

No. 26-13

**In the Supreme Court
of the United States**

KHALID SHAIKH MOHAMMAD, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

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

**BRIEF OF *AMICUS CURIAE*
PROFESSOR CLAIRE O. FINKELSTEIN IN
SUPPORT OF PETITIONERS**

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August 3, 2026

QUESTIONS PRESENTED

1. Whether a court of appeals has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), where the government has no statutory right to an interlocutory or final judgment appeal, to issue a writ of mandamus to review an interlocutory procedural order in a criminal case that does not have the effect of a dismissal.
2. Whether a trial court's procedural ruling in a criminal case may be enjoined by mandamus, where the court of appeals acknowledged that the trial court followed well-established and uncontested precedent

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INTEREST OF AMICUS CURIAE¹

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The views of the amicus do not necessarily reflect those of CERL or the University of Pennsylvania, and no portion of this brief should be attributed to those organizations or to their members.

Amicus is filing this brief to address the vital national security and rule of law interests potentially impacted by this case. As a national security expert, amicus has an interest in ensuring that the Court preserves and promotes the rule of law in 21st-century national security, warfare, and democratic governance.

SUMMARY OF THE ARGUMENT

Just days after Petitioners and the Convening Authority signed pretrial agreements ("PTAs") that would end decades of litigation in the long-running prosecution of Khalid Sheikh Mohammed, Mustafa Ahmed Adam al-Hawsawi, and other Guantanamo detainees for their involvement in the September 11th attacks, then-Secretary of Defense Lloyd James Austin III withdrew the Department of Defense from

each of the PTAs. The government appealed Secretary Austin's decision to the Court of Military Commission Review ("CMCR"), which ruled that the Secretary's action was prohibited under the Rules for Military Commissions ("R.M.C."). Secretary Austin and the Department of Defense ("DOD") appealed the Military Court's ruling to the U.S. Court of Appeals for the D.C. Circuit on an emergency petition. That court reversed and granted the government's request for a writ of mandamus to reinstate Secretary Austin's decision.

Amicus respectfully urges this Court to grant petitioner's application for certiorari in view of the extraordinary rule of law issues the case raises. Both Secretary Austin's intervention and the D.C. Circuit's decision to issue the mandamus raise issues that strike at the heart of the U.S. system of checks and balances and call into question the relationship between the executive branch and its own non-Article III courts. More specifically, the U.S. Supreme Court must determine whether Secretary Austin had the power to engage in a highly irregular intervention in a military court's decision. But it must also consider whether the Secretary of Defense has the authority to override a congressionally-mandated legal process for the review of military commission cases. Finally, the

Court must determine whether the D.C. Circuit has the authority to issue a mandamus under the All Writs Act, when Congress has provided for a different review process, thus substituting extraordinary relief for the interlocutory review that Congress deliberately withheld in this type of case.

Violations of the rule of law have been legion where the Guantanamo defendants are concerned, from the first moments of their captivity through the unlawful methods used in their interrogation to the lengthy and highly unpredictable course of the proceedings in the commission system. The controversial history of this and other Guantanamo cases makes departures from established legal norms especially damaging to public confidence in the commission system and the legitimacy of trying terror suspects in military commissions rather than regular Article III courts. In all criminal trials, but particularly in capital cases, the perceived legitimacy of the conviction depends crucially on protecting the rights of the defendants along the road to conviction. It is all the more critical to adhere to the rule of law in capital cases where the defendants have been in captivity for over twenty years, and where the defendants have been tortured in interrogations.

In addition to compromising the rights of the defendants, Secretary Austin's decision has also brushed aside the rights of the victims. These plea agreements were the only realistic path to conviction for the defendants. Unsurprisingly, therefore, many victims' families support the pretrial agreements. The D.C. Circuit has denied those families closure and vindication of the lives of their loved ones. Given the age and health challenges of the defendants, the likelihood is that without the plea agreements, the defendants will die in U.S. captivity as legally innocent men, despite their willingness to plead guilty to the charges against them.

ARGUMENT

I. SECRETARY AUSTIN'S WITHDRAWAL FROM THE PTAS WAS UNLAWFUL AND ILL- ADVISED.

The matter before the Court has exposed a significant ambiguity in the authority of a Secretary of Defense relative to his own convening authority and the decisions of the military courts that review the commission process. While the D.C. Circuit reinstated the Secretary's decision on the grounds that the Secretary exercises plenary power over the convening authority, that Court was divided on

the scope of the Secretary's authority once a military commission has been convened. As Judge Robert Wilkins' separate opinion in that case pointed out, even if the Secretary had the general authority to withdraw plea agreements in military cases, it is critically important that this Court resolve the basic question of the scope of the convening authority's discretion once the DOD has delegated it to a convening authority for the military commissions. See *In re United States*, 143 F.4th 411, 443 (D.C. Cir. 2025) (Wilkins, J., concurring in part, dissenting in part). This is a fundamental rule of law question. Does justice to the parties requires that the Secretary of Defense adhere to his own rules for military commission proceedings, or should the Secretary be permitted to withdraw from those rules at all? Arguably, the Secretary's authority over military commission cases depends critically on the conformity of the commission process to the rules laid out by Congress.

Secretary Austin's after-the-fact choice to withdraw from the PTAs was an unlawful and ad hoc interference in the regular business of the military courts, one that delegitimizes the military commission process.

First, by withdrawing from the PTAs that had been negotiated and approved by a properly designated convening authority, the Secretary

disregarded the congressionally prescribed process governing the military commissions system under Chapter 47A of title 10 U.S.C., as amended by the Military Commissions Act (“MCA”) of 2009 (title XVIII of Public Law 111-84), 10 U.S.C. §§948a, et seq; and as further amended by the National Defense Authorization Act for FY 2014, Public Law 113-66 §§ 1031, 1037; as well as, the Rules of Military Commissions (“R.M.C.”) and the Manual for Military Commissions (“M.M.C.”). Under the M.M.C., “[t]he decision whether to accept or reject an [pretrial agreement] offer is within the sole discretion of the convening authority.” *See* M.M.C. II-61(3).

Congress, along with implementing regulations, has established a clear structure for military commission procedures, where a designated convening authority (here, Brig. Gen. Susan K. Escallier) has the independent authority to negotiate and approve PTAs. The MCA of 2009 authorizes the President to establish military commissions “to try alien unprivileged enemy belligerents for violations of the law of war and other offenses” and explains that the Secretary of Defense himself may convene a military commission or may designate “an officer or official” for the purpose of convening such commission. *See* 10 U.S.C.

§948b, 10 U.S.C. §948h. Once the authority has been designated, this sole convening authority is authorized to try unprivileged enemy belligerents under pre-trial, trial, and post-trial procedures set forth by general courts-martial under chapter 47 of the Uniform Code of Military Justice (“UCMJ”), including the procedures to “withdraw from a pretrial agreement at any time before the accused begins performance of promises.” *See* R.M.C. 705(d)(3); R.M.C 705 (d) (4).

Military courts have also long recognized that even the appearance of improper superior interference within the military justice system is corrosive to the system’s legitimacy. While commanders have broad regulatory authority, they cannot extend their authority into areas that compromise the judicial process. “This Court has consistently held that any circumstance which gives even the appearance of improperly influencing the courts-martial proceedings against the accused must be condemned.” *United States v. Hawthorne*, 22 C.M.R. 83, 87 (C.M.A. 1956).

Secretary Austin’s withdrawal implicates those concerns. Regarding the statutory matter, the Secretary acted outside the congressionally established military commission process by revoking decisions made by a legitimate

convening authority that he himself appointed. Moreover, as a matter of institutional legitimacy, this same conduct risks drawing skepticism due to a public perception of unwarranted interference by a superior with a subordinate's decision. The formal name for this abuse of authority is "unlawful command influence," and although the military court found it unnecessary to address the command influence issue, the concept occupies an important place in the operations of the military commissions and protection of the rule of law. Specifically, Congress addressed the issue of unlawfully influencing the action of military commissions and the United States Court of Military Commission Review under 10 U.S.C. § 949b. Secretary Austin's decision to nullify the legally negotiated plea agreements implicates the same questions that the concept of unlawful command influence was designed to address.

This Court's review is thus necessary not only because the D.C. Circuit's resolution of the statutory question requires correction, but also because the Secretary's conduct presents a threat to the structure Congress built and to public confidence in the actions of influential military officials.

The decision to withdraw from the PTAs harms the rule of law in a second respect. As the

Court of Military Commission Review ruled, and the U.S. Court of Appeals for the Armed Forces (“CAAF” or “USCAAF”) affirmed, the Secretary withdrew from the PTAs after Petitioners had already begun performance of their agreements, despite the rule 705(d)(4)(B) of the RMC against withdrawal by the convening authority or special trial counsel after “the accused begins performance of promises contained in the agreement.” See R.M.C. 705(d)(3); R.M.C 705 (d) (4). In a criminal justice system governed by the rule of law, defendants only negotiate and treat an agreement as binding if the government regards itself as bound by the agreement as well. As Professor Peter Margulies argues, “[t]he binding nature of a plea agreement undergirds the whole process of negotiation in both UCMJ and military commission proceedings. (...) This provision [R.M.C. 705(d)(4)(B)] preserves the reciprocity necessary to any negotiation.” Peter Margulies, *Can the 9/11 Plea Withstand the Appointments Clause?* Lawfare (Jan 27, 2025) <https://www.lawfaremedia.org/article/can-the-9-11-plea-withstand-the-appointments-clause>

The Secretary’s decision to withdraw from the PTAs undermines the plea-agreement process in military commissions, where government withdrawal from PTAs is only permitted prior to a defendant beginning

performance of said agreement. *See, e.g. United States v. Manley*, 25 M.J. 346, 350 (C.M.A. 1987) (“[a]convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement” (citing R.C.M. 705(d)(5)(B))); *United States v. Parker*, 60 M.J. 666, 669 (N-M. Ct. Crim. App. 2004), *aff’d* in part, 62 M.J. 459 (C.A.A.F. 2006) (explaining that the period during which a convening authority may withdraw from a pretrial agreement is prior to the performance of the promises contained in the agreement); *United States v. Dean*, 67 M.J. 224, 227 (C.A.A.F. 2009)) (holding that the military judge erred in allowing the convening authority to unilaterally withdraw from the pretrial agreement once the accused had already begun performance of promises such as entering into an agreed stipulation of fact).

Even if the Secretary’s assumption of authority to withdraw from the PTAs was proper in theory, this opportunity ceased to exist once Petitioners’ performance of the agreements had begun. Every court reviewing this type of case has previously agreed on the governing standard for when withdrawal from a PTA is appropriate: prior to a defendant’s beginning performance of promises. “The rule [R.C.M 705(d)(4) (B)] does

not state, as it easily could have, that the convening authority may withdraw from a pretrial agreement at any time before the accused enters a guilty plea. Rather, it clearly states that the convening authority may withdraw from the agreement at any time before the accused “begins performance of promises contained in the agreement.” *Dean*, 67 M.J. at 227.

Applying that long-established standard to this same case, both the Military Judge and the CMCR agreed that the Secretary’s belated decision to withdraw from the PTAs after Petitioners had begun performance was unlawful and contrary to the text, history, and structure of Rule 705(d)(4)(B). Both decisions confirm that the Secretary’s choice to withdraw from the PTAs was not an appropriate exercise of his authority and did not align with the controlling law. This opinion was echoed by Judge Wilkins’ dissent at the Circuit level, though the Circuit majority held that performance had not yet begun. Given the split among tribunals and the potential for the Secretary’s withdrawal to undermine standard plea deal procedures, review is warranted to reconsider whether withdrawal was appropriate.

**II. EXECUTIVE INTERFERENCE
WITH THE INDEPENDENCE OF A
REGULARLY-CONSTITUTED
MILITARY COMMISSION
VIOLATES SEPARATION OF
POWERS BETWEEN THE
EXECUTIVE AND LEGISLATIVE
BRANCHES.**

The authority of the convening authority does not stem solely from the Secretary of Defense's inherent authority under Article II of the U.S. Constitution. It is an authority delegated to the Executive branch by Congress. Congress provided that military commissions and the military courts that review their decisions exercise independent judicial authority once the Secretary has chosen to exercise his delegated authority under the appropriate statutory authority. 10 U.S.C. §948(b)(f); 10 U.S.C. § 949b. That authority is nullified if executive officials are permitted to overturn judicial determinations once rendered. By revoking the plea agreements after they had been accepted by the military judge, Secretary Austin arbitrarily and improperly interfered with the commission's exercise of its adjudicative authority. Rather than correcting Secretary Austin's interference, the D.C. Circuit affirmed it by issuing mandamus to restore his

revocation of the plea agreements, effectively authorizing the Executive to override a lawfully constituted military tribunal. This is an inappropriate concentration of power. As Madison remarked in Federalist Paper No. 47, “The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.” THE FEDERALIST NO. 47, at 324 (J. Madison) (J. Cooke ed. 1961). This Court should grant certiorari to address critical questions relating to the independence of non-Article III courts, including military courts, as provided for by Congress, and the separation of powers that establishes Congress’ right to establish rules for the military justice system. The need to respect the autonomy of military commissions within the appropriate statutory framework raises at least two compelling rule of law issues meriting the Court’s attention. First, military commissions are regularly constituted tribunals whose judicial determinations are entitled to the same institutional deference afforded to non-Article III courts established by Congress. Andrew Nolan & Richard Thompson, Congressional Power to Create Federal Courts: A Legal Overview (CRS Report R43746, Jun 1, 2025).

https://www.congress.gov/crs_external_products/R/PDF/R43746/R43746.5.pdf

Second, permitting executive officials to nullify those determinations after the fact threatens historical traditions and statutory safeguards to prevent military courts from collapsing prosecutorial and adjudicative power into a single authority. Military courts exercise unique authority over plea agreements reached in the non-Article III court system. Consequently, protecting the authority of the military courts over the administration of plea agreements reached within the military commission process implicates the interests not only of the plea agreement's parties, but also of the judiciary tasked with overseeing that process. In *Hunter v United States*, this Court recognized that courts have an "independent" "institutional interest" in ensuring that fundamental rules are upheld and legal proceedings "appear fair to all who observe them," *Wheat v. United States*, 486 U. S. 153, 160 (1988). Any other course would run the risk of institutional harm and discredit. *Hunter v United States*, 608 U.S. ____ (2026).

**A. The Military Commission Is a Regularly
Constituted Tribunal Whose Judicial
Authority Must Be Respected.**

Congress passed the Military Commissions Act of 2006 and 2009 to legitimize military commissions in the face of this Court's rejection of their legality. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; Military Commissions Act of 2009, Pub. L. No. 111-84, div. A, tit. XVIII, 123 Stat. 2574 (codified as amended at 10 U.S.C. §§ 948a–950t); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). This history makes clear that the commissions cannot exercise lawful authority outside their congressionally mandated framework under the MCA. The Secretary of Defense is thus bound by the provisions of the MCA along with the rest of the executive branch.

Under the MCA and associated authorities, once a military judge accepts a plea agreement, that determination becomes an exercise of the commission's adjudicative function rather than an extension of the Executive's prosecutorial discretion. Permitting executive officials to nullify such a determination after judicial acceptance strips the commission of the independence Congress intended it to possess. The D.C. Circuit's decision to enforce Secretary Austin's decision thus licenses a significantly

expanded interpretation of inherent executive authority relative to Congress' power to pass legislation relating to the military justice system.

In *Hamdan*, the Court held that “the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 613–14 (2006). This Court explicitly rejected the proposition that the Executive could operate military tribunals unconstrained by Congress. *Id.* at 636–637. As the Court noted, this principle has been clear since *Ex parte Milligan*, in which this Court provided that “Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.” *Ex parte Milligan*, 71 U.S. (4 Wall) 2 139-140 (1866). Specifically, the Court in *Hamdan* held that military commissions were expected to follow the same procedures as those provided for courts-martial, which are governed by the UCMJ. *Id.* at 617.

By codifying the military commission system, Congress deliberately replaced unilateral executive action with a legislative framework intended to govern all aspects of the Commission's function, from pre-trial and trial, through post-trial procedures. In *Hamdi v. Rumsfeld*, Justice O'Connor explained that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens, *Youngstown Sheet & Tube*, 343 U. S., at 587." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004). The *Hamdi* Court emphasized that the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake." *Id.* At 536. Even in matters touching national security, judicial determinations cannot be displaced by unilateral executive action. "Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions. See *I.N.S. v. St. Cyr*, 533 U. S. at 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context

that its protections have been strongest”).” *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

Although this Court's analysis in *Hamdan* and *Hamdi* ultimately rests on domestic constitutional and statutory principles, those principles are consistent with the longstanding requirements of the Geneva Conventions. Common Article 3 permits sentences to be imposed only by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Those guarantees reflect a fundamental commitment to the rule of law by requiring an independent tribunal capable of rendering meaningful and binding judicial decisions, rather than one whose rulings remain contingent upon the caprice of unilateral executive approval.

The need to protect the lawfulness and legitimacy of the commissions system applies abundantly to the present instance. Once the military judge accepted the plea agreements, the PTAs became binding on all parties, including the Convening Authority and, by extension, the rest of the DoD. Secretary Austin's subsequent attempt to revoke the PTA's did not merely alter

litigation strategy; it purported to overturn a judicial determination already made by a tribunal created and governed by Congress. Allowing the Executive to nullify judicial determinations rendered pursuant to the statutory framework Congress created would effectively restore the very form of executive control over military commissions that Congress rejected when it enacted the Military Commissions Act. If executive officials may nullify judicial rulings after the fact, the military commission ceases to function as an independent court and instead operates only at the Executive's pleasure. That result is incompatible with both the statutory framework Congress enacted following *Hamdan* and the constitutional principles recognized in *Hamdi*.

B. The D.C. Circuit's Decision Undermines Constitutionally-Mandated Separation of Powers.

The question presented in this case extends well beyond the validity of the instant plea agreements. It concerns whether the Executive may summarily pre-empt the judicial decisions of a tribunal created by Congress and which Congress endowed with significant independence.

The issue is not merely whether the PTA's remain enforceable. Rather, this Court must determine whether the Executive may override judicial determinations issued by a lawfully constituted military tribunal after that tribunal has exercised its adjudicative authority. The D.C. Circuit effectively reduced the military commission to an advisory body whose rulings remain contingent upon executive approval. If left undisturbed, that decision threatens the legitimacy and credibility of military courts in general and military commissions under Chapter 47A of title 10 in particular.

**III. THE D.C. CIRCUIT'S MANDAMUS
WAS ITSELF AN AD HOC REMEDY
THAT RESTORED THE
SECRETARY'S AD HOC DECISION.**

In granting a mandamus, the D.C. Circuit did not simply restore a capricious and arbitrary exercise of power by the Secretary of Defense. The decision to overturn the decisions of two military courts using the extraordinary device of mandamus in the context of an emergency procedure was an ad hoc decision of its own, circumventing the procedures Congress established to govern pretrial agreements under the MCA of 2009. The MCA does not leave the modification, withdrawal from, or nullification of

negotiated pretrial agreements to ad hoc judgment by either the Secretary or a reviewing court. It instead establishes a defined chain of authority, vesting the power to approve or unwind plea agreements in the convening authority, subject to review by the military judge and the Court of Military Commission Review. 10 U.S.C. § 950f(d). This structure exists precisely to ensure a regular, reviewable process for decisions of this kind, rather than unilateral fiat by the Secretary of Defense. In granting the writ, the D.C. Circuit bypassed that body of law and, in a move dissenting Judge Wilkins called "stunning" and a "grave error," held that mandamus was proper. *In re United States*, 143 F.4th 411, 443 (D.C. Cir. 2025).

These commissions, first established in 2006 to try Guantánamo detainees, are modeled on courts-martial procedures and governed by military law and procedure. Critically, they were designed to operate independently of Article III and other civilian courts. The D.C. Circuit itself recognized this independence in 2016, when Guantánamo defendant Abd al-Rahim al-Nashiri petitioned for mandamus challenging the charges against him. *In re Al-Nashiri*, 835 F.3d 110 (D.C. Cir. 2016). There, the majority held that the court must abstain from considering the challenge, reasoning that federal

courts may not interfere with a commission proceeding earlier than Congress intended. *Id.* at 118. The court further held that Al-Nashiri's mandamus petition amounted to an attempt "to avoid the structure Congress has created." *Id.* at 113. In this case, the majority displayed no such reservation about interfering with the commission. Its justification is difficult to reconcile with that precedent. In part, the majority grounded its grant of mandamus in the need to resolve whether Secretary Austin possessed legal authority to revoke General Escallier's convening authority, a question already resolved by the CMCR and settled as law of the case. Had the military judge disregarded that determination on remand, the proper avenue for relief under the MCA's own structure would have been to petition the CMCR to enforce its ruling, not to seek an extraordinary writ from an Article III court that, by definition, is available only where no adequate alternative remedy exists. The government neither explained why it needed relief on an already-decided question nor satisfied the mandamus's "no adequate alternative means" requirement; instead, it sought relief in the D.C. Circuit precisely to avoid the structure Congress created.

The majority was similarly dismissive of *United States v. Dean*, in which the Court of Appeals for the Armed Forces held that entering into a stipulation of fact in connection with a pretrial agreement constitutes beginning performance. *United States v. Dean*, 67 M.J. 224, 229 (C.A.A.F. 2009). In a footnote, the majority declined to follow *Dean* on the ground that it "did not explain how its holding was consistent with the text of the withdrawal regulation or basic principles of contract law." *In re United States*, 143 F.4th 411, 434, n.2 (D.C. Cir. 2025). While the majority was correct that *Dean* is not binding on an Article III court, it never explained why the CMCR's reliance on *Dean*, the highest military appellate authority on point, in a case addressing materially identical facts, was so plainly wrong that the government's entitlement to relief was "clear and indisputable," as the showing mandamus requires. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–81 (2004). Nor did the majority attempt to reconcile that result with its own 2016 acknowledgment, in *Al-Nashiri*, of the deference owed to the procedures and governing law of the commissions.

In all criminal trials, but particularly in capital cases, the perceived legitimacy of the conviction depends crucially on protection of the

rights of the defendants along the road to conviction. The need to adhere to the rule of law in capital cases where the defendants have been in captivity for over twenty years and have been tortured to provide information is even more evident.

By disregarding the MCA's procedures and settled military-commission precedent to grant mandamus, the court substituted its own judgment for the framework Congress enacted, issuing what amounts to an advisory opinion on Secretary Austin's authority, with no statutory basis for doing so. Rather than deferring to the body of law every actor below had operated under, the majority imported general contract-law principles in a manner Judge Wilkins's dissent described as disrespectful to the work of two military courts and undermining the settled precedent from the military justice system's highest court of appeals. *In re United States*, 143 F.4th 411, 453 (D.C. Cir. 2025) (Wilkins, J., dissenting). This ad hoc departure from established military-commission law compounds Secretary Austin's own ad hoc rescission of the plea agreements, further delaying a case already marked by setbacks and complications and, most significantly, denying victims' families their most reasonable path to justice.

**IV. REJECTING THE PTAS
ELIMINATES ANY REALISTIC
MEANS OF OBTAINING A
CONVICTION AND DENIES
JUSTICE TO THE VICTIMS.**

The original PTAs represented the only tangible pathway to resolution of this case after over twenty years of ongoing litigation—the only shred of hope for the American public waiting for finality and, most importantly, the victims' families who have waited through every twist of the case, and for whom its unresolved status has become its own form of harm. As described above, the legal proceedings in this case have outlasted eight military judges, survived a presidential effort to relocate the trial, and remained stalled by unresolved fights over torture, classified evidence, and government secrecy. The result has been decades of suffering, and with the PTAs now unraveled, the victims' families are left once again waiting, with no clear path forward in sight. As explained below, proceeding to a contested trial carries no assurance of conviction; the withdrawal of the PTAs inflicts harm on the very families the prosecution exists to serve, and the D.C. Circuit's decision to reinstate that withdrawal

has plunged the case back into paralysis and uncertainty.

A contested trial offers no guarantee of conviction—the plea agreements represented the only realistic mechanism to assure convictions in the face of the complex issues in this ongoing litigation.

The stakes of continued delay are not merely practical but legal. Under the doctrine of abatement *ab initio*, a defendant who dies while a direct appeal is pending stands without a final conviction because the conviction and the underlying proceedings abate from their inception. *United States v. Pogue*, 19 F.3d 663, 666 (D.C. Cir. 1994). After more than two decades of litigation, further delay therefore creates a genuine risk that the victims' families will never obtain a final adjudication on the merits.

The plea agreements, by contrast, would have ensured accountability. As a 2022 33-member Working Group report co-chaired by Professor Claire Finkelstein and the Honorable Harvey Rishikof, a former convening authority of the military commissions, concluded, the plea agreement the Secretary of Defense canceled was the only realistic option for achieving a conviction in the military commissions system for these defendants. Claire Finkelstein &

Harvey Rishikof, *Beyond Guantanamo: Restoring the Rule of Law to the Law of War. A Report Recommending Closing the Guantanamo Bay Detention Facility*, Center for Ethics and the Rule of Law & Annenberg Public Policy Center (September 11, 2022),

[https://www.pennccerl.org/wp-](https://www.pennccerl.org/wp-content/uploads/2022/09/Beyond-Guantanamo-Restoring-the-Rule-of-Law-to-the-Law-of-War-update.pdf)

[content/uploads/2022/09/Beyond-Guantanamo-Restoring-the-Rule-of-Law-to-the-Law-of-War-update.pdf](https://www.pennccerl.org/wp-content/uploads/2022/09/Beyond-Guantanamo-Restoring-the-Rule-of-Law-to-the-Law-of-War-update.pdf). See also, Claire Finkelstein, Alberto Mora, & Stephen Xenakis, Secretary Austin's Fateful GTMO Plea Deals Decision, *Lawfare* (Aug 20, 2022),

<https://www.lawfaremedia.org/article/Secretary-Austin's-Fateful-GTMO-Plea-Deals-Decision>.

Other scholars have since recognized that negotiated plea deals provided the most likely avenue for the much-needed closure for the victims and their families, precisely because of evidentiary and procedural obstacles like the ones faced here. *See, e.g.*, Jonathan Hafetz, *The Last, Best Chance for Accountability at Guantanamo? A Negotiated Plea for the 9/11 Defendants*, *Just Security* (Nov. 15, 2022),

<https://www.justsecurity.org/84108/the-last-best-chance-for-accountability-at-guantanamo-a-negotiated-plea-for-the-9-11-defendants/>

(emphasizing the utility of plea agreements in that they avoid deciding unanswered questions

that would otherwise delay proceedings); Devon Chaffee, *Military Commissions Revived: Persisting Problems of Perception*, 9 U.N.H. L. REV. 237, 238-239 (2011) (documenting that, as of 2011, military commission cases involving Guantanamo Bay detainees had been incredibly slow to resolve, with the small number of cases reaching resolution overwhelmingly ending in guilty pleas rather than trials).

Many of the victims' families supported the PTAs, and the Secretary's withdrawal harms the very people the prosecution is meant to serve. Theodore Olson, *I Lost my Wife on 9/11. But I Believe that the Plea Deals Should Go Forward*, *The Washington Post* (Aug., 14, 2024) <https://www.washingtonpost.com/opinions/2024/08/14/9-11-plea-deals-theodore-olson-austin/> As reflected in the amicus briefs submitted in support of rehearing en banc following the D.C. Circuit's decision, numerous families simply wish for these proceedings to end with a definitive resolution. See Brief of Peaceful Tomorrows and Individual Family Members as Amici Curiae in Support of Petition for Rehearing En Banc at 17, *In re United States*, ECF No. 2138447.

This Court's review is necessary not only to resolve the significant legal questions discussed above, but also to restore the prospect of

meaningful and timely justice for the families of the September 11th victims—families who have waited far too long to vindicate their loved ones.

CONCLUSION

The Secretary's withdrawal from the PTAs, as well as the D.C. Circuit's decision to issue an unprecedented writ of mandamus, both raise pressing rule of law questions that urgently require resolution. Considered alongside the denial of justice for both defendants and victims and their families, the writ of certiorari should be granted.

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