No. 08-368

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

—v.—

COMMANDER DANIEL SPAGONE,
U.S.N., CONSOLIDATED NAVAL BRIG,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OPPOSING MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Petitioner Ali Saleh Kahlah al-Marri hereby submits the following response to the government's Motion to Dismiss or, in the Alternative, to Vacate the Judgment Below and Remand with Directions to Dismiss the Case as Moot ("Mot.").[1]

ARGUMENT

The government's motion to dismiss the writ of certiorari as moot should be denied because the government has not renounced the legal authority under which al-Marri was designated and detained as an "enemy combatant" and has made no commitment that al-Marri will not be re-designated and re-detained as an "enemy combatant" in the future. Alternatively, if the Court concludes that the case is moot, Petitioner agrees with the government that the judgment below should be vacated and remanded with instructions to direct the district court to dismiss the case as moot in line with this Court's "established practice." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); Mot. at 9 n.4.

I. THIS CASE IS NOT MOOT.

A. The government's decision to lodge criminal charges against al-Marri does not moot this case. "It is well settled 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.'" *Friends of the Earth, Inc. v. Laidlaw*

[1] Petitioner takes no position on the government's Application Respecting the Custody and Transfer of Petitioner Ali Saleh Kahlah Al-Marri (08A755).

Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Compulsory mootness in such circumstances would force the Court to leave a "defendant . . . free to return to [its] old ways." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Jurisdiction expires upon voluntary cessation therefore only if "it is *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190 (emphasis added); *accord County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (mootness appropriate when shown "with assurance" that alleged violation will not recur); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (per curiam) ("mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought"); *United States v. Concentrated Phosphate Exp. Ass'n, Inc.*, 393 U.S. 199, 203 (1968) (litigant's mere statement that it would be against its interest to continue the challenged conduct insufficient to "ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur").

The "formidable burden" of establishing with absolute clarity that the wrongful conduct will not recur lies with the party asserting mootness, and *not*—as the government suggests (Mot. at 9)—with the non-moving party. *Friends of the Earth*, 528 U.S. at 190*; accord Adarand*, 528 U.S. at 222. The

government has not satisfied that heavy burden here.[2]

The President's memorandum directing al-Marri's transfer to civilian custody does not repudiate the possibility that al-Marri will be returned to military custody and detained without charge. Mot. at App. A. Furthermore, the government's motion does not renounce the government's untenable reading of the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), nor does it claim that the meaning of that law has somehow changed absent congressional action.[3]

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[2] As noted above, the government (Mot. at 9-10) misreads this Court's precedents in an effort to impose on Petitioner the burden of demonstrating that the challenged conduct will recur. This Court repeatedly has explained that the burden falls not on the aggrieved party to show that the conduct will recur but on the aggrieving party to show that it will not recur. *See, e.g.*, *Friends of the Earth*, 528 U.S. at 190; *Adarand*, 528 U.S. at 222. Even the cases cited by the government adhere to that black-letter proposition. *See City of Mesquite*, 455 U.S. at 289 (finding no mootness based primarily on the fact that city's repeal of the objectionable language in the challenged ordinance "would not preclude it from reenacting precisely the same provision"); *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 661-662 (1993) (noting that failure to preclude resumption of challenged conduct prevents dismissal on mootness grounds (citing *City of Mesquite*, 455 U.S. at 289)).

[3] In addition, it is not entirely clear on the face of the President's memorandum whether al-Marri is merely being released from military custody or whether the government has also revoked his designation as an "enemy combatant." We assume that the prior designation has been revoked because the memorandum "supersedes" the prior presidential directive and

To the contrary, the government's motion is expressly based on "information available" at the moment. Mot. at App. A. The government reserves the right to re-designate al-Marri an "enemy combatant" in the future, and it even speculates about various ways in which such re-designation could occur. Mot. at 11 (noting, for example, that al-Marri could be re-designated an "enemy combatant" based on evidence adduced at trial). Plainly, the government continues to view al-Marri's military detention as a viable option under the AUMF.

The government (Mot. at 9-10) relies incorrectly on *Preiser v. Newkirk*, 422 U.S. 395 (1975), and *County of Los Angeles v. Davis*, 440 U.S. 625 (1979). These cases did not find the "no reasonable expectation" standard satisfied simply because "a public entity voluntarily discontinue[d] a challenged policy." Mot. at 9. Rather, in both cases, the Court referred specifically to evidence in the record, *i.e.*, actual evidence beyond the voluntary cessation itself, establishing that the petitioners would not be subject anew to unlawful action. *See Preiser*, 422 U.S. at 402; *Davis*, 440 U.S. at 631-634. In *Preiser*, the Court pointed to a "record of events" manifesting an assurance that the allegedly unlawful conduct would not recur. 422 U.S. at 402-403. In *Davis*, the Court found that the challenged hiring policy had never been implemented and that its

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because the government refers in its motion to al-Marri's possible "re-designation." Mot. at 10-11; Mot. at App. A. If our assumption is incorrect, and al-Marri's designation as an "enemy combatant" remains in force, that fact provides yet another reason why this case is not moot.

abandonment had "completely and irrevocably eradicated the effects of the alleged violation." 440 U.S. at 631. As the Court underscored, the *Davis* defendant not only had voluntarily ceased the challenged conduct but also had adopted a different official policy. *Id.* at 632-633. In stark contrast, the government in this case nowhere eschews its challenged reading of the AUMF. Rather, it reserves legal authority to detain al-Marri militarily, even acknowledging that al-Marri could be re-designated an "enemy combatant" in the future. Mot. at 11.

This, therefore, is the quintessential case in which "voluntary cessation" does not moot the case: A party seeks to avoid review of a favorable lower court judgment while affirmatively retaining the challenged legal authority and reserving the option of resuming the allegedly unlawful conduct. *See, e.g.*, *Friends of the Earth*, 528 U.S. at 193-194 (case not moot where party asserting mootness retained discharge permit under which it previously engaged in unlawful pollution); *Adarand*, 528 U.S. at 224 (case not moot where government voluntarily certified that 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"); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, __ U.S. __, 127 S. Ct. 2738, 2751 (2007) (school district's voluntary suspension of challenged policy pending outcome of litigation insufficient to make it "'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur'" (quoting *Friends of the Earth*, 528 U.S. at 189)); *City of Erie v. Pap's*

A.M., 529 U.S. 277, 287-288 (2000) (case not moot where asserting party was "still incorporated under Pennsylvania law" and "could again decide to operate a nude dancing establishment").

The government notes that "[t]he President has ordered a comprehensive review of all military detention policies worldwide, and that review is yet to be concluded." Mot. at 14. However, on January 22, 2009, President Obama also ordered a comprehensive re-evaluation of al-Marri's case. *See* Memorandum for the Attorney General: Review of the Detention of Ali Saleh Kahlah al-Marri (Jan. 22, 2009), *available at* http://www.whitehouse.gov/the_press_office/Review_of_the_Detention_of_Ali_Saleh_Kahlah/. The government's carefully formulated position, including its conspicuous failure to repudiate the ostensible legal authority for al-Marri's designation and detention as an "enemy combatant," presumably reflects that re-evaluation. This only underscores that the motion to dismiss seeks to preserve the claimed legal authority to detain al-Marri as an "enemy combatant." At the same time, the government seeks to deprive al-Marri of a decision by this Court challenging that claimed authority. Dismissal now thus would mean that al-Marri remains exposed to unlawful detention unless and until the government repudiates its asserted legal basis for that authority, whether through the comprehensive review process or otherwise.

This Court, having granted a writ of certiorari, should now adjudicate this matter to determine whether further military detention of al-Marri is permissible under the AUMF or consistent with the

Constitution. Unless the government can give al-Marri the assurance that he no longer faces the risk of renewed military detention under the claimed authority, the case is not moot.[4]

B. Prudential concerns also counsel strongly in favor of review now. This is the second time the government has ordered the transfer of a prisoner from military to civilian custody after years of detention and on the eve of Supreme Court review. Faced with an eleventh-hour transfer the first time, the Court denied the petition for certiorari, leaving unanswered the fundamental question of the president's authority to imprison militarily individuals arrested in the United States without charge. *Padilla v. Hanft*, 547 U.S. 1062, 126 S. Ct. 1649 (2006). This Court should not allow that claimed detention authority to evade review again.[5]

As this Court recently reiterated, the Constitution's guarantee of habeas corpus was

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[4] And unless that risk is dispelled, the threat of such re-designation will necessarily hang over the criminal prosecution, unfairly increasing the government's leverage in ways that could materially affect trial strategies and outcomes. *Cf.* Br. of Pet'r at 47 n.22 (noting that, according to former Attorney General John Ashcroft, al-Marri was originally designated an "enemy combatant" and transferred to military custody during his prior criminal proceeding because he became a "hard case" by "reject[ing] numerous offers to improve his lot by . . . providing information").

[5] Similar concerns are implicated by this Court's decisions recognizing an exception to the mootness doctrine for cases that are capable of repetition, yet evading review. *See, e.g.*, *Davis v. Fed. Election Comm'n*, __ U.S. __, 128 S. Ct. 2759, 2769 (2008); *Honig v. Doe*, 484 U.S. 305, 319 n.6 (1988).

intended to ensure a prompt and an effective remedy to illegal executive detention. *Boumediene v. Bush*, 553 U.S. __, 128 S. Ct. 2229, 2275 (2008). It ensures, above all, that there is a lawful basis for a prisoner's confinement. *Id.* at 2271. The "office and purposes of the writ of habeas corpus" will be compromised, not served, however, if the government knows that it may detain for years without charge and then repeatedly avoid review when its asserted detention power is called into question before this Court. *Padilla*, 126 S. Ct. at 1650 (Kennedy, J., joined by Roberts, C.J., and Stevens, J., concurring in the denial of certiorari). That concern is particularly acute in al-Marri's case. Al-Marri has already spent nearly six years in military detention and has already been shifted from civilian to military custody once before. Dismissing the writ of certiorari as moot, particularly when the government has not renounced its claimed legal authority to engage in the same conduct in the future, imperils the habeas remedy and the integrity of the judicial process.[6]

Moreover, unlike in *Padilla*, certiorari has already been granted in this case. Petitioner's merits

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[6] Petitioner recognizes that three Members of the Court in *Padilla* suggested the possibility of seeking a writ of habeas corpus in this Court in the event of any future military detention. *Padilla*, 126 S. Ct. at 1650 (Kennedy, J., joined by Roberts, C.J., and Stevens, J., concurring in the denial of certiorari). But that approach is necessarily post-hoc, and offers Petitioner no safeguard against future unlawful military detention. His constitutional right to prompt and effective habeas review will have already been irreparably harmed if he is returned to military custody no matter how speedy any ensuing review would be.

brief has been filed, along with numerous *amicus* briefs demonstrating the widespread public concern about the legal authority asserted by the government in this case. It is especially important that the prospect of further military detention be dispelled, once and for all, after years of intensive litigation in the lower courts, now that the issue is squarely presented and less than two months away from argument. *See Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, __ U.S. __, 2009 WL 454286, at *6 (Feb. 25, 2009) ("[P]rudential concerns" counsel against dismissal after the investment of "a substantial amount of time, effort, and resources in briefing and arguing the merits of [a] case."); *Friends of the Earth*, 528 U.S. at 191-192 ("To abandon the case at an advanced stage may prove more wasteful than frugal.").

In maintaining the possibility of Petitioner's future military detention, the government claims that new facts—including those adduced at trial—could provide a basis for renewed military detention and that any such detention should be evaluated based on those new facts. Mot. at 11. But Petitioner's argument has always been that there is *no* authority to detain him militarily under the AUMF and that any such authority would violate the Constitution. The hint that the government can fashion anew some basis for military detention by massaging the facts in Petitioner's case underscores the risk of recurrence and demonstrates how haphazardly amorphous and open-ended the government's asserted detention power derived from the AUMF's silence would be.

The government's insistence that the Court should dismiss the case as moot because merits adjudication would require the Court to address "extremely sensitive constitutional issues" fares no better. Mot. at 13-14. The threshold issue here is one of statutory meaning, albeit one that must be resolved in the shadow of elemental constitutional concerns. Br. for Pet'r at 18-48. It is the government's arguments—arguments pressed throughout its defense of its almost six-year-long military detention of al-Marri—that have raised constitutional red flags.

Finally, the government suggests that review now is inadvisable given the lack of similarly situated litigants. Mot. at 14. But this Court granted certiorari—over similar objections—to resolve the critically important question of whether the Executive has the legal authority under the AUMF to detain militarily a person lawfully residing in the United States without charge or trial based on suspected terrorist acts. That first-order question about our system of government remains as fundamental and important now as it was in December. And it remains as crucial as ever to al-Marri, on whom the cost of that legal uncertainty falls. Dismissal would leave the question unsettled.

II. IF THIS CASE IS MOOT, THE JUDGMENT BELOW SHOULD BE VACATED AND THE CASE REMANDED WITH INSTRUCTIONS THAT IT BE DISMISSED.

If the Court concludes that this case is moot, Petitioner agrees with the government that the Court should vacate the judgment of the court of appeals and remand with instructions to direct the district court to dismiss the case as moot. Mot. at 9 n.4.

This Court's "established practice" is to vacate a judgment that becomes moot while pending merits review. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). This practice "clears the path for future relitigation of the issues . . . and . . . is commonly utilized in precisely this situation to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 40-41.

In deciding whether to vacate a judgment below based on mootness, the principal and often controlling factor "is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24-25 (1994); *Anderson v. Green*, 513 U.S. 557, 560 (1995) (per curiam) (court must "pivotally" inquire into who caused mootness); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-72 (1997) (same). It is "'most consonant to justice'" that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not

in fairness be forced to acquiesce in the judgment." *Bancorp*, 513 U.S. at 24-25 (quoting *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft,* 239 U.S. 466, 477-478 (1916)). In making this determination, a court "must also take account of the public interest" and the "orderly operation of the federal judicial system." *Bancorp*, 513 U.S. at 26-27.

Vacatur is compelled here. If the case is moot, it is concededly so by virtue of unilateral action of the government, the prevailing party below. Further, the public interest and orderly operation of the federal judicial system demand vacatur. The Fourth Circuit's fractured judgment rests upon splintered opinions that confuse, rather than clarify, the law surrounding the critically important question presented. And dismissal of the writ of certiorari without vacatur of that judgment would leave legal residents and American citizens within the country vulnerable to indefinite military detention in the future without the benefit of this Court's definitive resolution of the matter.

CONCLUSION

For the foregoing reasons, the motion to dismiss the writ of certiorari as moot should be denied or, in the alternative, the judgment of the court of appeals should be vacated and the case remanded with instructions to direct the district court to dismiss the case as moot.

Respectfully submitted,

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