.S.C. § 948h; *see Al Bahlul v. United States* (*Al Bahlul IV*), 967 F.3d 858, 868–69 (D.C. Cir. 2020) (discussing Secretary's designation authority under 2006 MCA).

Based on 10 U.S.C. § 949a, the Secretary of Defense issued the Manual for Military Commissions, which was adapted from the Manual for Courts-Martial, United States (MCM). MMC, at Foreword (2019 ed). The Manual for Military Commissions contains the Rules for Military Commission. The

[4] Unless stated otherwise, all references to the Manual for Military Commissions refer to the 2019 version; all references to the Regulation for Trial by Military Commission refer to the 2011 version; all references to the Manual for Courts-Martial refer to the 2024 version; all references to the Military Commissions Act, 10 U.S.C. §§ 948a–950t, refer to the 2009 version, and all other citations to the United States Code refer to the 2024 version.

Secretary also issued the Regulation for Trial by Military Commission (2011 ed.) (RTMC). Under this regulation, "The Secretary of Defense is responsible for the overall supervision and administration of military commissions within the DoD [Department of Defense]." RTMC, ¶ 1-3(a).

Rule for Military Commission 401 provides the procedures and authorities for disposition of charges. That rule provides:

> **Rule 401. Forwarding and disposition of charges in general**
>
> (a) *Who may dispose of charges*. Only the Secretary or an officer or official of the United States designated by the Secretary for the purpose to convene military commissions may dispose 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.
>
> (b) *How charges may be disposed of*. Unless the authority to do so has been limited or withheld by a superior competent authority, an authority may dispose of charges by 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.

One tool in the disposition of charged offenses is through a PTA. "[P]lea agreements [must be] consistent with the requirements of voluntariness and intelligence -- because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange." *Mabry v. Johnson*, 467 U.S. 504, 508 (1984). In military commissions, PTAs are "created through the process of bargaining, similar to that used in creating any commercial contract. As a result, we look to the basic principles of contract law when interpreting pretrial agreements." *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999) (citing *Cooper v. United States*, 594 F.2d 12, 16 (4th Cir. 1979)); *see also United States v. Moreno-Membache*, 995 F.3d 249, 256 (D.C. Cir. 2021) ("Because a plea agreement is a contract, it must be read as a whole.").

The procedures, limitations, and requirements for PTAs in trials by military commission are detailed in Rule for Military Commissions 705(a). That rule states, "(a) *In general*. 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." This provision is repeated in paragraph 12-1 of the Regulation for Trial by Military Commission. Petitioner has not cited any defects in the negotiation process or in the three PTAs.

The Secretary of Defense is a "superior competent authority," and as such, he "may withhold the authority of [his] subordinate," BG (Ret.) Escallier,

"to dispose of charges." R.M.C. 401(a). Rule for Courts-Martial 401(a) (R.C.M.), MCM, and Rule for Military Commissions 401(a) have the same language. For at least ninety years, higher-level military commanders have had authority to withhold the authority of lower-level military commanders to serve as convening authorities in specific cases, and higher-level commanders also have occupied that role. However, the role of a superior convening authority is not to tell a subordinate convening authority what action he or she should take in a particular case. The following two cases address when a superior convening authority's intervention in the disposition of charges has been upheld.

In *United States v. Fleming*, 2 A.B.R. 359, 372 (1931), the United States Army Board of Review considered a court-martial in which the department commander withheld authority of subordinate commanders to dispose of charges against Captain Fleming. Pet'r's App. 985. The *Fleming* Board of Review said, "It is believed that the right of a superior commanding officer to order his military inferiors not to dispose of a given case, thus reserving disposition thereof to himself, is a necessary attribute of command without which he might become powerless to maintain discipline." *Id*.

More recently, in *Hayes v. Maksym*, No. NMCCA 200301982, 2004 CCA LEXIS 35 (N-M. Ct. Crim. App. Feb. 11, 2004) (unpub.), Hayes filed a petition for a writ of mandamus to overturn the decision of a superior convening authority to withdraw and refer his case to a higher-level court-martial. After arraignment for a special court-martial, Hayes submitted a PTA offer; the special court-martial convening authority agreed to refer his case to a lower-level summary court-martial in return for a guilty plea in a summary court-martial. *Id*. at *3. The maximum possible confinement was less at a summary court-martial than at a higher-level special court-martial. Later, based upon Rule for Courts-Martial 401(a), a superior convening authority withheld the authority of a special court-martial convening authority to dispose of Hayes' charges at a summary court-martial. *Id*. at *4. The superior convening authority then referred to a special court-martial the same charge and specifications upon which Hayes had previously been arraigned. *Id*. The United States Navy-Marine Corps Court of Criminal Appeals noted that Hayes "can point to no provision in the Uniform Code of Military Justice, the Manual for Courts-Martial, or case precedent that prohibits what happened in this case." *Id*. at *7. The Court of Criminal Appeals denied Hayes' petition for a mandamus writ. *Id*. (citing R.C.M. 401(a)).

The Secretary, as a superior convening authority, has an important role in referral of charges to trial by military commission. He "may cause charges, whether or not referred, to be transmitted to the authority for further consideration, including, if appropriate, referral." R.M.C. 601(f); *see* R.M.C. 601(b) ("A convening authority may refer charges to a military commission convened by that convening authority, or a predecessor, unless the power to do

so has been withheld by superior competent authority."). The Secretary also "may for any reason cause any charges or specifications to be withdrawn . . . at any time before findings are announced." R.M.C. 604(a); *see also* R.C.M 604(a) (stating same), *quoted in United States v. Leahr*, 73 M.J. 364, 369 (C.A.A.F. 2014). However, the charges may not be re-referred if the withdrawal was "for an improper reason." *Leahr*, at 369 (quoting R.C.M. 604(b)); *see* R.M.C. 604(a), Discussion ("Charges should not be withdrawn from a court-martial arbitrarily or unfairly to an accused." (quoting R.C.M. 604(b)).

The Secretary of Defense's intervention in respondents' existing PTAs is without precedent. Service secretaries, nonetheless, occasionally intervene in the disposition of individual cases. *See, e.g.*, Message from Stanley R. Resor, Sec'y of the Army, to Maj. Gen. George L. Mabry, Jr., Commanding General, The Support Troops, USARV, Subject: Charges Against Colonel Rheault et al (Sept. 29, 1969)[5] (Pet'r's App. 1080) ("Acting as a superior convening authority under the provisions of Article 22, UCMJ, I hereby assume jurisdiction over and hereby dismiss the court-martial charges . . . alleging conspiracy to murder and the murder of [an individual] on or about 20 June 1969."); *see also* Pet'r's Br. 18 n.83 (citing and discussing same message). We note that this precedent petitioner provides is for a superior convening authority to intervene by taking complete jurisdiction over disposition of a case—not partial control by being the convening authority for PTAs, while leaving the remainder of control to a subordinate convening authority.

Next, we consider concerns about the Secretary exercising improper influence over BG (Ret.) Escallier in his new role as convening authority for PTAs in respondents' case. The military judge stated in his ruling that respondents' motions seeking enforcement of their existing PTAs "are not being resolved on unlawful influence grounds, but [on] the idea that each of the Convening Authority's actions and decisions are immediately reversible if the Secretary disagrees[, which] potentially raises the specter of unlawful influence." Pet'r's App. 417. The military judge acknowledged that the Secretary could impose limits on BG (Ret.) Escallier's authority, *see id.*, yet concluded that "any prescribed 'limitations' must be in effect before the convening authority acts. Otherwise, the convening authority enjoys no real 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." *Id.* at 418–19.

The military judge expressed additional concern about the independence of BG (Ret.) Escallier because of the Secretary acting as convening authority for PTAs and BG (Ret.) Escallier acting as convening authority for all other matters in respondents' cases. The military judge noted that "[i]t is difficult to foresee

[5] (Message No. DA OUT 925536) (File No. OSA 250.1 VIETNAM), *in* NARA-RG 335 (UD-UP Entry 35), Security Classification: UNCLAS EFTO.

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." *Id*. at 418; *see* Resp'ts' Br. 23, 31–32.[6]

Intervenor Ali relies on *United States v. Hardy*, 4 M.J. 20 (C.M.A. 1977), *abrogated on other grounds by United States v. Blaylock*, 15 M.J. 190, 192–93 (C.M.A. 1983), to support his argument "that a superior convening authority may either take over a case in its entirety, or allow the lawfully designated subordinate to exercise its authority over the case without interfering with the subordinate's exercise of discretion." Intervenor Ali's Br. 13; *see id.* at 14. In *Hardy*, the case was referred to a special court-martial, and a superior convening authority ordered the subordinate convening authority who referred the case to withdraw the charges from the special court-martial. *Hardy*, 4 M.J. at 21.

The United States Court of Military Appeals in *Hardy* stated:

> Where, as here, the superior commander seeks to affect a *particular* case by *countermanding* discretionary judicial decision of a subordinate commander which the latter made pursuant to his then existing powers under the Uniform Code of Military Justice, the superior has injected the spectre of unlawful command control over the judicial act of the subordinate. This contravenes the intent of Article 37(a), UCMJ.[7]

Id. at 24. The court further observed that the order of the superior convening authority was improper because the subordinate convening authority's withdrawal of charges from the special court-martial "must result from his *own* decision . . . . His action in withdrawing a specific case from a court to which it

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[6] Petitioner argues that unlawful influence is not ripe for consideration because the military judge's ruling was decided on other grounds. Pet'r's Reply Br. 18 n.101 (Dec. 16, 2024) (citing App. 406 n.46; Resp'ts 'Attash & Hawsawi's Opp. to Ali's Mot. to Intervene 1–3 (Dec. 12, 2024)).

[7] The version of 10 U.S.C. § 837(a) in effect when *Hardy* was decided stated:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. . . .

Act of Oct. 24, 1968, Pub. L. No. 90-632, § 2(13), 82 Stat. 1335, 1338.

already properly had been referred must not be the result of a superior's *order* to do so pursuant to the *superior's* decision." *Id*. at 23. The court in *Hardy* added, "to tolerate otherwise would permit that superior commander, in a specific case and after-the-fact, to influence directly the action of the subordinate convening authority with respect to the latter's judicial acts *already properly taken* in that case." *Id*. (footnote citation omitted; emphasis added).

We find that *Hardy* stands for the proposition that the Secretary of Defense cannot *order* BG (Ret.) Escallier to withdraw from respondents' PTAs, which were already approved. *Hardy*, however, does not prevent the Secretary of Defense from withdrawing BG (Ret.) Escallier's authority to approve *future* PTAs in respondents' case.

Unlawful influence of convening authorities for military commissions is prohibited in 10 U.S.C. § 949b(a)(2), which states, "No person may attempt to coerce or, by any unauthorized means, influence . . . (B) the action of any convening, approving, or reviewing authority with respect to their judicial acts[.]" This language is similar to the language in the version of 10 U.S.C. § 837(a) that the Court of Military Appeals applied in *Hardy*. *See supra* note 7.

Title 10, section 837(d) of the United States Code, which applies to courts-martial, not military commissions, states:

> (1) A superior convening authority or commanding officer may withhold the authority of a subordinate convening authority or officer to dispose of offenses in individual cases, types of cases, or generally.
>
> (2) Except as provided in paragraph (1) or as otherwise authorized by this chapter, a superior convening authority or commanding officer may not limit the discretion of a subordinate convening authority or officer to act with respect to a case for which the subordinate convening authority or officer has authority to dispose of the offenses.

See also R.C.M. 104(d) (same). Section 837(d)(1) is repeated in Rule for Military Commissions 401, *supra*, but section 837(d)(2), prohibiting limitations on a convening authority's discretion, is not reflected in Rule for Military Commissions 401. Moreover, the Uniform Code of Military Justice provision prohibiting unlawful influence of superior convening authorities (R.C.M. 104(d)) is broader than what is provided for in the Military Commissions Act (R.M.C. 401(b)). In any event, the issue of unlawful influence was not fully litigated before respondents' military commission, and this issue therefore is not ripe for our consideration. *See* Pet'r's Reply Br. 18 n.101 (Dec. 16, 2024).

Nevertheless, neither of the litigants cited caselaw nor Rule for Military Commissions 401 to support prohibiting the Secretary from withdrawing BG (Ret.) Escallier's authority to approve future PTAs by withholding that authority now.

We agree with Intervenor Ali that the Secretary is prohibited "from telling the Convening Authority how to accomplish her judicial functions, including the negotiation of pretrial agreements." Intervenor Ali Br. 20 (citing 10 U.S.C. § 949b(a)(2)).[8] Section 949b(a)(2) provides: "No person may attempt to coerce or, by any unauthorized means, influence . . . (B) the action of any convening, approving, or reviewing authority with respect to their judicial acts . . . ." Paragraph 12-1 of the Regulation for Trial by Military Commission, entitled "Authority to Conclude Agreement" (emphasis omitted), provides additional guidance, as follows:

> 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 PTA offer submitted by an accused is within the sole discretion of the Convening Authority who referred the case to trial. *See* R.M.C. 705.

The Secretary has vast authority in the Department of Defense, and in military commissions. Logically, this vast authority includes the authority to act as convening authority to approve or disapprove PTAs without taking all of the responsibilities of the convening authority. A review of the First Circuit decision in *United States v. O'Neil*, 11 F.3d 292 (1st Cir. 1993), is helpful in explaining our analysis. That case discussed the principles of "the greater includes the lesser" and "avoiding illogical results" in the interpretation of statutes. The First Circuit stated:

> The principle that the grant of a greater power includes the grant of a lesser power is a bit of common sense that has been recognized in virtually every legal code from time immemorial. It has found modern expression primarily in the realm of constitutional law.
>
> While this principle has nested less frequently in the criminal law context, it is fully applicable in that milieu. . . .
>
> . . . .
>
> . . . It is also an established canon of statutory construction that a legislature's words should never be given a meaning that produces

[8] Intervenor Ali's brief cites to 10 U.S.C. § 949(a)(2). We corrected the section number to read § 949b(a)(2).

> a stunningly counterintuitive result -- at least if those words, read without undue straining, will bear another, less jarring meaning.

Id. at 296–97 (citations omitted); *see Andrews v. Warden*, 958 F.3d 1072, 1076 (11th Cir. 2020) ("Because *the greater power ordinarily includes the lesser power*, the President's pardon power includes the authority to commute a sentence to a lesser punishment." (emphasis added) (citing *Schick v. Reed*, 419 U.S. 256, 265–66 (1974); *Biddle v. Perovich*, 274 U.S. 480, 486–87 (1927))); *O'Connell v. Shalala*, 79 F.3d 170, 177 (1st Cir. 1996) ("[T]he statutory grant of a greater power typically includes the grant of a lesser power . . . ."). The United States Court of Appeal for the District of Columbia Circuit (D.C. Circuit) also has proclaimed that "[t]he greater power includes the lesser." *Quaker Action Grp. v. Hickel*, 429 F.2d 185, 192 (D.C. Cir. 1970) (per curiam). The D.C. Circuit, however, has noted that the scope of the "greater-includes-the-lesser-power argument" is limited when a "statute disallows the agency" from taking action to eliminate part of the requirements without eliminating all of them. *See Nat. Res. Def. Council v. EPA*, 777 F.3d 456, 471 (D.C. Cir. 2014). There are no such statutory limitations on the Secretary of Defense's authority relating to PTAs in the 2009 Military Commissions Act, the Manual for Military Commissions, or the Regulation for Trial by Military Commission.

Essentially, the Secretary has the power to withhold the authority of BG (Ret.) Escallier to dispose of charges in respondents' case under Rule for Military Commissions 401(a), and Regulation for Trial by Military Commission, paragraph 12-1. Accordingly, he has the lesser authority to withhold BG (Ret.) Escallier's power to approve PTAs in respondents' case, which is used in the process of disposing of charges. When BG (Ret.) Escallier signed the PTAs, she had authority to do so. Once those PTAs were signed, withdrawal could only occur if there was authority within the pretrial agreement itself, or there was statutory or rule authority to do so. Brigadier General (Ret.) Escallier's authority to withdraw from the PTAs in this case, however, is unavailable in any event because respondents began performance under these PTAs.[9]

The authority that the Secretary of Defense exercised in this case is located in Rule for Military Commissions 705(a), which authorized him to prescribe limitations on convening authorities to enter into PTAs. *See United States v. Allen*, 31 M.J. 572, 594 (N-M.C.M.R. 1990) (en banc) (stating Rule for Courts-Martial 705(a) "authorized the Secretary of the Navy to prescribe limitations on convening authorities to enter into pretrial agreements and that is exactly the authority that the Secretary exercised via § 0129c, JAGMAN," which "specifically prohibits a convening authority from entering into a pretrial

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[9] Brigadier General (Retired) Escallier retains authority to take any necessary actions on the existing PTAs in the case at bar. *See, e.g.*, *United States v. Hunter*, 65 M.J. 399, 400 (C.A.A.F. 2008) (involving whether convening authority had authority to withdraw from sentence limitation in PTA); *United States v. Williams*, 60 M.J. 360, 363 (C.A.A.F. 2004) (involving whether trial counsel had authority to withdraw from PTA due to untimely restitution).

agreement in a national security case without first obtaining the approval of the Secretary of the Navy"); Sec'y of Navy Instr. 5800.7D, Manual of the Judge Advocate General (JAGMAN) § 0137c (Mar. 15, 2004) [hereinafter JAGMAN Instr.] (Pet'r's Suppl. App. 32) ("No official of the [Department of the Navy] is authorized to enter into a pretrial agreement in any national security case . . . without first obtaining permission to do so from the Secretary of the Navy."); JAGMAN Instr. 5800.7E at § 0137c (June 20, 2007) (Pet'r's Suppl. App. 35) (same); *see also United States v. Kroetz*, No. ACM 40301, 2023 CCA LEXIS 450, at *11–12 (A.F. Ct. Crim. App. Oct. 27, 2023) (noting applicability of an Air Force instruction prohibiting "plea agreements involving an exact term of *confinement*," but noting absence of prohibition limiting agreements "to a particular punitive discharge"), *petition for rev. denied*, 84 M.J. 417 (C.A.A.F. Apr. 25, 2024); *United States v. Saulter*, 23 M.J. 626, 627 (A.F.C.M.R. 1986) (stating differences in "service-level restrictions" on PTAs may result in different outcomes among the services).

Statutory and regulatory authorities permit the Secretary to appoint himself as convening authority in full in respondents' case and to remove a subordinate convening authority in full. 10 U.S.C. § 948h. The Secretary of Defense also has authority to prescribe pretrial, trial, and post-trial procedures for military commission cases. 10 U.S.C. § 949a(a); *Al-Bahlul IV*, 967 F.3d at 872 (citing § 949a(a)); 10 U.S.C. § 948h. More specifically, the Secretary may prescribe limitations on the content of PTAs. R.M.C. 705(a); R.C.M. 705(a) (same). That secretarial authority is evident in another military commission rule, which provides: "A superior competent authority may withhold the authority of a subordinate to dispose of charges in individual cases, types of cases, or generally." R.M.C. 401(a); R.C.M. 401(a) (same); *see Blaylock*, 15 M.J. at 194 (stating a superior convening authority "may intervene to cause the withdrawal and rereferral of charges which in his view should be tried by a different kind of court-martial").

These broad authorities—including the specific authorities supporting the Secretary's appointment of convening authorities and withdrawal and re-referral of charges to a higher-level court (so long as those charges are not for improper reasons)—encompass the authority to withhold BG (Ret.) Escallier's authority to enter into PTAs with respondents. *See* RTMC, ¶ 12-1. Accordingly, we find a lack of evidence that the Secretary of Defense attempted to coerce or improperly influence BG (Ret.) Escallier with issuance of his August 2024 memorandum.

B. Vacation of respondents' existing pretrial agreements (PTAs)

The military judge determined the Secretary's withdrawal from the three PTAs was void because respondents had begun performance under the PTAs before that withdrawal. Pet'r's App. 411–13, 421–25. He concluded that performance of the PTAs began when respondents: (i) signed stipulations of

fact; (ii) negotiated and agreed to their respective LHMs; (iii) did not cross-examine "witness[es] for pretrial motions while the Prosecution and Defense Counsel for Mr. Ali questioned those same witnesses"; and (iv) did not file motions. *Id.* at 421–23.

The military judge based his decision primarily on Rule for Military Commissions 705(d)(4)(B) and he concluded that *United States v. Dean*, 67 M.J. 224, 227–28 (C.A.A.F. 2009), was "controlling." *Id.* at 424 n.120; *see id.* at 411–13, 422–24. Our court is not bound by *Dean*'s ruling regarding when an accused begins performance of a PTA because decisions of the United States Court of Appeals for the Armed Forces are not binding on our court. *See* 10 U.S.C. § 948b(c) ("The judicial construction and application of chapter 47 of this title, while instructive, is therefore not of its own force binding on military commissions established under this chapter."). Similarly, appellate court decisions discussing the Rules for Courts-Martial that are worded the same as Rules for Military Commissions are instructive but not binding on our court. *See generally United States v. Finch*, 79 M.J. 389, 395 (C.A.A.F. 2020) (finding interpretation of a word in federal appellate courts to be instructive when language of military rule "is identical to the corresponding federal rule").

In *Dean*, the following series of events occurred: "Contemporaneous with the Offer to Plead Guilty, Dean submitted a stipulation of fact to the convening authority which had been executed by Dean, his defense counsel and the trial counsel. The convening authority accepted and signed the Offer to Plead Guilty on [the same date]." 67 M.J. at 226. On the eve of Dean's trial, the trial counsel sought to amend the stipulation of fact to add additional misconduct, the defense counsel objected, and the convening authority withdrew the PTA. *Id.* The military judge permitted the withdrawal of the PTA, and after a contested trial, Dean received, and the convening authority approved, a sentence exceeding the limit in the PTA. *Id.*

The *Dean* Court cited Rule for Courts-Martial 705(d)(4)(B), and stated:

> In this case, Dean either performed or began to perform several of the promises listed in the agreement before the convening authority announced his withdrawal . . . : Dean elected trial by military judge alone . . . ; he entered into a stipulation of fact with trial counsel as to the circumstances of the offense . . . ; and . . . he filed an amended witness list which complied with two separate promises he made regarding the production of witnesses. The convening authority's right to withdraw "any time before the accused begins performance of promises contained in the agreement" therefore terminated before he announced his withdrawal from the agreement.

Id. at 228. Dean's election of forum and entering into a stipulation of fact with trial counsel both occurred before the convening authority signed the PTA; the amended witness list was filed after the convening authority approved the PTA. *Id.* at 226, 228.

In the case at bar, the military judge said, "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." Pet'r's App. 423.

Setting the stage for our continuing analysis, we discuss Rule for Military Commissions 705(d)(4), concerning withdrawal from a PTA, which states:

> *Withdrawal*.
>
> (A) *By accused*. The accused may withdraw from a pretrial agreement at any time; however, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a pretrial agreement only as provided in R.M.C. 910(h) or 811(d), respectively.
>
> (B) *By convening authority*. 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 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.

(Third emphasis added.) This provision is repeated in paragraph 12-3(a) of the Regulation for Trial by Military Commission. Until 2018, Rule for Military Commissions 705(d)(4)(B) and Rule for Courts-Martial 705(d)(4)(B) were the same.

On August 1, 2024, the day before the Secretary withdrew the PTAs in respondents' case, an FBI special agent testified on a pretrial motion. Pet'r's App. 906, 923, 926. Petitioner objected to respondents' "participat[ion] in any of the contested litigation based on the [PTAs]," reminding the respondents of their obligation under the PTAs. *Id.* at 917–18. Accordingly, respondents' counsel did not ask any questions of the witness. *Id.* at 404, 917–19. Respondents clearly began performance of a promise contained in the PTA—not to make or participate in motions—and Rule for Military Commissions 705(d)(4)(B) precluded the convening authority's withdrawal unless one of the

circumstances in Rule 705(d)(4)(B) applied. *See infra* Part III.A. None of those circumstances apply at this point in the litigation.

III. Application of *Cheney* tests

Petitioner's writ of mandamus and prohibition must meet all three of the *Cheney* tests, 542 U.S. at 380–81, otherwise we cannot grant relief. Extraordinary relief is available to enforce a PTA; yet, the right to relief must be "clear and indisputable." *See In re United States*, 32 F.4th 584, 597–98 (6th Cir. 2022) (concluding that government's writ of mandamus seeking to require reconsideration of improperly rejected plea agreement provided a "clear and indisputable right to mandamus").

A. Right to issuance of the writ must be clear and indisputable

Our analysis on the right to issuance of the writ involves two matters, (i) the military judge's vacatur of the Secretary's memorandum withdrawing from respondents' PTAs, and (ii) the military judge's order vacating the Secretary's memorandum pertaining to future PTAs. Petitioner has not established a clear and indisputable right regarding the first matter but has established a clear and indisputable right regarding the second matter.

Respondents began to perform a promise contained in their PTAs when they refrained from cross-examining an FBI special agent on August 1, 2024. Therefore, neither BG (Ret.) Escallier nor the Secretary could withdraw from the PTAs unless one of the other conditions in Rule for Military Commissions 705(d)(4)(B) applies; however, there is no evidence that any of those circumstances currently apply. Petitioner has not clearly established their right to a writ reversing the military judge's decision to vacate the Secretary's memorandum withdrawing the PTAs. The issue of the Secretary's withdrawal of the existing PTAs is resolved against petitioner.

We note, the authority of the convening authority to withdraw from a PTA is different under the Manual for Military Commissions than under the Manual for Courts-Martial. Under the Manual for Courts-Martial, the performance in this case would not have foreclosed the convening authority's withdrawal from the PTAs. In the 2018 amendment of Rule for Courts-Martial 705(e)(4)(B)(i),[10]

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[10] Rule for Courts-Martial 705(e)(4)(B) (2024) now states:

> (B) *By convening authority or special trial counsel.* The convening authority or special trial counsel, as applicable, may withdraw from a plea agreement at any time:
>
> (i) *before substantial performance by the accused of promises contained in the agreement*;

the President authorized the convening authority's withdrawal from a plea agreement "(i) before *substantial performance* by the accused of promises contained in the agreement." (Emphasis added.)

"Pursuant to 10 U.S.C. § 949a, the Manual for Military Commissions is adapted from the Manual for Courts-Martial." MMC, Foreword. Consistency between Rule for Military Commissions 705(d)(4)(B) in the Manual for Military Commissions and Rule for Courts-Martial 705(e)(4)(B)(i) in the Manual for Courts-Martial should be maintained. *See generally In re Al-Nashiri* (*Al-Nashiri I*), 791 F.3d 71, 86 (D.C. Cir. 2015) (recommending change to appointment process of CMCR judges to avoid constitutional issues).

We agree with the military judge that the Military Commissions Act and the Manual for Military Commissions do not use the plural of the word convening authority, and practical and legal difficulties with overlapping responsibilities are possible with two convening authorities on the same case. Pet'r's App. 418 & n.100. The Secretary nonetheless clearly has the authority to withdraw or withhold BG (Ret.) Escallier's authority in respondents' case to enter into future PTAs and reserve for himself such authority without requiring the Secretary to withdraw all convening authority responsibilities from BG (Ret.) Escallier. *See, e.g.*, *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 762 (D.C. Cir. 2014).

Here we find a clear abuse of discretion to the extent the military judge's order vacated the Secretary's memorandum pertaining to future PTAs. Thus, the first *Cheney* test is met with regard to potential future PTAs. Petitioner has satisfied the conditions in the first test. We next consider the second *Cheney* test.

B. No other adequate means to attain the relief desired

In *Al-Nashiri I*, 791 F.3d 75, Al-Nashiri "alleged that military judges are assigned to the CMCR in violation of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2." The Court denied a writ of mandamus and prohibition seeking to

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(ii) upon the failure by the accused to fulfill any material promise or condition in the agreement;

(iii) when inquiry by the military judge discloses a disagreement as to a material term in the agreement; or

(iv) if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

(Second emphasis added.) The "substantial performance" standard was added to Rule 705 in the Manual for Courts-Martial by Executive Order 13825, 83 Fed. Reg. 9889, 9967 (Mar. 8, 2018), effective January 1, 2019. Rule for Military Commissions 705(d)(4)(B), however, has not been amended.

recuse the military judges because the issue could be resolved on direct appeal, and it would constitute an advisory opinion to grant the writ of mandamus and prohibition. *Id.* at 80–81. In respondents' case, even though we find the military judge committed error when he vacated the Secretary's decision to withdraw BG (Ret.) Escallier's authority to enter into future PTAs and reserved such authority to himself, Pet'r's App. 405, this finding does not support the issuance of a writ of mandamus because the error "could be corrected on appeal without irreparable harm." *See Nat'l Ass'n of Criminal Def. Lawyers, Inc. v. DOJ*, 182 F.3d 981, 987 (D.C. Cir. 1999).

Petitioner essentially urges us to act in an advisory capacity, as the Secretary has not entered into any PTAs in this case. "Even if we were willing, we are unable to use advisory mandamus here because it would circumvent the no-other-adequate-means requirement." *Al-Nashiri I*, 791 F.3d at 80.

IV. Conclusion

Having found that petitioner failed to meet at least one of the first two *Cheney* tests—because petitioner has "other adequate means to obtain desired relief"—it is unnecessary to address the third test concerning appropriateness of the writ under the circumstances. *Id.* at 80–82 (dismissing writ of mandamus and prohibition without addressing third *Cheney* test).

Accordingly, it is hereby

ORDERED that petitioner's motions to admit appendix and supplemental appendix are **GRANTED**. It is

FURTHER ORDERED that respondents Mohammad and Hawsawi's appendix is **ADMITTED**.[11] It is

FURTHER ORDERED that respondent Bin 'Attash's motion to admit appendix is **GRANTED**. It is

FURTHER ORDERED that petitioner's motions for leave to file an outsized brief and reply brief are **GRANTED**. It is

FURTHER ORDERED that respondent Bin 'Attash's motion to file an outsized brief is **GRANTED.** It is

FURTHER ORDERED that the motion for leave to file an *amicus curiae* brief in support of respondents is **GRANTED**. It is

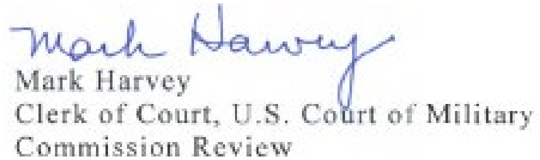
[11] Respondents failed to move for admission of their appendix.

FURTHER ORDERED that respondents Bin 'Attash and Hawsawi's motion for leave to file out of time an opposition to Ali's motion to intervene is **GRANTED.** It is

FURTHER ORDERED that intervenor Ali's motion to dismiss is **DENIED** and motion to intervene is **GRANTED**. It is

FURTHER ORDERED that petitioner's writ of mandamus and prohibition is **DENIED**.

FOR THE COURT:



Mark Harvey
Clerk of Court, U.S. Court of Military Commission Review