

In The
Supreme Court of the United States

—◆—
JOSE PADILLA,

Petitioner,

v.

COMMANDER C.T. HANFT,
U.S.N., COMMANDER,
CONSOLIDATED NAVAL BRIG,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

—◆—
REPLY BRIEF OF PETITIONER
—◆—

JENNY S. MARTINEZ
Counsel of Record
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-2749

MICHAEL P. O'CONNELL
STIRLING & O'CONNELL
145 King Street, Ste. 410
P.O. Box 882
Charleston, SC 29402
(843) 577-9890

ANDREW G. PATEL
111 Broadway, 13th Floor
New York, NY 10006
(212) 349-0230

DONNA R. NEWMAN
121 W. 27th Street, Ste. 1103
New York, NY 10001
(212) 229-1516

JONATHAN M. FREIMAN
WIGGIN AND DANA LLP
One Century Tower
P.O. Box 1832
New Haven, CT 06508
(203) 498-4400

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ARGUMENT

After holding Jose Padilla in military prison without charge for 42 months, the Government made public a criminal indictment against him – based on entirely different factual allegations – a mere two business days before its brief in opposition was due in this Court. Far from making the case less worthy of review, the Government’s actions highlight the need for this Court to grant certiorari to preserve the vital checks and balances that the Framers intended.

As the Fourth Circuit recognized, the Government’s recent 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.” Order, *Padilla v. Hanft*, No. 05-6396, at 6 (4th Cir. Dec. 21, 2005) (“Dec. Ord.”).¹ The Government’s most recent move is only the latest in a series of strategic maneuvers calculated to insulate its treatment of detainees in the “war on terror” from judicial review. Moreover, this is the fourth set of alleged “facts” on which the Government has attempted to deprive Padilla of his liberty. These actions highlight the danger of an unchecked Executive Branch.

The detention of Padilla as an “enemy combatant” has been “a centerpiece of the government’s war on terror” for the past four years, *id.* at 10, and raises questions of profound constitutional importance about the Government’s military power over citizens in the homeland. In rejecting the Government’s attempt to shield its decision from further review, the Fourth Circuit found that the issue presented “is of sufficient national importance as to warrant consideration by the Supreme Court.” *Id.* at 10; *accord id.* at 11 (recognizing “the ‘exceeding importance’ of the issue presented” in this certiorari petition, even as limited to alleged facts of this case); *see Rumsfeld v. Padilla*, 542 U.S. 426, 450 (2004) (question “indisputably of profound importance”); *id.* at 465 (Stevens, J., dissenting) (“At

¹ The full Order is reproduced at Appendix “App.” 43-53.

stake in this case is nothing less than the essence of a free society.”).

This Court’s power to hear the case is undiminished. Under clearly established law, the Government’s decision to indict Padilla does not render the case moot. Though the Government ignores the doctrine, it is well-established that “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, Inc.*, 455 U.S. 283, 289 (1982). The “interest in preventing litigants from attempting to manipulate the Court’s jurisdiction to insulate a favorable decision from review further” counsels strongly against a finding of mootness in such circumstances. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 288 (2000). In any event, the Fourth Circuit has “maintain[ed] for the Supreme Court the status quo while it considers the pending petition for certiorari.” Dec. Ord. at 12.

Now more than ever, this Court should grant certiorari to ensure the checks and balances that the Framers erected to preserve America as a land of liberty under the rule of law.

A. The Government’s Recent Actions Highlight the Need for this Court’s Review

The Government has now changed its story about Padilla for the fourth time in three years. As the Fourth Circuit noted, the latest set of facts are “considerably different from, and less serious than, those acts for which the government had militarily detained Padilla.” Dec. Ord. at 3. These constantly-shifting factual allegations underscore why the Framers prohibited the Government from imprisoning a citizen without giving him the right to confront the witnesses against him in a speedy and public trial before an impartial jury. U.S. CONST. AMEND. VI. “Due process” for persons captured on an overseas battlefield may be satisfied by a hearing at which there is a rebuttable presumption in favor of the Government’s hearsay and the citizen has the burden of proving himself innocent, *see Hamdi v. Rumsfeld*, 542 U.S. 507, 533-34 (2004), but it is emphatically not what the Constitution

intended for citizens arrested here in the United States based on suspected wrongdoing.

The Government's current allegations against Padilla are virtually unrecognizable from those at the start of his case:

- **May 2002:** Padilla is a “material witness” in a criminal proceeding. *Padilla v. Rumsfeld*, 352 F.3d 695, 700 (2d Cir. 2003).
- **June 2002:** Padilla is an “enemy combatant” because he plotted to set off a “dirty bomb” somewhere in the U.S. *See Padilla v. Rumsfeld*, 352 F.3d at 701.
- **June 2004:** Padilla plotted to blow up apartment buildings in the U.S. with natural gas, and this charge should be judged by the “court of public opinion.” *See Transcript, News Conference With Dep. Att’y Gen. James Comey*, D.C. Fed. News Serv., June 1, 2004.
- **Aug. 2004:** Padilla was in Afghanistan between 2001 and 2002 and planned to use an “atomic bomb” upon his return to the U.S. *See Rapp Decl.*, at ¶ 15 (Aug. 27, 2004).
- **Nov. 2004:** Padilla joined criminal conspiracy in 1990s to support overseas jihad. Superseding Indictment, *U.S. v. Hassoun*, Crim. No. 04-60001 (S.D. Fla. Nov. 17, 2005).²

As the Fourth Circuit recognized, the Government's “actions have left . . . the impression that Padilla may have been held for these years, even if justifiably, by mistake.” Dec. Ord. at 12. The government's recent actions have also suggested that despite its claims that military detention of citizens like Padilla is vital to national security, these policies can “yield to expediency with little or no cost to its conduct of the war on terror.” *Id.* at 12-13.

² A fuller account of the changes in the Government's story, and of its efforts to evade judicial review, was set forth in Padilla's brief to the Fourth Circuit, a copy of which is attached at App. 1-42.

Moreover, the latest factual shift is part of the Government's ongoing effort to use its control over the detention and release of "enemy combatants" to evade judicial review – as it did in the *Hamdi*, *Al-Marri*, *Kar*, and *Al-Kaby* cases³, and as it seeks to do here.

Those efforts began in this case almost immediately after Padilla's arrest. Just *two days* before a hearing on Padilla's material witness arrest, the Government designated him an enemy combatant and secreted him to a military prison. Padilla's counsel was not given advance notice or a chance to object. *Rumsfeld v. Padilla*, 542 U.S. at 457 (Stevens, J., dissenting).

The Government next denied Padilla all access to his lawyers or the courts, arguing that Padilla's lawyer lacked standing to file a habeas petition on his behalf – even though, being held incommunicado, he could not file a petition for himself. 352 F.3d 695, 703 (2d Cir. 2003).

After denying Padilla access to his lawyers for almost two years, the Government suddenly reversed itself on the *very day its certiorari reply brief was due*. See www.defenselink.mil/releases/2004/nr200040211-0341.html. The Government then conveniently argued that the access to counsel issue was "effectively moot." Reply Br. for Pet'r, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027).

Now as before, the plain purpose of the Government's maneuver is to deter this Court from scrutinizing the legal basis for Padilla's detention. As the Fourth Circuit recognized, it would be damaging to the rule of law to allow the government to conduct "litigation with the enormous implications of this litigation – litigation imbued with significant public interest – in such a way as to select by which forum as between the Supreme Court of the United States and an inferior appellate court it wishes to be bound." Dec. Ord. at 8; see also *id.* at 11 ("rule of law" is best served by allowing Supreme Court review).

³ App. 21-25.

The Government attempts to minimize the importance of judicial resolution of the constitutional issues presented by this case by noting that only two citizens – Padilla and Hamdi – have been designated “enemy combatants.” G.Br. 19. Such reasoning would have shocked the Framers. A headcount need not be taken before the deprivation of an American citizen’s fundamental liberties becomes a matter of public alarm. *See Hamdi v. Rumsfeld*, 542 U.S. at 555 (Scalia, J. dissenting) (quoting Blackstone) (“[F]or if once it were left in the power of any, the highest magistrate to imprison arbitrarily whomever he or his offers thought proper . . . there would soon be an end of all other rights and immunities.”). Indeed, the Court of Appeals recognized that its decision was one of “‘exceeding importance,’” even though its holding was limited to the alleged circumstances of this case. Dec. Ord. at 11.⁴

This case is not controlled by this Court’s decisions in *Hamdi* and *Ex parte Quirin*, 317 U.S. 1 (1942). As Petitioner explained in his opening brief, there is a fundamental difference between the President’s power over persons captured on an overseas battlefield and citizens arrested here in the United States. Nor does this Court’s narrow decision upholding the trial by military commission of German soldiers in World War II determine the legality of the indefinite detention without trial of citizens suspected

⁴ In preparation for a hearing, the district court had ordered briefing on various evidentiary issues to be submitted by November 29, 2005. The Government’s argument that review should be denied because the case is interlocutory and the district court’s factual findings may obviate the need for this Court’s review, G.Br.20, utterly contradicts its mootness argument. Moreover, as argued in Petitioner’s opening brief, a fact hearing would not obviate the need for this Court to decide the fundamental question presented by this case – whether the President has the power to militarily detain persons arrested in the U.S. Finally, the Government ignores Padilla’s argument that the Court of Appeals misconstrued the summary judgment standard by accepting all of the Government’s pleadings as true, despite the fact that the Government had not met its burden of showing it had sufficient admissible evidence to create a genuine issue of material fact for trial. *See* Pet’n at 24 n.9. This issue is encompassed within the questions presented.

of associating with terrorist organizations. To the contrary, this case presents novel questions of “surpassing importance,” Dec. Ord. at 11, about the scope of the President’s military power over citizens here at home for the duration of the indefinite “war on terror.” These are questions that it is the constitutional duty of this Court to resolve.

Finally, other recent developments underscore the need for this Court to address the fundamental constitutional questions presented by this case – questions that have now lingered unresolved for almost four years. In this case, the Court of Appeals found that in the “war on terror,” the President’s powers over citizens here at home were as broad as his powers over persons found on an overseas battlefield. The Government continues to defend this sweeping view of the President’s power to substitute military rule for the rule of law, G.Br.21, and seeks now to expand it further, arguing that the very authorities that it says justify the indefinite detention without charge of citizens also justify widespread spying on citizens without judicial warrant or Congressional notification.⁵ Unless this Court grants review now, the Padilla precedent will “lie[] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.” *Korematsu v. U.S.*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

B. The Case is Not Moot

The Fourth Circuit has already rejected the government’s attempt to avoid further judicial review by characterizing the case as moot. *See* Dec. Ord. at 7-8 (no government interest “would justify the intentional mooting of the appeal of our decision to the Supreme Court after three and a half years of prosecuting this litigation and on

⁵ *See, e.g.*, D. Johnston & L. Greenhouse, ‘01 *Resolution Is Central to ‘05 Controversy*, N.Y. TIMES, Dec. 20, 2005 (noting that President argues that his source of authority to wiretap domestically without warrant is same as his source of authority to detain enemy combatants – AUMF, Commander-in-Chief Clause, and *Hamdi*).

the eve of final consideration of the issue by that court.”). This Court should likewise recognize that the government’s unilateral actions do not moot the case.⁶

1. The Government’s Voluntary Cessation of the Challenged Detention Does Not Moot the Case

“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.” *Aladdin’s Castle*, 455 U.S. at 289. Courts would be otherwise compelled to leave “[t]he defendant . . . free to return to his old ways.” *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). A case is only moot if “it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur” – a “formidable burden” that lies with the party asserting mootness. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 170 (2000).

The Government has not met this “formidable burden” by indicting Padilla. It specifically reserves its right to resume its unlawful conduct. First, the President’s Order does not explicitly revoke Padilla’s status as an “enemy combatant”: it merely directs that he be “transferred to the control of the Attorney General for the purpose of criminal proceedings against him,” suggesting he could be returned to military custody at any time. Pres. Memo. for Sec’y of

⁶ The Government ignores the important aspects of mootness doctrine described below, choosing instead to focus its attention on the less directly relevant “capable of repetition, yet evading review” test. *E.g.*, *Murphy v. Hunt*, 455 U.S. 478 (1982). Yet this doctrine too shows the case is not moot. It requires not that a challenged activity be inherently brief, only that it will *likely* end soon enough to evade review. *See Honig v. Doe*, 484 U.S. 305, 322-23 (1988) (finding special education litigation not inherently brief, but likely to evade review); *Super Tire Eng’g Co. v. McCorkle*, 416 U.S. 115, 126 (1974). The Government argues that future military detentions will likely not be too brief to evade review, *see* G.Br.17, but ignores that the fact that *it alone decides* when the detentions end. *See supra* at 2-4. A finding of mootness here would amount to an invitation to detain citizens for months or years until their habeas petitions were on the verge of meaningful legal review, with an option to charge or release the citizen to avoid judicial review at the end of the period.

Def. (Nov. 22, 2005). Second, the Government has asserted its authority to redesignate Padilla as an “enemy combatant,” *see* G.Br.17, and has refused to say it will not again detain him as an enemy combatant if he is acquitted. *See* M. Isikoff & M. Hosenball, *Case Not Closed*, NEWSWEEK, Nov. 23, 2005, at <http://www.msnbc.msn.com/id/10184957/>. Indeed, when Padilla offered the Government an opportunity to prove that it would not resume its conduct by entering into a consent decree agreeing not to return him to military detention on the basis of any alleged past acts, the Government did not accept the offer.⁷

This Court has expressed particular skepticism when the party asserting mootness based on voluntary cessation prevailed in the court below. *See Pap's A.M.*, 529 U.S. at 288 (“preventing litigants from attempting to manipulate the Court’s jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness”); *see also Laidlaw*, 528 U.S. at 214 (Scalia J., dissenting) (noting the “absolutely clear” threshold appropriate “where . . . there is reason to be skeptical that cessation of violation means cessation of live controversy”). Such skepticism is warranted here. *See* Dec. Ord. at 6.

⁷ This Court has rejected mootness claims in situations with far lower odds of recurrence. *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); *Pap's A.M.*, 529 U.S. at 287 (closing of adult entertainment business did not moot case because 72-year-old owner “could again decide to operate a nude dancing establishment”); *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).

2. This Court Can Provide the Relief Sought

Contrary to the Government's assertion, Padilla has plainly not received all of the relief he sought simply by virtue of his indictment. *See* Hab. Pet'n, Prayer for Relief ¶ 1 (asking court to "declare" that Padilla's detention violates Constitution and Non-Detention Act, 18 U.S.C. § 4001(a)); *id.* ¶ 2 (requesting factual hearing to contest designation as enemy combatant).⁸

At the moment, Padilla remains in military custody. But even if he were immediately transferred to civilian custody for trial, the case would not be moot because the ever-present threat of return to military custody would render Padilla analogous to a habeas petitioner released on parole.⁹ A validly filed habeas petition does not become moot simply because the petitioner is released on parole. Indeed, a habeas petition filed by a parolee "always satisfies the case-or-controversy requirement, because . . . the restriction imposed by the terms of the parole[] constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). Like a parolee, Padilla "must live in constant fear" that he will be "returned to prison to serve out the very sentence he claims was imposed upon him in violation of the United States Constitution." *Jones v. Cunningham*, 371 U.S. 236, 242 (1963).

Indeed, even a person finally released from parole, who faces no threat of return to physical custody, may continue to pursue a habeas petition challenging his conviction because of "collateral consequences" that continue after release. *See Spencer*, 523 U.S. at 7. Padilla

⁸ "Mootness of an action relates to the basic dispute between the parties, not merely the relief requested. Thus, although subsequent acts may moot a request for particular relief or a count, the constitutional requirement of a case or controversy may be supplied by the availability of other relief." *Intrepid v. Pollock*, 907 F.2d 1125, 1131 (Fed. Cir. 1990).

⁹ Because Padilla believes his physical transfer to civilian custody would not 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.

is likely to suffer “concrete and continuing injur[ies],” *id.*, arising from his designation as an enemy combatant.

Here, by the Government’s own admission, Padilla can be returned to military custody at *any moment* based on the *sole determination of the Executive Branch*. See G.Br.17. The Government would therefore have Padilla defend against criminal charges, knowing at each critical stage – plea bargaining, moving to suppress, compelling witness testimony, arguing the constitutional significance of the Government’s delay in bringing charges – that success could bring a return to *indefinite incommunicado detention*. This threat is quite real. The other enemy combatant at the Charleston Naval Brig was transferred to military custody shortly before his civilian criminal trial was to begin, while a motion to suppress illegally obtained evidence was pending. See Pet. Br., *Al-Marri v. Hanft*, No. 02-04-2257-26AJ (D.S.C. Oct. 14, 2005), at 3-4. Such a chill over the exercise of Padilla’s rights serves as a constraint on his liberty “not shared by the public generally.”¹⁰ And it poses a major separation of powers problem for the integrity of the criminal trial.

CONCLUSION

This case not only continues to present a justiciable “case or controversy.” It presents questions of vital importance to the stability of the Nation as a constitutional republic governed by the rule of law. For the foregoing reasons, the Court should grant the petition for certiorari.

¹⁰ If this Court were to find the case moot, the appropriate action would be to grant certiorari, vacate the Court of Appeals decision, and remand. *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18, 25 (1994).

Respectfully submitted,

JENNY S. MARTINEZ
Counsel of Record
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-2749

MICHAEL P. O'CONNELL
STIRLING & O'CONNELL
145 King Street, Ste. 410
P.O. Box 882
Charleston, SC 29402
(843) 577-9890

ANDREW G. PATEL
111 Broadway, 13th Floor
New York, NY 10006
(212) 349-0230

DONNA R. NEWMAN
121 W. 27th Street, Ste. 1103
New York, NY 10001
(212) 229-1516

JONATHAN M. FREIMAN
WIGGIN AND DANA LLP
One Century Tower
P.O. Box 1832
New Haven, CT 06508
(203) 498-4400

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APPEAL FROM A FINAL JUDGMENT
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**SUPPLEMENTAL BRIEF
OF PETITIONER-APPELLEE**

JENNY S. MARTINEZ
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-2749

ANDREW G. PATEL
111 Broadway, 13th Floor
New York, NY 10006
(212) 349-0230

MICHAEL P. O'CONNELL
STIRLING & O'CONNELL
145 King Street, Suite 410
Post Office Box 882
Charleston, SC 29402
(843) 577-9890

DONNA R. NEWMAN
121 W. 27th Street, Ste. 1103
New York, NY 10001
(212) 229-1516

JONATHAN M. FREIMAN
WIGGIN AND DANA LLP
One Century Tower
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4400

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[1] INTRODUCTION

On November 22, 2005, the government filed a motion seeking this Court’s permission to transfer Jose Padilla from the military brig, in which he has been imprisoned as an enemy combatant for the past three and a half years, to a civilian detention center in Florida, where Padilla has been indicted by a federal grand jury. This Court has asked the parties to address:

[W]hether, if the government’s motion is granted, the mandate should be recalled and our opinion of September 9, 2005, vacated as a consequence of the transfer and in light of the different facts that were alleged by the President to warrant Padilla’s military detention and held by this court to justify that detention, on the one hand, and the alleged facts on which Padilla has now been indicted, on the other.

Padilla believes the appropriate course of action is for this Court to order his immediate transfer to civilian custody, and to defer action on the question of whether to recall the mandate until after the Supreme Court disposes

of his petition for certiorari, which is currently scheduled to be considered in early January. If the Supreme Court denies review, Padilla agrees with the government that there is “good cause” for recall of the mandate and vacatur of this Court’s previous decision, though on different grounds than the government suggests.

[2] **DISCUSSION**

I. Padilla’s Transfer Would Not Divest This Court of Jurisdiction.

Petitioner agrees with the government that this Court should immediately grant the motion to transfer Padilla to civilian custody, regardless of whether it decides to recall the mandate and vacate the earlier decision. Allowing Padilla’s immediate transfer would not eliminate the Court’s power to recall the mandate, which is an equitable power that has no connection to transfer or an application for transfer.

Nor would the transfer divest this Court of supervisory jurisdiction over the habeas petition pending in the district court. In *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), the Supreme Court reiterated 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. 542 U.S. at 440-41 (citing *Ex parte Endo*, 323 U.S. 283 (1944)). Thus, in *Endo*, the Northern District of California retained jurisdiction over a habeas petition filed by a detainee in California even after she

had been moved Utah. So, too, this Court would retain supervisory jurisdiction over this properly-filed habeas petition even after Padilla were moved to Florida.

[3] Petitioner further notes – and the government also acknowledges – that Fed. R. App. Proc. 23 is not likely applicable to cases where an individual is provisionally released by the government from the form of custody he is challenging, as opposed to simply transferred within the federal prison system. Thus, the application no doubt stemmed from “an abundance of caution.” Application and Notice of Release and Transfer, at 4. In criminal cases, when the petitioner is challenging his underlying conviction but is released finally or on parole during the course of proceedings, the case always remains justiciable, *see infra* Part IV.A, but Fed. R. App. Proc. 23 is not applicable and the respondent usually remains unchanged. The court may choose to add the state’s attorney general or another appropriate respondent with the power to grant relief, but this is not necessary. *See, e.g., Evitts v. Lucey*, 469 U.S. 387 (1985) (habeas petition filed while prisoner was in custody but continued after prisoner’s final release from custody, where superintendent of prison and attorney general served as respondents); *Carafas v. LaVallee*, 391 U.S. 234 (1968) (habeas case filed while prisoner was in custody but continued after final release, where sole respondent remained prison warden). Similarly, Commandant Hanft remains the appropriate respondent here.¹

¹ Moreover, the requirement that a habeas petitioner sue his “immediate custodian” in the district of confinement only applies to “challenges to present physical confinement.” *Rumsfeld*, 542 U.S. at 439-40. Once Padilla is transferred from his present physical confinement by the military to the physical custody of civilian law enforcement

(Continued on following page)

[4] If this Court has any doubt about Commandant Hanft remaining the appropriate respondent following transfer, it could properly add any nominal military custodian within this Court's territorial jurisdiction as a respondent before approving the transfer. *See* Fed. R. App. Proc. 23; *See* Fed. R. App. Proc. 43; Sup. Ct. Rule. 36.2. Likewise, the District Court, which regained jurisdiction over the case following the issuance of this Court's mandate, could substitute another federal official for Commandant Hanft under the general rules governing substitution of parties, including, *inter alia*, Fed. R. Civ. Proc. 25. So could the Supreme Court. Sup. Ct. R. 36.2. This overlapping network of rules is intended to ensure that habeas petitions cannot be mooted merely because the federal [5] government transfers a prisoner when a habeas petition is pending in the federal court system.

In any event, the government has argued that “whatever this Court concludes is the appropriate response to

officials, his habeas challenge to his enemy combatant status could not logically be directed at his immediate physical custodian in Florida, who has no control over that status. *Cf. Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 488-89 (1973) (Kentucky court had jurisdiction over habeas petition brought by prisoner in physical custody in Alabama but challenging a Kentucky detainer, so long as a legal custodian could be reached by service of process); *Strait v. Laird*, 406 U.S. 341 (1972) (inactive military reservist could bring habeas action against “nominal” custodian, “a commanding officer in Indiana who had charge of petitioner’s Army records” but who was deemed “present” in California through the actions of his agents); *Reimnitz v. State’s Attorney of Cook County*, 761 F.2d 405, 409 (7th Cir. 1985) (noting that in cases where habeas petitioner challenges deprivation of liberty he faces while on release on bail or on one’s own recognizance, the petitioner should simply “name as respondent someone (or some institution) who has both an interest in opposing the petition if it lacks merit, and the power to give the petitioner what he seeks if the petition has merit – namely, his unconditional freedom”).

the legal effect of the intervening events discussed above, it should grant the government's unopposed transfer application as soon as possible." Gov't Br. at 16. The government has thereby consented to this Court's continued exercise of jurisdiction over the instant habeas petition regardless of the transfer. Objections based on the immediate-custodian and territorial-jurisdiction rules governing habeas petitions do not go to subject matter jurisdiction and thus "can be waived by the Government." *Rumsfeld*, 542 U.S. at 452 (Kennedy, J., concurring). Accordingly, regardless of how this Court chooses to proceed on the recall of the mandate, there is no reason to delay the transfer of Padilla to civilian detention.

II. Deference and Comity Counsel this Court to Delay Decision on Recall of the Mandate Until the Supreme Court Resolves the Petition for Certiorari.

Padilla's certiorari petition is now pending before the Supreme Court and scheduled to be considered within the month. Consistent with the principles of deference and comity, the most appropriate course of action for this Court is to [6] defer any decision about whether to recall the mandate until after the Supreme Court acts on the petition for certiorari.

The recall of a mandate is an action of "last resort" that should be exercised "only in extraordinary circumstances." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998). The Supreme Court has underscored that this equitable power should "be held in reserve against grave, unforeseen contingencies." *Id.*; see also *Alphin v. Henson*, 552 F.2d 1033, 1035 (4th Cir. 1977) (affirming that the court can recall the mandate only in "exceptional cases"). The

Supreme Court is currently contemplating review of this case and, without the use of any extraordinary powers, can fully consider the effect of the changed circumstances on the legal issues at stake. Deference and comity to the Nation's highest court should counsel this Court to hold its power "in reserve" until the Supreme Court disposes of the petition for certiorari. Such a course of action would avoid the unnecessary exercise of a power that should be used only as a "last resort."

To avoid jurisdictional conflict, lower courts usually may not act in a case that is pending on appeal. The Courts of Appeals regularly defer to proceedings in the Supreme Court, even before they issue their mandate.² *Cf.* Fed. R. App. P. [7] 41(d)(2)(B) (requiring that if a party who obtains a stay of the mandate from the appellate court files a writ of certiorari with the Supreme Court, the stay "continues until the Supreme Court's final disposition"); *Bernards v. Johnson*, 314 U.S. 19, 30 (1942) (asserting that a circuit court, after granting a stay, "had power to take further steps" in the case "upon disposition of the petition for certiorari"); *Alphin*, 552 F.2d at 1034 ("Our control over a judgment of our court continues until our mandate has issued . . . *unless, of course, our control has*

² A court of appeals has more discretion to alter its judgment before the mandate has issued than after it decides to issue it. See *Wilson v. Ozmint*, 357 F.3d 461, 464 (4th Cir. 2004) ("The mandate of the court has not yet issued in this case, and, therefore, we may, at our discretion, amend what we previously decided to make it conform, to the facts of the case, without need of finding that the case presents the sort of grave, unforeseen contingencies which would be necessary to recall a mandate that had already issued.") (internal quotations omitted).

been ousted by proceedings in the Supreme Court.”) (emphasis added).

In general, an appeal “is an event of jurisdictional significance” that divests the lower court of jurisdiction over the issues on appeal. *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982); *see also U.S. v. Montgomery*, 262 F.3d 233, 239-40 (4th Cir. 2001) (noting that the filing of an appeal ordinarily “confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal,” a practice which is necessary to “avoid confusion or waste of time resulting from having the same issues before two courts at the same time”). Actions by the lower court that alter the status quo are thus particularly disfavored. *Cf. Hawaii Hous. Auth. v. Midkiff*, [8] 463 U.S. 1323, 1324 (1983) (Rehnquist, Circuit Justice 1983) (refusing to stay or vacate order of court of appeals recalling its mandate and issuing an injunction, but only on the grounds that lower courts have inherent authority to act “to preserve the status quo during the pendency of an appeal, even to this Court”).

A cautious approach is particularly appropriate in view of the rules governing modification of district court judgments. Like other courts, this Court has analogized the power of a district court to alter or amend a judgment under Federal Rule of Civil Procedure 60(b) to the power of a court of appeals to recall its mandate. *See, e.g., U.S. v. Winestock*, 340 F.3d 200, 203 n.1 (4th Cir. 2003) (“Throughout this opinion, we will use the umbrella term ‘motions for reconsideration’ to refer to post-judgment motions filed in the district court pursuant to Fed. R. Civ. P. 59(e) or Fed. R. Civ. P. 60(b), as well as appellate motions for rehearing or to recall the mandate.”). The

majority of circuits, including this one, have ruled that a district court should not grant a Rule 60(b) motion during the pendency of an appeal, but at most may indicate its desire to entertain the motion and allow the parties to apply to the appellate court for a limited remand. *See Fobian v. Storage Technology Corp.*, 164 F.3d 887, 890-91 (4th Cir. 1999); Wright & Miller, *Federal Practice & Procedure* § 2873. The appellate court can then decide whether an immediate remand is appropriate.

[9] The most prudent course of action for this Court is to respect the status quo during the pendency of the appeal before the Supreme Court. In other words, this Court should give the Supreme Court the same respect that it asks the district courts to give it. Since it has indicated its desire to entertain the question of recall, *cf. Fobian*, 164 F.3d at 890-91, this Court has already put the parties on notice that they may argue the propriety of vacatur and/or remand in their briefs to the Supreme Court. By deferring its decision on whether to recall the mandate until after the Supreme Court has acted on the petition for certiorari, this Court would abide by the Supreme Court's teaching that recall of a mandate is a "last resort," *Calderon v. Thompson*, 523 U.S. at 550, and it would avoid taking the extraordinary action of interfering with the Supreme Court's consideration of the case by recalling a mandate while a petition for certiorari is pending. If the Supreme Court decides to grant certiorari, then the high court will presumably address the effect of the changed circumstances on the legal issues in the case, either directly or on remand to this Court, as it deems appropriate. On the other hand, if the Supreme Court denies certiorari, this Court will still have the power to recall the mandate and vacate its earlier opinion, and it

would have much stronger justification for exercising such an unusual remedy.

Notably, the instant case is distinguishable from cases in which the Supreme Court's denial of certiorari signals the final termination of the litigation and thus [10] might be construed to impose a heightened bar to recall of the mandate. Here, the procedural posture in which the case reaches the Supreme Court is the denial of a motion for summary judgment. Thus, the denial of certiorari by the Supreme Court would not terminate the litigation, but would merely trigger the return of complete jurisdiction over the case to the lower courts for further proceedings, whether on the issue of mootness, recall of the mandate on other grounds, or for a trial on the merits. Moreover, because the denial of certiorari is a discretionary act reflecting the high court's unique standards for controlling its docket, it would not reflect the Supreme Court's view of the merits, and would in no way suggest that the Supreme Court had somehow determined that it would be inappropriate for this Court to recall its mandate or take whatever other further action it deemed necessary to dispose of the case. *See, e.g., Teague v. Lane*, 489 U.S. 288, 296 (1989) ("As we have often stated, the 'denial of a writ of certiorari imports no expression of opinion upon the merits of the case'" and because of the "'variety of considerations [that] underlie denials of the writ,'" should not be accorded any precedential value) (citations omitted).

[11] **III. If the Supreme Court Declined Review, There Would Be Good Cause for this Court to Recall its Mandate and Vacate its Decision.**

If the Supreme Court declines to review the case on certiorari, this Court should recall its mandate and vacate

its decision. The Fourth Circuit has stated that it will exercise the extraordinary remedy of recalling the mandate “for good cause or to prevent injustice.” *Butler v. Academy Ins. Group, Inc.*, 1994 WL 483413, at *2 (4th Cir. 1993) (per curiam);³ *Alphin v. Henson*, 552 F.2d 1033, 1035 (4th Cir. 1977) (mandate may be recalled “to avoid injustice”). Recall of the mandate is also justified where necessary “to protect the integrity of the court’s own processes.” *Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304, 306 (1948); accord *Perkins v. Standard Oil*, 487 F.2d 672, 674 (9th Cir.1973). Furthermore, recall of the mandate may be particularly appropriate where the case involves “special public interest concerns . . . in governmental litigation” and the court’s decision relates to “action by the parties of a continuing nature.” *McGeshick v. Choucair*, 72 F.3d 62, 65 (7th Cir. 1995).

This case fulfills each of those criteria, making recall of the mandate particularly appropriate if certiorari is denied. As a review of the undisputed record makes plain, the government has repeatedly altered its factual allegations to suit its goals, and it has actively manipulated the federal courts to avoid [12] accountability for its actions. Its egregious conduct unquestionably constitutes good cause to recall the mandate and vacate – or even reverse – the opinion. Absent vacatur or reversal, this Court’s opinion will stand in history not for its legal principles, but as a blow to the integrity of the judicial process and a mark of injustice. Cf. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (granting writ of coram

³ A copy of the unpublished decision in *Butler* was included in the government’s brief.

nobis to remediate decision rendered on the basis of government misrepresentations).

A. The Government Has Manipulated Padilla and the Federal Court System Throughout This Case.

For the fourth time in three years, the government has changed its story on Padilla. This Court's decision that the President had authority to detain Padilla as an enemy combatant was premised on the third set of now-abandoned facts, which the government now contends it will never have to prove or recant. Moreover, over the past three and a half years, the government has fought at every turn to avoid judicial review of its actions with respect to enemy combatants. In short, the government's egregious conduct and gamesmanship in the federal courts justifies a recall of the mandate and vacatur of the September 9, 2005, decision.

[13] i. The Government Has Changed its Facts Repeatedly.

The government's factual claims against Padilla at the start of his case are virtually unrecognizable from its most recent factual allegations against him. Padilla was originally arrested at Chicago O'Hare Airport on a material witness warrant on May 8, 2002, and transferred to the Southern District of New York. Counsel was appointed for him, met with him several times, and filed a motion to vacate the material witness warrant. Just *two days before a judicial hearing* on the motion, at which the government would have had to justify its continued detention of Padilla as a material witness, the President declared

Padilla an enemy combatant and ordered him removed from the Southern District of New York. *See Rumsfeld v. Padilla*, 542 U.S. 426, 431; *id.* at 456 (2004) (Stevens, J., dissenting).

Having freed itself from the need to prove anything before a judge, the government changed its story, claiming next that Padilla had plotted to set off a “dirty bomb” somewhere in the United States. *See Padilla v. Rumsfeld*, 352 F.3d 695, 701 (2d Cir. 2003). These facts provided the basis upon which the President designated Padilla an enemy combatant and were submitted to the District Court under penalty of perjury. *Id.* at 700; Decl. of Michael Mobbs ¶¶ 7-9, available at <http://news.lp.findlaw.com/hdocs/docs/padilla/padillabush82702mobbs.pdf>.⁴

[14] The government then backpedaled, noting that it “[didn’t] think there was actually a plot beyond some fairly loose talk.” *See* http://www.defenselink.mil/transcripts/2002/t06112002_t0611cbs.html. And although the government vehemently resisted the district court’s attempt to examine the basis for its “dirty bomb” allegations, it did see fit to hold a press conference – while the Supreme Court was considering Padilla’s case – to present further “evidence” about Padilla’s conduct. *See* Scott Turow, *Trial by News Conference? No Justice in That*, Wash. Post, June

⁴ The Mobbs Declaration acknowledged that the two informants on whom the government relied were unreliable, that at least one of the informants was on “various types of drugs,” that their information may have been “part of an effort to mislead or confuse” U.S. officials, and that some of the information was subsequently recanted. ¶ 3 n.1. The government may have thought it safe to be candid because it argued that the affidavit’s conclusion (justifying detention without charge) could not be analyzed by any judge. G.Br. at 45-48, *Padilla v. Rumsfeld*, 352 F.3d 695 (2d. Cir. 2003) (No. 03-2235).

13, 2004, at B01. At that press conference, the government presented entirely new allegations against Padilla, including that he had plotted to blow up apartment buildings in the United States with natural gas. In a remarkable display of candor, the government also acknowledged that it would not give Padilla any forum in which to defend himself against these new allegations. The government admitted that it had no plans to present its evidence to any court, preferring instead to press its new charges in “the court of public opinion.” Transcript, *News Conference With Deputy Attorney General James Comey*, D.C. Federal News Service, June 1, 2004.

[15] The government completed its retreat from the “dirty bomb” facts it had submitted to the New York courts when Padilla re-filed his habeas petition in South Carolina. Just months after the Supreme Court ruled in *Hamdi* that the President was authorized to detain as enemy combatants citizens captured on the battlefield in Afghanistan, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality), the government *submitted a new declaration* to the District Court, this time conveniently alleging that the primary basis for Padilla’s continued detention was his presence in Afghanistan during 2001 and 2002. *See Decl. of Jeffrey N. Rapp*, JA 17-24.

Finally, of course, the government sidestepped all of its previous arguments and chose to indict Padilla on completely different grounds, namely for his alleged participation in a conspiracy in the 1990s to support acts of violent jihad outside the United States. It has refused to disavow any of the three earlier strains of factual allegations against Padilla, and it maintains that the President may redetain Padilla based on these facts – or perhaps yet another formulation – at some point in the future. G.Br. at

11. The plain purpose of this latest maneuver was to prevent the Supreme Court from scrutinizing the legal basis for Padilla's detention as an enemy combatant, and to prevent the district court from scrutinizing the factual basis for that detention. But to permit this Court's decision to stand – a decision [16] that was based, in large part, on the government's word⁵ – would condone a miscarriage of justice and undermine this Court's integrity.

ii. The Government Has Manipulated the Federal Courts to Avoid Judicial Scrutiny of its Actions.

The government's attempts to evade judicial review began almost immediately following Padilla's arrest and detention. As previously mentioned, the President designated Padilla an enemy combatant and transferred him to military custody just two days before a hearing on the validity of Padilla's material witness arrest. Padilla's counsel was not given advance notice of the transfer or any opportunity to object to it. *Rumsfeld*, 542 U.S. at 457 (Stevens, J., dissenting).

The government then plunged Padilla into a legal black hole. He was denied all access to his lawyers – in fact, he was denied access to anyone except his captors and interrogators. The government then objected to the jurisdiction of the New York court, trying to shut down any inquiry into its actions. And the government went so far as to argue that the lawyer who had been representing

⁵ Because of the procedural posture of the appeal reviewing a motion for summary judgment, this Court was required to view the facts in the light most favorable to the government.

Padilla in the material witness warrant proceedings lacked standing to file a habeas petition challenging his new incommunicado detention – even though Padilla, [17] being held incommunicado, could not file a petition for himself. 352 F.3d 695, 703 (2d Cir. 2003).

The government’s attempts to evade judicial review continued with the issue of access to counsel. After denying Padilla access to his lawyers for almost two years, the government suddenly reversed itself on February 11, 2004 – *the day its certiorari reply brief was due* in the Supreme Court – and allowed Padilla access to counsel. See www.defenselink.mil/releases/2004/nr200040211-0341.html. The government was then conveniently able to argue in that brief that the access to counsel issue was “effectively moot.” Reply Br. for the Pet’r, *Rumsfeld v. Padilla*, No. 03-1027 (U.S. S. Ct. Feb. 11, 2004).

The government has actively sought to avoid judicial scrutiny of the conditions of Padilla’ detention as well. When Padilla noted in his petition for certiorari before judgment earlier this year that holding him in solitary confinement for a fourth year would cause him irreparable psychological harm, the government tried to avoid review by responding that Padilla “has never challenged the conditions of his confinement in any judicial proceeding, or otherwise contended that he has been treated inhumanely.” Gov’t Opp. at 16 n.3, *Padilla v. Hanft*, No. 04-1342 (U.S. S.Ct., May 9, 2005). This was patently false. In fact, Padilla had objected to aspects of his conditions of confinement in his habeas petition and in his opposition to a stay pending appeal. See Reply to Br. in Opp. at [18] 9-10, *Padilla v. Hanft*, No. 04-1342 (U.S. S.Ct. May, 17, 2005). Moreover, Padilla’s attorneys had been actively engaged in out-of-court negotiations with the government

to ameliorate his conditions of confinement for months; indeed, a meeting on this topic with Padilla's attorneys had been held in the Solicitor General's own conference room only a few weeks before.

Though its factual allegations have changed with the prevailing winds, the government's actions have been strategically consistent. At every turn, the government has sought to manipulate the federal courts' jurisdiction and evade judicial review. This pattern of manipulation extends beyond this case to the other cases involving alleged "enemy combatants" detained in the United States. Yaser Hamdi, like Padilla a U.S. citizen detained in a military prison as an enemy combatant, was isolated from his attorneys for almost two years. And as with Padilla, the government determined that he was no longer a threat to national security – and so could speak to his lawyers – *the day before* its Supreme Court brief in opposition to certiorari was due, thereby purportedly "mooting" the issue in his case. See www.defenselink.mil/releases/2004/nr200040211-0341.html (Hamdi allowed access to counsel on December 2, 2004); Respondent's Brief in Opposition to Certiorari, *Hamdi v. Rumsfeld*, No. 03-6696 (U.S. S.Ct. December 3, 2004). Once the Supreme Court ruled that Hamdi was entitled to notice of the allegations against him and an opportunity to contest those allegations in front of a [19] neutral decisionmaker, *Hamdi*, 542 U.S. at 533, the government orchestrated his release to Saudi Arabia rather than come forward with proof of his enemy combatant status. See Eric Lichtblau, *U.S., Bowing to Court Ruling, Will Free 'Enemy Combatant'*, N.Y. Times, Sept. 23, 2004, at A1. The agreement was announced on September 22, 2004, just *five days before* jurisdiction over the case was scheduled to return the district judge, who

had indicated a desire to begin immediate hearings. Similarly, Ali Saleh Kahlah Al-Marri, a U.S. resident who had been criminally indicted for making false statements on a bank application and to the FBI, was declared by the government to be an enemy combatant and transferred to military custody while a motion to suppress illegally obtained evidence was pending, and shortly before his criminal trial was to begin. *See* Petitioner's Brief, *Al-Marri v. Hanft*, No. 02:04-2257-26AJ (D.S.C. Oct. 14, 2005), at 3-4.⁶

In light of this persistent pattern of last-minute maneuvering to evade judicial review, the government's decision to make public the Florida criminal [20] indictment against Padilla *a mere two business days* before its brief opposing certiorari review of this Court's decision was due cannot be construed as coincidence. The indictment against Padilla's alleged co-conspirators in Florida had been released more than a year earlier, on September 16, 2004. *See United States v. Hassoun*, Crim. No. 04-60001, Superseding Indictment (S.D. Fla. Sept. 16, 2004). Examination of the earlier indictments suggests that Padilla was "unindicted co-conspirator #2" in the 2004 version of the indictment, and that the allegations against him were substantially the same as in the current indictment.

⁶ The government also successfully evaded judicial review with respect to its detention of Cyrus Kar, an American filmmaker and Vietnam veteran detained in Iraq for 55 days, and released only after a federal habeas corpus suit was filed, *see* Henry Weinstein, *Is This How You Treat One of Your Own?*, L.A. Times, July 24, 2005, at A1; and of Numan Adnan Al-Kaby, a U.S. resident also detained in Iraq and released "less than a week after lawyers filed suit demanding his release." Carol D. Leonnig, *U.S. Resident Freed From Baghdad Prison*, Wash. Post, Sept. 7, 2005, at A06.

Compare Superseding Indictment, *United States v. Hassoun*, Crim. No. 04-60001 (S.D. Fla. Nov. 17, 2005), *with id.*⁷ One can only assume that the government strategically chose to wait until *after* this Court had issued a ruling in its favor, but just *before* the Supreme Court would decide whether to review that ruling, to indict Padilla.⁸

[21] B. The Government’s Egregious Conduct Would Constitute “Good Cause” for Recall of the Mandate and Vacatur or Reversal of the Opinion.

The government’s course of conduct in this area of the law is dubious at best. Were the Supreme Court to deny review, the governmental conduct, coupled with the novel constitutional issues in this case, would strongly counsel this Court to recall its mandate to avoid the fundamental injustice of letting stand a judgment that Padilla can lawfully be detained as an enemy combatant when the government’s factual allegations undergirding that decision are *gravely* in doubt.⁹ See *Butler v. Academy Ins. Group, Inc.*, 1994 WL 483413, at *2 (4th Cir. 1993) (per curiam) (mandate may be recalled for “good cause” and “to prevent injustice”); *Alphin v. Henson*, 552 F.2d 1033, 1035

⁷ Copies of both indictments are attached as an addendum.

⁸ The decision to indict Padilla also came shortly before the district court was scheduled to receive briefing from the parties on numerous issues that might result in decisions unfavorable to the government, including the use of evidence obtained through coercive interrogation.

⁹ Although the government suggests that the indictment is not inconsistent with the facts alleged in the district court, it has, of its own volition, effectively abandoned those allegations.

(4th Cir. 1977) (mandate may be recalled “to avoid injustice”).

Recall of the mandate would also be necessary to “protect the integrity of [this] court’s own processes.” *Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304, 306 (1948); *accord Perkins v. Standard Oil*, 487 F.2d 672, 674 (9th Cir. 1973). No rule of law requires judges to remain blind to government actions that ordinary citizens recognize as unjust manipulation of the legal system. Further, separation of powers concerns and considerations of fair judicial administration suggest that this Court [22] must be careful not allow itself to be manipulated to render advisory opinions in the government’s favor on hypothetical facts the government never intends to prove, particularly on novel constitutional issues of historic scope and importance.

Finally, this case involves “special public interest concerns” that relate to government policies of a continuing nature. Courts have recognized that recall of the mandate may be particularly appropriate where the case involves not merely “damages between private litigants” but where there are “special public interest concerns that might be present in governmental litigation in which the court’s previous action” relates to “action by the parties of a continuing nature.” *McGeshick v. Choucair*, 72 F.3d 62, 65 (7th Cir. 1995); *American Iron and Steel Institute v. E.P.A.*, 560 F.2d 589 (3d Cir. 1977) (recognizing that “the public interest” is encompassed under the broader rubrics of “good cause” or “special circumstances” and can justify the recall of a mandate); *id.* (noting that recall of the mandate may be particularly appropriate where the court “rendered an order” concerning government conduct

“which necessarily is of a continuing nature” and affects more than just the particular litigants before the court).

This Court’s decision addressed a constitutional issue of first impression and profound significance. It authorized the President to detain indefinitely U.S. citizens arrested in the United States without criminal charge or trial. Moreover, the decision concerns government conduct of an ongoing nature and of [23] fundamental public interest. As such, it is of great significance not only to Padilla, but to all other Americans who could find themselves detained as “enemy combatants.” The government continues to hold out the possibility of detaining other citizens in the future, including those indicted and scheduled for trial under our longstanding criminal process, in military custody as enemy combatants. As it has frankly admitted, “the President could redesignate petitioner for detention as an enemy combatant – just as he could theoretically designate criminal defendants whose conduct . . . would suffice to justify detention as an enemy combatant. . . .” G.Br. at 11. Yet the government’s unilateral actions have consistently evaded judicial review of the procedural and factual standards governing enemy combatant determinations. Should the Supreme Court decline review, it would be of paramount importance to the public interest and the fairness of the judicial process that this Court recall its mandate and vacate its decision, so that Padilla or a future citizen facing detention as an enemy combatant have the opportunity to relitigate this issue fully. *See* G.Br. at 11.

* * *

The shifting nature of the government’s factual allegations against Padilla highlights the dangers of

allowing the military detention of citizens without the constitutional protections by which the Framers safeguarded the integrity of criminal trials. Without those protections, and the accountability they provide, [24] governmental error and abuse expand exponentially. And the expansion comes at the expense of the courts and the citizenry, who become subject to a government free to create, alter or abandon its story as it goes along. See *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (“The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”); *id.* at 241 n.15 (Murphy, J., dissenting) (noting that the military viewed the *absence* of sabotage as an indication of imminent subversion justifying preventative detention of Japanese Americans). The government’s conduct in this case underscores the merits of the arguments that Padilla presented to this Court earlier this year, and this Court would be well justified not just to vacate its opinion, but to reverse it on the merits. Only then would the “loaded weapon” now aimed at the courts and the citizenry be safely stowed beyond the reach of the always grasping “hand of . . . authority.”

IV. The Government Has Not Met Its Burden of Proving Mootness

A case becomes moot only if “(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.” *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979) (internal citations and quotations omitted). “The burden of demonstrating mootness is a

heavy one,” *id.*, and the government has failed to meet it here, where it [25] continues to assert not only the power to detain Padilla as an “enemy combatant,” but also the will to do it.

The government meets neither branch of the test. It openly admits that it is “possible that the President could redesignate petitioner for detention as an enemy combatant,” G.Br. at 11, thus making it impossible to say “with *assurance* that there is *no reasonable expectation* that the alleged violation will recur.” *Davis*, 440 U.S. at 631 (emphasis added). Moreover, the government fails to explain how “the effects of the alleged constitutional violation” have been “completely and irrevocably eradicated.”

To the contrary, meaningful judicial relief can still be provided by granting Padilla’s habeas petition, which would (1) lift the threat of return to military custody, which Padilla faces in an immediate and concrete way that differs from other Americans and which will impinge on his ability to mount a defense at his criminal trial, and (2) ameliorate the real and immediate collateral consequences Padilla faces as a result of his illegal detention by the Executive.

A. The Case Is Not Moot Because the Government Continues to Assert the Authority to Detain Padilla as an Enemy Combatant.

The government continues to assert the right to return him to military detention as an enemy combatant at any time and for any reasons. Padilla’s situation is thus analogous to a prisoner whose habeas petition has not been [26] resolved by the time he is released on parole – a

situation in which the courts have consistently held that the habeas petition is not moot but presents a live, justiciable case or controversy. *See, e.g., Jones v. Cunningham*, 371 U.S. 236 (1963); *Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

The President's recent memorandum authorizes Padilla's transfer to the custody of the Attorney General only "for the purposes of criminal proceedings against him," and it does not state that Padilla's designation as an enemy combatant has been withdrawn. President George W. Bush, Memorandum for the Secretary of Defense, Nov. 20, 2005. Indeed, the government has acknowledged that it is "possible that the President could redesignate petitioner for detention" by the military. G.Br. 11. Importantly, when asked whether it will allow Padilla to go free if he is acquitted by a jury of his peers, *the government has refused to answer. See* Michael Isikoff and Mark Hosenball, *Case Not Closed*, *Newsweek*, Nov. 23, 2005, at <http://www.msnbc.msn.com/id/10184957/site/newsweek/>. Neither the President's Order nor the Florida indictment revokes Padilla's status as an enemy combatant, eliminates the government's authority to detain him as an enemy combatant on unproven facts, or in any other manner gives him the full relief he asked for in his habeas petition: "an opportunity to contest the Government's [27] factual allegations" that supposedly justified his detention as an "enemy combatant." *See* Habeas Petition, Prayer for Relief ¶ 2.¹⁰

¹⁰ Contrary to the government's assertion, Padilla has plainly not received all of the relief he sought in his habeas petition. *See* Habeas Petition, Prayer for Relief ¶ 1 (asking the court to "declare" that Padilla's detention violates the Constitution and Non-Detention Act, 18

(Continued on following page)

Padilla's release from military custody will hardly make him a "free man." Even if acquitted of all criminal charges, he is a man who will be free only by what the government deems its grace, never free by right. There can be no legitimate debate that the threat of reimprisonment at any time for any reason constitutes a restraint on liberty "not shared by the public generally," which is more than sufficient to present this Court with an Article III "case or controversy." *Jones*, 371 U.S. at 240; *Bernard v. Garraghty*, 934 F.2d 52, 55 n.3 (4th Cir. 1991) (noting that "other forms of significant restraint by the state on the petitioner's liberty" other than "actual physical custody" are capable of redress through habeas relief). The Court has long recognized that the Great Writ is not limited to providing relief [28] from restraints on liberty made up of "prison walls and iron bars," and that it "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Id.*; see also *Hensley v. Municipal Court, San Jose Milpitas Judicial*

U.S.C. § 4001(a)); id ¶ 2 (requesting a factual hearing on the grounds for his designation as an enemy combatant); id. ¶ 5 (requesting "such other relief as the Court may deem necessary and appropriate"). In general, "[m]ootness of an action relates to the basic dispute between the parties, not merely the relief requested. Thus, although subsequent acts may moot a request for particular relief or a count, the constitutional requirement of a case or controversy may be supplied by the availability of other relief." *Intrepid v. Pollock*, 907 F.2d 1125, 1131 (Fed. Cir. 1990) (citing *Powell v. McCormack*, 395 U.S. 486, 496-97 (1969) (holding claim for injunctive relief related to seating in Congress not moot because separate claim for back salary still viable)). See also *Coalition for Gov't Procurement v. Fed. Prison Indus.*, 365 F.3d 435, 461 (6th Cir. 2004) (relying on request that district court grant "any other such relief as is necessary" in finding case not moot on appeal).

Dist., Santa Clara County, California, 411 U.S. 345 (1973) (holding the “in custody” requirement of habeas satisfied when “freedom of movement rests in the hands of state judicial officers, who may demand [petitioner’s] presence at any time and without a moment’s notice”); *Strait v. Laird*, 406 U.S. 341 (1972) (finding jurisdiction to consider habeas petition from citizen subject to future active-duty military service though currently serving as unattached Reserve officer).

The Executive’s decision to transfer Padilla from the custody of the Department of Defense, therefore, places Padilla in a position closely analogous to that of a habeas petitioner who has been released on parole. Indeed, the Supreme Court has found that a habeas petitioner who is free on parole satisfies not only Article III’s “case or controversy” requirement, but also the more exacting test of being “in custody” for the purpose of *filing* a habeas petition. *See Jones*, 371 U.S. 236; *Spencer*, 523 U.S. at 7 (noting a parolee’s challenge to the validity of his conviction “*always* satisfies the case-or-controversy requirement, because . . . the restriction imposed by the terms of the parole[] constitutes a concrete injury, [29] caused by the conviction and redressable by invalidation of the conviction”) (emphasis added). Like a parolee, Padilla “must live in constant fear” that he could be “returned to prison to serve out the very sentence he claims was imposed upon him in violation of the United States Constitution.” *Jones*, 371 U.S. at 242.¹¹

¹¹ Notably, the Government cites no habeas cases to support its claim that release from detention renders the case moot, but only a handful of utterly inapposite cases involving challenges to prison conditions under 42 U.S.C. § 1983. *See, e.g., Slade v. Hampton Roads*
(Continued on following page)

But even a prisoner who is finally released from both prison and parole – a prisoner who faces no threat of return to physical custody – may continue to pursue a habeas petition challenging his conviction. An individual who was “in custody” at the time of filing a habeas petition does not need to remain in custody for the duration of his case in order for the court to retain jurisdiction over the matter. *See Spencer*, 523 U.S. at 7. In the criminal context, courts will typically proceed to consider the merits of the habeas petition of a released prisoner because the “collateral” consequences of the conviction satisfy the constitutional requirement of a live “case or controversy.” *See Nakell v. Attorney General of North Carolina*, 15 F.3d 319, 320-21 (4th Cir. 1994) (holding habeas petition not moot despite “unconditional release from custody” when petitioner “may suffer collateral legal consequences resulting from his conviction”). So too here, Padilla may suffer collateral legal consequences resulting from his designation as an [30] enemy combatant, consequences which independently render his challenge to that designation a live controversy.

The Supreme Court has found “the mere possibility of such collateral consequences” sufficient to allow a habeas case to continue as a “justiciable case or controversy” despite a prisoner’s final release from custody. *Benton v. Maryland*, 395 U.S. 784, 790 (1969). In the criminal context, the Supreme Court has acknowledged “the obvious fact of life that most criminal convictions do in fact entail adverse collateral consequences,” *Spencer*, 523 U.S.

Regional Jail, 407 F.3d 243, 249 (4th Cir. 2005), *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991); *Magee v. Waters*, 810 F.2d 451 (4th Cir. 1987).

at 12 (*quoting Sibron v. New York*, 392 U.S. 40, 55 (1968)), and therefore has found that courts may presume that habeas petitions present an active “case or controversy” even after a prisoner’s final and unconditional release from custody. *Id.* at 8 (“In recent decades we have been willing to presume that a wrongful criminal conviction has continuing collateral consequences.”).

Padilla continues to have a “substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him,” *Fiswick v. U.S.*, 329 U.S. 211, 222 (1946), because he is likely to suffer “concrete and continuing injur[ies],” *Spencer*, 523 U.S. at 7, arising from his designation as an enemy combatant. Through official orders, Padilla has been branded by the President of the United States an “enemy combatant,” accused of waging war on the United States without adhering the laws of war. It is the most heinous of scarlet letters in a [31] society rightly concerned with the threat of terrorism. He has been accused of associating with al Qaeda, waging war on his fellow countrymen, planning to blow up apartment buildings, and planning to detonate a “dirty bomb.” The seriousness of the government’s accusations will likely result in severe and continuing reputational harms to Padilla, above and beyond even those reputational harms that accompany conviction for a violent felony. Relief from these collateral consequences would be afforded if Padilla were to receive the full relief requested in his habeas petition – including declaration that his detention as an enemy combatant violated the Constitution and Non-Detention Act, 18 U.S.C. § 4001(a), Habeas Petition, Prayer for Relief, ¶ 1, and the opportunity for a factual hearing on the grounds for his designation as an enemy combatant, *id.* ¶ 2. Thus, even apart from the threat of

reimprisonment as an enemy combatant, these additional harms alone constitute adverse collateral consequences sufficient to satisfy the “case and controversy” requirement.¹²

[32] B. The Government’s Voluntary Cessation of the Challenged Conduct Cannot Render the Case Moot.

It is well established that “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). If it did, the courts would be compelled to leave “[t]he defendant . . . free to return to his old ways.” *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). 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.” *United States 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

¹² The seriousness of the government’s accusations against Padilla is compounded by their wide public distribution. For instance, then Attorney General John Ashcroft interrupted an official visit in Moscow to announce Padilla’s arrest, announcing to a national audience that the government had “captured a known terrorist who was exploring a plan to build and explode a radiological dispersion device, or ‘dirty bomb,’ in the United States.” James Risen & Philip Shenon, *Traces of Terror: The Investigation; U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb*, N.Y. Times, June 11, 2002, at A1.

party asserting mootness. *Id.* The Government utterly fails to meet its burden of demonstrating that it is “absolutely clear” that the alleged violation will not recur. To the contrary, the government specifically reserves the right to resume its unlawful conduct.. G.Br.11 (admitting that it is [33] “possible that the President could redesignate petitioner for detention as an enemy combatant”).¹³

Indeed, the government has repeatedly refused to provide any assurance that Padilla would not be detained militarily again if acquitted of the present criminal charges in Florida. On the day that the indictment was unsealed, counsel for Padilla asked the Office of the Solicitor General whether the government contended that it would still have the power to detain Padilla as an enemy combatant even if he were acquitted of all criminal charges in Florida, and a representative of that Office stated that it did claim such power. Isikoff and Hosenball, *supra*. On Tuesday of this week, December 13, 2005, counsel for Padilla, having reviewed the government’s argument to this Court that the case is moot, invited the government to enter into an agreement, to be entered as a consent decree in the district court, by which the federal government would agree never again to designate Jose Padilla as an ‘enemy combatant,’ or to detain him in military custody, on the basis of any actions that occurred or are alleged to have occurred at any time prior to the entering of the consent decree. Such an agreement would provide the “assurance” that the Supreme Court has held

¹³ Perhaps because the government so clearly cannot satisfy the burden that the voluntary cessation doctrine places on it, the government’s brief completely avoids any discussion of this doctrine.

is a [34] necessary prerequisite to a finding of mootness. The government did not accept the offer.

The government's failure to provide "absolutely clear" proof that the controversy is over – even when given an opportunity to do so by opposing counsel – underscores that the case is not moot. In fact, situations with seemingly far lower odds of recurrence have been found by both this Court and the Supreme Court not to be moot. *See, e.g., Erie v. Pap's A.M.*, 529 U.S. 277, 287-88 (2000) (finding case not moot, where proprietor of nude dancing facility was of an advanced age and had voluntarily closed and sold his dancing business, but where he still owned a license to operate one); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (per curiam) (finding case not moot, where state had certified business as a disadvantaged business enterprise, but such certification resulted from voluntary compliance); *Aladdin's Castle*, 455 U.S. at 289 (finding case not moot where city had repealed objectionable statute, but was free to reenact it at any time); *Virginia ex rel. Coleman v. Califano*, 631 F.2d 324, 326-27 (4th Cir. 1980) (finding case not moot where federal agency had granted Virginia a requested administrative hearing, but "refused to concede that Virginia was entitled to a hearing as a matter of right, [and] continued to assert the correctness of its position").

[35] The Supreme Court has found particularly suspect a party's assertion of mootness based on its voluntary cessation of the allegedly illegal behavior when, as here, the party prevailed in the court below. *See Pap's A.M.*, 529 U.S. at 288 ("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.”¹⁴ 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 (TOC), Inc.*, 528 U.S. 167, 214 (2000) (Scalia, J., dissenting). Until the government proves that its wrongful conduct will not recur, this controversy is live.

C. The Case Is Not Moot Because Padilla’s Claims Are Capable of Repetition, Yet Evading Review

Even if this Court were to find that all of Padilla’s requested relief had been granted by his release from the military brig, and that the voluntary cessation doctrine did not preclude a finding of mootness, this case would still be justiciable because the government’s conduct is also “capable of repetition, yet evading review.” *E.g.*, *Murphy v. Hunt*, 455 U.S. 478 (1982). The government’s own [36] statements and actions make clear that there is at least a “reasonable expectation,” *Honig v. Doe*, 484 U.S. 305, 318 & n.6 (1988), that “the same controversy will recur involving the same complaining party.” *Murphy*, 455 U.S. at 482.¹⁵

¹⁴ Notably, the case did not become moot as a result of the end of an activity of some predetermined length, such as a release from prison after a set term or graduation from school. *Cf. Bunting v. Mellen*, 124 S.Ct. 1750, 1752 (2004) (Stevens, J.) (concurring in denial of cert.) (finding mootness appropriate where defendants had graduated from university and had not prevailed below, and thus case “lack[ed] the potential for gamesmanship that concerned” the Court in other cases).

¹⁵ Unlike revocation of parole, which requires further misconduct, the government could again detain Padilla without even alleging

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The “evading review” doctrine does not require that the challenged activity be inherently short in duration, only that it is *likely* to be short enough that it evades review. See *Honig*, 484 U.S. at 322-23 (finding special education litigation not inherently brief, but likely to repeatedly evade review); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 126 (1974) (finding labor dispute not inherently brief, but likely to evade review, since “the great majority of economic strikes” do not last long enough for complete judicial review); see also *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174 (9th Cir. 2002) (assessment of evasion does not depend on specific time line when “the duration of the controversy is solely within the control of the defendant”). Here, the government has sole power over whether the military detention of those citizens it deems enemy combatants will be short enough to evade review. The Government’s absolute control over the detention and release of those it has labeled enemy combatants allows the government to evade review at will – as it seeks to do here, and as it has tried to do in the *Hamdi*, *Al Marri*, *Kar*, and *Al-Kaby* cases. A finding of mootness in this [37] case would amount to an invitation to the government to detain citizens in limbo for months or years until their habeas petitions were on the verge of progressing to meaningful legal or factual review, with an option to charge or release the citizen to avoid any judicial review at the end of the limbo period.

further misconduct. Cf. *Weinstein v. Bradford*, 96 S. Ct. 347, 348 (1975) (per curiam); *Honig*, 484 U.S. at 320.

D. Were the Case Moot, This Court Could Recall Its Mandate and Vacate Its Opinion.

Padilla acknowledges that this Court has the power to recall its mandate and vacate its opinion if it is convinced the case became moot following issuance of the mandate.

However, doing so now – as opposed to after the Supreme Court has resolved the pending petition for certiorari – would be an extraordinary step for all the reasons of deference and comity set forth above.¹⁶ See *supra* at Pt. II.

Ignoring those prudential concerns, the government suggests that mootness doctrine itself would sanction this Court’s immediate recall of its mandate and vacatur of its decision:

Under *United States v. Munsingwear*, 340 U.S. 36 (1950), and its progeny, the ‘established practice’ of appellate courts ‘in dealing with a civil case . . . which has become moot while on its way to [the Supreme Court]’ has been to ‘vacate the judgment’ if review of that judgment ‘was prevented through happenstance.’

[38] G.Br.13. That suggestion errs by conflating the Supreme Court and the courts of appeals. The Supreme Court held in *United States v. Munsingwear* that vacating a lower court decision is “[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way

¹⁶ Counsel for Padilla are aware of only a single example of a court of appeals recalling its mandate and vacating for post-mandate mootness while a petition for certiorari was pending. *Brewer v. Swinson*, 837 F.2d 802 (8th Cir. 1988).

here or pending our decision on the merits.” 340 U.S. 36, 39 (1950). Yet it has never been the “established practice” of the *courts of appeals* to vacate a decision for mootness when a case becomes moot on its way *to the Supreme Court*. Indeed, such a practice would have made the Court’s decision in *Munsingwear* a logical impossibility: if courts of appeals regularly recalled their mandates and vacated their opinions when cases became moot en route to the Supreme Court, then the Supreme Court could never grant, vacate and remand under *Munsingwear*.

Given the obvious national importance of this case, which the government has previously asserted “self-evidently merits” the Supreme Court’s review, *see* Gov’t Pet. For Cert., *Rumsfeld v. Padilla*, at 11, and the Supreme Court’s ability to vacate the case under *Munsingwear* if it concludes that it is moot, the proper course of action for this Court would be to stay its hand until the Supreme Court has resolved this case or declined its review.

* * *

[39] If this Court recalls its mandate on the basis of mootness and vacates its opinion (whether now, on remand from the Supreme Court, or following a Supreme Court denial of certiorari), it should leave standing the district court judgment. The Supreme Court has noted “that it is far from clear that vacatur of the District Court’s judgment would be the appropriate response to a finding of mootness on appeal brought about by the voluntary conduct of the party that lost in the District Court.” *Friends of the Earth*, 528 U.S. at 194 n.6. If this case is moot, it is of course moot entirely because of the government’s calculated voluntary conduct, and the government

should not be rewarded by the vacatur of the district court opinion that it lost.

CONCLUSION

For the foregoing reasons, this Court should immediately approve the government's application to transfer Padilla, but should defer consideration as to whether to recall its mandate and vacate or reverse its opinion of September 9, 2005, until after the Supreme Court has acted on the currently pending petition for certiorari. If the Supreme Court denies certiorari, this Court should recall its mandate and vacate or reverse its opinion to prevent injustice and protect the integrity of the judicial process.

[40] Respectfully submitted,

Dated: December 16, 2005

JENNY S. MARTINEZ
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-2749

ANDREW G. PATEL
111 Broadway, 13th Floor
New York, NY 10006
(212) 349-0230

MICHAEL P. O'CONNELL
STIRLING & O'CONNELL
145 King Street, Suite 410
Post Office Box 882
Charleston, SC 29402
(843) 577-9890

DONNA R. NEWMAN
121 W. 27th Street, Ste. 1103
New York, NY 10001
(212) 229-1516

JONATHAN M. FREIMAN
WIGGIN AND DANA LLP
One Century Tower
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4400

[1] **PUBLISHED**

Filed: December 21, 2005

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-6396
(CA-04-2221-26AJ)

JOSE PADILLA,

Petitioner-Appellee,

versus

C. T. HANFT, U.S.N. Commander,
Consolidated Naval Brig.,

Respondent-Appellant.

ORDER

The motion filed by the government for authorization to transfer petitioner from military custody in the state of South Carolina to civilian law enforcement custody in the state of Florida is denied. The suggestion that the court's opinion of September 9, 2005, be withdrawn is denied.

Judge Luttig wrote an opinion in which Judge Michael concurred. Judge Traxler wrote a separate opinion concurring in part.

For the Court

/s/ Patricia S. Connor
Clerk

[2] LUTTIG, Circuit Judge:

Before the court is the government's motion pursuant to Supreme Court Rule 36 for authorization to transfer Jose Padilla immediately out of military custody in the State of South Carolina and into the custody of federal civilian law enforcement authorities in the State of Florida, together with its suggestion that we withdraw our opinion of September 9, 2005, in which we held that the President possesses the authority under the Authorization for the Use of Military Force to detain enemy combatants who have taken up arms against the United States abroad and entered into this country for the purpose of attacking America and its citizens from within.

Because we believe that the transfer of Padilla and the withdrawal of our opinion at the government's request while the Supreme Court is reviewing this court's decision of September 9 would compound what is, in the absence of explanation, at least an appearance that the government may be attempting to avoid consideration of our decision by the Supreme Court, and also because we believe that this case presents an issue of such especial national importance as to warrant final consideration by that court, even if only by denial of further review, we deny both the motion and suggestion. If the natural progression of this significant litigation to conclusion is to be pretermitted at

this late date under these circumstances, we believe that [3] decision should be made not by this court but, rather, by the Supreme Court of the United States.

I.

The relevant events preceding the government's motion are as follows.

The government has held Padilla militarily for three and a half years, steadfastly maintaining that it was imperative in the interest of national security that he be so held. However, a short time after our decision issued on the government's representation that Padilla's military custody was indeed necessary in the interest of national security, the government determined that it was no longer necessary that Padilla be held militarily. Instead, it announced, Padilla would be transferred to the custody of federal civilian law enforcement authorities and criminally prosecuted in Florida for alleged offenses considerably different from, and less serious than, those acts for which the government had militarily detained Padilla. The indictment of Padilla in Florida, unsealed the same day as announcement of that indictment, made no mention of the acts upon which the government purported to base its military detention of Padilla and upon which we had concluded only several weeks before that the President possessed the authority to detain Padilla, namely, that Padilla had taken up arms against United States [4] forces in Afghanistan and had thereafter entered into this country for the purpose of blowing up buildings in American cities, in continued prosecution of al Qaeda's war of terrorism against the United States.

The announcement of indictment came only two business days before the government's brief in response to Padilla's petition for certiorari was due to be filed in the Supreme Court of the United States, and only days before the District Court in South Carolina, pursuant to our remand, was to accept briefing on the question whether Padilla had been properly designated an enemy combatant by the President.

The same day as Padilla's indictment was unsealed in Florida, the government filed with us a motion pursuant to Supreme Court Rule 36 for authorization to transfer Padilla to Florida, a motion that included no reference to, or explanation of, the difference in the facts asserted to justify Padilla's military detention and those for which Padilla was indicted. In a plea that was notable given that the government had held Padilla militarily for three and a half years and that the Supreme Court was expected within only days either to deny certiorari or to assume jurisdiction over the case for eventual disposition on the merits, the government urged that we act as expeditiously as possible to authorize the transfer. The government styled its motion as an "emergency application," but [5] it provided no explanation as to what comprised the asserted exigency.

When we did not immediately authorize Padilla's transfer as requested, the government, rather than file its response to Padilla's petition for certiorari as scheduled, sought and received from the Supreme Court an extension of time until December 16 within which to file that response.

Instead of simply granting the motion for immediate authorization to transfer Padilla, we directed the parties

to brief the question whether, in light of the difference in the facts asserted to justify Padilla's military detention on which our decision was premised and the facts underlying the charges in Padilla's indictment in Florida, our opinion should be vacated in the event of Padilla's transfer. In response to our request for briefing, the government has now taken the position that our decision of September 9 should be withdrawn entirely.

II.

Under Supreme Court Rule 36, the custodian of a habeas petitioner whose case is pending before the Supreme Court "may not transfer custody to another person unless the transfer is authorized under this Rule." Rule 36 further provides that "[u]pon application by a custodian, the court, Justice, or judge who entered the decision under review may authorize transfer and [6] the substitution of a successor custodian as a party." There is no articulated purpose for this rule, the rule does not specify a standard upon which a requested transfer should be authorized or denied, and it is unclear to us what the applicable standard ought to be or 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 for us to deny the government's motion, as well as its suggestion for vacatur of our opinion.

A.

First, the government's actions since this court's decision issued on September 9, culminating in and including its urging that our opinion be withdrawn, together with the timing of these actions in relation both

to the period for which Padilla has already been held and to the government's scheduled response to Padilla's certiorari petition in the Supreme Court, 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.

We are not in a position to ascertain whether behind this appearance there is the actual fact, because the government has not explained its decisions either publicly or to the court. The media has variously reported that the government's abrupt change in course was prompted by its concern over Supreme Court review [7] of our decision and/or its concern for disclosure of the circumstances surrounding its receipt of the information regarding Padilla's plans to blow up buildings in American cities or of the identities and locations of the persons who provided that information. In one instance, immediately after we had initially declined to act on the government's transfer motion, these concerns were detailed in the press and attributed to former and current Administration officials speaking on the condition of anonymity. It was even reported that the government had considered transfer and criminal prosecution of Padilla before its argument in this court that military detention of Padilla was necessary in the interest of national security. No such explanations have been provided to the court, however.

It should go without saying that we cannot rest our decisions on media reports of statements from anonymous government sources regarding facts relevant to matters pending before the court, nor should we be required to do so or to speculate as to facts based upon such reports. The information that the government would provide to the media with respect to facts relevant to a pending litigation, it

should be prepared to provide to the court. Nevertheless, even if these were the government's concerns, neither concern would justify the intentional mooted of the appeal of our decision to the Supreme [8] Court after three and a half years of prosecuting this litigation and on the eve of final consideration of the issue by that court.

As for the first of these reported concerns, we would regard the intentional mooted by the government of a case of this import out of concern for Supreme Court consideration not as legitimate justification but as admission of attempted avoidance of review. The government cannot be seen as conducting litigation with the enormous implications of this litigation – litigation imbued with significant public interest – in such a way as to select by which forum as between the Supreme Court of the United States and an inferior appellate court it wishes to be bound.

As for the second reported concern, the means by which the government may have come by its information concerning Padilla, as well as the current locations of any persons who might have provided that information, are legally irrelevant to the appeal of our decision now pending before the Supreme Court. These concerns would be relevant, if at all, only at the hearing required by *Hamdi v. Rumsfeld* to determine the legitimacy of the President's designation of Padilla as an enemy combatant. And if the government did fear "sensitive evidentiary issues" that might arise in this hearing, it could have sought a stay from the district court, continued to pursue its argument before the Supreme Court that the President possesses the authority from [9] Congress to detain persons such as Padilla, and transferred Padilla to civilian law enforcement custody and initiated prosecution only after final

Supreme Court resolution of the pending appeal, whether favorable or unfavorable. Thus, in the end, concerns over evidentiary issues could no more justify the government's actions than could an interest in avoiding Supreme Court review.

That neither of these speculated reasons would have justified the government's actions is not to say that there are not legitimate reasons for those actions. There may well be. For example, the government could have come to believe that the information on which Padilla has been detained is in fact not true or, even if true, is not sufficiently reliable to justify his continued military detention (although to serve as legitimate basis for its actions the government would have had to come to such belief based upon information or intelligence acquired since the issuance of our decision). Of course, if the government had come to so believe, it is expected that it would have informed this court or the Supreme Court and *then* proceeded as it has. But any legitimate reasons are not evident, and the government has not offered explanation. Absent explanation, our authorization of Padilla's transfer under the circumstances described and while the case is awaiting imminent consideration by the Supreme Court would serve only to compound the appearance [10] to which the government's actions, even if wholly legitimate, have inescapably given rise.

B.

Second, apart from the need to protect the appearance of regularity in the judicial process, we believe 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.

For four years, since the attack on America of September 11, 2001, a centerpiece of the government's war on terror has been the President's authority to detain militarily persons who, having engaged in acts of war against the United States abroad, have crossed our borders with the avowed purpose of attacking this country and its citizens from within – the kind of persons who committed the atrocities of September 11. The President himself acted upon the belief that he possessed such authority and that such authority was essential to protect the Nation from another attack like that of September 11 when he designated Padilla an enemy combatant, declared that Padilla “represent[ed] a continuing, present and grave danger to the national security of the United States,” and directed the Secretary of Defense to assume and maintain custody over Padilla. The government's belief in the indispensability to our national security of the [11] President's authority to detain enemy combatants such as Padilla was reaffirmed by the Attorney General when he stated at the time that our opinion issued that “the authority to detain enemy combatants like Jose Padilla plays an important role in protecting American citizens from the very kind of savage attack that took place almost four years ago to the day.” And though we limited our holding to the circumstance where the President detains persons who have associated with enemy forces abroad, taken up arms on behalf of such forces, and thereafter entered into this country with the avowed purpose of prosecuting war against America on her own soil, we ourselves recognized

the “exceeding importance” of the issue presented, even as so limited.

On an issue of such surpassing importance, we believe that the rule of law is best served by maintaining on appeal the status quo in all respects and allowing Supreme Court consideration of the case in the ordinary course, rather than by an eleventh-hour transfer and vacatur on grounds and under circumstances that would further a perception that dismissal may have been sought for the purpose of avoiding consideration by the Supreme Court.

Accordingly, for the reasons stated, we deny both the government’s motion for authorization to transfer and its suggestion of vacatur of our opinion of September 9, and thereby [12] maintain for the Supreme Court the status quo while it considers the pending petition for certiorari.

III.

Because of their evident gravity, we must believe that the consequences of the actions that the government has taken in this important case over the past several weeks, not only for the public perception of the war on terror but also for the government’s credibility before the courts in litigation ancillary to that war, have been carefully considered. But at the same time that we must believe this, we cannot help but believe that those consequences have been underestimated.

For, as the government surely must understand, although the various facts it has asserted are not necessarily inconsistent or without basis, its actions have left not only the impression that Padilla may have been held

for these years, even if justifiably, by mistake – an impression we would have thought the government could ill afford to leave extant. They have left the impression that the government may even have come to the belief that the principle in reliance upon which it has detained Padilla for this time, that the President possesses the authority to detain enemy combatants who enter into this country for the purpose of attacking America and its citizens from within, can, in the end, yield to expediency with little or no cost to its conduct of the [13] war against terror – an impression we would have thought the government likewise could ill afford to leave extant. And these impressions have been left, we fear, at what may ultimately prove to be substantial cost to the government’s credibility before the courts, to whom it will one day need to argue again in support of a principle of assertedly like importance and necessity to the one that it seems to abandon today. While there could be an objective that could command such a price as all of this, it is difficult to imagine what that objective would be.

For the reasons stated, the government’s motion to transfer and the suggestion that our opinion of September 9, 2005, be vacated are denied.

[14] TRAXLER, Circuit Judge, concurring in part:

I do not think Rule 36 is applicable to this situation. I agree with my colleagues that we should not vacate our earlier opinion.
