No. 05-6396

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOSE PADILLA,
PETITIONER-APPELLEE,

v.

COMMANDER C.T. HANFT,
USN COMMANDER, CONSOLIDATED NAVAL BRIG,
RESPONDENT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF OF AMICI CURIAE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW IN SUPPORT OF SUPPLEMENTAL BRIEF OF PETITIONER-APPELLEE JOSE PADILLA

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No. 05-6396 Caption: Padilla v Hanft

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No. 05-6396 Caption: Padilla v Hanft

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Seth Waxman
(signature)

December 21, 2005
(date)

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STATEMENT OF IDENTITY

The Brennan Center for Justice at NYU School of Law ("Brennan Center") and the Association of the Bar of the City of New York ("ABCNY") respectfully submit this brief as *amici curiae* in support of Petitioner-Appellee Jose Padilla ("Padilla"). *Amici* moved this Court for leave to file this brief on December 16, 2005.

STATEMENT OF INTEREST

The Brennan Center is a community of lawyers, teachers, students and scholars that seeks to link the academy and the practicing bar in defense of the values that infused the matchless contribution of Justice William Brennan, Jr. to American constitutional law. The Brennan Center previously appeared in this case as *amicus curiae*.

ABCNY is a professional association of over 22,000 attorneys. Founded in 1870, ABCNY has long been committed to studying, addressing, and promoting the rule of law and, when appropriate, law reform. Through its many standing committees, ABCNY educates the bar and public about current issues arising in connection with the "war" on terrorism, the pursuit of suspected terrorists, and the treatment of detainees.

Amici believe that this Court should refrain from taking further action in this matter, at least until the Supreme Court rules on Padilla's pending petition for a

writ of certiorari. The actions of the United States in this case suggest a strategic effort to prevent the Supreme Court from carrying out its constitutional role as the final arbiter of the important legal issues raised by Padilla's prolonged military detention. This Court should not allow itself to be drawn into the government's strategic gambit, but should stay further action until the Supreme Court has completed its review of Padilla's petition and decided whether to issue a writ of certiorari.

ARGUMENT SUMMARY

The Executive's decision to indict petitioner and return him to civilian custody on the eve of the Supreme Court's consideration of his pending petition for a writ of certiorari seeking review of the legality of his prolonged military detention raises a procedural issue of enormous importance. For the first time since the Civil War, this Court is confronted by a sustained effort by the Executive branch to oust the Supreme Court from its historic role as final arbiter of the meaning of the Constitution. *Amici* believe that it would significantly weaken the rule of law if the Executive branch is once again successful in blocking review by the Supreme Court of the constitutional issues raised by the Executive's imposition of prolonged military detention on petitioner. While reasonable persons can -- and do -- disagree over the legality of prolonged military custody of suspected terrorists, reasonable persons cannot disagree that the Supreme Court should have

the final word on the constitutionality of Padilla's three-year confinement in the military brig. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.) ("It is emphatically the province of the judicial department to say what the law is.").

While the government's conduct raises a procedural question of profound importance, it does not create an Article III concern for this Court. That Padilla has been indicted by civilian authorities and is poised to be transferred from military to civilian custody does not change the fact that a live controversy existed at the time this Court issued its decision, and continues to exist until this day. Having obtained a favorable ruling from this Court on the existence of Executive authority to detain enemy combatants -- an issue that will undoubtedly continue to affect the relationship between the parties during the pendency of Padilla's criminal proceedings -- the government cannot seek to deprive the Supreme Court of the power to review that decision on Article III mootness grounds any more than it could manufacture federal jurisdiction where none existed. Accordingly, the government's suggestion that this case is moot raises, at most, prudential concerns that the Supreme Court should be permitted to address in the first instance.

Until the Supreme Court completes its review of Padilla's petition for certiorari, it would be neither equitable nor prudent for this Court to exercise its extraordinary equitable powers to determine whether and on what grounds to recall

its mandate and vacate its opinion. The equities do not favor the government. The government's decision to release Padilla from military custody was timed to suit the government's legal strategy. The Court should not exercise its discretion to reward the government for its machinations.

The public interest in judicial economy and orderly adjudication of cases suggest the same outcome. The issues presented in the parties' supplemental briefs are significant. The government argues that Padilla's indictment and imminent release from military custody after more than three years moot his habeas petition. Padilla argues that the government's shifting allegations and apparent attempts to evade Supreme Court review amount to an unjust manipulation of the legal system. It is highly likely, if not certain, that the Supreme Court ultimately will decide some or all of these issues when resolving Padilla's petition. This Court is not required to and, indeed, should not take up those issues before the Supreme Court rules. Moreover, any ruling on these issues by this Court would be subject to Supreme Court review. Therefore, another ruling from this Court now would only complicate the already intricate procedural posture of this case, and needlessly so.

For these reasons, at least while the petition for certiorari is pending, this Court should take no further action other than to approve Padilla's transfer from military to civilian custody.

STATEMENT OF THE CASE

In the wake of the terrorist destruction of the World Trade Center, the bombing of the Pentagon and the crash of Flight 93 on September 11, 2001, the Executive branch evolved a well-intentioned but constitutionally-flawed legal response that concentrated vast powers in the President. Relying upon his inherent powers as Commander-in-Chief and the general language in the AUMF, the President asserted unilateral power to designate and detain supporters of the Taliban captured in Afghanistan, as well as supporters of al Qaeda captured elsewhere in the world, in prolonged military custody as "enemy combatants."[1] The President asserted, as well, the power to try certain enemy combatants for terrorist acts before military commissions authorized to mete out severe penalties, including death.

On May 8, 2002, petitioner, an unarmed civilian with alleged ties to terrorist organizations, was arrested at O'Hare Airport in Chicago upon arrival from Pakistan pursuant to a material witness warrant issued by Chief Judge Mukasey of the Southern District of New York. *Rumsfeld v. Padilla,* 542 U.S. 426, 430-31 (2004) (*Padilla III*). Shortly after Padilla's apprehension and arrest, Attorney General Ashcroft publicly accused him of seeking to explode a "dirty bomb" in the

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[1] The Executive declined, however, to accord such "enemy combatants" the protections guaranteed under the Geneva Conventions.

United States in furtherance of al Qaeda's terrorist designs. *Padilla ex rel. Newman v. Bush*, 352 F.3d 695, 724 (2d Cir. 2003) (*Padilla II*). Instead of indicting Padilla, the United States moved him to New York, where he was held for one week in the maximum security wing of the Metropolitan Correctional Center as a "material witness" in connection with an ongoing grand jury investigation into terrorism.

On May 15, 2002, Padilla appeared before Chief Judge Mukasey, who appointed counsel to represent him. *Id.* at 700. On May 22, Padilla's court-appointed counsel moved to vacate the material witness warrant, raising serious statutory and constitutional challenges to the government's decision to detain Padilla indefinitely without bringing criminal charges against him. *Id.* By June 7, the motion had been submitted for decision. A June 11 conference was scheduled on the motion before Chief Judge Mukasey.

On June 9, rather than face judicial review of the material witness warrant, the United States withdrew the warrant and transferred Padilla from New York to the military brig in Charleston, South Carolina, where the President proposed to detain him indefinitely, without access to family, friends or counsel, as an "enemy combatant." *Id.* When Padilla's counsel arrived at the June 11 conference with Chief Judge Mukasey, her client had already been transferred to military custody at the direction of Secretary of Defense Donald Rumsfeld. *Id.* Counsel then

immediately filed a habeas corpus petition as next friend, identifying Secretary Rumsfeld as Padilla's ultimate custodian, and challenging the legality of the government's continued military detention of Padilla. *Id.*

Chief Judge Mukasey refused to dismiss Padilla's habeas petition. Although the court upheld the President's power to detain civilians as enemy combatants, it nonetheless held that Padilla had a right to a fact hearing to challenge his designation and detention. *See Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 599-600 (S.D.N.Y. 2002) (*Padilla I*). Over the government's objections, the court also found that Padilla had the right to present facts through counsel. *Id.*

Unwilling to accord Padilla even the minimal procedural protection of access to counsel, the United States appealed to the Second Circuit, which held that the President lacked authority to detain American citizens arrested in the United States as enemy combatants in the absence of authorization by Congress. *Padilla II*, 352 F.3d at 724. The Second Circuit explicitly rejected the Executive's assertion that congressional authorization could be implied from the general language of the AUMF. *Id.* at 699.

On appeal to the Supreme Court, the United States argued that because Padilla had been moved to the Charleston military brig two days prior to the filing of the habeas corpus petition in the Southern District of New York, the Southern District lacked statutory jurisdiction over Padilla's immediate custodian, the

warden of the Charleston military prison. Chief Justice Rehnquist, writing for five members of the Court, accepted the government's argument and reversed and remanded with directions to dismiss the petition without prejudice. As a result, Padilla's counsel had to begin anew in South Carolina. *Padilla III,* 542 U.S. at 451.

On July 2, 2004, four days after the Supreme Court's decision in *Padilla III,* Padilla's counsel filed a second habeas corpus petition in the District of South Carolina challenging Padilla's prolonged military detention. In response, the government changed spots once again. For the first time, the Executive asserted that Padilla took up arms on an Afghan battlefield. *See Padilla v. Hanft*, 389 F. Supp. 2d 678, (D.S.C.) Gov't Ans. to Pet. for Writ of Habeas Corpus at 4-7 (filed Aug. 30, 2004).[2] Further, the government no longer contended that Padilla came to the United States to set off a "dirty bomb," but instead alleged that he entered the country to blow up apartment buildings. *Id.*

Padilla moved for summary judgment on stipulated facts. On February 28, 2005, the District Court, agreeing with the Second Circuit, ruled that the President lacked inherent military authority to detain Padilla, and that the AUMF failed to

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[2] The government's answer to Padilla's habeas petition relied heavily on the double and triple hearsay declaration of Jeffrey N. Rapp, Director of the Joint Intelligence Task Force Combating Terrorism, who has no personal knowledge of any asserted facts.

provide sufficiently explicit congressional authorization. *Padilla v. Hanft*, 389 F. Supp. 2d 678, 689, 691 (D.S.C. 2005) (*Padilla IV*). The government appealed.

On September 9, 2005, this Court reversed the District Court. *Padilla v. Hanft*, 423 F.3d 386, 397 (4th Cir. 2005) (*Padilla V*). Assured by the United States that Padilla was being detained by the military as an "enemy combatant" in the Afghan conflict who happened to be apprehended in Chicago, this Court held that Padilla's indefinite military detention was lawful. The decision relied on the plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which had held that the AUMF for Afghanistan impliedly authorizes the military detention of enemy combatants captured on an Afghan battlefield and engaged in combat there, and on *Ex parte Quirin*, 317 U.S. 1 (1942), which upheld the military trials of alleged German saboteurs who landed in full uniform on American soil from a German submarine. *Padilla V*, 423 F.3d at 393-94, 396.

Padilla filed a petition for certiorari on October 25, 2005, imploring the Supreme Court to determine the legality of his prolonged military detention. On November 7, 2005, shortly after the petition was filed, the Supreme Court granted certiorari in *Hamdan v. Rumsfeld* to review the decision of the D.C. Circuit upholding the constitutionality of the use of military commissions to try alleged enemy combatants detained at Guantanamo Bay, Cuba. *Hamdan v. Rumsfeld*, 415 F.3d 33, 43-44 (D.C. Cir.), *cert. granted*, 126 S. Ct. 622 (2005).

Confronted with the prospect in *Hamdan* of imminent Supreme Court review, and facing the likely grant of certiorari in Padilla's case, the United States changed theories once again, this time charging Padilla in an indictment filed on November 17, 2005, and unsealed on November 22. *United States v. Hassoun et al.*, No. 04-60001-CR-Cooke (S.D. Fla.), Superceding Indictment (S.D. Fla.).[3] The indictment for the first time alleges that Padilla was a member of a terrorist conspiracy aimed at Europe, not the United States. *Id.* at 4. The indictment makes no mention of a dirty bomb in the United States, no mention of the bombing of apartment buildings, and no mention of Padilla's alleged presence on the Afghan battlefield. *Id.*

The allegations against Padilla in the Superceding Indictment are essentially the same allegations made against unnamed "unindicted co-conspirator #2" in the original *Hassoun* indictment, filed on September 16, 2004. *Compare United States v. Hassoun et al.*, No. 04-60001-CR-Cooke (S.D. Fla.), *with id.* Thus, the government apparently made a strategic decision not to indict Padilla until after this Court's ruling. The *New York Times* reported additional evidence of such strategic conduct in a November article, based on information from a "former senior official." The official stated that if the government had lost in the Fourth Circuit, it would not have indicted Mr. Padilla, and instead would have sought

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[3] *Available at*: http://news.findlaw.com/hdocs/docs/padilla/uspad111705ind.pdf.

Supreme Court review. Douglas Jehl & Eric Lichtblau, *Shift on Suspect is Linked to Role of Qaeda Figures*, N.Y. Times, Nov. 24, 2005, at A1.

There is only one plausible explanation for the eleventh-hour indictment of Padilla on charges unrelated to any of the ever-shifting justifications offered for his prolonged military detention. The United States is seeking, once again, to frustrate review in the Supreme Court of its military detention policies, this time by transferring Padilla from military back to civilian custody, just as he was moved from civilian to military custody three years ago in a successful effort to prevent judicial review in the Southern District of New York.

On November 22, 2005, pursuant to Rule 36(2) and Federal Rule of Appellate Procedure 27(e), the United States sought leave to transfer Padilla from the Charleston brig to civilian custody as a consequence of the indictment. On November 30, this Court directed the government to address whether the court should vacate its prior opinion in light of Padilla's changed circumstances. On December 9, the United States revealed its true strategy by inviting immediate vacation of *Padilla V* under *United States v. Munsingwear*, 340 U.S. 36 (1950), and seeking an order directing the District Court to dismiss Padilla's habeas corpus petition as moot.

On December 16, the government filed its brief in opposition to certiorari, in which it continued its effort to avoid Supreme Court oversight. The government

advanced two main arguments: *first*, that this Court's decision is moot and *second*, that the decision is interlocutory and therefore unreviewable. *See Padilla v. Hanft*, 05-533, (U.S.) Gov't's Br. in Opp. to Cert. at 3 (filed Dec. 16, 2005). The strategy of the United States appears to be to secure the vacation of both lower court opinions in an effort to oust the Supreme Court of its certiorari jurisdiction under 28 U.S.C. § 1254(1) to review the merits of Padilla's prolonged military detention.

ARGUMENT

THE COURT SHOULD REFRAIN FROM TAKING ANY FURTHER ACTION IN THIS CASE UNTIL THE SUPREME COURT ACTS ON PADILLA'S PETITION FOR A WRIT OF CERTIORARI.

The government has argued that the Fourth Circuit should recall its mandate and vacate its opinion as moot even as, after three-and-one-half years in a military brig, Padilla's challenge to the lawfulness of his detention is finally on the doorstep of the Supreme Court. Although it is responsible for creating the circumstances that give rise to its self-serving suggestion of immediate vacatur, the government asks the Court to exercise its equitable powers at a time and in a manner that suits one party and one party only: the government. This Court should reject the government's strategic call to action at least until the Supreme Court rules on Padilla's petition for certiorari.

A. If The Court Were To Act Now, It Would Have To Determine Whether Extraordinary Circumstances Justify Recalling Its Mandate And On What Grounds To Exercise Its Equitable Powers To Vacate Its Opinion.

To decide whether to vacate its opinion, this Court will have to (1) decide whether grounds exist to recall its mandate; (2) consider whether exceptional circumstances exist to exercise its equitable power to vacate its prior opinion as moot at the suggestion of the government; and (3) address Padilla's arguments that recall of the mandate and vacatur are not appropriate now, but if ever appropriate, should be based on the government's conduct, not mootness.

As a first step in any decision on vacatur, this Court would have to decide whether it was appropriate to recall its mandate. While a circuit court has the inherent power to recall a mandate, a court should only do so in extraordinary circumstances. *See Calderon v. Thompson*, 523 U.S. 538, 549-50 (1998) (stating that "in light of the 'profound interests in repose' attaching to the mandate of a court of appeals," the recall power should only be used sparingly) (citations omitted). Such extraordinary circumstances may exist when a decision has been obtained by fraud, *Demjanjuk v. Petrovsky*, 10 F.3d 338, 356 (6th Cir. 1993), when the court has misread the record, *Patterson v. Crabb*, 904 F.2d 1179, 1180 (7th Cir. 1990), or when a subsequent change in the law called into question the court's judgment, *Zipfel v. Halliburton Co.*, 861 F.2d 565, 570 (9th Cir. 1988). Although both parties take the position that recall of the Court's mandate may be

appropriate, they disagree on the timing of such a decision and on the grounds that support recall. *Compare* Supp. Br. of Pet'r-Appellee 5-10, 11-24 (arguing that the Fourth Circuit should refrain from deciding these issues until after the Supreme Court has had an opportunity to grant or deny certiorari; if the Supreme Court does not grant certiorari, the Fourth Circuit should recall the mandate and vacate its opinion because of the government's egregious conduct); Supp. Br. for the Appellant 13-16 (stating that the government does not oppose the recall of the mandate and vacatur of its opinion before the Supreme Court rules on Padilla's request for certiorari because it is within this Court's power to do so).

If the Court finds that the circumstances here justify recalling the mandate, it then would have to decide whether there are appropriate grounds to vacate the opinion. Appellate courts are empowered by statute to vacate opinions, but the exercise of that power is equitable in nature. *See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21 (1994); 28 U.S.C. § 2106 ("[t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review"). There is no Article III requirement that an appellate court vacate a decision rendered in a live dispute that subsequently becomes moot while on appeal; rather, the decision whether to vacate is within the appellate court's equitable discretion. *See Humphreys v. Drug Enforcement Admin.*, 105 F.3d 112,

115 (3d Cir. 1996) (citing *Bancorp*, 513 U.S. at 25) (denying motion for vacatur of previously rendered decision where the mooting event occurred post-decision).[4] "There is a significant difference between a request to dismiss a case . . . for mootness prior to the time an appellate court has rendered its decision on the merits and a request made after that time . . . . [When a valid decision has already been rendered] . . . [w]hether or not to dismiss is a question that lies within [the appellate court's] discretion." *Id.* (citing *Armster v. United States Dist. Ct.*, 806 F.2d 1347, 1355 (9th Cir. 1986)).

"[T]he appellate vacatur decision under *Bancorp* is informed almost entirely, if not entirely, by the twin considerations of fault and public interest." *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 118 (4th Cir. 2000). Under *Bancorp*, "the principal consideration in determining whether the extraordinary relief of appellate vacatur is warranted is whether the party seeking relief from the judgment caused the mootness by voluntary action . . . or whether, instead,

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[4] Indeed, Chief Justice Rehnquist has argued that no Article III impediment exists even to consideration by the Supreme Court of an appeal that satisfied Article III requirements below, but became moot on appeal. *Honig v. Doe*, 484 U.S. 305, 331-32 (1988) (Rehnquist, C.J., concurring). Justice Ginsburg, writing for the Court in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000), held that in view of the "sunk costs" involved in such an appeal, to the extent an Article III constraint exists, it is far weaker than the standing requirements imposed at the commencement of the case. Justices Scalia and Thomas dissented in *Friends of the Earth* on the grounds that plaintiffs never had standing, but "did not disagree" with the majority's conclusions as to mootness. *Id.* at 210-13.

appellate review of the adverse ruling was prevented by the vagaries of circumstance or the unilateral action of the party who prevailed below." *Id.* at 117 (citing *Bancorp*, 513 U.S. at 24-26) (internal citations and quotations omitted). If the party seeking vacatur is responsible for the mootness, vacatur is only available in "exceptional circumstances"; otherwise, vacatur is available subject to "considerations of the public interest." *Id.* at 117-18 (citing *Bancorp*, 513 U.S. at 25, 29).

Bancorp and *Valero* reflect the clear policy that a party should not benefit from its strategic behavior in mooting a case absent "exceptional circumstances." Yet that is precisely what the government seeks here. The Government's calculated decision to unveil simultaneously Padilla's criminal indictment and his impending transfer from military to civilian custody have created the circumstances it now seeks to exploit. The government argues, both to this Court and to the Supreme Court, that these calculated events render Padilla's petition moot. *See* Supp. Br. for the Appellant 6-13 (arguing that the intervening indictment has mooted Padilla's habeas petition because the predicate for his habeas application is no longer present); Br. for the Resp't in Opp'n at 13-19, *Padilla v. Hanft*, No. 05-533 (U.S. Dec. 16, 2005) (similar). Presumably, if this Court vacates the underlying opinions, the government will use that decision to bolster its arguments in the Supreme Court that Padilla's petition for certiorari

should be denied as moot. Any action that this Court takes now could, thus, skew the procedural posture of this case in a way that impacts the Supreme Court's certiorari review.

If the Court decides to reach these issues now, it must also consider Padilla's position on recall of the mandate and vacatur, particularly in light of the government's conduct and the equitable nature of the power to vacate. Padilla argues that because his indictment is based on a set of allegations entirely different from the allegations of wrongful conduct the government advanced before this Court to justify his detention, the legal framework of the opinion is no longer valid and should therefore be vacated. Supp. Br. of Pet'r-Appellee 11-24. Indeed, Padilla has suggested that the government "has actively manipulated the federal courts," *id.* at 11, in a way that could require recall of the Court's mandate to protect the integrity of the Court's own processes, *id.* at 21. Thus, this Court would first need to grapple with these arguments if it were to consider whether or not to recall the mandate and vacate its opinion before the Supreme Court acts.

B. The Court Should Not And Need Not Reach These Difficult Issues Now.

It would be neither equitable nor prudent for the Court to address these weighty issues before the Supreme Court rules on Padilla's petition for certiorari. Given Padilla's request that the Court defer reconsideration of its prior opinion until the Supreme Court acts, to accept the government's suggestion to recall the

mandate and vacate that opinion immediately would be to employ the Court's equitable powers to benefit the party whose conduct has given rise to the need for recall and vacatur. Such a course of action would conflict with the principles underlying the doctrine of mootness and would be an incongruous exercise of equitable powers.

Equally important, because the Supreme Court almost certainly will address the government's suggestion of mootness and may very well address Padilla's claim on the merits, judicial economy suggests that it would be imprudent for the Court to accept the government's invitation to decide now whether to vacate its prior opinion as moot.

There is no dispute that Padilla's petition raises issues of great public importance, and there can be little doubt that the Supreme Court will seriously consider and soon decided Padilla's request for review. Even if the Supreme Court ultimately does not review the case on the merits, however, it is very likely to address the government's suggestion of mootness. When the Supreme Court agrees that a case pending on certiorari review has become moot, its practice has not been to deny the petition, but to grant the petition and then dispose of the case as moot. *See United States v. Munsingwear*, 340 U.S. 36, 39-40 (1950). *See also* 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3533.10, at 434 (2d ed. 1984) ("In the *Munsingwear* case, the Court states that

the established practice is to vacate and direct dismissal of a civil case 'which has become moot while on its way here or pending our decision on the merits.' . . . Many recent cases appear to reflect this practice, in summarily granting certiorari, vacating, and remanding to dismiss -- often with a citation to the *Munsingwear* decision."). *See generally Teel v. Khurana*, 525 U.S. 979, 979 (1998); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918, 918 (1993); *Sivley v. Soler*, 506 U.S. 969, 969 (1992); *Yellow Freight Sys., Inc. v. United States*, 506 U.S. 802, 802 (1992); *Gantt v. Skelos*, 506 U.S. 801, 801 (1992); *State Democratic Executive Comm. of Ala. v. Hawthorne*, 499 U.S. 933, 933 (1991); *Dillon v. Alleghany Corp.*, 499 U.S. 933, 933 (1991); *City Gas Co. of Fla. v. Consol. Gas Co. of Fla., Inc.*, 499 U.S. 915, 915 (1991); *Onwuasoanya v. United States*, 488 U.S. 920, 920 (1988); *Honig v. Students of Cal. Sch. for the Blind*, 471 U.S. 148, 149-50 (1985) (all vacating court of appeals opinion on grounds of mootness). Thus, if the Supreme Court finds that the case is moot, it likely will vacate the Fourth Circuit's opinion and remand the case with directions to dismiss Padilla's petition for a writ of habeas corpus. Only in the event that the Supreme Court believes the case is not moot but also determines not to grant certiorari might the petition be resolved (denied) without a ruling on mootness. The likelihood that the Supreme Court will address the mootness question strongly favors maintaining the status quo in this Court.

Moreover, even if this Court were to vacate its opinion tomorrow, Supreme Court review would not be foreclosed. Either party could petition for certiorari from a decision by this Court on the issue of mootness. *See Great W. Sugar Co. v. Nelson*, 442 U.S. 92, 93-94 (1979) (reversing the circuit court's dismissal of a case for mootness because the circuit court should have vacated the district court's opinion after finding the case moot). This further increases the odds that the Supreme Court eventually will address the issues that the government has asked the Fourth Circuit to take up now. Indeed, it is a virtual certainty that if this Court were to rule on the issues presented by the parties' supplemental briefs now, the losing party would ask the Supreme Court to reverse it. At best, this would lead to the bizarre (and preventable) procedural anomaly of two simultaneously pending petitions for certiorari addressing overlapping issues.

CONCLUSION

For the foregoing reasons, this Court should refrain from deciding the complex issues presented by the parties' supplemental briefing. In the unlikely event that the Supreme Court does not decide whether this case is moot in the course of reviewing Padilla's petition for certiorari, the Fourth Circuit will have ample opportunity to address those issues. In the interim, the Court should approve Padilla's transfer from military to civilian custody.

Dated: December 21, 2005

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-6396 **Caption:** Padilla v. Hanft

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Attorney for Assoc. of the Bar of the City of NY and Brennan Center for Justice

Dated: December 21, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December 2005, two copies of the foregoing Brief Amici Curiae of the Association of the Bar of the City of New York and the Brennan Center for Justice at NYU School of Law in support of Petitioner-Appellee Jose Padilla were served via U.S. Mail, postage prepaid, on the following:

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