

Military Commissions:
9-11 Khalid Sheikh Mohammed et. al.
July 31, 2024–August 2, 2024
Announcement of a Concluded Plea Bargain and
Subsequent Revocation by the Secretary of Defense

Events:

After multiple attempts by each side through the years to establish a plea bargain between the 9-11 co-conspirators and the U.S. government, the Military Commissions announced a plea agreement on July 31, 2024, that covered three of the men. The co-conspirators not covered were ISN 10013 Ramzi Bin Al Shihb¹ and ISN 10018 Ali Abd Al Aziz Ali, who may or may not have been involved in separate negotiations.² The announcement of the agreement was made after letters explaining the negotiated terms were sent to victim family members.

Among other terms, the agreement authorized by the Military Commissions Convening Authority removed the conduct of a full trial and the possibility of a death sentence in exchange for a guilty plea from each of the three co-conspirators. A sentencing hearing would be held after the accused rendered their pleas in a pre-trial hearing, and then each of the detainees covered would serve up to a life sentence in confinement.

On August 2, 2024, Secretary of Defense Lloyd Austin nullified the plea agreements and reinstated the case against the men as a trial with eligibility for the death penalty. In the same memorandum that nullified the agreements, the Secretary of Defense also declared that the special nature of the case dictated that he removes the authority to negotiate plea agreements with the accused from the Convening Authority and reserve it to himself.

Conservative members of Congress have expressed support for withdrawing the plea agreement, crediting it as unjust to the victims and victim family members, who would not see justice done in a trial and whose only recourse for closure would be to compete for a potentially limited number of slots to make victim impact statements to the sentencing panel. Liberal members of Congress have asked the Secretary of Defense to reconsider his withdrawal of the plea agreement, citing the measure as unjust to the detainees who have been incarcerated for up to 20 years and upholding it as a way to reduce expenditures of time and resources that a full trial would require.³

The judge in the 9-11 case has directed defense teams for ISN 10024 Khalid Sheikh Mohammed, ISN 10014 Walid Muhammad Salih Mubarak Bin Attash, and ISN 10011 Ali Abdul Aziz Ali Mustafa Ahmed Adam Al Hawsawi to prepare briefings concerning the Secretary of Defense's legal authorities for overriding negotiating authorities that the Office of the Secretary of Defense has previously placed upon the subordinate Convening Authority and how they may or may not relate to the Secretary of Defense's ability to add to, withdraw, or otherwise modify referred charges in the case. The defense for ISN 10018 Ali/Baluchi has filed an extended motion to dismiss all charges and the case on evidence of

1 ISN 10013 Ramzi Bin Al Shihb's proceedings were severed from the initial 9-11 case in August 2023 amid concerns raised by a mental competency evaluation.

2 ISN 10018 is also known as Amar Al Baluchi.

3 “Specified Issue Order: Actions of a Superior Convening Authority Pursuant to the Military Commissions Act,” located at [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE957C\(Specified%20Issue%20Order\)\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE957C(Specified%20Issue%20Order)).pdf); last accessed Aug 16, 2024. Two other identical copies also posted, reflecting that the order is for three different defense teams. Judge notes in a footnote that the defense for ISN 10018 Ali/Baluchi will be permitted to file a briefing as well, if he elects to take a position on the matter.

unlawful influence by members of Congress. All parties to the case appear to be seeking discovery about communications between the Convening Authority, the Secretary of Defense, the Executive Branch, and Congress in the matter of the plea agreement.⁴

Observations:

The timing and nature of the plea bargain may reflect competing judicial and political factors, with the timing of the announcement occurring at an important juncture in the pre-trial proceedings. Judge Matthew McCall has repeatedly stated his intent to rule on the admissibility of all remaining evidence and testimony before his mandatory retirement, leaving the succeeding judge a clean bench to preside over the trial. This evidence includes the controversial FBI “Letterhead Memoranda” and documents referencing or analyzing the pro se filing of the “Islamic Response to the Government's Nine Accusations” made in a nullified previous military commissions trial attempt.^{5, 6} If admitted, these documents would significantly weaken most of the theories of defense and shift the case onto a mitigation footing rather than a culpability footing. A plea bargain became the last option for the defense to control the timing and outcome of the proceedings, given the judge's schedule of pre-trial witness testimony and final motion arguments.

The timing of the plea deal also potentially reflects campaign promises made on the approach to the 2020 election. Then-candidate Joseph Biden stated his intent to close the detention facility at GTMO, though he defended the Obama administration's failure to fulfill a similar promise by declaring a need for congressional approval. President Biden attempted a closure in 2021 but that proved unfeasible. After the attempted closure, the relatively rapid formulation of plea deals with Majid Khan, Mohammed Farik Bin Amin, Mohammed Nazir Bin Lep, and Abd Al Hadi Al Iraqi led to sentencing hearings during the Biden administration, as well as multiple authorizations of uncharged detainees for transfer under the Periodic Review Board program. The detainees remaining at GTMO for Military Commissions trial are Abd Al Rahim Hussein Muhammed Abdu Al Nashiri, Encep Nurjaman, and the five 9-11 co-conspirators.^{7, 8} President Biden's office claimed it was not aware of the plea agreement prior to the public announcement. Although the Secretary of Defense has claimed ultimate authority over GTMO plea agreements, the President is commander in chief over the militaries that make up the Department of Defense. As such, political considerations in the final months of an election year may bring further machinations and delays to the 9/11 trial proceedings.

4 Under security review, so posting location unavailable as of Aug 16, 2024.

5 The LHMs are reports of interviews the FBI held with the individual co-conspirators, wherein the detainees made many admissions about themselves and each other. The FBI attests that the detainees made their answers free of coercion and volunteered much of the information. The defense declares that the statements are unreliable due to prior torture, and that the FBI's choices of questions were tainted by information gained through CIA duress.

6 Located at [https://www.mc.mil/Portals/0/pdfs/KSM/KSM%20\(AE127\)%20Islamic%20Resp.pdf](https://www.mc.mil/Portals/0/pdfs/KSM/KSM%20(AE127)%20Islamic%20Resp.pdf); last accessed Aug 16, 2024. The “Islamic Response” was a declaration of guilt on all charges made by all five co-conspirators that included justification of their acts in vengeance and in Allah and was effectively a plea in an aborted Military Commission wherein the accused had elected to act pro se. The defense asserts that since the trial was annulled and the detainees determined incapable of adequately defending themselves in a capital case, nothing from that trial is admissible in the current proceedings. The prosecution holds that, because one or more of the accused sent a copy of the document through the International Committee of the Red Cross to family members for distribution and publication across the Islamic world, the document is now public, so copies of and reports about it are admissible in this military commission, and it represents a voluntary admission of guilt in many aspects.

7 ISN 10015 Nashiri is charged with bombing the U.S.S. *Cole* and facilitating other terrorist acts.

8 Nurjaman was originally arraigned with Bin Lep and Bin Amin on charges of bombing tourist-frequented night clubs in Bali, Indonesia. His case was severed prior to Bin Lep and Bin Amin negotiating a plea agreement.