No. 08-368

In the Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI, PETITIONER

v.

DANIEL SPAGONE, UNITED STATES NAVY COMMANDER, CONSOLIDATED NAVAL BRIG

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

REPLY BRIEF IN SUPPORT OF THE MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO VACATE THE JUDGMENT BELOW AND REMAND WITH DIRECTIONS TO DISMISS THE CASE AS MOOT

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Petitioner asks this Court to resolve extremely sensitive constitutional questions in order to render a hypothetical pronouncement that will not affect the legal rights of petitioner or any other person. This Court should decline that suggestion.

Petitioner does not contest that he has received all of the relief that he seeks in his habeas petition, or that upon his transfer, no individuals will remain detained as enemy combatants on United States soil.[1] In these cir-

[1] There have been a total of three individuals detained as enemy combatants on United States' soil during the entirety of the seven-plus

cumstances, petitioner's claim is entirely abstract. The hypothetical possibility of future detention on which petitioner relies is insufficient to prevent this case from being moot. The concerns underlying the mootness doctrine are at their height here, given that highly sensitive and fact-specific constitutional and national security matters are at stake. And, in any event, petitioner does not deny the strong *prudential* arguments counseling against review. See *Padilla* v. *Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in denial of certiorari). Given that petitioner will be able to challenge any future detention should the need arise, there is no need for this Court to decide the seminal constitutional questions raised here without a concrete case before it.

1. Four salient considerations, none of which petitioner answers, militate strongly against further review in this case. First, against the backdrop of a comprehensive review of all detention policies, the President has effected a definitive and fundamental change in the government's treatment of petitioner. The President's February 27, 2009, Memorandum ends the custody that petitioner is challenging and directs that, upon petitioner's transfer to the control of the Attorney General, the authority to hold petitioner in military detention "shall cease." Mot. to Dismiss App. 1a. The Memorandum also unambiguously "supersedes" the June 23, 2003, Memorandum that ordered petitioner detained as an enemy combatant.[2] *Ibid.*

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year period since the September 11, 2001 attacks: petitioner, Jose Padilla, and Yaser Hamdi.

[2] Petitioner takes no position on the government's application to this Court to acknowledge petitioner's transfer to civilian custody. Accordingly, respondent respectfully asks this Court to grant that application.

Second, petitioner will now be subject to a different regime entirely: civilian criminal proceedings. He will have the opportunity to answer the charges against him, and he will be afforded the constitutional protections to which all criminal defendants are entitled.

Third, as a result of petitioner's transfer to civilian custody, he has now received all of the relief that he seeks in his habeas petition. C.A. App. 25 (seeking order "directing Respondent to charge Petitioner with a criminal offense or to release him"). No live controversy remains in this case.

Fourth, in light of the hypothetical nature of this dispute, the Court should refrain from deciding the sensitive constitutional issues presented by petitioner's challenge. It is well-settled that constitutional questions should not "be dealt with abstractly," but should be addressed "only as they are appropriately raised upon a record before" the Court. *Local No. 8-6, Oil Workers Int'l Union* v. *Missouri*, 361 U.S. 363, 370 (1960) (*Local No. 8-6*) (quoting *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Bd.*, 315 U.S. 740, 746 (1942)).

2. a. In light of these considerations, petitioner's reliance on the "voluntary cessation" doctrine is unavailing.[3] As petitioner acknowledges, the purpose of habeas corpus is to obtain release from confinement. Pet. Br. Opp. Mot. to Dismiss 7-8 (Resp.); see *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2266-2267 (2008). Because the President has issued an order that releases petitioner from the custody he challenges as soon as the transfer can be effectuated, and because petitioner does not

[3] Petitioner does not contend that the "capable of repetition but evading review" exception prevents this case from being moot. Cf. Pet. Br. Opp. Mot. to Dismiss 7 n.5

claim that there are any ongoing collateral consequences of his detention, there is no additional relief that a court may order. See *Spencer* v. *Kemna*, 523 U.S. 1, 7-8 (1998); *Picrin-Peron* v. *Rison*, 930 F.2d 773, 775 (9th Cir. 1991) (court had no power to grant relief pursuant to habeas petition after prisoner was released); cf. *Padilla*, 547 U.S. at 1063 (Kennedy, J., concurring in denial of certiorari) ("Even if the Court were to rule in Padilla's favor, his present custody status would be unaffected.").

Indeed, the relief that petitioner now seeks has transmuted itself into something akin more to a declaratory judgment: a ruling that will "give [him] the assurance that he no longer faces the risk of renewed military detention." Resp. 7. But again, the purpose of habeas corpus is to challenge actual present custody, not to provide a vehicle for obtaining a declaration as to the legality of hypothetical future custody. And, indeed, petitioner has never sought such declaratory or injunctive relief. C.A. App. 25. Unlike an ordinary civil case, in which an injunction might be sought to prevent a defendant from resuming a challenged practice in the future, no hypothetical possibility of future detention can prevent petitioner's habeas petition from being moot. Unsurprisingly, petitioner cites no cases from this Court—and the government is aware of none—finding that a habeas case is not moot by application of the voluntary-cessation doctrine when the petitioner already has been released from custody.

b. In any event, petitioner's reliance on the voluntary-cessation doctrine reduces to the unsupported assertion that the government is simply attempting to "avoid review" (Resp. 8) while "preserv[ing] the claimed legal authority to detain [petitioner] as an enemy com-

batant" (Resp. 6) (internal quotation marks omitted). Those allegations cannot overcome the formal determination by the President that petitioner is to be *released* from custody as an enemy combatant in order to face civilian criminal charges against him.[4] See *Commercial Cable Co.* v. *Burleson*, 250 U.S. 360, 362 (1919) (finding challenge to presidential seizure "wholly moot" after President returned seized cable lines, despite asserted "fear that [the cable lines] may again be wrongfully taken"); *Padilla*, 547 U.S. at 1063 (Kennedy, J., concurring in denial of certiorari) (habeas petition rendered "hypothetical" by release from military detention).

Petitioner's assertions (Resp. 5, 6, 8) that the President's revocation of his enemy combatant detention is a temporary diversion intended to frustrate judicial review have no foundation. The government's institution of criminal charges against petitioner is the result of a grand jury finding of probable cause to believe that petitioner committed the crimes for which he has been indicted—a finding that independently supports the validity of the release and transfer. Moreover, these criminal charges are the product of a review directed by the President specifically with respect to petitioner and tremendous efforts by prosecutors and investigators. And that review of petitioner's status has occurred in the context of a comprehensive review of detention policies being undertaken by the Executive Branch. The government's decision to indict, and the President's decision to relinquish military detention so that petitioner shall face those charges, are actions entitled to a "presumption of

[4] Petitioner correctly notes that the burden of establishing mootness is on the government; but that undisputed proposition (Mot. to Dismiss 9) does not aid petitioner because the government has satisfied that burden.

regularity." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14 (1926)). Indeed, the presumption of regularity should be at its zenith when a formal determination by the President is at stake.

Other circumstances amply support the conclusion that transfer to criminal custody is a meaningful termination of the custody petitioner challenged. Jose Padilla, one of the two other enemy combatants formerly detained on United States soil, was subject to a similar presidential release and transfer—and was tried and incarcerated in the civilian system without ever facing re-designation.[5] And the government's agreement here (Mot. to Dismiss 9 n.4) that vacatur of the decision below would be appropriate conclusively demonstrates that the government is not attempting to preserve its victory while evading review. See *City News & Novelty, Inc.* v. *City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). Thus, contrary to petitioner's contention (Resp. 4), there is "actual evidence" from experience—in addition to the formal determination by the President of the United States—establishing the legitimacy of the government's action.[6] See *Preiser* v. *Newkirk*, 422 U.S. 395, 402

[5] Petitioner's assertion (Resp. 7 n.4) that the possibility of future detention will chill his criminal defense is unpersuasive. The criminal proceeding will take place under the supervision of the district court, with the full panoply of constitutional protections available to him, and petitioner will be able to immediately raise any claims relating to alleged violations of his rights.

[6] In contrast, the decisions on which petitioner relies all involved evidence that the defendant would likely resume the challenged conduct. See *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2751 (2007) (defendant ceased practice "pending the outcome of this litigation" while "vigorously defend[ing]" its legitimacy); *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167,

(1975); *County of Los Angeles* v. *Davis*, 440 U.S. 625, 632 (1979).

Moreover, there is no reasonable expectation that any hypothetical future military detention would arise in the same legal and factual context. Although petitioner suggests (Resp. 4) that the government "speculates" about the circumstances in which it might detain him in military custody in the future, the point is simply that even if petitioner were re-designated, the circumstances would almost certainly be different. In the short term, both the President's review of detention policies and petitioner's criminal proceedings will run their course and will transform the factual setting, both for the government and petitioner. And because the President's Memorandum removes the existing designation of petitioner as an enemy combatant subject to military detention, any future detention—were that hypothetical possibility ever to occur—would require new consideration under then-existing circumstances and procedure. See *Padilla*, 547 U.S. at 1063 (Kennedy, J., concurring in denial of certiorari) ("consideration of what rights [Padilla] might be able to assert" in the future would be speculative).

3. Petitioner invites the Court (Resp. 9) to issue what amounts to an advisory opinion "dispell[ing] once and for all" "the prospect of further military detention." Tellingly, however, petitioner has no answer to the powerful equitable and prudential concerns that counsel strongly against review here. Petitioner agrees (Resp.

176-178, 193 (2000) (finding issue of fact as to resumption of conduct where defendant had history of manipulative litigation practices); *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216, 222-223 (2000) (defendant granted plaintiff the relief it sought, but in a patently invalid manner that was unlikely to be upheld).

10) that this case implicates "elemental constitutional concerns," but he points to no occasion on which this Court reached out to decide a case that would not affect the petitioner *or any other individual.*[7] Indeed, the Court has repeatedly declined to do just that. See, *e.g.*, *Local No. 8-6*, 361 U.S. at 396; *Kremens* v. *Bartley*, 431 U.S. 119, 133 (1977).

Nor can petitioner explain why his challenge must proceed now, despite its hypothetical nature, when any future detention could be "addressed if the necessity arises," in a manner that ensures that "the office and purposes of the writ of habeas corpus are not compromised." *Padilla*, 547 U.S. at 1063-1064 (Kennedy, J., concurring in denial of certiorari) (describing trial-court protections and original writ of habeas corpus). Neither petitioner's preference for prospective judicial habeas review (Resp. 8 n.6), nor the length of the past military detention from which he is now to be released (Resp. 8), can displace the equitable limitations of the writ or the caution that is called for in this sensitive area where national security policy and the Constitution intersect. In similar situations, this Court has acted on its prudential concerns by dismissing the writ. See *Medellin* v. *Dretke*, 544 U.S. 660, 666-667 (2005) (in light of possible relief in state courts, "it would be unwise to reach and resolve" difficult questions).

Finally, this Court has often recognized that a court may "forgo the exercise of its habeas corpus power," *Munaf* v. *Geren*, 128 S. Ct. 2207, 2220 (2008) (quoting

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[7] Contrary to petitioner's suggestion (Resp. 8-9), *Friends of the Earth*, 528 U.S. at 191-192, and *Pacific Bell Tel. Co.* v. *Linkline Commc'ns, Inc.*, No. 07-512 (Feb. 25, 2009), slip op. 7, did not indicate that judicial resource concerns would ever cause the Court to decide constitutional questions unnecessarily.

Francis v. *Henderson*, 425 U.S. 536, 539 (1976)) when confronted with a case that is not one "in which [that power] ought to be exercised," *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830) (Marshall, C.J.); see 28 U.S.C. 2241(a) (providing that writ "*may* be granted" (emphasis added)). The Court has therefore refrained from exercising its habeas jurisdiction where prudential concerns—such as interference with foreign affairs or national security—counsel against entertaining the writ. See *Munaf*, 128 S. Ct. at 2221. Here, even if petitioner's case were not moot for Article III purposes, compelling prudential concerns militate against exercising habeas jurisdiction to decide complex constitutional questions in a hypothetical posture. This Court should therefore dismiss the writ of certiorari in its equitable discretion (or vacate the judgment and remand with directions to dismiss, see 28 U.S.C. 2106) even if it does not conclude that the case is moot.

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The writ of certiorari should be dismissed. In the alternative, the judgment below should be vacated and the case remanded with directions to dismiss the habeas corpus action as moot, or in the exercise of equitable discretion.

Respectfully submitted.

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