No. 05-533

# In the Supreme Court of the United States

JOSE PADILLA, PETITIONER

*v.*

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

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

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTION PRESENTED

Whether the President had authority under the Constitution and Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, enacted in the wake of the attacks of September 11, 2001, to order the military, pursuant to his now-superceded June 9, 2002 directive, to detain petitioner as an enemy combatant.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 423 F.3d 386. The opinion of the district court (Pet. App. 26a-54a) is reported at 389 F. Supp. 2d 678.

### JURISDICTION

The judgment of the court of appeals was entered on September 9, 2005. The petition for a writ of certiorari was filed on October 25, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

On June 9, 2002, the President ordered the Secretary of Defense to detain petitioner militarily, as an enemy combatant, based on information that petitioner closely associated

with al Qaeda, engaged in hostile and war-like acts, and presented a grave danger to the national security of the United States. C.A. App. 16. After the earlier round of litigation culminating in this Court's decision in *Rumsfeld* v. *Padilla*, 542 U.S. 426 (2004), petitioner filed a habeas petition in South Carolina seeking that he be released from military custody "or charged with a crime," *id.* at 13, and arguing that the President lacked authority to detain him militarily, even assuming the validity of the government's allegations that petitioner trained with and was closely associated with al Qaeda before and after September 11, 2001; engaged in armed conflict against the United States and allied forces in Afghanistan; and accepted a mission from al Qaeda to enter the United States and carry out attacks on our citizens within our borders, *id.* at 111-112. The district court granted summary judgment for petitioner and ordered that petitioner be released from custody or charged with a crime. The court of appeals reversed, concluding that, under *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), the President was authorized to detain petitioner militarily as an enemy combatant.

At petitioner's request, the court of appeals issued its mandate so the case could return to the district court, where petitioner can contest the factual basis for his detention as an enemy combatant. Before the factual proceedings began, however, petitioner was indicted by a grand jury in the Southern District of Florida for a number of federal crimes—conspiring to murder, maim, and kidnap individuals outside of the United States; conspiring to provide material support to terrorists; and providing material support to terrorists, App., *infra*, 2a-35a—and the President determined that it is in the interest of the United States that petitioner be released from detention by the Secretary of Defense and transferred to the control of the Attorney General for the purpose of criminal proceedings against him, App., *infra*, 1a. Accordingly, the

President issued a Memorandum directing the Secretary of Defense, at the request of the Attorney General, to release petitioner from military custody and transfer him to the control of the Attorney General. That Memorandum expressly superseded the President's June 9, 2002, directive to the Secretary of Defense to detain petitioner militarily as an enemy combatant, and specifically provided that, upon transfer of petitioner to the Attorney General, the authority of the Secretary of Defense to detain petitioner pursuant to the President's June 9, 2002, order "shall cease." *Ibid.*

In light of the criminal charges now pending against petitioner and the President's Memorandum superceding his June 9, 2002, directive and ordering that petitioner be released from military custody—the very relief that petitioner sought in this habeas action—petitioner's underlying habeas petition is now moot. Indeed, because the mandate has issued and parallel proceedings were underway in the lower courts, the court of appeals directed the parties to address whether it should recall the mandate in the case and vacate its opinion addressing the legality of petitioner's military detention. *Padilla* v. *Hanft*, No. 05-6396 (4th Cir. Nov. 30, 2005). The government submitted a supplemental brief arguing that recall and vacatur are warranted because petitioner's habeas action is moot.

The fact that the case is now moot itself calls for denial of certiorari. Indeed, that will be particularly clear if the court of appeals decides to vacate its opinion. But even if the case were not moot, certiorari would be unwarranted at this juncture because the court of appeals' decision is interlocutory, consistent with this Court's decisions, and correct on the merits. In any event, the intervening events have, at a minimum, seriously undercut any other basis for review in this case. For all of these reasons, the petition should be denied.

1. On September 11, 2001, the United States endured a foreign enemy attack more savage, deadly, and destructive than any sustained by the Nation on any one day in its history. That morning, agents of the al Qaeda terrorist network hijacked four commercial airliners and crashed three of them into targets in the Nation's financial center and seat of government. The fourth crashed in rural Pennsylvania due to the heroic efforts of the passengers. The attacks killed approximately 3000 persons, injured thousands more, destroyed billions of dollars in property, and exacted a heavy toll on the Nation's infrastructure and economy.

Congress and the President took immediate action to defend the country and prevent additional attacks. Congress swiftly enacted its support of the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 * * * in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224; see Pet. App. 56a. The AUMF recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," and emphasized that it is "both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad." AUMF Pmbl.; see Pet. App. 55a-56a.

Soon after the AUMF's enactment, the President expressly confirmed that the September 11 attacks "created a state of armed conflict" with al Qaeda. Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833, § 1(a). He ordered the armed forces of the United States to subdue the al Qaeda network, as well as the Taliban regime in Afghanistan that supported

it. In the course of those armed conflicts, the United States military, consistent with the Nation's settled practice in times of war, has seized and detained numerous persons who were fighting for and associated with the enemy.

The war against al Qaeda and its supporters continues, both in Afghanistan, where thousands of United States troops remain on the ground, and elsewhere. See, *e.g.*, *Global Intelligence Challenges 2005, Meeting Long-Term Challenges with a Long-Term Strategy: Testimony Before the Senate Select Committee on Intelligence* (Feb. 16, 2005) (statement of Porter J. Goss) (testifying that al Qaeda remains "intent on finding ways to circumvent U.S. security enhancements to strike Americans and the [h]omeland," and that "[i]t may be only a matter of time before [al Qaeda] or another group attempts to use chemical, biological, radiological, and nuclear weapons"), *available at* <http://www.cia.gov/cia/public_affairs/speeches/2004/Goss_testimony_02162005.html>. Indeed, 2005 has been the deadliest year in the war in Afghanistan for United States troops. See B. Bender, *US Endures Deadliest Year In Afghanistan*, Boston Globe A6 (July 3, 2005).

2. Petitioner was one such person detained as an enemy combatant. In 2000, petitioner attended the al Qaeda-affiliated al-Farouq training camp just north of Kandahar, Afghanistan. C.A. App. 19 (Rapp Decl.). After successfully completing that training, petitioner spent three months just north of Kabul, Afghanistan, guarding what he understood to be a Taliban outpost while armed with a Kalashnikov assault rifle. *Id.* at 19-20; see Pet. App. 8a.

In early 2001, Mohammed Atef, a senior al Qaeda operative, asked petitioner to undertake a mission to blow up apartment buildings in the United States. C.A. App. 19, 27. Petitioner agreed and received further training from an al Qaeda explosives expert. *Id.* at 21; see Pet. App. 8a.

After the attacks of September 11th, when the United States commenced combat operations against the Taliban and al Qaeda, petitioner and other al Qaeda operatives moved from safehouse to safehouse in Afghanistan to avoid bombing or capture, and later began moving towards Afghanistan's mountainous border with Pakistan in order to evade United States forces and air strikes. C.A. App. 20-21. Armed with an assault rifle, petitioner took cover with other operatives in a network of caves and bunkers near Khowst, Afghanistan, and was eventually escorted into Pakistan by Taliban personnel. *Ibid.*; see Pet. App. 8a.

Soon after entering Pakistan, petitioner met with senior Osama bin Laden lieutenant Abu Zubaydah to discuss the possibility of conducting terrorist operations in the United States. C.A. App. 21. Zubaydah sent petitioner to Karachi, Pakistan, to meet with Khalid Sheikh Mohammad (KSM), al Qaeda's operations leader. *Id.* at 22. KSM suggested that petitioner revive the plan to detonate apartment buildings, as petitioner had initially discussed with Atef. *Ibid.* Petitioner accepted the assignment, and KSM gave him full authority to conduct the operation. *Ibid.* Before departing for the United States, petitioner received training from Ramzi Bin al-Shibh, a senior al Qaeda operative, on the secure use of telephones and e-mail protocols. *Ibid.* Al Qaeda operatives also gave petitioner $15,000, travel documents, a cell phone, and an e-mail address to notify al Qaeda facilitator, Ammar al-Baluchi, upon petitioner's arrival in the United States. *Ibid.*; see Pet. App. 8a-9a.

On May 8, 2002, petitioner flew from Zurich, Switzerland, to Chicago's O'Hare International Airport, where he was detained and arrested in the customs inspection area pursuant to a material witness warrant. C.A. App. 92-94; see Pet. App. 9a. Petitioner had been monitored by FBI agents in the Zurich airport and on the plane. Petitioner was carrying

$10,526 in currency, the cell phone that he had been given, and the e-mail address that he was to use to update al-Baluchi. C.A. App. 23.

On June 9, 2002, the President—acting as Commander in Chief and pursuant to the AUMF—made a formal determination that petitioner "is, and at the time he entered the United States in May 2002 was, an enemy combatant." C.A. App. 16; see Pet. App. 6a-7a. The President found, in particular, that petitioner: was "closely associated with al Qaeda, an international terrorist organization with which the United States is at war"; "engaged in * * * hostile and war-like acts, including conduct in preparation for acts of international terrorism" against the United States; "possesse[d] intelligence" about al Qaeda that "would aid U.S. efforts to prevent attacks by al Qaeda on the United States"; and "represent[ed] a continuing, present and grave danger to the national security of the United States," such that his military detention was "necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens." *Ibid.*

Consistent with the foregoing findings, the President directed the Secretary of Defense "to receive [petitioner] from the Department of Justice," which had custody over petitioner pursuant to a material witness warrant, "and to detain him as an enemy combatant." C.A. App. 16; Pet. App. 7a. Immediately upon issuance of that directive, the Department of Justice moved to vacate the material witness warrant. That motion was granted, and petitioner was transferred to military control and taken to the Consolidated Naval Brig in Charleston, South Carolina, where he has since been detained.

3. On June 11, 2002, petitioner's counsel filed a habeas corpus petition on his behalf in the Southern District of New York. The district court held that it had jurisdiction and that

the President had legal authority to detain petitioner as an enemy combatant. *Padilla ex rel. Newman* v. *Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), rev'd in part and remanded, 352 F.3d 695 (2d Cir. 2003), rev'd, 542 U.S. 426 (2004).

The United States Court of Appeals for the Second Circuit agreed that the Southern District of New York had jurisdiction. *Padilla* v. *Rumsfeld*, 352 F.3d 695, 702-710 (2003), rev'd, 542 U.S. 426 (2004). On the merits, however, the court held, over a dissent, that the President lacked authority to detain petitioner militarily as an enemy combatant. See 352 F.3d at 710-724 (majority opinion); *id.* at 726-733 (Wesley, J., concurring in part and dissenting in part).

This Court granted certiorari, and held that the Southern District of New York lacked jurisdiction and that the habeas petition should have been filed in the District of South Carolina. *Rumsfeld* v. *Padilla*, 542 U.S. 426, 434-451 (2004). The Court declined to reach the question whether the President had authority to detain petitioner militarily as an enemy combatant. *Id.* at 430.

4. On July 2, 2004, petitioner filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina seeking that he be released from military custody or charged with a crime. C.A. App. 7-13.

a. Petitioner alleged that his military detention violated (i) the Constitution, because American citizens arrested in the United States may be detained only pursuant to the criminal process; and (ii) 18 U.S.C. 4001(a)—which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress"—because the AUMF did not authorize petitioner's military detention. C.A. App. 10-11. The petition sought that petitioner "immediately be released [from military custody] or charged with a crime." *Id.* at 13.

The government filed a response detailing the legal and factual bases for petitioner's detention as an enemy combatant. Attached to that response was the August 27, 2004, Declaration of Jeffrey N. Rapp, the Director of the Joint Intelligence Task Force for Combating Terrorism, an agency within the Department of Defense. The Rapp Declaration included information and intelligence that were not available during the earlier litigation in the Second Circuit and in this Court. Among other things, the Rapp Declaration made clear that petitioner not only came to the United States to commit terrorist attacks, but also had associated with al Qaeda and the Taliban and evaded capture by United States armed forces on the battlefields of Afghanistan. See C.A. App. 3-7; Pet. App. 8a-9a.

On October 20, 2004, petitioner filed a motion for summary judgment arguing that he was "entitled to judgment as a matter of law even if all of the facts pleaded [in the Rapp Declaration] are assumed to be true." Pet. Mem. in Support of Mot. for Summ. J. 1. Accordingly, the parties and the court assumed, for purposes of petitioner's motion, that all of the facts set forth in the Rapp Declaration were true. See *id.* at 1, 2 n.1; Pet. App. 8a n.1.

b. On February 28, 2005, the district court granted the summary judgment motion and habeas petition and ordered that petitioner be released from custody or charged with a crime. Pet. App. 54a & n.14. The court concluded that, notwithstanding this Court's decision in *Hamdi*, *supra*, the AUMF did not provide sufficiently clear authorization for petitioner's military detention. The court held that Congress must speak in clear and unmistakable terms when it authorizes the President to detain enemy combatants, Pet. App. 42a-43a, 47a, and that the AUMF did not clearly authorize petitioner's detention because it authorized the use of only "necessary and appropriate" force, *id.* at 46a-47a. In the

district court's view, military detention was not necessary and appropriate in petitioner's case because he was captured not on a field of battle but in a civilian setting in the United States. *Id.* at 40a-41a, 46a-47a. The court further concluded that the President lacked inherent authority as Commander in Chief to detain petitioner militarily as an enemy combatant. *Id.* at 49a-51a.

5. On September 9, 2005, the court of appeals unanimously reversed. Relying primarily on *Hamdi*, the court held (Pet. App. 10a-23a) that the AUMF authorized petitioner's military detention because petitioner, just like Hamdi, was "armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States." *Id.* at 8a. That is, the court concluded that petitioner fell squarely within "the definition of 'enemy combatant' employed in *Hamdi*"—namely, an individual who was "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." Pet. App. 11a-12a (quoting *Hamdi*, 542 U.S. at 516 (plurality opinion)) (internal quotation marks omitted). Noting that *Hamdi*'s definition of "enemy combatant" did not include any reference to the locus of a putative combatant's capture, the court rejected petitioner's attempt to distinguish *Hamdi* based on the fact that petitioner "was seized on American soil, whereas Hamdi was captured on a foreign battlefield." Pet. App. 14a; see *id.* at 14a-17a. The court emphasized (*id.* at 12a) that its reading of *Hamdi* was "reinforced" by this Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), "on which * * * *Hamdi* itself heavily relied," and in which the Court upheld the President's exercise of military jurisdiction over a citizen who, like petitioner: "associate[d] [himself] with the military arm of the enemy government, and with its aid, guidance and direction enter[ed] this country bent on hostile acts," Pet. App. 13a

(quoting *Quirin*, 317 U.S. at 37-38); and "*had been captured domestically*" in a civilian setting, *id.* at 16a.

The court likewise rejected petitioner's contention "that only a clear statement from Congress can authorize [petitioner's] detention." Pet. App. 19a. The court observed that any clear-statement rule "would appear the opposite" "of the kind for which [petitioner] argues," because this Court has stated that the President's exercise of military jurisdiction over enemy combatants is "not to be set aside by the courts without the clear conviction that [it is] in conflict with the * * * laws of Congress." Pet. App. 20a (quoting *Quirin*, 317 U.S. at 25). In any event, the court concluded that even if a clear statement of authorization were required, the AUMF provided it, because: (a) this Court in *Hamdi* held that the AUMF "clearly and unmistakably authorized" Hamdi's detention, Pet. App. 21a (quoting *Hamdi*, 542 U.S. at 519 (plurality opinion)); and (b) *a fortiori*, petitioner's detention was "clearly and unmistakably authorized" because "in addition to supporting hostile forces in Afghanistan and taking up arms against our troops on a battlefield in that country like Hamdi, [petitioner] *also* came to the United States in order to commit future acts of terrorism against American citizens and targets," *ibid.*[1]

At petitioner's request, the court of appeals issued its mandate on October 7, 2005. After the mandate issued, petitioner asked the district court for an opportunity to brief several issues concerning how to proceed with a factual challenge to petitioner's military detention as an enemy combatant. On

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[1] Because the court concluded (Pet. App. 23a) that the AUMF provided the President "the power to detain identified and committed enemies such as [petitioner]," following this Court's lead in *Hamdi*, it had no occasion to address the government's additional contention that the President had inherent authority under Article II of the Constitution to order petitioner's military detention.

October 25, 2005, petitioner filed a petition for a writ of certiorari in this Court.

6. On November 17, 2005, a federal grand jury in the District Court for the Southern District of Florida returned a sealed indictment charging petitioner with conspiring to murder, maim, and kidnap individuals outside of the United States, in violation of 18 U.S.C. 2 and 956(a)(1) (Count One); conspiring to provide material support to terrorists, in violation of 18 U.S.C. 371 and 2339A(a) (Count Two); and providing material support to terrorists, in violation of 18 U.S.C. 2 and 2339A(a) (Count Three). App., *infra*, 2a-35a. The indictment was unsealed on November 22, 2005.

On November 20, 2005, the President determined that "it is in the interest of the United States that [petitioner] be released from detention by the Secretary of Defense and transferred to the control of the Attorney General for the purpose of criminal proceedings against him." The President's Memorandum to that effect made clear that it "supersede[d]" the President's June 9, 2002, directive to the Secretary of Defense to detain petitioner militarily as an enemy combatant. The Memorandum directed the Secretary of Defense to release petitioner from the control of the Department of Defense and transfer him to the control of the Attorney General upon the Attorney General's request. The Memorandum also provided that, upon such transfer, the authority of the Secretary of Defense to detain petitioner pursuant to the President's June 9, 2002, order "shall cease." App., *infra*, 1a.

On November 22, 2005, the government filed in the court of appeals an Unopposed Emergency Application and Notice of Release and Transfer of Custody of Petitioner Jose Padilla. On November 29, 2005, petitioner filed a motion in the district court to stay further proceedings until after this Court resolves the petition for a writ of certiorari. The district court denied that motion as moot "[i]n light of * * * the indict-

ment of [petitioner] on criminal charges in the Southern District of Florida." Likewise, the district court "relieved" the parties of their obligation to file briefs addressing the question of how to proceed with the factual disposition of the habeas petition.

On November 30, 2005, in response to the unopposed transfer application, the court of appeals directed the parties to address whether, in light of the criminal charges against petitioner and his impending transfer from military to civilian custody, the mandate in the case should be recalled and the court's opinion vacated. On December 9, 2005, the government filed a supplemental brief in that court noting that the case is moot and arguing that recall and vacatur would be well within the court's discretion under the doctrine of *United States* v. *Munsingwear*, 340 U.S. 36 (1950). The government further asked the court to grant the unopposed transfer application and to remand the case with instructions to dismiss the habeas petition as moot. Petitioner's supplemental brief in response is due on December 16, 2005, the filing date of this brief in opposition.

## ARGUMENT

The habeas petition, the decision below, and the petition for a writ of certiorari are all addressed solely to the lawfulness of petitioner's military detention as an enemy combatant. Because petitioner has been charged with criminal offenses and ordered released from that military detention, the case is moot and further review would be inconsistent with the jurisdictional requirements of Article III. Indeed, the mootness of this case may be further underscored if the court of appeals vacates its September 9, 2005, opinion. Additionally, and quite apart from strict jurisdictional requirements, the prudential axiom that courts should avoid the resolution of sensitive constitutional issues counsels denial of certiorari

here, where the Court's decision will have no practical effect on petitioner in light of the intervening events. Moreover, the court of appeals' decision that petitioner asks this Court to review is interlocutory, as evidenced by petitioner's request to the court of appeals to expedite issuance of the mandate and the district court proceedings that were underway to allow petitioner to pursue his factual challenge to his military detention. The interlocutory nature of the case has forced the lower courts to consider whether the indictment and Presidential Memorandum moot proceedings in the lower courts, and independently renders the dispute unworthy of this Court's review at this juncture. Finally, the decision is, in all events, correct on the merits and does not conflict with any decision of this Court or any other court of appeals. For all of these reasons, further review is unwarranted.

1. a. Under Article III of the Constitution, the federal courts lack jurisdiction to entertain cases that no longer present live controversies. See, *e.g.*, *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998); *St. Pierre* v. *United States*, 319 U.S. 41, 42 (1943) (per curiam). "This means that, throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Spencer*, 523 U.S. at 7 (quoting *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990)). In light of the events supervening the court of appeals' decision, that fundamental constitutional requirement is no longer satisfied in this case.

Petitioner's habeas petition is explicitly and exclusively addressed to his detention by the *military* "without criminal charges." C.A. App. 10. In addition, each of the claims in the habeas petition is addressed to or is necessarily dependent upon petitioner's *military* detention as an enemy combatant during wartime. And, as relief, the petition seeks an "order that he immediately be released or charged with a crime."

C.A. App. 13. The court of appeals' opinion is similarly limited to petitioner's military detention as an enemy combatant: it addresses itself to and decides only the question whether "the President of the United States possesses the authority to detain *militarily* a citizen of this country who is closely associated with al Qaeda, an entity with which the United States is at war; who took up arms on behalf of that enemy and against our country in a foreign combat zone of that war; and who thereafter traveled to the United States for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets." Pet. App. 7a (emphasis altered).

The predicate for this habeas action, however, no longer exists. On November 17, 2005, petitioner was criminally charged. In addition, on November 20, 2005, the President determined that "it is in the interest of the United States that [petitioner] be released from detention by the Secretary of Defense and transferred to the control of the Attorney General for the purpose of criminal proceedings against him." The President's November 20, 2005, Memorandum expressly "supersedes" the President's June 9, 2002, directive to the Secretary of Defense to detain petitioner militarily as an enemy combatant and mandates that upon petitioner's transfer from military to civilian custody, the authority of the military to detain him as an enemy combatant "shall cease." App., *infra*, 1a. The President's November 20, 2005, Memorandum therefore explicitly eliminates the directive that provided the authority to detain petitioner as an enemy combatant.

Because petitioner has been criminally charged and the President has directed that petitioner's military detention "shall cease," petitioner has received the relief that he sought in the habeas petition, C.A. App. 13 (seeking an "order that he immediately be released or charged with a crime")—and, indeed, the relief that the district court ordered when it

granted his petition. This habeas action therefore no longer meets the core jurisdictional requirements of Article III. It is settled law that where a claimant receives the relief he seeks—here, release from military custody or criminal charges—there is no longer a live controversy and the case is moot. See *Weinstein* v. *Bradford*, 423 U.S. 147, 148 (1975) (per curiam); *St. Pierre*, 319 U.S. at 42-43.

Nothing counsels a departure from that rule here. To the contrary, further review of this case would be wholly imprudent in light of the extremely sensitive constitutional issues raised by the habeas petition. It is axiomatic that courts should avoid the resolution of constitutional questions wherever possible. See, *e.g.*, *Ashwander* v. *TVA*, 297 U.S. 288, 346-348 (Brandeis, J., concurring). As the Court made clear in *Hamdi*, that settled prudential principle applies with full force to enemy-combatant cases. 542 U.S. at 539 (plurality opinion) (instructing lower courts to "proceed with the caution that we have indicated is necessary in this setting" by "engaging in a [litigation] process that is both prudent and incremental"). Further review would be particularly imprudent in light of the fact that the President has determined that petitioner no longer should be detained as an enemy combatant and that the Secretary of Defense's authority to detain petitioner pursuant to the President's June 9, 2002, directive "shall cease."

b. Any claim that the case falls within the narrow exception to the mootness doctrine for actions "capable of repetition yet evading review" because the President could later decide, based on an independent determination, to redesignate petitioner as an enemy combatant would be entirely speculative and legally insufficient. To be clear, as evidenced by the President's November 20, 2005, Memorandum, the Secretary of Defense's authority to detain petitioner as an enemy combatant will cease upon petitioner's transfer to the

control of the Attorney General. While it is theoretically possible that the President could redesignate petitioner for detention as an enemy combatant—just as he could theoretically designate other current criminal defendants whose conduct would suffice to justify detention as an enemy combatant—in that unlikely event, petitioner would have ample opportunity to challenge any such military custody at that time.

That hypothetical scenario would not fit within the capable-of-repetition-yet-evading-review exception. Under that exception, which was first enunciated in *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911), a court may review an otherwise moot case only where (1) the challenged action would be too short in duration to be fully litigated prior to cessation or expiration; *and* (2) there is a reasonable expectation or "demonstrated probability" that the plaintiff will be subject to the same action again. See *Spencer*, 523 U.S. at 17-18; *Honig* v. *Doe*, 484 U.S. 305, 318 n.6 (1988); *City of L.A.* v. *Lyons*, 461 U.S. 95, 109 (1983) (plaintiff must "make a reasonable showing that he will again be subjected to the alleged illegality"). For these reasons, this Court has cautioned that "the capable-of-repetition doctrine applies only in exceptional situations." *Lyons*, 461 U.S. at 109.

Here, petitioner could not establish either prong of the capable-of-repetition exception. As indicated, it is entirely speculative whether petitioner would ever again face military detention as an enemy combatant, and even if he did, there is no reason to believe that such detention would be too brief to allow him to challenge fully that detention in court. Indeed, there is little need to speculate on the latter matter: if, as the government urged at the time, petitioner had filed his habeas action in the appropriate court in the first instance, the issues raised in the habeas petition presumably could have been finally resolved by this Court in June 2004. It is therefore implausible, to say the least, that any hypothetical future

military detention of petitioner would somehow evade meaningful judicial review. Cf. *Spencer*, 523 U.S. at 17-18 (holding that habeas petitioner "ha[d] not shown (and we doubt that he could) that the time between parole revocation and expiration of sentence is always so short as to evade review. Nor has he demonstrated a reasonable likelihood that he will once again be paroled and have that parole revoked.").

This conclusion is unaffected by petitioner's assertion (Pet. 29-30) of a supposed need for this Court's immediate guidance because: (1) "Executive [B]ranch officials" have purportedly "fueled" uncertainty about the scope of the President's authority to detain enemy combatants by making "vague and unconstrained statements regarding the breadth of this power"; and, relatedly, (2) criminal defendants who are uncertain about the state of the law "face immense pressure to avoid an 'enemy combatant' designation * * * by pleading guilty."[2] The government has never strayed from the position that the President has authority to detain militarily a person who, like petitioner, trained with and was closely associated with al Qaeda before and after September 11, 2001; engaged in armed conflict against the United States and allied forces in Afghanistan; and, after eluding our forces in Afghanistan, accepted a mission from al Qaeda to enter the United States and carry out attacks on our citizens within our borders. The instant petition is directed only to the question of authority on *those* facts. This Court's resolution of that now-moot question would likely provide only limited guidance

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[2] Petitioner's suggestion (Pet. 29) that the Executive has claimed authority to designate as an enemy combatant a "little old lady" who sends money to what she believes is a "charity that helps orphans in Afghanistan" but turns out to be a front to finance al Qaeda activities is based solely on a statement taken out of context from a district court oral argument transcript in a different case. See 12/2/2004 Tr. at 119, *Benchellali* v. *Bush*, No. 04-CIV-1142 (D.D.C.) (clarifying statement).

in the diverse array of criminal and non-criminal cases to which petitioner apparently refers. That is especially so because, as explained at pp. 20-30, *infra*, this case involves nothing more than the application of the Court's recent decision in *Hamdi* as reinforced by this Court's recently reaffirmed decision in *Quirin*. There is no reason to assume that any decision by the Court applying *Hamdi* to the current facts would apply broadly to many other enemy combatants. Indeed, since September 11, 2001, there have been only two cases (this one and *Hamdi*) involving United States citizens detained militarily in the United States as enemy combatants.

2. Even if this case were not moot, review by this Court of the court of appeals' decision would be imprudent, because the court of appeals' decision is interlocutory. Because petitioner elected to proceed first with only a legal challenge to his detention, the court of appeals' decision addresses only the question of the President's authority to order petitioner's military detention, assuming the government's facts are true, and it remands the case to the district court to decide the remainder of petitioner's habeas claims. Nor is this case interlocutory only in some technical sense. Petitioner has indicated that he will present a factual challenge to his military detention, and he asked the court of appeals to expedite the issuance of its mandate precisely so that he could commence that factual challenge in the district court without further delay. By his actions, therefore, petitioner has demonstrated that he views the remand proceedings as significant and capable of obviating the need for review of his purely legal challenge to the President's authority.

The interlocutory posture of this case distinguishes this case from the *Hamdi* and *Padilla* cases this Court considered in 2004, both of which involved definitive resolutions of the habeas petitions, and counsels against review at this juncture. The interlocutory character of the case "of itself alone

furnishe[s] sufficient ground for the denial" of petitioner's request for this Court's review. *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of petition for certiorari) ("[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction"); Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258-261 (8th ed. 2002).

That approach is particularly warranted here, because the proceeding remaining on remand is precisely the type of *factual* challenge that the plurality in *Hamdi* had in mind when it spelled out the due process requirements for citizen-detainee cases. It held that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the *factual* basis for his classification, and a fair opportunity to rebut the Government's *factual* assertions before a neutral decisionmaker." 542 U.S. at 533 (emphases added); *id.* at 509 ("We hold that * * * due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."). Thus, were the claim not moot, proceedings in the lower courts could obviate the need for any review of the constitutional question (if petitioner prevailed on his factual contentions), and this Court could still review the question presented in the petition *after* petitioner has received the full process this Court described in *Hamdi* and which he has now initiated in the district court.

3. In any event, the court of appeals correctly concluded that, on the facts described in the Rapp Declaration, the President has authority under the AUMF, as interpreted in

*Hamdi*, to detain petitioner militarily, and its decision does not conflict with any decision by this Court or any other court of appeals.

In *Hamdi*, this Court confirmed that the military may seize and detain enemy combatants, including United States citizens, for the duration of the relevant conflict with al Qaeda. Specifically, this Court upheld the President's authority, under the AUMF, to detain as an enemy combatant a presumed American citizen who "was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there." 542 U.S. at 516 (plurality opinion); accord *id.* at 587 (Thomas, J., dissenting). As the court of appeals recognized (Pet. App. 11a-12a), petitioner readily meets that description. Petitioner, like Hamdi, carried an assault rifle on the battlefields of Afghanistan against United States and coalition forces. Petitioner, moreover, associated himself not just with Taliban forces (as did Hamdi), but with al Qaeda itself at a time when the United States was engaged in armed conflict with those forces. See pp. 5-6, *supra*. For these reasons, as the court of appeals concluded, petitioner fits squarely within the definition of "enemy combatant" employed by this Court in *Hamdi*.

a. Petitioner errs in arguing (Pet. 9-17) that the court of appeals' opinion "dramatically extends this Court's decision in *Hamdi*," inasmuch as Hamdi was "captured in a *foreign* combat zone" while petitioner was "arrested unarmed in a civilian setting in the United States." The court of appeals correctly held (Pet. App. 16a) that "the reasoning in *Hamdi* does not support a distinction based on the locus of capture." Nothing in *Hamdi*'s definition of enemy combatant turned on the place of capture. Instead, the plurality emphasized that it was defining the term enemy combatant for purposes of that case as "an individual who * * * was 'part of or sup-

porting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there." 542 U.S. at 516. Thus, without any reference to the locus of capture, the plurality concluded that "[t]here can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for [the September 11] attacks, are individuals Congress sought to target in passing the AUMF." *Id.* at 518. Similarly, in noting that it was not attempting to define the permissible bounds of the term "enemy combatant," the plurality emphasized that "[h]ere, the basis asserted for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield; that is, that he was an enemy combatant," *id.* at 522 n.1, and again made no mention of place of capture.

As petitioner himself points out (Pet. 10), the plurality emphasized that the purpose of detaining enemy combatants during wartime is to prevent them from returning to battle and taking up arms once again. *Hamdi*, 542 U.S. at 518-519. Nothing about that purpose supports drawing a distinction based on the locus of capture. Petitioner's contention boils down to a claim that the government has less authority to detain an individual who eludes capture on the foreign battlefield and then comes to the United States intent on committing further warlike acts. That argument cannot be squared with *Hamdi*, let alone with the Court's decision in *Quirin*, which *Hamdi* reaffirmed. Given the current conflict and the September 11 attacks that led to the AUMF, moreover, an al Qaeda combatant captured while attempting to enter the United States to commit hostile acts against our citizens at home poses an even greater threat than one captured on a foreign battlefield. It is therefore no surprise that the plurality in *Hamdi* made no mention whatsoever of the locus of

capture in discussing the preventive purpose of detaining enemy combatants. Instead, the plurality reasoned that "[a] citizen, no less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States,' " and that "such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict." *Id.* at 519. That is necessarily true whether that citizen is captured on the battlefield in Afghanistan or attempting to travel from that foreign battlefield to the United States to include Chicago in the domestic front of the war on terror.

b. In light of *Hamdi*, petitioner also errs in suggesting (Pet. 6) that the decision below "directly conflicts with the decision of the Second Circuit in * * * *Padilla* v. *Rumsfeld*, 352 F.3d 695 (2d Cir. 2003)." The Second Circuit's decision lacks precedential force because this Court reversed the decision and held that the Southern District of New York (and thus the Second Circuit) lacked jurisdiction over the habeas petition. *Rumsfeld* v. *Padilla*, 542 U.S. 426, 434-451 (2004); see *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.") (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)).

In any event, the Second Circuit decided the case on a record that contained no reference to the fact that petitioner, just like Hamdi, engaged in armed conflict against our forces in Afghanistan. That evidence was submitted for the first time in the district court below, and it is that evidence that the court of appeals assumed to be true for purposes of petitioner's summary judgment motion. More importantly, that evidence, which is assumed true in this proceeding, is

dispositive under *Hamdi*, which was handed down *after* the Second Circuit's decision. Simply stated, the Second Circuit decided a different case on different facts and different law, and thus its decision would not conflict with the decision below even if this Court had not reversed it.[3]

4. Petitioner's contention (Pet. 12) that the decision below conflicts with *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), is equally unavailing in light of this Court's decisions in *Quirin* and *Hamdi*.

a. In *Quirin*, this Court unanimously upheld the President's assertion of military control over a group of Nazi saboteurs—including a presumed American citizen (Herbert Haupt), 317 U.S. at 20—who were seized by FBI agents in the United States before carrying out plans to sabotage domestic war facilities during World War II. In doing so, the Court explained that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of * * * the law of war." *Id.* at 37-38. Once again, that readily describes petitioner, and his case is indistinguishable in all material respects from *Quirin*. There, the saboteurs were affiliated with German forces during World War II, received explosives training in Germany, and came to the United States with plans to destroy domestic targets. *Id.* at 21. Here, petitioner was closely associated with al Qaeda after September 11, 2001, received explosives training at al Qaeda training camps, and then came to the United States at al Qaeda's direction

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[3] Petitioner's reliance (Pet. 10) on Judge Wilkinson's concurring opinion in *Hamdi* v. *Rumsfeld*, 337 F.3d 335 (4th Cir. 2003), vacated and remanded, 542 U.S. 507 (2004)—which stated that "[t]o compare [Hamdi's] battlefield capture to the domestic arrest [of petitioner] is to compare apples and oranges," *id.* at 344—is misplaced for the same reasons.

and with its assistance to advance the conduct of further attacks against the United States.

Petitioner's attempts to distinguish *Quirin* (Pet. 17-18) are unavailing. For instance, it is factually misleading and legally irrelevant to assert (Pet. 17 & n.4) that petitioner "lacks the military status that was the prerequisite to the military jurisdiction upheld in *Quirin*." Contrary to petitioner's contention, the *Quirin* saboteurs did not "have" or "assert" military status; though they landed in the United States wearing military uniforms, "[i]mmediately after landing they buried their uniforms * * * and proceeded in civilian dress." 317 U.S. at 21. As the District Court for the Southern District of New York observed, the saboteurs had donned the partial uniforms only to preserve a plausible claim to prisoner-of-war status should they have been captured during the landing. *Padilla ex rel. Newman* v. *Rumsfeld*, 233 F. Supp. 2d 564, 594 n.12 (2002). When they were later seized and detained in a civilian setting, the saboteurs were clearly not asserting military status.

More fundamentally, whether and when the saboteurs asserted military status is legally irrelevant, because the *Quirin* Court did not rest its decision on that fact; rather, it held that a person who is "a part of *or associated with* the armed forces of the enemy" is subject to detention and trial as an enemy combatant. 317 U.S. at 45 (emphasis added); see *id.* at 37-38; see also *Hamdi*, 542 U.S. at 516-524 (plurality opinion) (holding that an individual who is "part of *or supporting* forces hostile to the United States" is an enemy combatant (emphasis added)). The Court's use of the disjunctive—"or associated with"—precludes any argument based on the reality or assertion of formal membership in the military. Accord Michael Dobbs, *Saboteurs: The Nazi Raid on America* 204 (2004) (noting that "only two" of the *Quirin* saboteurs "were formally enrolled in the German army").

Nor can *Quirin* be distinguished on the ground that the saboteurs were tried by a military commission while petitioner (Pet. 18) "explicitly challenges the constitutionality of his military detention without trial." As the plurality explained in *Hamdi*, "[w]hile Haupt was tried for violations of the law of war, nothing in *Quirin* suggests that his [United States] citizenship would have precluded his *mere detention* for the duration of the relevant hostilities." 542 U.S. at 519 (emphasis added); see Pet. App. 19a (court of appeals recognizing that this Court in *Hamdi* regarded "mere detention" "as a lesser imposition than" trial by military commission).

Nor does it matter that "*Quirin* was decided before Congress enacted [18 U.S.C.] 4001(a)." Pet. 18. Even assuming Section 4001(a) could apply to petitioner's military detention (and it does not),[4] the AUMF provides any congressional authorization that is required, as *Hamdi* makes clear. In light of the events that precipitated the AUMF, it cannot plausibly be argued that it provides less authority over those who more closely resemble the attackers of September 11th in terms of their threat to domestic, rather than foreign, targets.

b. For these reasons, *Quirin* forecloses petitioner's reliance (Pet. 12-13, 19) on *Milligan*. *Milligan* held that the military lacked authority to subject to trial by military commission a citizen who was alleged to have conspired against the United States in the Civil War. In *Quirin*, the Court unanimously confined *Milligan* to its specific facts and found its holding "inapplicable" to the detention and military trial of the German saboteurs, explaining that Milligan, "not being

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[4] Section 4001(a) is located in Title 18 ("Crimes and Criminal Procedure") rather than Title 10 ("Armed Forces") or Title 50 ("War and National Defense"), and is part and parcel of a provision directed to the Attorney General's "control and management of Federal penal and correctional institutions, *except military or naval institutions*," 18 U.S.C. 4001(b)(1) (emphasis added).

a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war." 317 U.S. at 45. But petitioner, like the *Quirin* combatants, "associate[d] [himself] with the military arm of the enemy government, and with its aid, guidance and direction enter[ed] this country bent on hostile acts"; thus, he is an "enemy belligerent[ ] within the meaning of * * * the law of war." *Id.* at 37-38.

Significantly, petitioner's reliance on *Milligan* is also foreclosed by *Hamdi*. The plurality in *Hamdi* expressly reaffirmed that *Quirin* is the "most apposite precedent" in the enemy-combatant context and that it "both postdates and clarifies *Milligan*." 542 U.S. at 523; accord *id.* at 593 (Thomas, J., dissenting). Indeed, the plurality expressly rejected the dissent's reliance on *Milligan* to the exclusion of *Quirin*. See *ibid.* (admonishing that "[b]rushing aside [*Quirin*] * * * is unjustified and unwise"). Because petitioner, like Hamdi, is a classic battlefield combatant, *Milligan* is just as inapplicable here as it was in *Hamdi*.

5. Petitioner's contention (Pet. 18-19) that the court of appeals' decision conflicts with this Court's decision in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), is similarly mistaken. As petitioner points out (Pet. 18), *Youngstown* "restrict[s] the exercise of military power as an instrument of domestic policy." That decision casts no doubt, however, on the President's authority here because this case does not involve "domestic policy." The President's order in *Youngstown* that the Secretary of Commerce take control of private steel mills to prevent a work stoppage is different in kind from the President's order that the Secretary of Defense detain petitioner as an enemy combatant in order to prevent him from carrying out a terrorist scheme he planned and trained for, with the aid of al Qaeda operatives, in Afghanistan and Pakistan. The former represents a domestic eco-

nomic initiative; the latter, by contrast, represents a core exercise of the President's Commander-in-Chief power, which is at its apex when the Nation itself comes under attack. *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863) (when the Nation itself is attacked, "the President is not only authorized but bound to resist force by force"); see *Padilla* v. *Rumsfeld*, 352 F.3d at 727 (Wesley, J., concurring in part and dissenting in part) (whereas in *Youngstown* "the President's attempt to link the [steel] seizure to prosecuting the war in Korea was * * * too attenuated," "[i]n [petitioner's] case the President's authority is directly tied to his responsibilities as Commander in Chief").[5]

6. Finally, petitioner errs in arguing (Pet. 7-9) that the decision below "conflicts with this Court's precedents holding that Congress must speak clearly when it authorizes the infringement of individual liberties." The vast majority of the cases petitioner cites on that score are wholly inapposite because they have nothing to say about the detention of enemy combatants. At issue in *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946), for example, was whether the Hawaiian Organic Act authorized the Governor of Hawaii to order that *civilians* charged with garden-variety *civilian* offenses be tried before military tribunals. *Id.* at 309-310 (noting that petitioners

[5] For similar reasons, petitioner's invocation (Pet. 12) of the Suspension Clause is unavailing. Because the Suspension Clause provides Congress the extraordinary authority to suspend the writ of habeas corpus "when in Cases of Rebellion or *Invasion* the public Safety may require it," U.S. Const. Art. I, § 9, Cl. 2 (emphasis added), it underscores the obvious point that domestic threats pose even greater dangers than foreign ones. Nothing in the Suspension Clause's provision of suspension authority in the face of domestic threats reflects an illogical intent to impose greater restraints on the President's authority to address military threats at home than abroad. In any event, nothing in the decision below implicates the Suspension Clause, as it remands for factual development of petitioner's habeas petition.

were charged with "embezzling stock" and "engag[ing] in a brawl"). The Court in *Duncan* explicitly distinguished cases involving military detentions like petitioner's: "Our question does not involve the well-established power of the military to exercise jurisdiction over * * * enemy belligerents, prisoners of war, or others charged with violating the laws of war." *Id.* at 313-314 (footnotes omitted). Likewise, *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), *Gutknecht* v. *United States*, 396 U.S. 295 (1970), and *Green* v. *McElroy*, 360 U.S. 474 (1959), do not remotely "involve the well-established power of the military to exercise jurisdiction over * * * enemy belligerents." Rather, they involve, respectively: the applicability of the Age Discrimination in Employment Act to judges; the legality of Selective Service delinquency regulations as applied to conscientious objectors; and the government's revocation of security clearances granted to privately-employed aeronautical engineers. Their relevance to the instant matter—at least as compared to on-point precedent like *Hamdi* and *Quirin*—is far from obvious.

The only apposite case that petitioner cites is *Hamdi* itself. But there the plurality specifically rejected a clear-statement rule by concluding that "the AUMF satisfie[s] § 4001(a)'s requirement that a detention be 'pursuant to an Act of Congress,'" even though it "does not use specific language of detention." 542 U.S. at 517, 519; see *id.* at 587 (Thomas, J., dissenting). That result directly follows from *Quirin*, which declined to impose a clear-statement restriction on the President's authority and indeed suggested that any such rule runs in the opposite direction: "[T]he detention and trial of petitioners ordered by the President in the declared exercise of his powers as Commander in Chief * * * are not to be set aside by the courts without the clear conviction that they are in conflict with the * * * laws of Congress." 317 U.S. at 25; see Pet. App. 20a.

Nor does *Howe* v. *Smith*, 452 U.S. 473 (1981), aid petitioner's assertion (Pet. 8) that any purported "constitutional 'clear statement' rule is buttressed in this case by * * * 18 U.S.C. 4001(a)." *Howe* involved the temporary federal civilian detention of a Vermont prisoner and did not speak to military detention of enemy combatants. 452 U.S. at 475-479. Thus, its passing statement in a footnote to the effect that Section 4001(a) "proscrib[es] detention *of any kind* by the United States," *id.* at 479 n.3, is of limited force. But, in any event, Section 4001(a) is triggered at most by the locus of detention, not capture, and so its relevance (and the relevance of *Howe*'s footnote dictum) were fully considered in *Hamdi*. The AUMF, thus, fully justified petitioner's detention consistent with Section 4001(a) and this Court's precedents. Of course, on a going forward basis, petitioner's detention as a criminal defendant undoubtedly complies with Section 4001(a) and moots his petitions for habeas corpus and certiorari.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2005