

No. 25-1335

In the Supreme Court of the United States

WALID BIN ‘ATASH, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioner is among those accused of perpetrating the terrorist attacks of September 11, 2001, which killed 2976 people. In July 2024, a subordinate military official entered a pretrial agreement with petitioner that would have spared him the death penalty. Two days later, the Secretary of Defense withdrew from the agreement. But a military judge refused to honor the Secretary's withdrawal. The judge concluded that petitioner had begun performance, so the Secretary could not invoke a military-commission rule permitting withdrawal "at any time before the accused begins performance of promises contained in the agreement." Rule for Military Commissions 705(d)(4)(B). At the government's request, the United States Court of Appeals for the D.C. Circuit issued writs of mandamus and prohibition giving effect to the Secretary's withdrawal and barring hearings in which petitioner would take any action pursuant to the withdrawn agreement.

The question presented is:

Whether the court of appeals properly concluded that the government had a clear and indisputable right to relief because petitioner had not begun to perform promises contained in his pretrial agreement.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	19

TABLE OF AUTHORITIES

Cases:

<i>Al Baluchi, In re</i> , 952 F.3d 363 (D.C. Cir. 2020)	14
<i>Cheney v. United States Dist. Court</i> , 542 U.S. 367 (2004)	13
<i>Grice, In re</i> , 974 F.3d 950 (9th Cir. 2020)	14
<i>HTC Corp., In re</i> , 889 F.3d 1349 (Fed. Cir. 2018), cert. denied, 586 U.S. 1194 (2019)	14
<i>Khadr, In re</i> , 823 F.3d 92 (D.C. Cir. 2016)	14
<i>Middendorf v. Henry</i> , 425 U.S. 25 (1976)	15
<i>Office of the Utah Att’y Gen., In re</i> , 56 F.4th 1254 (10th Cir. 2022)	13
<i>Schalgenhauf v. Holder</i> , 379 U.S. 104 (1964)	14
<i>United States v. Dean</i> , 67 M.J. 224 (C.A.A.F. 2009)	15-17
<i>United States v. Fokker Servs. B.V.</i> , 818 F.3d 733 (D.C. Cir. 2016)	13
<i>United States v. Williams</i> , 504 U.S. 36 (1992)	12
<i>United States, In re</i> , 945 F.3d 616 (2d Cir. 2019), cert. denied, 141 S. Ct. 658 (2020)	13

Statutes and rules:

Military Commissions Act of 2009, Pub. L. No. 111-84, Div. A, Tit. XVIII, 123 Stat. 2574 (10 U.S.C. 948 <i>et seq.</i>)	2
--	---

IV

Statutes and rules—Continued:	Page
10 U.S.C. 948b(a)	2, 17
10 U.S.C. 948b(c)	15, 17
10 U.S.C. 948h	2
10 U.S.C. 949a(a)	2, 3
10 U.S.C. 949a(a)	3
10 U.S.C. 949a(b)	3
10 U.S.C. 950f(a)	3
10 U.S.C. 950g(a)	3, 15, 17, 18
10 U.S.C. 950g(d)	15
10 U.S.C. 950t(2)	3
10 U.S.C. 950t(3)	3
10 U.S.C. 950t(15)	3
10 U.S.C. 950t(16)	3
10 U.S.C. 950t(23)	3
10 U.S.C. 950t(24)	3
10 U.S.C. 950t(29)	3
Rule for Courts-Martial 705(d)(4)(B) (2005)	15
Rules for Military Commissions:	
Rule 705(a)	3
Rule 705(b)(1)	3
Rule 705(b)(2)(B)	3
Rule 705(d)(3)	9
Rule 705(d)(4)(B)	3, 5, 8-11, 13, 15, 18
Rule 705(e)	10, 12
Miscellaneous:	
Exec. Order No. 13,825, 83 Fed. Reg. 9889 (Mar. 8, 2018)	18
Exec. Order No. 14,347, 90 Fed. Reg. 43,893 (Sept. 5, 2025)	4

Miscellaneous—Continued:	Page
Stephen M. Shapiro et al., <i>Supreme Court Practice</i> (11th ed. 2019)	18
U.S. Dep’t of Def., Regulation for Trial by Military Commission (2011)	2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-129a) is reported at 143 F.4th 411. The opinion of the Court of Military Commission Review (Pet. App. 131a-163a) is reported at 762 F. Supp. 3d 1183. The order of the Military Commissions Trial Judiciary (Pet. App. 165a-200a) is unreported.

JURISDICTION

The court of appeals entered an order granting writs of mandamus and prohibition on July 11, 2025. Petitions for rehearing were denied on January 6, 2026 (Pet. App. 202a-203a). On March 31, 2026, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 21, 2026, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 11, 2001, the United States suffered the deadliest terrorist attacks in our Nation’s history. The attacks left 2976 people dead; injured numerous civilians, military personnel, and first responders; and destroyed tens of billions of dollars’ worth of property. See Pet. App. 4a. Petitioner is among those charged with perpetrating the attacks. See *id.* at 48a.¹

1. In the Military Commissions Act of 2009, 10 U.S.C. 948a *et seq.*, Congress authorized the establishment of “military commissions to try alien unprivileged enemy belligerents for violations of the law of war” and certain other offenses. 10 U.S.C. 948b(a). Military commissions are not standing bodies; they are instead convened to try a particular case. Congress vested the authority to convene a military commission in “the Secretary of Defense or * * * any officer or official of the United States designated by the Secretary for that purpose” (the Convening Authority). 10 U.S.C. 948h.

Congress also gave the Secretary broad authority to prescribe “[p]retrial, trial, and post-trial procedures” for military commissions. 10 U.S.C. 949a(a); see U.S. Dep’t of Def., *Regulation for Trial by Military Commission* ¶ 1-3(a) (2011) (“The Secretary of Defense is responsible for the overall supervision and administration of military commissions within the [Department of Defense].”). Although the statute makes the “procedures and rules of evidence applicable in trials by general courts-martial” applicable in military-commission cases, it also permits the Secretary to depart from those

¹ Petitioner’s co-defendants, Khalid Shaikh Mohammad and Mustafa Ahmed Adam al Hawsawi, have filed a separate petition for a writ of certiorari in No. 26-13. The government is filing a separate response to that petition concurrently with this brief.

rules and procedures. 10 U.S.C. 949a(a); see 10 U.S.C. 949a(b).

Pursuant to his authority under the Military Commissions Act, the Secretary has published the Rules for Military Commissions (R.M.C.). Those rules allow the Convening Authority to enter pretrial agreements with an accused, which may include a promise by the accused to plead guilty and a promise by the government not to pursue the death penalty. See R.M.C. 705(a), (b)(1), and (2)(B). The rules also allow the Convening Authority to “withdraw from a pretrial agreement” in various circumstances, including “at any time before the accused begins performance of promises contained in the agreement.” R.M.C. 705(d)(4)(B).

Decisions by military commissions are reviewed by the United States Court of Military Commission Review. 10 U.S.C. 950f(a). Congress vested “exclusive” appellate jurisdiction over military-commission proceedings in the United States Court of Appeals for the District of Columbia Circuit. 10 U.S.C. 950g(a).

2. For his role in perpetrating the September 11 terrorist attacks, petitioner has been charged before a military commission with attacking civilians, attacking civilian objects, murder in violation of the law of war, destruction of property in violation of the law of war, hijacking or hazarding a vessel or aircraft, terrorism, and conspiracy. Pet. App. 6a; see 10 U.S.C. 950t(2), (3), (15), (16), (23), (24), and (29). Five of those charges carry the death penalty. Pet. App. 6a.

In August 2023, then-Secretary of Defense Lloyd J. Austin III designated retired Army Brigadier General Susan Escallier as the Convening Authority for peti-

tioner’s military commission. Pet. App. 6a.² Escallier authorized negotiations with petitioner and his co-defendants regarding pretrial agreements. *Ibid.*

On July 29, 2024, petitioner submitted a signed “Offer for Pretrial Agreement” to Escallier. Pet. App. 7a (citation omitted). Petitioner offered to plead guilty to all charges in exchange for the government’s agreement not to pursue the death penalty. *Ibid.* Petitioner attached a signed stipulation of fact confessing to his involvement in the September 11 attacks. See *ibid.* He agreed to move to withdraw all pending motions. *Id.* at 25a. And, upon acceptance of his guilty plea, he agreed to waive all waivable motions. *Ibid.*

On July 31, 2024, Escallier accepted petitioner’s offer and signed his agreement (along with ones for his co-defendants Mohammad and al Hawsawi). Pet. App. 7a. Over the next two days, August 1 and 2, 2024, petitioner’s counsel refrained from questioning a witness at the suppression hearing of a fourth co-defendant who had not entered a pretrial agreement. *Id.* at 8a. The judge explained that, if petitioner’s guilty plea was not accepted, he could question the witness later. *Ibid.*

On August 2, 2024, Secretary Austin announced that he was reclaiming his role as the Convening Authority over pretrial agreements and withdrawing from the agreements Escallier had entered two days before. Pet. App. 175a-176a. Secretary Austin explained that a decision of such “significance” should rest with him as the superior authority. *Id.* at 175a.

² The current Secretary also holds the title of “Secretary of War.” Exec. Order No. 14,347, § 2(a), 90 Fed. Reg. 43,893, 43,893 (Sept. 5, 2025). Because this case involves the actions of a former Secretary who lacked that title, this brief refers to the “Secretary of Defense.”

3. Petitioner nevertheless sought to enforce his pretrial agreement and enter a guilty plea, arguing that Secretary Austin's withdrawal was invalid. Pet. App. 167a-168a. In November 2024, the military judge presiding over the commission agreed and planned a hearing to accept petitioner's plea. *Id.* at 199a-200a. The judge held that the Secretary could not withdraw Escallier's authority over pretrial agreements only, as Secretary Austin had purported to do. *Id.* at 190a-191a. In the alternative, the judge concluded that petitioner had begun performing promises in his pretrial agreement such that the Secretary could no longer withdraw under Rule 705(d)(4)(B). *Id.* at 195a. As acts of performance, the judge pointed to, *inter alia*, petitioner's signed stipulation of fact and his failure to question the witness at the August 1 and 2 hearing. *Id.* at 195a-196a.

4. The government sought a writ of mandamus and prohibition from the Court of Military Commission Review to effectuate the Secretary's withdrawal and prevent the military judge from accepting petitioner's guilty plea. Pet. App. 132a-133a.

The Court of Military Commission Review denied the writ. Pet. App. 131a-163a. The court agreed with the government that the Secretary could replace Escallier, explaining that the Secretary's "vast authority" over military commissions "includes the authority to act as convening authority to approve or disapprove [pretrial agreements]." *Id.* at 151a. But the court held that the Secretary could not withdraw from the agreements because, in the two days it took him to do so, petitioner had begun performance. *Id.* at 155a-159a. The court relied solely on petitioner's failure to question the witness at the August 1 and 2 suppression hearing, which the court appears to have viewed as performance of pe-

itioner’s promise to withdraw all pending motions. *Id.* at 158a-159a.

5. On the government’s petition, the court of appeals issued writs of mandamus and prohibition. 7/11/2025 Order.³ The court “vacated” “the military judge’s order * * * preventing the Secretary of Defense’s withdrawal from the pretrial agreements.” *Ibid.* And it “prohibited” the judge “from conducting hearings in which [petitioner and his co-defendants] would enter guilty pleas or take any other action pursuant to the withdrawn pretrial agreements.” *Ibid.*

The court of appeals explained its reasoning in a joint opinion by Judges Millett and Rao. Pet. App. 4a-52a. The court acknowledged that extraordinary writs “will be granted only in exceptional circumstances.” *Id.* at 13a. The party seeking the writ must demonstrate (1) a “clear and indisputable” right to relief; (2) the absence of another “adequate means to attain the relief”; and (3) that “the writ is appropriate under the circumstances” in the court’s “discretion.” *Ibid.* (citation omitted). The court concluded that this is the “rare case in which that exacting standard has been met.” *Ibid.*

First, the court of appeals explained why the government had a clear and indisputable right to relief. Pet. App. 14a-42a. The court agreed with the Court of Military Commission Review that Secretary Austin had the authority to withdraw Escallier’s authority over pretrial agreements and that “[t]he military judge clearly erred in holding otherwise.” *Id.* at 15a. The court held that the “military judge also clearly erred in his determination that [petitioner] had begun performance of promises contained in the pretrial agreement[.]” *Id.* at

³ The court of appeals’ order granting the writs is not included in the petition appendix but is available at 26-13 Pet. App. 145a-146a.

14a. Petitioner could not have begun performance by signing the stipulation of fact because he did so *before* Escallier signed the agreement. *Id.* at 33a-40a. Nor could petitioner have begun performance by not questioning the witness at the August 1 and 2 hearing because a promise “not to question witnesses appears nowhere in the agreement[’s] text.” *Id.* at 24a. Instead, petitioner pledged only to withdraw all pending motions. *Id.* at 25a. Yet he made “no formal or even informal request” to start the withdrawal process and left his pending motions “preserved for future action.” *Id.* at 27a-28a.

Next, the court of appeals concluded that the government lacked an “alternative ‘adequate means’ of enforcing its right to withdraw from these plea agreements.” Pet. App. 42a; see *id.* at 42a-47a. Any government appeal after a final judgment would, in the court’s view, face “daunting procedural and substantive roadblocks” that rendered that alternative inadequate. *Id.* at 47a.

Finally, the court of appeals found mandamus relief appropriate under the circumstances, emphasizing that this prosecution “implicate[s] a national interest of the highest degree.” Pet. App. 48a. The court recognized that whether petitioner should face the death penalty is a “grave” question “that requires political accountability.” *Ibid.* Yet the military judge’s “clear and indisputable errors” deprived the politically accountable Secretary of Defense of his lawful authority to make that decision. *Id.* at 51a.

Judge Wilkins concurred in part and dissented in part. Pet. App. 53a-129a. He agreed that the Secretary could withdraw Escallier’s authority over pretrial agreements and that the government lacked an adequate alternative means of relief. *Id.* at 54a. But in his

view, petitioner had begun performance of the promises in his pretrial agreement, so the government had not clearly and indisputably shown that it was entitled to the writs. *Id.* at 76a-129a.

The court of appeals denied petitions for rehearing en banc, with only Judge Wilkins noting that he would have granted the petitions. Pet. App. 202a-203a & n.**.

ARGUMENT

Petitioner contends (Pet. 17-36) that the court of appeals erred in concluding that the government had a clear and indisputable right to relief from the military judge's order enforcing a pretrial agreement from which the Secretary had withdrawn. That contention lacks merit. In the two days between when the agreement was signed and Secretary Austin withdrew, petitioner took no steps to begin performing any promises in the agreement. The Secretary was therefore free to withdraw, as the court of appeals correctly concluded. That fact-bound conclusion does not establish any meaningful conflict in the lower courts and does not otherwise warrant this Court's review.

1. Under the governing Rules for Military Commissions, the government may withdraw from a pretrial agreement "at any time before the accused begins performance of promises contained in the agreement." R.M.C. 705(d)(4)(B). The court of appeals correctly determined that petitioner had not begun performance, so the Secretary could lawfully withdraw from the agreement. Pet. App. 14a-42a.

Petitioner points (Pet. 24-34) to three acts which he says began performance: (1) his entry into the stipulation of fact, (2) his failure to question a witness at the August 1 and 2 suppression hearing, and (3) his compliance with ongoing commitments like not engaging in

hostilities against the United States or profiting from his alleged crimes. Under the plain text of the agreement, none of those acts began performance.

First, petitioner did not begin performance by entering the stipulation of fact attached to his offer. As the court of appeals explained, petitioner undisputedly “entered into the stipulation[] of fact *before* the[] pretrial agreement[] [was] fully executed.” Pet. App. 35a. The executed stipulation was attached to the “proposed pretrial agreement” that petitioner submitted on July 29, 2024. *Ibid.* Two days later, Escallier accepted and signed that offer—and only at that point was the pretrial agreement formed. *Id.* at 35a-36a. Thus, “[a]t the time the stipulation[] [was] executed, there [was] no pretrial agreement[] in existence and therefore no promises ‘contained in the agreement[]’ for [petitioner] to perform.” *Id.* at 36a.

Petitioner’s disagreements with the court of appeals’ straightforward analysis are unsound. Petitioner contends (Pet. 24-26) that the court of appeals misconstrued Rule 705(d)(4)(B) to require that the accused perform a promise in an extant pretrial agreement. According to petitioner (Pet. 25), nothing in the Rule’s text limits its application to “only after an agreement’s execution.” And whether or not there was a formal agreement, petitioner claims (Pet. 26) that “the deal [was] all but done in the practical sense,” so the court should treat petitioner’s offer *as if* it were a formal agreement.

But under both the Rules for Military Commissions and basic contract law, an unexecuted agreement is not an agreement at all. It is simply an “*offer* of the accused to enter into a pretrial agreement” that the Convening Authority is free to “reject” or “counteroffer.” R.M.C. 705(d)(3) (emphasis added). Under Rule 705(d)(4)(B),

however, the government may withdraw if the accused has not “beg[un] performance of promises contained in the *agreement*”—not in an *offer*. R.M.C. 705(d)(4)(B) (emphasis added). Contrary to petitioner’s assertion (Pet. 25), there is nothing “arbitrary and wooden” about the Rule’s distinction between a fully executed agreement and a unilateral offer. While entering a stipulation of fact might be performance of some other hypothetical pretrial agreement, as petitioner’s military-law authorities reflect (Pet. 27), it was not performance here when petitioner submitted his stipulation before any agreement existed.

Petitioner asserts (Pet. 26) that “no rational accused” would enter a stipulation of fact admitting guilt if the Convening Authority could reject that offer. But that ignores that the Rules specifically forbid the use of “any statements made by an accused in connection [with] an “offer[] to enter into a pretrial agreement” subject to limited exceptions. R.M.C. 705(e). The stipulation of fact was certainly an “important part of negotiations between [petitioner] and the prosecution” and a critical piece of consideration for the government’s agreement not to seek the death penalty. Pet. App. 39a. But it was not “performance of promises contained in the agreement” that would limit the government’s ability to withdraw. R.M.C. 705(d)(4)(B).

Second, petitioner did not begin performance by failing to question a witness at the August 1 and 2 hearing. As the court of appeals observed, “a commitment not to question witnesses appears nowhere in the agreement[’s] text,” so petitioner cannot have been performing any promise in the agreement when he forwent questioning. Pet. App. 24a.

Petitioner does not meaningfully argue otherwise. Rather than engage with the agreement’s text, he immediately turns to the “expectations of the parties.” Pet. 31 (citation omitted). According to petitioner (*ibid.*), his “promises to waive all waivable motions and to withdraw from all pending motions” could “plausibl[y]” be understood to require him to “stop litigating the contested parts of his case,” and co-defendant’s counsel and a prosecutor understood the agreement that way.

But whatever two lawyers said at a hearing cannot trump the plain text of the agreement. In the waiver provision, petitioner pledged to “knowingly, voluntarily, and expressly waive[] all waivable motions” “[u]pon the Military Judge’s acceptance of this Agreement.” Pet. App. 25a (citation omitted). And in the withdrawal provision, petitioner promised “to move to withdraw all pending motions.” *Ibid.* (citation omitted). The waiver provision never took effect because the military judge never accepted the agreement. *Id.* at 30a. And as to both provisions, petitioner never took any action to begin waiving or withdrawing motions. *Id.* at 27a, 31a-32a. “[Q]uite the opposite,” the military judge stated that petitioner could question the witness later if his plea was not accepted and thereby “preserved” his motions “for future action.” *Id.* at 27a-28a.

While Rule 705(d)(4)(B) requires only that the accused “begin performance,” Pet. 33 (citation omitted), petitioner “made no formal or even informal request of the court that could amount to moving to withdraw a motion or even beginning to do so,” Pet. App. 27a. Petitioner likewise took no “identifiable action” to begin waiving any motion, *id.* at 33a, much less waiving any motion “expressly,” *id.* at 25a (citation omitted). As the court of appeals recognized, “when ‘the plain meaning

of the language’ in a contract is clear, ‘the inquiry begins and ends with the text.’” *Id.* at 22a (citation omitted). Given the unambiguous terms of the agreement, the court properly ended its inquiry there.

Petitioner also asserts (Pet. 33) that the government should not be permitted to withdraw because he had detrimentally relied on the agreement. But the acts he points to as reliance (Pet. 33-34)—entering the stipulation and refraining from questioning—are the same acts that were not performance for all of the reasons above. Petitioner cannot have relied on the government’s promise not to seek the death penalty in taking actions that the agreement did not require. And, even if he did rely, petitioner suffered no detriment. The military-commission rules make clear that petitioner’s stipulation cannot be used against him. R.M.C. 705(e). And the military judge expressly reserved petitioner’s right to question the witness later. Pet. App. 27a.

Third, petitioner briefly invokes (Pet. 29) various promises in the agreement to refrain from action. For example, petitioner promised not to initiate a monetary claim against the United States, not to engage in hostilities against the United States, and not to seek a financial benefit from his alleged crimes. *Ibid.* Petitioner did not raise those provisions below, so they are forfeited and not properly before this Court. See *United States v. Williams*, 504 U.S. 36, 41 (1992). Regardless, petitioner does not point to any specific opportunities he forwent because of his agreement. If failing to commence hostilities against the United States in the two days the agreement was in effect was enough to constitute performance, the government would virtually never be able to withdraw from such agreements. That would thwart the Rule’s express recognition that there

will be a period between agreement and the beginning of performance in which the government may withdraw. See R.M.C. 705(d)(4)(B).

2. Petitioner further contends (Pet. 21-23) that, even if the military judge erred, he did not make the kind of egregious error that could warrant mandamus.

As the court of appeals recognized, mandamus and prohibition are “extraordinary forms of relief,” available in only “rare case[s],” under an “exacting standard.” Pet. App. 13a. Petitioner may disagree with the court of appeals’ conclusion that that standard was met. But he identifies no error in the court’s unexceptionable recitation of the settled mandamus standard. See *id.* at 13a-14a.

Instead, petitioner argues (Pet. 21-22) that mandamus should be categorically unavailable unless the party seeking relief offers an on-point case granting relief in similar circumstances. That per se rule makes little sense. Mandamus is “a ‘drastic and extraordinary’ remedy ‘reserved for really extraordinary causes.’” *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004) (citation omitted). By their nature, those errors may be novel. The D.C. Circuit has therefore “never required the existence of a prior opinion addressing the precise factual circumstances or statutory provision at issue in order to find clear error justifying mandamus relief.” *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 749-750 (2016). Other circuits too do not require “binding authority directly on point.” *In re United States*, 945 F.3d 616, 625 (2d Cir. 2019), cert. denied, 141 S. Ct. 658 (2020); see *In re Office of the Utah Att’y Gen.*, 56 F.4th 1254, 1263 n.6 (10th Cir. 2022) (per curiam). Mandamus can be an important tool for “issues of first impression” so that appellate courts can “settle new and

important problems.” *Schalgenhauf v. Holder*, 379 U.S. 104, 111 (1964). It would be highly illogical to allow trial courts to evade mandamus just by making errors so novel and unexpected that no court has reversed them before.

The courts-of-appeals cases on which petitioner relies (Pet. 21-22) do not hold otherwise. *In re Al Baluchi*, 952 F.3d 363 (D.C. Cir. 2020), recognized that a mandamus petitioner may show a clear and indisputable right to relief by “point[ing] to ‘cases in which a federal court has held that’ relief is warranted ‘in a matter involving like issues and comparable circumstances.’” *Id.* at 369 (citation omitted). The case does not say that the petitioner “must” cite such a case. *Contra* Pet. 21.

Conversely, *In re Khadr*, 823 F.3d 92 (D.C. Cir. 2016) (Kavanaugh, J.), recognized that a petitioner had not shown a clear and indisputable right to relief both given the lack of appellate authority *and* because there was “a substantial argument” on the other side. *Id.* at 100. And in *In re Grice*, 974 F.3d 950 (9th Cir. 2020), the court stated that it was “not firmly convinced that the district court erred” “[g]iven the lack of controlling precedent.” *Id.* at 959. All of those cases recognize—correctly—that binding precedent is a classic way to establish a clear and indisputable right to relief. They do not hold that it is the *only* way to establish that right.⁴

⁴ *In re HTC Corp.*, 889 F.3d 1349 (Fed. Cir. 2018), cert. denied, 586 U.S. 1194 (2019), is even further afield. In that case, the Federal Circuit observed—in holding that mandamus was inappropriate under the circumstances—that the petitioner was incorrect that courts had reached “‘inconsistent’ holdings” because it had “not cite[d] a single case that has adopted its interpretation.” *Id.* at 1361. *HTC* does not contain the rule statement that petitioner ascribes (Pet. 21) to it.

Petitioner is also incorrect (Pet. 22-23) to suggest that the D.C. Circuit should have given binding or near-binding deference to the military courts because this case involves a military regulation. Congress purposefully gave the D.C. Circuit “exclusive” appellate jurisdiction in military-commission cases, with the power to decide all “matters of law.” 10 U.S.C. 950g(a) and (d). While “[t]he judicial construction and application of” the Uniform Code of Military Justice is “instructive,” it is “not of its own force binding on military commissions”—and, by extension, the D.C. Circuit. 10 U.S.C. 948b(c).

In any event, this case does not turn on “areas of law peculiar to the military branches” that might warrant deference in some circumstances. *Middendorf v. Henry*, 425 U.S. 25, 43 (1976). The D.C. Circuit applied basic contract-law and textual-interpretation principles well within its ken. See Pet. App. 19a-22a, 26a-40a.

3. The court of appeals’ decision does not create any conflict warranting this Court’s review.

Petitioner argues (Pet. 17-20) that the decision below conflicts with *United States v. Dean*, 67 M.J. 224 (C.A.A.F. 2009). That case involved a now-superseded Rule for Courts-Martial, which, like R.M.C. 705(d)(4)(B), permitted the government to withdraw from a pretrial agreement “at any time before the accused begins performance of promises contained in the agreement.” *Dean*, 67 M.J. at 227 (quoting Rule for Courts-Martial 705(d)(4)(B) (2005)). In a pretrial agreement, the accused (Dean) agreed to plead guilty to all but one specification with a bench trial to be held on the remaining specifications with stipulated facts and a limited number of witnesses. *Id.* at 225-226. Dean submitted a stipulation of fact with his offer of agreement and, after the

agreement was signed, withdrew most of his witnesses as required by the agreement. *Id.* at 226.

On the eve of trial, the government sought to withdraw after learning of additional misconduct by Dean. *Dean*, 67 M.J. at 226. The government argued that an accused does not “‘begin’” performance “until the accused enters a guilty plea,” and because Dean had not yet entered his plea, the government was free to withdraw. *Id.* at 227.

The Court of Appeals for the Armed Forces rejected that argument. *Dean*, 67 M.J. at 227-228. As the court explained, the plain text of the Rule gave the government the unlimited right to withdraw only before the accused began “performance of promises” (plural) “contained in the agreement.” *Id.* at 227 (citation omitted). It did not suggest that the only relevant promise was to plead guilty. *Ibid.* The court therefore held that the government could not withdraw because Dean had begun “to perform several of the promises listed in the agreement.” *Id.* at 228. The court listed three purported acts of performance without explanation: Dean elected a bench trial before signing the agreement, he submitted a stipulation of fact with his offer, and he submitted a revised witness list after the agreement was executed. *Ibid.*

Judge Baker dissented on other grounds but observed that the first two acts listed by the majority “occurred before the convening authority entered into the agreement,” so “it is not clear how [Dean] could, as a matter of military or contract law, begin performing.” *Dean*, 67 M.J. at 231. Judge Baker did not dispute that the third act—withdrawing several witnesses—constituted performance. See *ibid.*

Dean's bottom-line holding and most of its analysis is fully consistent with the decision below. The D.C. Circuit—like the Court of Appeals for the Armed Forces—recognized that the performance of any promise in a pretrial agreement, not just the promise to plead guilty, limits the government's ability to withdraw. See Pet. App. 34a. Thus, the result in *Dean* would have been the same under the D.C. Circuit's reasoning because Dean clearly began performance by filing an amended witness list after the agreement. See *Dean*, 67 M.J. at 228.

Petitioner emphasizes (Pet. 18) that *Dean* also listed Dean's submission of a stipulation of fact as an act of performance. But as the court of appeals observed, *Dean* did not explain *why* it listed that act, which was undisputedly unnecessary to the holding. Pet. App. 33a n.9. Congress gave the D.C. Circuit "exclusive" jurisdiction over military-commission cases and directed that decisions in the courts-martial context like *Dean* are merely "instructive" and "not of [their] own force binding." 10 U.S.C. 948b(c), 950g(a). The D.C. Circuit did not err in exercising its independent judgment rather than deferring to an unreasoned half-sentence in a military-court decision.

For similar reasons, petitioner is incorrect to suggest (Pet. 27-28) that the Secretary implicitly ratified that portion of *Dean* when he patterned the Rules for Military Commissions on the Rules for Courts-Martial. Even assuming that a single decision of the Court of Appeals for the Armed Forces could create a "settled" interpretation, Pet. 28 (citation omitted), no one disputes *Dean*'s core holding that pleading guilty is not the only way to perform a pretrial agreement. There is no reason to think that the Secretary would have intended to

endorse *Dean*'s off-hand mention of how Dean had performed on the facts of that case.

Regardless, any tension between *Dean* and the decision below does not warrant review. At most, the D.C. Circuit disagreed with the Court of Appeals for the Armed Forces about how an uncontested legal rule applies to a particular fact pattern—hardly a conflict on “an important constitutional or federal law question” worthy of this Court’s review. Stephen M. Shapiro et al., *Supreme Court Practice* § 4.7, at 4-26 (11th ed. 2019). Moreover, as petitioner acknowledges (Pet. 23), the rule in *Dean* was repealed and replaced in 2018 and “no other state or federal regulation uses that language.” See Exec. Order No. 13,825, 83 Fed. Reg. 9889, 9967 (Mar. 8, 2018). The only remaining rule with this text is R.M.C. 705(d)(4)(B), over which the D.C. Circuit has “exclusive jurisdiction.” 10 U.S.C. 950g(a). Petitioner’s asserted conflict therefore lacks any prospective significance.

4. This case does not otherwise warrant further review. Petitioner urges (Pet. 34) this Court to intervene given the “importance of this case.” The prosecution of petitioner and his co-defendants for the deadliest terrorist attacks on American soil is undoubtedly a matter of national importance. But the court of appeals’ issuance of writs of mandamus and prohibition properly cleared the way for those prosecutions to continue. Far from warranting this Court’s intervention, the decision below ensured that the “grave” “judgment about whether [petitioner] should face the death penalty” lies in politically accountable hands. Pet. App. 48a.

The government recognizes that these prosecutions have been lengthy and that the families of petitioner’s victims are divided about whether the continued pursuit

of the death penalty is appropriate. But precisely because “this case implicates the interests of the entire nation,” that decision should be made by an official who answers to the American people. Pet. App. 48a. The court of appeals properly corrected the military judge’s egregious legal errors in this undoubtably important case. There is accordingly no need for this Court’s intervention at this juncture.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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