

IN THE SUPREME COURT OF THE UNITED STATES

No.

C.T. HANFT, UNITED STATES NAVY COMMANDER,
CONSOLIDATED NAVAL BRIG, APPLICANT

v.

JOSE PADILLA

**APPLICATION RESPECTING THE
CUSTODY AND TRANSFER OF JOSE PADILLA**

The Solicitor General, on behalf of the United States and applicant Commander C.T. Hanft, respectfully requests that the Court grant this application and recognize the release and transfer of Jose Padilla from the control of C.T. Hanft, Commander of the U.S. Naval Brig in Charleston, South Carolina, to Loren Grayer, Warden of the Federal Detention Facility in Miami, Florida, where Padilla is now facing criminal charges. This application is necessitated by the December 21, 2005, order of the U.S. Court of Appeals for the Fourth Circuit denying the government's unopposed application to recognize such transfer. As explained below, the Fourth Circuit's order is inconsistent with Rule 36 of this Court's Rules, is based on a mischaracterization of events and an unwarranted attack on the exercise of Executive discretion, and, if

given effect, would raise profound separation-of-powers concerns.¹

INTRODUCTION

On December 21, 2005, a divided panel of the U.S. Court of Appeals for the Fourth Circuit issued an order that denied an unopposed application to transfer Padilla from the control of the military to civilian custody in order to answer the federal criminal charges now pending against him. (A copy of the Fourth Circuit's order is attached as Addendum A.) Although both the government and Padilla agreed that Padilla should be transferred from military custody to answer those charges, the Fourth Circuit denied that application and refused to recognize the transfer of Padilla contrary to the wishes of the government and Padilla. The order thus purports to exercise an unidentified and unprecedented judicial authority to disregard a presidential directive to transfer an enemy combatant out of military custody, despite the agreement of both parties that the transfer should take place.

¹ This application is filed pursuant to Rules 22 and 36 of this Court. Rule 36.4 states that this Court may modify an initial order respecting the custody of a prisoner while a decision in a habeas action involving the prisoner is pending before the Court. The Fourth Circuit's December 21, 2005, order is an initial order respecting the custody of Padilla because it refuses to give effect to the presidential order transferring Padilla out of military custody and has the effect of unnecessarily prolonging Padilla's military custody. Therefore, to the extent that Rule 36 applies at all to the extraordinary transfer at issue in this case (see Part I, infra), the Court has the authority to entertain this application pursuant to Rule 36. In addition, if necessary, the Court has jurisdiction to consider this application and fashion appropriate relief pursuant to the All Writs Act, 28 U.S.C. 1651.

The court of appeals based that order on an assumption -- but expressly not a legal determination -- that the release and transfer are governed by Supreme Court Rule 36. See 12/21/05 Order at 6. As a result of the court's order, Padilla remains in military custody even though the President has ordered that he be released from such custody upon the request of the Attorney General and even though Padilla has consented to his release from military custody and transfer to civilian custody, in accordance with the President's order, and has urged that such transfer be authorized "immediately." Padilla C.A. Supp. Br. 39 (attached as Addendum B); see also 05-533 Pet. Reply 9 n.9. Indeed, in light of the agreement between the parties with respect to Padilla's release and transfer, as a practical matter, the only thing currently keeping Padilla in military custody is the Fourth Circuit's order denying the unopposed transfer application.

The Fourth Circuit's order defies both law and logic. The Fourth Circuit had no basis for denying the government's application without even concluding that Rule 36 applied to the transfer. In any event, nothing in Rule 36 appears to contemplate that an application would be required in the extraordinary circumstances presented here. That is especially true given that the only custody challenged in the habeas petition -- military detention -- has been ordered by the President to cease, and Padilla himself has urged the courts to give effect to the

Executive's transfer order. The Fourth Circuit's order refusing to recognize Padilla's transfer out of military detention to the control of the Attorney General is inconsistent with the narrow focus of Rule 36 and, if allowed to stand, would raise separation of powers questions of the first order.

Regardless of how this Court chooses to dispose of Padilla's petition for a writ of certiorari (No. 05-533), and regardless of whether the Court concludes -- as the government has argued in opposition to that petition -- that this case is moot in light of recent events, the Court should make clear as expeditiously as possible that nothing in Rule 36 or any other provision of law prevents the military from executing the President's order, releasing Padilla from military custody, and transferring him to civilian custody. The Fourth Circuit's order amounts to an effort by the court to maintain Padilla's military detention solely to preserve a case or controversy about the legality of military detention even though neither party to the controversy wishes to continue the military detention. Whether or not there is a basis to find an exception to the mootness doctrine (and the government believes there is none), there is no basis for denying Padilla the relief he sought in his habeas petition or to prevent the Executive from pursuing criminal charges against Padilla at this time. The Fourth Circuit's contrary conclusion is based on an incomplete characterization of events and an unfounded and unwarranted attack

on the exercise of Executive discretion.

Accordingly, the Court should clarify that the extraordinary transfer at issue is not governed by Rule 36 or, in the alternative, grant this application as soon as practicable.

STATEMENT

1. Rule 36 of this Court's Rules states that, when a decision in a habeas proceeding is pending before this Court, "the person having custody of the prisoner may not transfer custody to another person unless the transfer is authorized under this Rule." Sup. Ct. R. 36.1. Rule 36 further states that, "[u]pon application by a custodian, the court, Justice, or Judge who entered the decision under review may authorize transfer and the substitution of a successor custodian as a party." Id. R. 36.2. Rule 36 also states that an "initial order respecting the custody or enlargement of the prisoner * * * shall continue in effect * * * unless for reasons shown to the court of appeals, this Court, or a judge or Justice of either court, the order is modified or an independent order respecting custody, enlargement, or surety is entered." Id. R. 36.4.

2. On June 9, 2002, the President ordered the Secretary of Defense to detain Padilla militarily, as an enemy combatant, based on information that Padilla closely associated with al Qaeda, engaged in hostile and war-like acts, and presented a grave danger to the national security of the United States. C.A. App. 16.

After the earlier round of litigation culminating in this Court's decision in Rumsfeld v. Padilla, 542 U.S. 426 (2004), Padilla filed a habeas petition in South Carolina seeking that he be released from military custody "or charged with a crime," C.A. App. 13. Padilla argued that the President lacked authority to detain him militarily, even assuming the validity of the government's allegations that Padilla trained with and was closely associated with al Qaeda before and after September 11, 2001; engaged in armed conflict against the United States and allied forces in Afghanistan; and accepted a mission from al Qaeda to enter the United States and carry out attacks on our citizens within our borders, id. at 111-112. The district court granted summary judgment for Padilla and ordered that Padilla be released from custody or charged with a crime. The court of appeals reversed, concluding that, under Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality), the President was authorized to detain Padilla militarily as an enemy combatant. See 05-533 Br. in Opp. 10-11.²

At Padilla's request, the court of appeals issued its mandate so the case could return to the district court, where Padilla could contest the factual basis for his detention as an enemy combatant. Before the factual proceedings began, however, Padilla was indicted

² On October 25, 2005, Padilla filed a petition for a writ of certiorari (No. 05-533) seeking review of that decision. The government filed a brief in opposition to the petition on December 16, 2005.

by a grand jury in the Southern District of Florida for conspiring to murder, maim, and kidnap individuals outside of the United States; conspiring to provide material support to terrorists; and providing material support to terrorists. 05-533 Pet. App. 2a-35a. The indictment was part of an ongoing federal case against other individuals involved in the same conspiracy with a trial currently scheduled for September 2006. Shortly after indictment, the President determined that it is in the interest of the United States that Padilla be released from detention by the Secretary of Defense and transferred to the control of the Attorney General to answer the criminal charges against him. Id. at 1a. The President thus directed the Secretary of Defense, at the request of the Attorney General, to release Padilla from military custody and transfer him to the control of the Attorney General. That presidential directive expressly superseded the President's June 9, 2002, directive to the Secretary of Defense to detain Padilla militarily as an enemy combatant, and specifically provided that, upon transfer of Padilla to the Attorney General, the authority of the Secretary of Defense to detain Padilla pursuant to the President's June 9, 2002, order "shall cease." Ibid.

3. On November 22, 2005, the government filed in the court of appeals an Unopposed Emergency Application and Notice of Release and Transfer of Custody of Petitioner Jose Padilla. (A copy of the government's application is attached as Addendum C.) The

government explained that this Court's "Rule 36 does not appear to apply in the extraordinary circumstances presented by this application," i.e., where the President orders the transfer of an individual held as an enemy combatant out of military custody to civilian detention to face criminal charges. C.A. Appl. 4. However, the government explained that it filed the application requesting the court to recognize the transfer "out of an abundance of caution." Ibid. In addition, the government advised the court of appeals that it would inform the district court of Padilla's release and transfer and address the impact of recent events in its brief in opposition to Padilla's petition for certiorari (No. 05-533) in this Court. Id. at 4 n.1.

On November 29, 2005, Padilla filed a motion in the district court to stay further proceedings until after this Court resolves the petition for a writ of certiorari. The district court denied that motion as "moot" in light of the "recent developments," including "the indictment of Padilla on criminal charges in the Southern District of Florida." Likewise, the district court "relieved" the parties of their obligation to file briefs addressing the question of how to proceed with the factual disposition of the habeas petition.

On November 30, 2005, the court of appeals sua sponte directed the parties to address whether it should recall the mandate in the case and vacate its opinion addressing the legality of Padilla's

military detention. (A copy of the court's order is attached as Addendum D.) On December 9, 2005, the government filed a supplemental brief in response to the court's order. (A copy of the government's brief is attached as Addendum E.) The government explained that petitioner's habeas challenge to his military detention is moot in light of the intervening events. C.A. Supp. Br. 6-13. In addition, the government explained that, in light of the fact that this action is now moot, it would be well within the court's discretion under the doctrine of United States v. Munsingwear, Inc., 340 U.S. 36 (1950), to recall the mandate and vacate its prior decision. C.A. Supp. Br. 5-6, 13-16. The government stressed, however, that regardless of whether the court agreed that the case is moot or elected to recall the mandate and vacate its decision, the court should grant the government's unopposed transfer application. Id. at 16.

On December 16, 2005, Padilla filed a supplemental brief in response to the court's November 30, 2005 order. Although Padilla argued that his transfer out of military custody into the control of the Attorney General would not cause the case to be moot, he joined the government in urging the court to authorize the transfer "immediately." Padilla C.A. Supp. Br. 39.

4. On December 21, 2005, a divided panel of the court of appeals denied the government's transfer application, and thereby refused to recognize the transfer of Padilla out of military

custody into the control of the Attorney General, as the President has directed and Padilla himself has requested.

a. The panel majority did not definitively conclude that Rule 36 applies to Padilla's release from military custody and the transfer to the control of the Attorney General. Rather, it merely noted that "it is unclear * * * whether the rule even applies in a circumstance such as this." 12/21/05 Order 6. Nevertheless, without resolving whether it had any basis to act pursuant to Rule 36 -- and without identifying any other basis for its order -- the court held that "to the extent our authorization is needed, we believe that there are two reasons for us to deny the government's motion." Ibid.

First, the panel majority observed that the government's actions in indicting Padilla and seeking his release from military custody and his transfer to the control of the Attorney General, pursuant to the President's order, together with the timing of those actions, "have given rise to at least an appearance that the purpose of these actions may be to avoid consideration of our decision by the Supreme Court." 12/21/05 Order 6. The panel majority conceded that it was "not in a position to ascertain whether behind this appearance there is the actual fact" that the government was motivated by a desire to avoid Supreme Court review, but it pointed to "various[] report[s]" in the media that the government's actions were prompted, at least in part, by its

concern over Supreme Court review. Id. at 6-7.

Second, the panel majority stated that "the issue presented by the government's appeal to this court and Padilla's appeal to the Supreme Court is of sufficient national importance as to warrant consideration by the Supreme Court, even if that consideration concludes only in a denial of certiorari." 12/21/05 Order 10.

b. Judge Traxler wrote separately. Although he agreed with the panel majority that a vacatur of the court's earlier opinion was not warranted, he would have held that "Rule 36 is [not] applicable to this situation." 12/21/05 Order 14.

ARGUMENT

I. THE COURT SHOULD DETERMINE THAT RULE 36 DOES NOT GOVERN THE EXTRAORDINARY TRANSFER AT ISSUE

Rule 36 of this Court's Rules provides that when a decision in a habeas corpus proceeding is pending before the Supreme Court, "the person having custody of the prisoner may not transfer custody to another person unless the transfer is authorized under this Rule." Sup. Ct. R. 36.1. It further states that "the court, Justice, or Judge who entered the decision under review may authorize transfer and the substitution of a successor custodian as a party." Id. R. 36.2.

Rule 36 does not appear to contemplate that an application would be required in the extraordinary circumstances presented by this case -- i.e., where the President has ordered the release of an individual held as an enemy combatant out of military custody

and into civilian custody to face criminal charges. Rather, as the government explained to the court of appeals, the Rule appears to contemplate situations where an individual who is being held by law enforcement authorities in connection with criminal charges or a criminal conviction is transferred from one civilian detention facility to another civilian detention facility. The Rule appears to be a means of facilitating an ongoing challenge to that civilian detention (which is not ended by the transfer). That appears to be the context in which the Rule has overwhelmingly been applied. See Robert L. Stern et al., Supreme Court Practice § 17.9, at 767-769 (8th ed. 2002). Consistent with its status as a court rule, functionally identical to Federal Rule of Appellate Procedure 23, Rule 36, far from authorizing the courts to review and block the Executive's transfer decisions, appears to serve the far more modest purpose of facilitating an ongoing challenge to an ongoing form of custody by ensuring that, upon such transfer, an appropriate "successor custodian" is substituted as a party.

Here, in contrast, the President has ordered that Padilla be released from military custody altogether and transferred to the custody of federal law enforcement officials to face criminal charges. The only custody challenged in the habeas petition -- military detention -- will therefore cease altogether once Padilla is released from military custody. That release brings an end to his challenged custody, and Padilla's subsequent transfer to the

Attorney General for criminal proceedings should not be understood as a transfer governed by the Rule, at least in these extraordinary circumstances. Padilla's habeas petition makes clear that it is directed solely to his detention by military authorities, and in Padilla's prayer for relief he specifically requests an "order that [he] immediately be released or charged with a crime." C.A. App. 13 (emphasis added). Because Padilla has been charged with a crime and is being released from military custody, the government believes that Padilla's habeas action is now moot. But whether or not Padilla's habeas challenge to his military detention is moot, Padilla's complete release from military custody and transfer to the control of the Attorney General -- the specific relief sought in the habeas petition -- would appear to be a release, rather than a "transfer," within the meaning of Rule 36.

That is particularly true in light of the grave separation-of-powers concerns that would be created by applying a procedural rule to prevent the Executive from transferring an individual detained as an enemy combatant out of military custody. See O.K. v. Bush, 377 F. Supp. 2d 102, 116 (D.D.C. 2005) ("[I]t is implausible that Congress intended [Rule 23 of the Federal Rules of Appellate Procedure, which establishes a parallel mechanism to Supreme Court Rule 36 for cases on appeal] to block the movement of detainees captured in the course of ongoing military hostilities."). While the Rule plays a modest, strictly procedural function in its

ordinary applications to a transfer from one custodian to another in the course of the single, ongoing type of custody challenged in the underlying habeas petition, its application by the court of appeals here transformed it into a substantive basis for refusing to recognize and give effect to a presidential directive.

This Court should make clear that Rule 36 does not operate as a substantive limitation on the authority of the Executive to engage in a quintessentially executive function, and does not apply here. Cf. Ortiz v. Fibreboard Corp., 527 U.S. 815, 842 (1999) (noting the jurisdictional limitation of the Rules Enabling Act, 28 U.S.C. 2072(b) -- that the Federal Rules of Procedure "shall not abridge, enlarge or modify any substantive right" -- and adopting a "limiting construction" of Federal Rule of Civil Procedure 23(b)(1)(B) in order to "minimiz[e] potential conflict with the [Act], and [to] avoi[d] serious constitutional concerns"). There is no basis to interpret Rule 36 to have such an extraordinary effect, and well settled principles of judicial restraint and constitutional avoidance counsel strongly against it.³

³ In addition, the fact that Padilla has consented to his release from military custody and transfer to the control of the Attorney General -- and indeed has urged that this release and transfer be authorized "immediately," Padilla C.A. Supp. Br. 39; see also 05-533 Pet. Reply 9 n.9 -- provides an independent ground for concluding that Rule 36 is inapplicable. Where, as here, both parties agree to the release and transfer, whatever effect it may have on the pending habeas litigation, the Rule should not apply. See Padilla C.A. Supp. Br. 3. (agreeing with government that Rule "is not likely applicable to cases where an individual is provisionally released by the government from the form of custody

For these reasons, the Court should clarify that Rule 36 does not apply to the extraordinary circumstances presented here. Nothing in the court of appeals' December 21, 2005, order is to the contrary. Remarkably, the panel majority denied the unopposed motion to transfer in this constitutionally sensitive area, and thereby refused to recognize Padilla's release from military custody and transfer to the control of the Attorney General, without actually deciding whether that Rule, in fact, applies and provides the court with any authority to act. 12/21/05 Order 6 ("[I]t is unclear to us * * * whether the rule even applies in a circumstance such as this. This said, to the extent our authorization is needed, we believe there are two reasons to deny the government's motion."). That was clear error.

It would be one thing for a court to assume arguendo that the Rule applied in an order granting a transfer application. But there is no basis for a court to assume the authority to deny an unopposed motion to transfer and thereby refuse to recognize the transfer without definitively identifying any authority to do so. Nor is there any other basis for a court to interfere with an executive transfer decision. The "transfer" here is the result of two independent actions -- Padilla's release from military detention and his detention by the Attorney General during the

he is challenging, as opposed to simply transferred within the federal prison system").

pendency of criminal charges -- neither of which the Fourth Circuit has authority to superintend. The former ends the only form of custody challenged in the habeas petition and the latter is subject to the supervision of the district court in which the criminal charges are now pending against Padilla.

Judge Traxler, writing separately, concluded that Rule 36 is not applicable here. 12/21/05 Order 14. For the reasons just discussed, Judge Traxler was correct. Accordingly, this Court should clarify as soon as practicable that the government is free to transfer Padilla pursuant to the President's directive.

II. IF IT CONCLUDES THAT RULE 36 APPLIES, THE COURT SHOULD GRANT THIS APPLICATION AND AUTHORIZE PADILLA'S RELEASE FROM MILITARY CUSTODY AND TRANSFER TO CIVILIAN CUSTODY

A. Padilla's Release From Military Custody And Transfer To The Control Of The Attorney General, Pursuant To The President's Memorandum, Should Be Authorized Immediately

If the Court concludes that Rule 36 applies to the extraordinary circumstances presented by this application, the government respectfully requests that this Court grant this application as soon as possible. The President has determined that it is in the interests of the United States that Padilla be released from military custody and transferred to the control of the Attorney General so that he can face the criminal charges against him. At this point, more than a month has passed since Padilla was indicted and the President ordered his release from military custody and transfer to civilian authorities to face

criminal charges. The President's order should be given effect without further delay. That is particularly true in light of the fact that the habeas petition in this case itself seeks Padilla's release from military custody and the filing of criminal charges, and Padilla himself has urged that the President's order be given "immediate" effect. Padilla C.A. Supp. Br. 1.

It bears emphasis that the question whether to authorize Padilla's release from military custody and transfer to the control of the Attorney General is wholly independent of any question about the impact his release and transfer might have on his habeas petition challenging his military custody, this Court's decision to grant Padilla's petition for a writ of certiorari, or the appropriateness of vacating the court of appeals' decision in light of the intervening events. The government believes that Padilla's release from military custody and transfer to the control of the Attorney General pursuant to the President's Memorandum will render Padilla's habeas action moot and, at a minimum, is grounds for denial of his petition for a writ of certiorari to review the court of appeals' decision regarding the President's authority to detain him militarily. See 05-533 Br. in Opp. 13-19. Padilla, on the other hand, contends that his release and transfer will not render his habeas action moot and should not affect this Court's decision whether to grant his petition for a writ of certiorari to review the legality of his military custody. See Padilla C.A. Supp. Br.

24-37; 05-533 Pet. Reply 9 & n.9. However those issues are ultimately resolved, there is no basis to prevent Padilla's immediate release from military custody and transfer to the control of the Attorney General -- particularly where the parties are in agreement that the release and transfer should take place as soon as possible.

No matter how this Court resolves those issues, transfer is appropriate. If the Court denies Padilla's certiorari petition, there would be no basis for delaying or denying transfer, without regard to whether this Court orders vacatur of the Fourth Circuit decision upholding the President's authority. On the other hand, if the Court grants the petition for certiorari and finds an exception to the mootness doctrine, there is still no reason to deny the transfer (which Padilla himself seeks) or to prevent the government from moving forward with its criminal prosecution against Padilla.

The decision below appears to have reversed the proper order of proceedings. Out of apparent concern that the transfer would moot the habeas petition and thereby eliminate the case and controversy, the court below assumed an authority to prevent the case from becoming moot. Instead, the court should have first considered whether it had any authority to deny an unopposed application for transfer, and in the absence of any basis to deny such an application, the court should have granted the application,

and considered in turn questions of mootness, exceptions to mootness, and vacatur. This Court's cases consider the impetus for mootness events to be relevant in determining whether vacatur of lower court decisions is appropriate. See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 24-25 (1994). Likewise, when circumstances leading to mootness inherently prevent timely judicial review, the Court will sometimes recognize exceptions to allow the Court to adjudicate an otherwise moot case. But the Court has never suggested that the courts have the inherent authority to prevent the parties from taking steps that could moot a pending case, whether the case is pending in this Court or any other. Such a doctrine would amount to an extraordinary and unwarranted extension of judicial power flatly at odds with the limitations of Article III of the Constitution. For the same reasons that courts do not initiate lawsuits, they should not preclude parties from taking agreed upon acts that may end a case or controversy. Indeed, the fact that the Executive and Padilla agree that this release and transfer should occur as soon as possible is alone sufficient ground to grant the application.

B. The Court Of Appeals' Order To The Contrary Is Erroneous

The court of appeals' unprecedented order refusing to recognize the transfer of Padilla out of military custody is grounded on the court's apparent concerns about the government's motives for the transfer rather than any interpretation of Supreme

Court Rule 36. In fact, as discussed, the panel majority took the extraordinary step of refusing to recognize the transfer without ever deciding that "[Rule 36] even applies in a circumstance such as this." 12/21/05 Order 6. That analysis is tantamount to the discredited practice of "'assuming' jurisdiction for the purpose of deciding the merits" -- a practice that, as this Court has stressed, "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998). Indeed, the court of appeals below did not purport to identify any basis for its order other than Rule 36 and yet it refused to give effect to a presidential transfer order without even concluding that Rule 36 applied to the transfer at issue. The court of appeals' order is fundamentally flawed for that reason alone. More broadly, the order below second guesses and usurps both the President's Commander-in-Chief authority and the Executive's prosecutorial discretion in a manner inconsistent with bedrock principles of separation of powers.

In any event, there is no basis for crediting the court of appeals' attempt to ascribe improper motives to the government.⁴

⁴ The court of appeals' suspicions appear to be based in large part on unidentified media reports. See 12/21/05 Order 6-7. The media is of course free to report or speculate on the government's internal deliberations with respect to a matter, but there is no merit to the court of appeals' remarkable suggestion that the government is responsible for addressing any such media reports in its filings before the courts. The government explained

The decision of whether, or when, to seek the indictment of an individual for a criminal offense represents a quintessential exercise of executive discretion. See United States v. Armstrong, 517 U.S. 456 (1996). As discussed above, Padilla was indicted on criminal charges of conspiring to murder, maim, and kidnap individuals outside of the United States; conspiring to provide material support to terrorists; and providing material support to terrorists. Significantly, that indictment was made part of a pending criminal prosecution brought against Padilla's alleged co-conspirators in the Southern District of Florida which is scheduled for trial next fall. There is no basis for questioning the good faith of the government in moving forward with the indictment.

Nor is there anything improper about the fact that the events underlying Padilla's criminal indictment differ from those underlying the President's June 9, 2002, order. The offenses with which Padilla has been charged are gravely serious; if convicted of those charges, Padilla could face life imprisonment. It is well within an appropriate exercise of prosecutorial discretion to limit the charges in the indictment to those that will satisfy the interests of justice. That is particularly true given that, as the court of appeals even acknowledged (12/21/05 Order at 8-9),

the circumstances surrounding Padilla's indictment in its supplemental brief in response to the court of appeals' November 30, 2005 order. The government was not obligated to go further and disclose its internal deliberations.

narrowing the charges would avoid sensitive evidentiary issues that may implicate core national security concerns and constitutional interests. The decision to focus an indictment on certain charges to avoid evidentiary difficulties or compromising confidential sources or methods is a classic matter for executive discretion that courts generally will not second guess. See, e.g., Roviaro v. United States, 353 U.S. 53, 59-60 (1957). Indeed, in light of such issues, there may be substantial practical advantages to bringing a discrete criminal case against an enemy combatant, in the event one can be brought. The ability of the government to pursue such a discrete criminal case may not be available to the government in future cases, but where such an alternative exists, there is nothing remotely sinister about the government's effort to pursue criminal charges that minimize evidentiary complications. Nor does that choice suggest any lack of ability to prove the facts that support the military detention under the distinct evidentiary rules that apply in that context, as opposed to those that govern an ordinary criminal prosecution. Cf. Hamdi, 542 U.S. at 532-539.⁵

⁵ Any suggestion that the government indicted Padilla because it could not establish the factual basis for his military detention as an enemy combatant is not only baseless but fundamentally at odds with the longstanding presumption of regularity accorded to executive action. See United States Postal Service v. Gregory, 534 U.S. 1, 10 (2001); Armstrong, 517 U.S. at 464. Before the decision to proceed with the indictment, the government stood ready to prove the factual basis underlying Padilla's military detention pursuant to the process set forth in Hamdi. The indictment of Padilla on separate criminal charges in connection with a pending criminal conspiracy case against others does not signal any inability or

Relatedly, the scope of information that the President as Commander in Chief may consider in determining whether to detain an individual as an enemy combatant in wartime is much broader than the information the Executive might use to form the basis for a criminal prosecution subject to the Federal Rules of Evidence. Those types of judgments, like the decision to charge Padilla in an ongoing criminal prosecution involving co-conspirators that is already scheduled for trial, are generally committed to the discretion of the Executive. See Armstrong, supra. The court of appeals had no basis for refusing to recognize the transfer of Padilla from military custody to civilian custody simply on the ground that the court might have disagreed with the Executive's exercise of such discretion, and such disagreement is the only evident rationale for the court of appeals' order.

Furthermore, the premise of the court of appeals' order -- that the government's actions were improperly motivated simply to avoid Supreme Court review -- is at odds with the history of this litigation. The legality of Padilla's detention already has been the subject of plenary review by this Court. See Rumsfeld v. Padilla, 542 U.S. 426 (2004). The government fully briefed and

unwillingness on the government's part to make the factual showing called for by Hamdi to authorize Padilla's military detention as an enemy combatant. Nor does the possibility that the Executive may choose to indict an enemy combatant for discrete criminal offenses that come to light prevent the Executive from militarily detaining him on a different factual basis prior to indictment.

defended the President's authority to detain Padilla in that earlier round of litigation, and the government stands ready to defend the President's authority to detain Padilla in the event this Court accepts Padilla's arguments concerning mootness. See 05-533 Br. in Opp. 20-24. In addition, the government continues to defend the President's authority to detain enemy combatants seized domestically in the context of a non-citizen. See Al-Marri v. Hanft, 378 F. Supp. 2d 673 (D.S.C. 2005).

Even assuming, arguendo, the validity of the court of appeals' premise, its order would still be unfounded. There is no principle that prevents a party from forgoing Supreme Court review, or from taking steps that would eliminate either the alleged need or jurisdictional basis for this Court's review. That is especially true where, as here, the parties are in agreement that a particular action -- here, the release and transfer of Padilla -- should take place. Indeed, it is not uncommon for parties to agree to settle a case while it is pending before this Court, even if a purpose of the settlement may be to avoid Supreme Court review. See U.S. Bancorp, supra. There is nothing unusual or improper about such mooting events, nor is there any doctrine that authorizes a court to prevent a party from taking such steps in order to ensure that a decision is capable of this Court's review or that a live case or controversy persists. Moreover, this Court has recognized that, even where it is appropriate to assume that government action is

motivated by pending litigation, there is nothing improper about such action, nor is there any basis to discount it in the context of that litigation. Cf. United States v. Morton, 467 U.S. 822, 835-836 n.21 (1984).

The court of appeals was also mistaken in suggesting that the government improperly sought vacatur of the court's September 9, 2005, decision in order to avoid this Court's review. See 12/21/05 Order 5, 6, 11. To be clear, in its initial application to the Fourth Circuit, the government filed only an application for the transfer of Padilla. The government did not ask the court to vacate its prior decision. Rather, the question of vacatur was introduced by the court sua sponte in its November 30, 2005, order directing the parties to brief whether, inter alia, "the mandate should be recalled and our opinion vacated as a consequence of [recent events.]" 11/30/05 Order 1. In response to the briefing order, the government argued that it was within the discretion of the court of appeals to recall the mandate and vacate its prior decision, if it chose to do so. But the government -- which secured a favorable decision from the Fourth Circuit and is fully prepared to defend that decision if this Court grants Padilla's petition for certiorari -- did not affirmatively argue that the court should exercise that discretion. And, as noted, the exclusive focus of its application to the Fourth Circuit was

Padilla's transfer.⁶

Finally, although the government believes that plenary review is not warranted in Padilla's case for the reasons explained in its brief in opposition to certiorari, the government (lest there be any doubt) is fully prepared to defend the court of appeals' decision that the President had the authority to direct the Secretary of Defense to detain Padilla as an enemy combatant. As the government has explained at length in its brief in opposition (at 20-30), the court of appeals' September 9, 2005, decision was correct and in line with this Court's precedents. In addition, the fact that the Executive has now exercised its discretion to prosecute Padilla for the serious criminal offenses of which he has been charged (for which, if convicted, he could receive up to life imprisonment) should by no means suggest that the government was not prepared to defend the factual basis for his military detention under the Hamdi framework. See note 5, supra.

⁶ Particularly in view of the interlocutory posture of this case, the court of appeals had discretion to vacate its prior decision even though case was pending on review before this Court. See Gov't C.A. Supp. Br. 14 n.3. The interlocutory nature of the case effectively forces the lower courts to consider mootness where is requested in the ongoing lower court proceedings before this Court acts on the petition. See, e.g., 11/29/05 Order, Padilla v. Hanft, No. Civ. A. 2:04-2221-26A (D.S.C.). In any event, just as there is no rule that requires a court of appeals to recall its mandate and vacate a prior decision in these circumstances, there is no rule that a court of appeals' decision must remain in place so that it may be reviewed by this Court.

* * * * *

In its September 9, 2005, decision, the court of appeals correctly held that the President had the authority to order the military detention of Padilla. That authority is essential to the President's Commander-in-Chief powers to protect the homeland from attack, especially in the current war. The Fourth Circuit's order denying the government's application for transfer, however, effectively transforms a ruling that the President may detain Padilla into a ruling that the President must detain Padilla militarily as an enemy combatant, even after the President has determined that it is in the interests of the United States that Padilla be released from military detention and transferred to the control of the Attorney General to face criminal charges, and even though Padilla himself has specifically sought that transfer. That unprecedented and unfounded assertion of judicial authority should be undone as expeditiously as possible by this Court.

CONCLUSION

For the foregoing reasons, the Court should clarify that Rule 36 does not apply to the transfer at issue or, in the alternative, grant this application as expeditiously as possible.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
Counsel of Record
