

No. 25-1335

In the Supreme Court of the United States

WALID BIN ‘ATASH,
PETITIONER,
v.
UNITED STATES,
RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

PETITIONER’S REPLY BRIEF

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INTRODUCTION

The D.C. Circuit’s ruling marks the first time that a civilian court has invoked mandamus to reject the meaning of a military rule embraced by every level of the military justice system—including in a decision by the nation’s highest military court.

The weakness of the government’s response is reflected in its treatment of that decision. The brief in opposition waits until its final pages to discuss *United States v. Dean*, 67 M.J. 224 (C.A.A.F. 2009), and, even then, does not deny a conflict between that case and this one. BIO at 15–18. To the contrary, the government acknowledges that, in *Dean*, the Court of Appeals for the Armed Forces “listed [the] submission of a stipulation of fact”—just as Petitioner has done here—“as an act of performance.” *Id.* at 17. But it claims “*Dean* did not explain *why* it listed that act” as a form of performance and that “most of [*Dean*’s] analysis is fully consistent with the decision below.” *Id.* Yet *Dean* did explain itself, describing the government’s position in that matter as “untenable” “[i]n light of the plain language” of the regulation and in “direct[] conflict[] with” military guidance. 67 M.J. at 227–28. And it is of course irrelevant whether “most” of *Dean*’s reasoning mirrors the ruling below. What matters is whether the differences between these cases create a consequential conflict in this case. They do. Petitioner’s stipulation would have precluded the government’s withdrawal in the Court of Appeals for the Armed Forces. Here it did not.

The government’s attempts to defend the merits of the D.C. Circuit’s decision are similarly unavailing. It insists, for instance, that mandamus must remain a “tool for

issues of first impression so that appellate courts can settle new and important problems.” BIO at 13–14 (cleaned up). But the question here was not a new one. Every level of the military justice system had confronted it before. Every level had reached the same conclusion. And if a petitioner cannot “show[] a clear and indisputable right to relief” where there is a “lack of appellate authority” in its favor and a “substantial argument” on the other side, then mandamus cannot possibly lie when there *is* appellate authority and that contrary authority supplies the substantial argument for denying relief. BIO at 14; *In re Khadr*, 823 F.3d 92, 100 (D.C. Cir. 2016).

The government likewise claims that Petitioner did not begin performance of his promise to waive all waivable motions when he chose to remain silent at a motions hearing. As the government acknowledges, that position is an about-face from what it said before the Secretary of Defense’s attempted withdrawal. BIO at 11. Prior to withdrawal, counsel for the government insisted that “with the waiver of all motions from [the] accused, they can’t actively continue to participate in any of the contested litigation based on the pretrial agreement.” App. 29a. And as this Court has explained, “[t]here is no surer way to find out what parties meant[] than to see what they have done” “before [a contract] comes to be the subject of controversy.” *Brooklyn Life Ins. Co. of N.Y. v. Dutcher*, 95 U.S. 269, 273 (1877); *Old Colony Tr. Co. v. City of Omaha*, 230 U.S. 100, 118 (1913).

Shorn of its arguments against review, what remains is something upon which all can agree: that “[t]he prosecution of petitioner” is “undoubtedly a matter of national importance.” BIO at 18. And the D.C. Circuit’s exclusive jurisdiction means only this Court can provide

authoritative review when that prosecution creates a conflict with established military precedent. The Court should grant the petition and reverse.

I. THE DECISION BELOW CONFLICTS WITH SETTLED MILITARY LAW.

1. In arguing that the D.C. Circuit’s ruling does not create a conflict “warrant[ing]” review, the government does not deny that *Dean* listed three actions as constituting performance. BIO at 8. The accused, it observes, “elected a bench trial before signing the agreement,” “submitted a stipulation of fact with his offer,” and “submitted a revised witness list after the agreement was executed.” *Id.* at 16.

How does the government deal with that contrary authority? By accepting that the filing of the amended witness list constituted performance since it occurred after the agreement was signed—and then dismissing the other two actions as “undisputedly unnecessary to the holding” in *Dean*. *Id.* at 17.

Yet as Petitioner has noted, “where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.” Pet. at 19 (quoting *United States v. Title Ins. & Tr. Co.*, 265 U.S. 472, 486 (1924) (cleaned up)). The government’s response is silent on this point.

2. Instead, the government pivots, and questions whether “a single decision of the Court of Appeals for the Armed Forces [can] create a ‘settled’ interpretation” of a military rule—particularly if the conflict supposedly arises from “an unreasoned half-sentence” from that

decision. BIO at 17. That claim is wrong several times over.

First, an appellate court need not decide an issue multiple times before its interpretation—set forth in a binding, published opinion—becomes “settled” law. Indeed, the Military Commissions Trial Judiciary and Court of Military Commission Review here both reached the same result and did so by straightforwardly drawing on *Dean*, confirming that *Dean* did establish what it meant to begin performance of a pretrial agreement. Military guidance, including a manual given to military lawyers stating that “signing the stipulation of fact is performance,” only further affirms that point. *See* U.S. ARMY TRIAL DEF. SERV., Defense Counsel 101 Deskbook at 20-13 (14th ed. July 2024).

Second, the existence of a conflict turns on a court’s holding, not the length of the court’s explanation. And *Dean* in any event gave several reasons behind its decision. It pointed to the regulation’s “plain language,” prior case law, and the Manual for Courts-Martial. 67 M.J. at 227–28 & n.2. The Court of Appeals for the Armed Forces, in short, employed the “traditional” tools of construction—text, precedent, and practice—that this Court has instructed judges to apply when determining a regulation’s meaning. *Kisor v. Wilkie*, 588 U.S. 558, 575, 586–87 (2019).

And third, in promulgating the Rules for Military Commissions, the Secretary had ample opportunity to clarify or repudiate *Dean*. He instead adopted the same withdrawal language wholesale in 2010—post-*Dean*—and retained that language even after the courts-martial rule later changed. *See* Pet. at 27–29.

3. The government’s remaining efforts to downplay the conflict are even further afield.

It contends, for instance, that “this case does not turn on ‘areas of law peculiar to the military branches.’” BIO at 15 (quoting *Middendorf v. Henry*, 425 U.S. 25, 43 (1976)). To be clear: This case is about what it means to “begin[] performance” of a pretrial agreement under Rule 705(d)(4)(B) of the Rules for Military Commissions. That regulation is “identical to the” corresponding rule for military courts-martial—R.C.M. 705(d)(4)(B)—which was “in effect when Congress created the military commissions system in 2009.” See App. 184a. As the government admits, no other legal rule uses this language. BIO at 18. It is not in the Federal Rules of Criminal Procedure, does not appear in state contract law, and has no place in the local rules of any of the federal district courts. If these circumstances do not reflect an “area[] of law peculiar to the military branches,” it would be difficult to find a situation that would.

The brief in opposition also asserts that the D.C. Circuit need not give “binding or near-binding deference to the military courts.” *Id.* at 15. Petitioner has made no such argument. Instead, Petitioner has invoked this Court’s teaching that military judgments are “normally entitled to great deference” because they involve “a legal tradition which is radically different from that which is common in civil courts.” Pet. at 22–23 (quoting *Middendorf*, 425 U.S. at 43; *Noyd v. Bond*, 395 U.S. 683, 694 (1969)). This matter falls squarely within that instruction, having arisen from a military rule, governing military agreements, and interpreted by military courts—with no civilian counterpart. Rather than extending deference, the D.C. Circuit brushed *Dean* aside in a footnote. App. 36a–37a n.10.

Finally, the government notes that the language of the courts-martial rule has changed and that the D.C. Circuit holds exclusive jurisdiction over appeals from the Court of Military Commission Review. Given these circumstances, the government claims that the question presented “lacks any prospective significance.” BIO at 18.

The government’s conclusion does not follow from its premise. To start, the D.C. Circuit’s exclusive jurisdiction is not an open license for it to disregard established military law. The statutory text in fact counsels against that very move: “The judicial construction and application” of the rules for courts-martial are “instructive” when interpreting the rules for military commissions because the latter is “based upon” (or, in this case, drawn verbatim from) the former. 10 U.S.C. § 948b(c).

Moreover, the exclusive jurisdiction in the D.C. Circuit underscores, rather than diminishes, the case for further intervention. That is because the typical route to this Court’s review—percolation and conflict across multiple circuits—is not possible here. The *only* conflict that can arise is when the D.C. Circuit and Court of Appeals for the Armed Forces have taken different views on the same regulatory or statutory language. And that is exactly what happened in this case.

Last, subsequent developments underscore the question’s continuing significance. Just two days after the government filed its brief in opposition before this Court, the military trial judge granted a motion to suppress the confession of one of Petitioner’s co-accused. *See United States v. Mohammad*, AE630BBBBBB (Mil. Comm’n Trial Judiciary Aug. 28, 2026). A similar motion for Petitioner remains pending. By any reasonable measure,

a decision on these motions (particularly a ruling against the government) would give the parties renewed reason to come to the table. Should that happen, only this Court can provide final review of Rule 705(d)(4)(B)’s interpretation and application. The conflict between the D.C. Circuit and the highest military court is thus ripe, important, and capable of recurrence.

II. THE D.C. CIRCUIT’S DECISION IS INCORRECT.

1. On the merits of the decision below, the government begins by contending that the D.C. Circuit “recit[ed]” the “settled mandamus standard” and applied that “uncontested legal rule” to a “particular fact pattern,” thereby reaching a “fact-bound conclusion” which does not merit review. BIO at 8, 13, 18. But this Court has repeatedly made clear that merely “recit[ing] the proper standard” does not insulate a decision from review, *Rice v. Collins*, 546 U.S. 333, 337 (2006), including in its mandamus cases, *see Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980).

The question presented is also not about the mandamus standard generally, but the legal framework applicable to one aspect of the writ—i.e., what it means for a lower court’s error to be clear and indisputable. Some circuits have determined that an error is not clear or indisputable “[w]here no prior [in circuit] authority prohibits the district court’s ruling, or where the issue in question has not yet been addressed by any circuit court in a published opinion.” *In re Grice*, 974 F.3d 950, 955 (9th Cir. 2020). Others have held, as the government notes, that a party need not marshal “binding authority directly

on point.” BIO at 13 (quoting *In re United States*, 945 F.3d 616, 625 (2d Cir. 2019)). From here, the government argues that a “per se rule” that leaves mandamus “categorically unavailable unless the party seeking relief offers an on-point case granting relief” “makes little sense,” because mandamus must be available for matters of first impression. *Id.*

This petition does not depend on such a categorical rule. Indeed, the government itself recognizes that, in *Khadr*, then-Judge Kavanaugh denied mandamus given the lack of appellate authority in one’s favor and “a substantial argument” on the other side. BIO at 14 (citing *Khadr*, 823 F.3d at 100). If that is so, then a published decision by the highest military court establishes—at a bare minimum—a “substantial argument” in support of the rulings by the military judges in this case. The government is silent on this basic problem with the D.C. Circuit’s ruling. That flaw alone defeats the government’s claim to a clear and indisputable right to relief.

2. The government turns next to the specific acts Petitioner points to as beginning performance: the signed stipulation and Petitioner’s silence at the August 1 and 2 motions hearing.

On the stipulation, the government concedes that Petitioner’s statements were “a critical piece of consideration for the government’s agreement not to seek the death penalty.” BIO at 10. But it repeats the panel’s reasoning that “at 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 9 (citing App. 36a) (cleaned up).

Yet as Petitioner has explained, that reading does not reflect how Rule 705 actually works. Pet. at 26. While Rule 705 contemplates that either side may begin negotiations, R.M.C. 705(d)(1), only the accused may “submit a written offer” to the Convening Authority, R.M.C. 705(d)(2). And when he does so, the accused submits the offer and stipulation together, so that the Convening Authority may—as it did here—sign the documents in a package. See Defense Counsel 101 Deskbook at 20-18. Petitioner has not found, and the government has not identified, a single instance where a stipulation of fact was signed after an offer was submitted, whether in the courts-martial or military commissions context. That practical reality highlights why it was improper for the D.C. Circuit to use “basic contract law” to displace a judgment informed by military experience and expertise. BIO at 9. The latter accounts for how military negotiations work. The former does not.

As to Petitioner’s silence at the August motions hearing, the government argues that the pretrial agreement required Petitioner “to waive all waivable motions.” *Id.* at 11. And Petitioner, it says, took “no identifiable action to begin waiving any motion.” *Id.* (internal quotation marks omitted).

But Petitioner’s pretrial agreement did not require him to waive every motion immediately upon signing. Instead, it provides that “[u]pon the Military Judge’s acceptance of this Agreement,” Petitioner promises to “knowingly, voluntarily, and expressly waive[] all waivable motions.” App. 25a. At the August hearing, the military judge had not yet accepted Petitioner’s agreement. Consequently, Petitioner had before him three options.

He could have ignored the prosecutor’s instruction to stop “participat[ing] in . . . the contested litigation” and gone forward with questioning the witness. App. 29a. No one disputes that Petitioner would have breached his pretrial agreement had he done so.

Or Petitioner could have—as the government suggests—made a “formal or even informal request” to “withdraw a motion.” BIO at 11. But that suggestion only exposes the problem with the government’s logic. Under its theory, any such action would have been no more performance than the signed stipulation. In each case, Petitioner would have taken an action contemplated by the pretrial agreement before the government claims a necessary antecedent condition had occurred: The stipulation preceded the Convening Authority’s signature, the withdrawal of motions would have preceded the military judge’s acceptance of the agreement. The government, in short, cannot have it both ways. It cannot fault Petitioner for failing to perform one obligation prematurely while insisting that his premature performance of another obligation does not count.

That leaves a third option, to follow the prosecutor’s instruction and stay silent. That route does not reject performance, nor does it complete it. It instead represents a “first part of a process,” *Begin*, MERRIAM-WEBSTER DICTIONARY (12th ed. 2026)—a process the government itself sought to advance when, at the conclusion of the August hearing, it requested that the military judge “schedul[e] the plea hearing[] as soon as possible” to “insulate the proceedings from any unlawful influence,” App. 8a.

III. THIS CASE IS AN EXCELLENT VEHICLE TO ADDRESS AN IMPORTANT ISSUE.

All agree that the prosecution of Petitioner and his co-accused is a matter of great national importance. BIO at 18; *accord* App. 14a. Nor is there any question that the issue here is cleanly presented, with the conflict acknowledged below and the relevant facts undisputed. App. 20a; App. 36a–37a n.10.

Less clear is how the Court should handle this petition and the one filed by Petitioner’s co-accused. Both, to be sure, challenge the panel’s mandamus ruling. *See, e.g.*, Pet. at 30–38, *Mohammad v. United States* (26-13). But the *Mohammad* petition focuses on a jurisdictional issue that, unlike the mandamus question, produced no disagreement below: Every panel member agreed that jurisdiction existed. *Id.* at 16–30; *see, e.g.*, App. 12a, 54a (Wilkins, J., concurring in part and dissenting in part). The Court can certainly grant both petitions; it can also grant this petition and hold *Mohammad* pending disposition of this matter.

* * *

One final note. Near the end of the government’s brief, it urges the Court to stay its hand, because the relevant decisions over Petitioner’s prosecution “should be made by an official” who is “politically accountable.” BIO at 18–19. The government has made that same argument before. *See* U.S. Br. at 26, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (“[T]he Executive—unlike the courts—is politically accountable for the decisions made in prosecuting war.”). This Court rejected that argument

then, and stressed that courts must, even during “our most challenging and uncertain moments,” continue to “exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims.” *Hamdi*, 542 U.S. at 532, 535 (plurality op.). So too here. Political accountability may determine who makes prosecutorial decisions. It does not determine who says what the law means.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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