

IN THE
Supreme Court of the United States

KHALID SHAIKH MOHAMMAD AND MUSTAFA AHMED ADAM AL HAWSAWI,
Petitioners,

—V.—
UNITED STATES OF AMERICA,
Respondent.

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

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INTRODUCTION

The court of appeals issued a writ in aid of appellate jurisdiction that Congress did not create, that the panel could not identify, and that the government did not claim, in order to grant relief that requires the creation of a circuit split. The government asserts that the court of appeals was right to do so because the military judge's holding—that the Secretary of Defense's effort to withdraw from a pretrial agreement in the September 11 case was untimely—showed “extraordinary disregard for the Secretary's authority over these military-commission prosecutions.” BIO.8. But the military judge applied the Secretary's own rule, as construed by the military's highest court, and that decision was unanimously affirmed by a panel of military appellate judges. The military judge's decision is not an usurpation of power; to the contrary, it faithfully applied the law.

This Court was unequivocal in *Will v. United States*: courts cannot “grant the Government a right of review which Congress has chosen to withhold.” 389 U.S. 90, 97 n.5 (1967). The court of appeals contravened that rule and subverted Congress's scheme for how the military should prosecute those allegedly responsible for the September 11 attacks.

The court of appeals' decision also deepened division among the circuits about whether and when the government may circumvent limits on its statutory appellate rights in criminal cases through mandamus petitions.

This case presents as clean a vehicle as possible for resolving both disagreements. Review should be granted.

ARGUMENT

I. THE DECISION BELOW DEEPENS A CIRCUIT SPLIT ON THE MEANING OF *WILL*

The government fails to join issue with the first question presented by labeling the D.C. Circuit’s assertion of mandamus jurisdiction a “straightforward application of . . . well-settled principles.” BIO.9. It was not, as the dissent below demonstrates. The majority below inverted this Court’s decision in *Will v. United States*, as have some other circuits. As a result, there is widespread confusion among the circuits about *Will*’s reach.

This case presents an ideal vehicle for this Court to put that confusion to rest.

A. The Question Presented Was Fully Briefed and Decided Below.

The government concedes Petitioners’ first question presented is jurisdictional and “not subject to forfeiture.” BIO.11. Nonetheless, the government complains that the court of appeals “devote[d] two paragraphs” to its jurisdiction. *Id.* But the court of appeals decided this jurisdictional question after full ventilation by the parties. Petitioners fulsomely raised the issue below, first in response to the government’s stay application, and later, after the court ordered the proceedings consolidated, by incorporating it by reference into its mandamus opposition. The government likewise responded fulsomely, first in its stay application and then by

reference in its mandamus briefing.¹ Respondents’ Brief in Opposition to Petitioner’s Emergency Motion for a Stay at 3–4, 10–11, 18–25, *In re United States*, No. 25-1009 (D.C. Cir. Jan. 8, 2025), Dkt. 2093203; Petitioner’s Reply in Support of Emergency Motion for Stay at 3–5, *In re United States*, No. 25-1009 (D.C. Cir. Jan. 9, 2025), Dkt. 2093206; Respondents’ Brief in Opposition to Petitioner’s Petition for a Writ of Mandamus at 8, *In re United States*, No. 25-1009 (D.C. Cir. Jan. 17, 2025), Dkt. No. 2094949; Reply in Support of Petition for a Writ of Mandamus and Prohibition at 5–6 & n.3, *In re United States*, No. 25-1009 (D.C. Cir. Jan. 22, 2025), Dkt. 2095733.

The rule from *Cutter* that this is a “court of review, not of first view” is therefore well satisfied. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The panel, as the government acknowledges, “first assured itself of its own jurisdiction.” BIO.6. It did so at length and with the aid of briefing from both parties that it had ordered consolidated, indeed relying on a case cited in Petitioners’ stay briefing. Pet.App.12a–13a. The question is therefore fully presented for this Court’s resolution.

¹ Particularly where the court of appeals consolidated the stay and mandamus proceedings, both parties below properly made arguments in the mandamus briefing by reference to their earlier stay briefing. The government is wrong to rely on *Al-Tamimi v. Adelson*, which actually held that incorporation by reference is “unobjectionable” where, as here, a prior order had discouraged repetitious filings and the opponent “had a fair opportunity to respond.” BIO.11 (citing 916 F.3d 1, 6–7 (D.C. Cir. 2019)).

B. The Government Misconstrues the Rule and Rationale of *Will*.

Under *Will*, any uncertainty over whether the government had a statutory right to appeal to the D.C. Circuit should have sufficed to defeat the mandamus petition. *Will*, 389 U.S. at 97–98. As Petitioners have already explained, the power to grant extraordinary writs exists to *preserve* a court’s jurisdiction—not to expand it. Pet. 27–29.

The government does not deny the underlying statutory uncertainty (nor could it, given the D.C. Circuit’s own acknowledgement of the same). The government nevertheless insists that mandamus can lie even where appellate jurisdiction is questionable, contending that “[w]here a court of appeals could at some stage *** entertain appeals from a proceeding, ‘it has the power in proper circumstances *** to issue writs of mandamus reaching’ that proceeding.” BIO.9 (quoting *La Buy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957)).

But *La Buy*, a civil case, rested on the “supervisory control of the District Courts by the Courts of Appeals.” 352 U.S. at 259–60. *Will* declined to extend this supervisory doctrine to government mandamus petitions in criminal cases. *Will*, 389 U.S. at 107. And the government itself acknowledges that the order under appeal in *United States v. United States District Court*, 407 U.S. 297 (1972), would have had the effect of dismissal for one of the defendants. BIO.12. The government claims that neither the lower court nor this Court treated such effect as a prerequisite for jurisdiction, but that reading stretches the Court’s holding past its breaking point.

The lower court explicitly noted the potential dismissal in its opinion, *see United States v. United States District Court*, 444 F.2d 651, 655 (6th Cir. 1971), and this Court passed on the jurisdictional issue only cursorily. *See* 407 U.S. at 301 n.3.

The government's only direct answer to *Will* is that the opinion reserved whether there might be circumstances short of dismissal where the government could seek mandamus in a criminal case, asserting that *Will* "acknowledged" that the prospect of a future appeal "*might* support jurisdiction." BIO.11–12 (citing *Will*, 389 U.S. at 98 & 95 n.4) (emphasis added). But regardless of whether the government may seek mandamus relief from district court orders short of dismissal, there is no doubt that it cannot obtain through mandamus what it has no right to appeal.

Thus, the caveats in *Will* are less expansive than the government describes. The Court merely noted that it was "not decid[ing] under what circumstances, *if any*, such a use of mandamus would be appropriate." BIO.11 (quoting *Will*, 389 U.S. at 98 (emphasis added) and 95 n.4). Whatever that might encompass, it does not support the D.C. Circuit's exercise of mandamus jurisdiction here. Even while resolving the case on different grounds, this Court expounded at length on the dangers of allowing the government to use mandamus to circumvent statutory restrictions on its right to appeal in criminal cases. *Will*, 389 U.S. at 96–98.

C. Reaffirming *Will*'s Jurisdictional Holding Would Settle Longstanding Confusion Among the Courts of Appeals.

The lower courts are deeply divided on whether mandamus is available when a statute limits interlocutory review in criminal prosecutions. *See* Pet. 18–23. If nothing else, this Court's intervention is needed to reaffirm that *Will* requires a close nexus between the relief sought and the government's statutory appellate rights. The government's attempt to paper over disagreement among the circuits rests on red herrings and outright misreadings.

First, the government points to criminal cases where it obtained mandamus relief—but these rested on the 1971 amendments to 18 U.S.C. § 3731, in which *Congress* expanded the circuit courts' jurisdiction over those appeals. Pub.L. 91–644, § 14(a), January 2, 1971, 84 Stat. 1880. Thus, unlike here, it was far from clear that the government was seeking to employ mandamus as a substitute for nonexistent appellate rights. The government quotes *United States v. Kane*, 646 F.2d 4, 9 (1st Cir. 1981), for example, as a post-*Will* case in which the First Circuit held the government could seek mandamus whenever “an appeal could lie at some later stage.” BIO.14. But it omits the next portion of the quote, which reveals that the First Circuit was referring to the “potential jurisdiction” the government could invoke “from a judgment of conviction or from either pre-trial exclusion of evidence or dismissal of the indictment as a sanction for the government's noncompliance with the present order.” *Kane*, 646 F.2d at 9. In other words, and unlike here, mandamus jurisdiction rested

on an explicit appellate right the government could assert.

Second, the government also contends that the Ninth Circuit in *Dior* held that it had “the authority to issue a writ of mandamus under 28 U.S.C. § 1651.” *United States v. Dior*, 671 F.2d 351, 357 (9th Cir. 1982). But the court was merely observing that the All Writs Act was the statutory basis for its mandamus jurisdiction. The court held that “mandamus may not be used to thwart the congressional policy against piecemeal appeals,” and refused to issue the writ. *Id.* at 357. Moreover, on that court’s ruling that the government had no appeal from the new-trial order, the government followed this Court’s instruction in *Will*: it went to Congress, which amended § 3731 to add orders “granting a new trial after verdict or judgment.” Pub. L. 98–473, § 1206, October 12, 1984, 98 Stat. 1837.

Finally, the government misreads the Tenth Circuit’s decision in *McVeigh* to the point of near mischaracterization. The government contends that the Tenth Circuit denied the writ only because it was “unpersuaded” on the facts and did “not categorically rule out” government mandamus. BIO.14. But the Tenth Circuit dismissed the government’s appeal for want of § 3731 jurisdiction and denied mandamus, quoting *Will* for the principle that it “may never be employed as a substitute for appeal in derogation of the[] clear policies [embodied by the limitations in § 3731].” *United States v. McVeigh*, 106 F.3d 325, 333 (1997) (internal citations omitted).

The other cases the government cites as examples of the courts’ “settled practice” of granting mandamus

on motions falling short of dismissal merely underscore why this Court’s review is warranted. BIO.12–13 & n.4. Most do not even cite *Will* or engage in any analysis of the courts’ mandamus jurisdiction. Instead, most assume jurisdiction and displace consideration of the principle against piecemeal appeals (if addressed at all) to their analysis of whether mandamus is warranted.²

Listing these and further examples of government success at obtaining mandamus relief, Wright & Miller notes that “even responsible [government] petitions fail” to secure mandamus on the very same issues that are successful in other cases. 16 Wright & Miller’s *Federal Practice and Procedure* § 3936.2 (Apr. 2026 update). The authors emphasize that policy concerns regarding government appeals in criminal cases “were stressed in the initially restrictive, but

² Moreover, the government’s examples are readily distinguishable from the case at hand, in which a trial judge ruled untimely the government’s attempt to withdraw from a plea agreement. The government’s cases involve a circuit court’s exercise of jurisdiction where the district court made extraordinary rulings, such as: denying a government motion to dismiss a charge and instead hiring a “private prosecutor” to continue pressing charges, *In re United States*, 345 F.3d 450 (7th Cir. 2003); ordering secret investigations into government misconduct, *In re United States*, 441 F.3d 44 (1st Cir. 2006); allowing the defense to argue jury nullification, *In re United States*, 945 F.3d 616 (2d Cir. 2019); accepting a jury instruction creating a defense with no statutory basis, *In re United States*, 578 F.3d 1195 (10th Cir. 2009); allowing pre-trial depositions by the defense of government witnesses, *United States v. Fei Ye*, 436 F.3d 1117 (9th Cir. 2006); and granting a venue transfer before the government received a copy of the motion, let alone had a chance to respond, *In re United States*, 273 F.3d 380 (3d Cir. 2001).

ultimately ambiguous, decision in *Will*,” which only further confirms the need for this Court’s intervention.

An honest survey of the circuit courts thus reveals sharply diverging approaches to *Will*’s rule and rationale. This Court must set the course straight. As this case makes clear, the stakes could not be higher.

D. This Case Is a Perfect Vehicle for Clarifying *Will*’s Jurisdictional Rule.

Finally, the government contends that this Court should wait to resolve what *Will* left open because this case arises under “a unique statutory regime.” BIO.15. But the “unique” statutory regime here makes this case an ideal vehicle for resolving the first question presented.

In the civilian criminal-justice system, cases involving government mandamus petitions face the threshold question of whether the writ is in aid of one of the jurisdictional bases the government can invoke under § 3731. Given § 3731’s breadth, the government there has many options to present a colorable argument. This, in turn, often results in decisions that bypass the question presented here, assuming jurisdiction and resolving doubtful government petitions on other factors. *See* BIO.13–14 (citing cases). The “typical fact pattern,” BIO.15, will thus force this Court to first resolve complex, case-specific questions regarding the nexus between the relief the government has requested and the scope of its appellate rights. In that system, it is the rare case, such as *McVeigh*, where courts of appeals have clarified that their denial of the writ rests on *Will*.

Here, no one disputes that the government has no clear appellate rights in the D.C. Circuit. In fact, the absence of appellate jurisdiction was the express predicate for the majority's finding that a writ should issue, insofar as the government was without an alternative means of relief. Pet.App.50a, 52a. The statutory uniqueness of the military commissions' appellate scheme makes the issue black and white. The question this Court reluctantly reserved in *Will* is presented as cleanly as it possibly can be here. See Vladeck Amicus Br.11–14, 20–22.

II. THE CIRCUITS ARE DIVIDED OVER WHAT IS REQUIRED TO ESTABLISH ENTITLEMENT TO MANDAMUS RELIEF

The government tries but fails to minimize the importance of Petitioners' second question presented. It acknowledges that the decision below falls within a raft of circuit court decisions that have articulated various and inconsistent tests to evaluate what constitutes a "clear and indisputable right to relief." BIO.18. It contends that these are distinctions without a difference. But in form and practice, the lower courts are in disarray.

The circuits have split on the mandamus standard in identical cases applying the identical law. The circuits split irreconcilably, for example, over what a petitioner must show to establish a clear and indisputable entitlement to relief under the Crime Victims' Rights Act. Compare *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017 (9th Cir. 2006) and *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562 (2d Cir. 2005), with *In re Antrobus*, 519 F.3d 1123, 1125, 1128 (10th Cir. 2008), *In re Dean*, 527 F.3d 391, 394 (5th

Cir. 2008), and *In re Wellcare Health Plans, Inc.*, 754 F.3d 1234, 1237 n.3, 1238 (11th Cir. 2014).

Circuits have used nearly identical language to reach opposite conclusions. For example, the D.C. Circuit has said that a right to mandamus relief is “clear and indisputable” only where the petitioner “can point to ‘cases in which a federal court has held that’ relief is warranted ‘in a matter involving like issues and comparable circumstances.’” *In re Al Baluchi*, 952 F.3d 363, 369 (D.C. Cir. 2020) (quoting *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 355 (D.C. Cir. 2007)). In contrast, the Second Circuit has “never required petitioners to point to binding authority directly on point in order to establish their entitlement to the writ.” *In re United States*, 945 F.3d 616, 625 (2d Cir. 2019) (citation omitted).

The D.C. Circuit demonstrates the confusion in microcosm. Most of its cases hold that mandamus petitioners must cite on-point case law or unambiguous statutory text, while others, including the decision below, hold the exact opposite. Compare *Republic of Venezuela v. Philip Morris, Inc.*, 287 F.3d 192, 199 (D.C. Cir. 2002); *In re al-Nashiri*, 791 F.3d 71, 86 (D.C. Cir. 2015) (“Even if we ultimately agreed with [petitioner] on the merits, mandamus would not lie because the answer was hardly ‘clear’ ex ante.”); *In re al-Nashiri*, 835 F.3d 110, 137 (D.C. Cir. 2016) (“open questions are ‘the antithesis of the “clear and indisputable” right needed for mandamus relief’”); *In re Khadr*, 823 F.3d 92, 99–100 (D.C. Cir. 2016); *Al Baluchi*, 952 F.3d at 369 (court “will deny mandamus even if a petitioner’s argument, though ‘pack[ing] substantial force,’ is not clearly mandated by statutory authority or case law”), with *United States*

v. Fokker Servs. B.V., 818 F.3d 733, 749–50 (D.C. Cir. 2016); *see also* Vladeck Amicus Br.14–19.

That the D.C. Circuit and other circuits apply the “clear and indisputable” rule so inconsistently demonstrates that it is no rule at all. A “governing standard” consisting of “the unfettered wisdom of a majority of [an appellate panel], revealed to an obedient people on a case-by-case basis” is “not a government of laws at all”. *Morrison v. Olson*, 487 U.S. 654, 712 (1988) (Scalia, J., dissenting).

CONCLUSION

The petition for certiorari should be granted.

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