IN THE SUPREME COURT OF THE UNITED STATES

No. 05A578

C.T. HANFT, U.S. NAVY COMMANDER,
CONSOLIDATED NAVAL BRIG, APPLICANT
v.
JOSE PADILLA

PADILLA'S RESPONSE TO THE GOVERNMENT'S APPLICATION RESPECTING HIS CUSTODY AND TRANSFER

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STATEMENT

On Wednesday afternoon, December 28, 2005, the Solicitor General filed an "Application Respecting the Custody and Transfer of Jose Padilla" in which it asks this Court to "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." G. App. 1. Shortly thereafter, the Court invited Padilla to respond by Friday afternoon, December 30, 2005, roughly forty-eight hours after receiving the application by email attachment. This is that response. For the reasons set forth below, Padilla opposes the government's application, and respectfully requests that the application be referred to the full Court and considered with his petition for certiorari at the January 13, 2006, conference. Padilla further requests that, if this Court grants certiorari, it simultaneously authorize his release from military custody pursuant to the habeas petition, given that the government now consents to such release.

INTRODUCTION

The government's application asks this Court hastily to resolve what the Solicitor General describes as "separation of powers questions of the first order," G. App. 4, and it amounts to a request that this Court establish an entirely new procedural mechanism for review of certain decisions of the courts of appeals. This Court has previously reviewed lower court decisions concerning the custody of habeas petitioners pursuant to Federal Rule of Appellate Procedure 23 (which is identical to Supreme Court Rule 36 and provides overlapping authority with the Supreme Court rule) on a writ of certiorari. *See Hilton v. Braunskill*, 481 U.S. 770 (1986) (on certiorari review, determining factors that a court of appeals may consider in determining whether to release prisoner pending appeal under Fed. R. App. Pro. 23). But rather than filing a petition for

certiorari or even asking clearly for a writ of mandamus, the government asks this Court to use some ill-defined and novel basis of jurisdiction to issue an opinion "recognizing" Padilla's transfer and "clarifying" that one of the Court's rules does not apply to such transfer. What the government clearly wants is for this Court to reject the Fourth Circuit's strong criticism of the government's conduct. There is no legal precedent for such a request, and prudence alone would counsel declining the government's hurried invitation to construct a new jurisdictional fount of appellate review and use the jurisdiction to resolve the allegedly fundamental constitutional issues that the government now presses. Padilla can and should be transferred quickly out of physical military custody, but that transfer should be accomplished in accord with ordinary judicial processes, as Padilla explains below.

The government had the power to transfer Padilla from physical military custody for more than three years, yet only now does it deem swift transfer imperative. It is not clear why. The government has made no effort at all to show any irreparable harm to its interests that would flow from Padilla's remaining in military custody for two more weeks in order to allow appellate review to proceed in an orderly fashion. Padilla's criminal trial is not scheduled to begin until September 2006. G. App. 7. It is thus hard to see why his immediate presence in Florida is imperative.[1]

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[1] Indeed, the only reason for the urgency of the government's request would seem to be its hope that Padilla's physical transfer *will* somehow moot the case. As discussed *infra* Pt. III, that is not true, and even if it were, it would not be a legitimate factor supporting extraordinary relief. The government's urgency is particularly odd in light of its long delay in charging Padilla with a crime. In September, 2004, the government announced an indictment charging two people with having been part of a conspiracy to promote violent jihad in foreign countries and naming two other "unindicted co-conspirators." *U.S. v. Hassoun*, 04-6001 Cr-Cooke (S2) (attached as addendum). The government nevertheless chose to wait more than a year – until after the Fourth Circuit opinion but before this Court's review – to announce a superseding indictment naming one of the unindicted co-conspirators as Padilla. *Id.* (S5) (attached as addendum). Moreover, the government claimed more than a year ago that it had ceased questioning or interrogating Padilla. *Padilla v. Hanft*, D.S.C., Tr. of 9/14/2004 Sched. Conf. at 8-10 (attached as addendum).

While the government obviously believes that the Fourth Circuit's decision is in error, an error by a lower court that causes no irreparable harm is not grounds for the Supreme Court to create a new avenue for review, or to grant extraordinary relief on an expedited basis. Indeed, if anyone is subject to irreparable harm, it is Padilla, who has asserted for the past 42 months that every minute he spends in military custody is a violation of the separation of powers and his constitutional rights "of the first order." Padilla, however, has no objection to delaying his physical transfer for two more weeks in order to ensure that the Court has a full opportunity to consider the merits of his petition for certiorari in an orderly fashion.

As the Solicitor General surely knows, this Court has not traditionally understood Sup. Ct. R. 36 to provide an alternative to certiorari as a mechanism for review of court of appeals orders regarding the custody of prisoners. *See Hilton*, *supra* (reviewing via writ of certiorari court of appeals application of Fed. R. App. Pro. 23 (identical to S.Ct. R.36)). The government nevertheless urges this Court to adopt this novel view, though it does not defend or even describe the type of review it seeks in any detail. We believe the rule does not provide appellate review authority outside ordinary channels, but rather, by its plain text, allows the government to seek approval of a prisoner transfer in the first instance in either the court of appeals or this Court. But whichever view of Rule 36 is correct, this question of first impression is one that ought to be resolved, if at all, on certiorari review and is clearly not an issue that this Court should decide in a matter of hours or days.

There is no reason to abandon this Court's ordinary deliberative processes here, where the relief that the government seeks can be accomplished, pursuant to ordinary and established procedural mechanisms, in a matter of days: on or soon after this Court's consideration, on January 13, 2006, of the underlying petition for certiorari in this case. Were this Court to grant certiorari at the conference, it would have jurisdiction to order Padilla's immediate release from

military custody because that is part of the relief sought in his habeas petition.[2] Given that the government now accedes to that part of the habeas petition's prayer for relief, there would be no jurisdictional impediment to the Court's immediate granting of such relief.[3] Granting such relief pursuant to the habeas petition under review on certiorari would be the simplest solution because it would not require this Court to invoke any extraordinary powers or resolve novel and complicated questions concerning its and the Fourth Circuit's jurisdiction or the scope of Sup. Ct. Rule 36. Were this Court instead to grant certiorari only to vacate the court of appeals decision and remand the matter with instructions to dismiss it as moot, or were it to choose to deny certiorari altogether, the Fourth Circuit or the District of South Carolina would be fully equipped to authorize Padilla's transfer, and nothing these lower courts have done has indicated they would in any way interfere with expeditious transfer following a "grant, vacate and remand" or a denial of certiorari.

Allowing transfer at or shortly after the January 13, 2006 conference would allow this Court to avoid unnecessarily deciding complicated procedural issues, related both to the Solicitor General's request to erect a new mechanism of judicial review of court of appeals decisions and to the Fourth Circuit's jurisdiction to authorize or deny transfer – issues that this Court would have to address without the benefit of full briefing, oral argument, or the deliberation ordinarily and prudently brought to such questions. It would also allow this Court the opportunity to consider fully any jurisdictional issues in the context of the petition for certiorari. As Padilla explained in his reply brief to the underlying certiorari petition, he is confident that his physical transfer would not affect this Court's jurisdiction to consider his habeas petition on the merits. Petr. Reply Br. 9 n.9, *Padilla v. Hanft*, No. 05-533 ("Because . . . his physical transfer to civilian custody would not

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[2] As explained below and in Padilla's certiorari reply brief, this was not the *only* relief Padilla sought in his habeas petition, and the granting of this relief would not render the case moot. *See infra* Pt. III; P. Cert. Reply Br. 9-10.

[3] Indeed, the very order granting certiorari and setting a briefing schedule could order Padilla's physical release from military custody.

moot the case or otherwise deprive this Court of jurisdiction, if this Court grants review, Padilla would prefer to be transferred to civilian custody during the pendency of that review."); *see also id.* 6-10 (detailing why this "case or controversy" is not moot). However, because the jurisdictional issues are complex, Padilla believes the most appropriate and prudent course of action would be for the Court to consider the government's application for transfer along with Padilla's petition for certiorari at the January 13, 2006 conference.

ARGUMENT

I. This Court Should Not Hastily Resolve "Profound" Constitutional Questions or Create a Novel Mechanism for Reviewing Court of Appeals Decisions.

1. The procedural issues raised by the government's application are novel and complex. To begin, it is not entirely clear what the government is asking this Court to do, or on what basis it is invoking this Court's jurisdiction. The government begins by asking this Court to "*recognize* the release and transfer of Jose Padilla." G. App. 1. And the government concludes by requesting that this Court "*clarify* that Rule 36 does not apply to the transfer at issue or, in the alternative, grant this application as expeditiously as possible." *Id.* 27. Like all Article III courts, however, the Supreme Court does not generally issue advisory opinions "recognizing" events or "clarifying" its rules, but instead resolves concrete cases or controversies pursuant to the jurisdiction granted to it by statute.

2. To the extent the government is seeking review of the merits of the Fourth Circuit's December 21, 2005, decision, the government should have sought that review in the form of a petition for certiorari pursuant to 28 U.S.C. § 1254, not an application to the Circuit Justice. Padilla should then have been afforded the opportunity to respond to that petition in the normal time and under the normal rules governing petitions for certiorari. *See Hilton, supra.*

Claims that a lower court has exceeded its subject matter jurisdiction, infringed on the President's prerogatives, or otherwise violated the "separation of powers" are routinely reviewed on certiorari. *See, e.g., United States v. Nixon,* 418 U.S. 683 (1974) (reviewing on certiorari Executive claim that separation of powers meant judiciary lacked authority to review President's assertion of executive privilege); *Clinton v. Jones*, 520 U.S. 681 (1997) (reviewing on certiorari Presidential claim that separation of powers precluded judicial entertainment of suit against President during his term of office); *see also Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (reviewing on certiorari Presidential claim that court of appeals lacked subject matter jurisdiction to declare that government had no power to detain, indefinitely and without charge, citizen seized in civilian setting in the United States); *cf. Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 770 (2000) (reviewing on certiorari executive claim that court exceeded its jurisdiction by entertaining federal qui tam suit against state in violation of state sovereignty).

Proper procedure and prudence counsel this Court to follow the same well-trodden path here, where the Solicitor General claims that the Fourth Circuit's December Order "raise[s] separation of powers questions of the first order." G. App. 4.[4] It should go without saying that, except when delay will cause irreparable harm, the Nation is not served by having constitutional questions that the Solicitor General describes as "questions of the first order" resolved with inadequate deliberation. *See also id.* 2 (describing Fourth Circuit order as raising "profound separation-of-powers concerns").[5]

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[4] In any event, even were this Court inclined to grant the government's application, it need not resolve any profound constitutional questions, but could instead simply find that the Court of Appeals had no basis for failing to authorize Padilla's transfer when Padilla himself consented to the transfer. This Court's sound practice of avoiding unnecessary resolution of constitutional questions would counsel in favor of such an approach.

[5] We would be remiss not to note that it is Padilla's certiorari petition that raises the most "profound separation-of-powers concerns." The government's application underscores those concerns in its use of euphemisms such as "evidentiary difficulties" and "evidentiary

3. The government also alludes, in a footnote, to the All Writs Act, 28 U.S.C. § 1651. G. App. 2, n.1. The government has not, however, explicitly asked this Court for relief in the form of mandamus ordering the Fourth Circuit to grant the government's motion for transfer (or prohibiting it from denying the motion for transfer), nor has it invoked Supreme Court Rule 20, which governs procedures for extraordinary writs. Rule 20 requires a party seeking an extraordinary writ to show:

> that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

S.Ct. Rule 20.1; *see also* S.Ct. Rule 20.3(a) ("A petition seeking a writ of prohibition, a writ of mandamus, or both in the alternative shall state the name and office or function of every person against whom relief is sought and shall set out with particularity why the relief sought is not available in any other court.").[6]

Moreover, the government has not even attempted to demonstrate how the criteria for a writ of mandamus are satisfied here. The government has offered no reason why review of the Fourth Circuit's December 21, 2005, decision on certiorari would be inadequate to provide the government the relief it seeks. *See Ex parte Fahey*, 332 U.S. 258, 259, 260 (1947) (writs of mandamus and prohibition are "drastic and extraordinary remedies" to be "reserved for really extraordinary causes," in which "appeal is a clearly inadequate remedy"). As noted above, claims that a court of appeals has exceeded its jurisdiction or violated the separation of powers are

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complications," G. App. 22, to describe its readiness to use, as "evidence" in a *Hamdi* hearing, testimony reportedly obtained through torture (including near-drowning) at secret detention facilities abroad. *See e.g.*, J.Risen *et al.*, *Harsh C.I.A. Methods Cited In Top Qaeda Interrogations,* N.Y. Times, May 13, 2004. As Padilla argued in his certiorari briefs, a hearing founded on such "evidence" is not the due process the Framers envisioned for citizens arrested in the U.S.

[6] Under Sup. Ct. R. 20.3(b), as under the rules governing petitions for certiorari, Padilla would ordinarily have 30 days to respond to an application for an extraordinary writ. This, too, counsels in favor of delaying consideration of the application until the January 13 conference.

routinely reviewed on certiorari, and the government has provided this Court with no reason whatsoever why it cannot wait the seventeen days between now and this Court's January 13, 2006 conference. While the government obviously disagrees quite strenuously with the Fourth Circuit's characterization of the government's conduct during this litigation, mandamus is not an expeditious editing device by which a disgruntled party can seek to correct unfavorable dicta.[7]

4. Instead of seeking this Court's review of the Fourth Circuit's December Order through the established channels of a certiorari petition or an extraordinary writ of mandamus, the government urges this Court to construe Supreme Court Rule 36.4 as providing a never-before-used mechanism – independent of those two long-established means – for Supreme Court review of decisions of the courts of appeals. G. App. 2 n.1. This Court has never read the rule to allow a novel third path of review, and it should not do so now, on the expedited basis sought by the government.

Rule 36 proceeds in four parts. Part one prohibits any "person having custody of the prisoner" from "transfer[ing] custody to another person unless the transfer is authorized under this Rule." R.36.1. As explained below, *see infra* at 12-13, the plain text of the rule sets no limits on the "persons" or "prisoners" to whom it applies. Part two gives the initial judicial decision-maker discretion to permit a transfer, stating 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" when

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[7] Much of the dicta to which the government objects was equally applicable to the Fourth Circuit's decision not to recall its mandate and vacate its earlier opinion, a decision which the government does not ask this Court to overturn. The Court was surely empowered to consider that misconduct in deciding whether it should take the extraordinary step of recalling its mandate and vacating its own opinion, an action which the government urged the Fourth Circuit to take. G. C.A. Supp. Br. at 15-17. This Court, moreover, should give substantial deference to the Fourth Circuit's views about whether the government's actions before it were an improper attempt to manipulate its judicial processes, and should not set those findings aside on an expedited basis without a chance to fully review the record. We have elsewhere catalogued in detail our agreement with the Fourth Circuit's characterization of the government's actions in this case, *see generally* P. Cert. Reply Br. at 2-4 & App. 11-21, and need not belabor the point here.

a custodian requests it. R.36.2 (emphasis added). Part three then guides courts and judges in determining whether, following transfer or custodial substitution, the prisoner should be released or detained while the habeas appeal continues. Rule 36.3(a) provides that, following a decision "failing or refusing to release a prisoner" (such as a denial of a habeas petition, or here, the Fourth Circuit's reversal of the district court's grant of summary judgment in favor of Padilla), "the prisoner may be detained . . . or may be enlarged . . . as may appear appropriate." *Id.* at (a). On the other hand, there is a presumption of release following "a decision ordering release" (i.e., a grant of habeas) absent a contrary order. *Id.* at (b).

The final part of the rule, Sup. Ct. R. 36.4, states that "[a]n initial order respecting the custody or enlargement of the prisoner . . . shall continue in effect pending review . . . 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." The "initial orders" to which this part of the rule refers appear to be those listed in Rule 36.3: decisions granting or denying habeas relief, what the rule refers to as "a decision failing or refusing to release a prisoner" (i.e., a denial of habeas or, as here, the reversal of a grant of summary judgment in favor of the petitioner) or "a decision ordering release" (i.e., a grant of habeas). The Fourth Circuit's refusal to grant the government's request for authorization to transfer Padilla under Rule 36.1 is not an "initial order respecting the custody or enlargement of the prisoner" in this sense, and Rule 36.4 thus does not provide this Court with a never-before-used review mechanism to review the Fourth Circuit's December Order. Indeed, it would be quite unusual if it did, as the sources of this Court's jurisdiction are set forth in Chapter 81 of Title 28 of the U.S. Code, and are not generally found in this Court's own rules. *See* 28 U.S.C. § 1251 (original jurisdiction of S.Ct.); 28 U.S.C. § 1252 (appeals from three-judge courts); 28 U.S.C. § 1254 (certiorari jurisdiction over courts of appeals); 28 U.S.C. § 1257 (certiorari jurisdiction over

highest courts of the States); 28 U.S.C. § 1258 (certiorari jurisdiction over Supreme Court of Puerto Rico); 28 U.S.C. § 1259 (certiorari jurisdiction over Court of Appeals for the Armed Forces).[8]

II. The Government Is Estopped From Claiming that Rule 36 Does Not Apply.

The government's request that this Court somehow "clarify" that Rule 36 does not apply to the transfer here is particularly odd in light of the fact that it was the *government* that invoked Rule 36 before the Fourth Circuit. Indeed the first words of the government's November 22, 2005, application to the Fourth Circuit are "Pursuant to Supreme Court Rule 36 . . . ." Given that the government explicitly asked the Fourth Circuit to provide it relief pursuant to Rule 36, the government should be estopped from now claiming that the Fourth Circuit's invocation of that rule was so unwarranted an exercise of jurisdiction as to justify mandamus or other extraordinary remedy in this Court.[9]

Moreover, the government now asks this Court to use Rule 36 (and thus to embark on a new procedural path for Supreme Court review of decisions of the courts of appeals) as a basis for jurisdiction in order to "clarify" that Rule 36 does not apply at all to the case. G. App. 2 n.1. This circularity makes little sense. If the Rule does *not* apply, then the government cannot use it to seek advisory "clarification" from this Court. If the Rule *does* apply, then no "clarification" is

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[8] Were this Court nevertheless to choose to resolve hurriedly the "profound" constitutional questions raised by the Solicitor General, it could do so by denying or granting the government's application, and need not "affirm" or "reverse" the Fourth Circuit's December Order.

[9] In light of the government's request that the Fourth Circuit provide it relief "[p]ursuant to Supreme Court Rule 36," the government's strenuous attacks on the Fourth Circuit's resolution of the request are puzzling. Thus, though the government asked the Fourth Circuit to exercise judicial authority, it now attacks the court for doing so, saying the court merely "*purports* to exercise an unidentified and unprecedented judicial authority to disregard a presidential directive." G. App. at 2 (emphasis added); *see also id.* at 14 (excoriating court "for refusing to . . . give effect to a presidential directive"). If a court is not free to "disregard" the government's characterization of the legal meaning of an action that it has taken, then it is no longer free "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

necessary. Regardless, the government – which initiated the entire Rule 36 discussion by invoking the rule in the Fourth Circuit, and which now invokes it here again as the basis for *this* Court's jurisdiction – should be estopped from claiming that the Rule does not apply.

Padilla cannot disagree that Supreme Court Rule 36 – like the rest of the federal rules and statutes – was not likely drafted in contemplation that the government would someday be shifting U.S. citizens back and forth between incommunicado military detention and the civilian prison system. And as Padilla has previously explained to this Court, his release from military custody is not really like a prisoner's transfer from one Bureau of Federal Prisons facility to another, but instead is akin to a prisoner's release on parole – an action which neither deprives the courts of jurisdiction over a pending habeas petition nor necessitates a change in the custodian named in the petition. P. Cert. Reply Br. at 9-10 & App. 29-35; *see also* P. C.A. Supp. Br. at 25-31 & 10 n.1.[10]

Nevertheless, it would be highly imprudent for this Court to hold that the government has an unlimited ability to transfer prisoners in military custody while their habeas petitions are pending, and that such transfers are wholly outside the scope of Supreme Court Rule 36 and Federal Rule of Appellate Procedure 23.[11] The plain purpose of these two rules is to prevent the government from evading the federal courts' review of habeas petitions by physically moving prisoners. *See generally* Wright & Miller, Federal Practice & Procedure, § 3969 (discussing cases applying the rules). As this Court made clear in an earlier round of this litigation, the habeas statute rather strictly requires that habeas petitioners challenging their current physical custody sue

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[10] It was in this sense that Padilla suggested in the Fourth Circuit that Fed. R. App. Pro. 23 did not seem directly applicable to the case; because there is no need to name a substitute custodian in such circumstances, the portion of the rule authorizing the court to name a substitute custodian is irrelevant. P. C.A. Supp Br. at 3-4.

[11] Contrary to the government's claims, Padilla's counsel informed the government that he would not oppose his transfer from military custody – *not* that he agreed with the arguments made in the government's Notice of Release and Transfer. Indeed, the government never provided Padilla's counsel with a copy of the filing until after it had been filed.

their immediate physical custodians in the territory where they are confined. *See Rumsfeld v. Padilla*, 542 U.S. 426 (2004). Supreme Court Rule 36 and Federal Rule of Appellate Procedure 23 ensure that the courts will not be deprived of jurisdiction by stringent application of the immediate custodian and territoriality requirements when a prisoner is physically moved while his habeas petition is already on appeal. Explicitly empowering the courts to authorize the transfer of the prisoner to another location and at the same time appoint a successor custodian accommodates the executive branch's interest in detaining prisoners where it deems appropriate, and at the same time protects the federal courts' substantial interest in ensuring a continuity of jurisdiction in pending cases.[12]

Rule 36's language is unequivocal, and applies to *all* transfers of prisoners while appeals of habeas petitions are pending:

> 1. Pending review in this Court of a decision in a habeas corpus proceeding commenced before a court, Justice, or judge of the United States, the person having custody of the prisoner may not transfer custody to another person unless the transfer is authorized under this Rule.
> 2. Upon 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.

S. Ct. R. 36. The plain language of the rule makes no exceptions for transfers in or out of military custody. Nor would it be prudent for this Court to issue a broad ruling exempting such transfers

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[12] Indeed, this Court's decisions seemingly recognize that the federal courts would have the inherent power to appoint a successor custodian even if there were no rules on this topic, and even in cases involving wartime detentions by the military. *See Rumsfeld*, 542 U.S. at 440-41 (recognizing the "important but limited proposition that when the Government moves a habeas petitioner after she properly files a petition naming her immediate custodian, the District Court retains jurisdiction and may direct the writ to any respondent within its jurisdiction who has legal authority to effectuate the prisoner's release" from the custody that was the subject of the original challenge) (citing *Ex parte Endo*, 323 U.S. 283 (1944)). Thus, there is no merit to the government's argument that application of Rule 36 to this transfer would somehow violate the Rules Enabling Act. Gov't Application at 14. The federal courts' ability to implement procedural rules that ensure orderly appellate review is a part of the core judicial power vested in them by Article III. Moreover, should this Court deem it necessary to appoint a successor custodian as respondent following Padilla's transfer, *Endo* provides ample authority for it to do so.

from judicial scrutiny, particularly on an emergency motion without the benefit of full briefing. *Cf. Rumsfeld*, 542 U.S. at 454 (Kennedy, J., concurring) (expressing concern about the possibility of cases where government "kept moving [the prisoner] so a filing could not catch up to the prisoner").[13]

III. Nothing About Padilla's Physical Release from Military Custody Would Moot this Ongoing Controversy.

If this Court grants certiorari, it should order Padilla's physical release from the military brig in South Carolina. This release would not moot the case or otherwise impair this Court's jurisdiction. As we have explained elsewhere, Padilla's physical transfer would not run afoul of the immediate custodian or territoriality requirements of the habeas statute, 28 U.S.C. § 2241. *See* P. Cert. Reply Br. at 9 & n.9; id. at App. 9 - App. 12 (P. C.A. Supp. Br. at 2-4). Likewise, we have shown that Padilla's physical release from the military brig would not moot the case. *See* P. Cert. Reply Br. at 9; id. at App. 29 - App. 39 (P. C.A. Supp. Br. at 25-37).

However, the Fourth Circuit may have had some lingering concern that Padilla's physical transfer would moot the case because the President's Memorandum to the Secretary of Defense states that "*upon such transfer*, your authority to detain Mr. Padilla provided in [the June 9, 2002] order shall cease." Memorandum for the Secretary of Defense, Nov. 20, 2005 (emphasis added). Any such concern would be misplaced, for nothing prevents the President from reauthorizing Padilla's military detention at any moment. As Court has held, "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1981); *see also U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (noting that if voluntary cessation mooted cases, courts

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[13] Judge Traxler wrote separately that he "did not think Rule 36 is applicable to this situation," but said no more on the issue, giving no indication why he "did not think" the Rule applicable. Dec. Ord. at 14 (Traxler, J., concurring in part).

would be compelled to leave "[t]he defendant . . . free to return to his old ways"). In accordance with this principle, the test for determining whether a case has been mooted by the defendant's voluntary cessation of its conduct is stringent: a case is only moot "if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *U.S. v. Concentrated Phosphate Export Assn.,* 393 U.S. 199, 203 (1968) (emphasis added). This "heavy burden of persua[ding]" the Court that the challenged conduct will not resume lies with the party asserting mootness. *Id.* In fact, this Court has viewed with *particular* suspicion a party's assertion of mootness based on voluntary cessation of the challenged conduct when, as here, the party asserting mootness prevailed below. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000) ("Our interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness here."). As Justice Scalia has succinctly warned, courts should be "skeptical" that "cessation of violation means cessation of live controversy." *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 214 (2000) (Scalia, J., dissenting).

The government has utterly failed to meet its burden of demonstrating that it is "absolutely clear" that the alleged violation will not recur.[14] To the contrary, it specifically reserves the right to resume its unlawful conduct. *See* G. Opp. Cert. 17, and has refused to provide any assurance that it will not again detain him as an enemy combatant if he is acquitted. See P. Cert. Reply Br. 8. Indeed, while the government properly notes that "it is not uncommon for parties to agree to settle a case while it is pending before this Court," G. App. 24, it fails to note that it did *not* accept an

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[14] *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (voluntary moratorium on use of chokeholds by police not sufficient to moot case "since the moratorium by its terms [was] not permanent" and could be lifted at any time); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (case not moot where government voluntarily certified contractor was disadvantaged business enterprise, because it was not "absolutely clear that the litigant no longer had any need of the judicial protection that it sought"); *Aladdin's Castle*, 455 U.S. at 289 (finding case not moot where city voluntarily repealed objectionable statute but was free to reenact at any time).

invitation by Padilla to settle the case by agreeing never again to detain him militarily on the basis of any alleged past acts.[15] Until the government proves that its wrongful conduct will not recur, this controversy is live.

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Padilla is certainly eager to be released from the military brig where he has been held virtually incommunicado and in solitary confinement for the past three and a half years. The government's sudden urgency in demanding his *immediate* transfer to civilian custody is a bit puzzling, however, in light of its long delay in bringing criminal charges. At the tail end of more than three years of nearly incommunicado military detention, Padilla is content to wait two more weeks in order to have his transfer approved through ordinary judicial processes, in the hopes that the government's continuing threat to return him to the military prison will eventually be lifted once and for all.

CONCLUSION

For the foregoing reasons, this Court should deny the government's invitation to issue an advisory opinion on the scope of Rule 36 and deny the government's invitation to construe the Rule to create a never-before-used and novel appellate mechanism to review the Fourth Circuit's order. Instead, this Court should order his release from physical military custody upon consideration of the petition for certiorari at the January 13, 2006 conference.

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[15] Moreover, contrary to the Government's assertion, Padilla has plainly not received all of the relief he sought in his habeas petition simply by virtue of his criminal indictment. *See* Habeas Petition, Prayer for Relief ¶ 1 (asking the court to "declare" that Padilla's detention violates the Constitution and Non-Detention Act, 18 U.S.C. § 4001(a)); id ¶ 2 (requesting a factual hearing on the grounds for his designation as an enemy combatant). Padilla would still receive immediate and concrete benefits from the granting of this additional relief even after his transfer to military custody, because the granting of such relief would remove the ever-present threat of return to military custody that will otherwise hang like a cloud over his criminal trial.

Respectfully submitted,

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