

ORAL ARGUMENT SCHEDULED ON APRIL 27, 2018

Nos. 18-5032, 18-5110

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

JOHN DOE,

Petitioner-Appellee,

v.

JAMES MATTIS, in his official capacity as SECRETARY OF DEFENSE,

Respondent-Appellant.

On Appeal from the United States District Court
for the District of Columbia

REDACTED SUPPLEMENTAL BRIEF FOR APPELLANT

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GLOSSARY

ISIL

Islamic State of Iraq and the Levant

INTRODUCTION

Petitioner is a dual citizen of the United States and Saudi Arabia who traveled to territory in Syria controlled by the Islamic State of Iraq and the Levant (“ISIL”), where he was ultimately captured by a foreign military on a battlefield before being turned over to U.S. forces in the region. App. 201, 210-11. The United States is currently holding Petitioner in military custody in Iraq and now seeks to relinquish custody of him to [REDACTED]

[REDACTED]

[REDACTED] On April 19, 2018, shortly before 8:00 p.m., the district court issued a preliminary injunction enjoining that transfer. That injunction is interfering with the State Department’s ability to conduct international diplomacy and the U.S. military’s ability to relinquish custody of a detainee whom it no longer wishes to detain. It was entered in error and should be vacated.

As detailed in the Government’s prior briefing and below, Petitioner has not carried his burden of showing entitlement to a preliminary injunction enjoining his transfer. *First*, Petitioner is not likely to succeed in his effort to block the Government from relinquishing custody of him to [REDACTED]. The authorities Petitioner has invoked are either facially inapposite or directly contrary to his position. *Second*, Petitioner has not shown that he will suffer irreparable harm from being transferred [REDACTED]. The district court held that the proposed transfer will

irreparably harm Petitioner by divesting him of “his constitutional right to contest his detention in a U.S. Court,” ECF 87 at 5, but that right exists only insofar as Petitioner is challenging detention by *U.S.* forces. Petitioner has no right to contest detention by a foreign sovereign in the U.S. courts, as he recognizes when he concedes that he would have no judicial recourse if [REDACTED], or some other government detained him following his release from U.S. custody in Iraq. *Finally*, the balance of the equities and public interest favor the Government, given the paramount importance of foreign relations with a critical partner and the importance of giving the military broad discretion over battlefield operations, particularly during ongoing hostilities in an active theater of combat.

For all these reasons, the Court should vacate the preliminary injunction. And due to the immediate, ongoing harms that injunction is causing to the United States’ foreign relations, as well as the injunction’s ongoing interference in military operations, the Government respectfully requests that this Court dissolve the preliminary injunction immediately.

ARGUMENT

I. PETITIONER HAS NOT SHOWN HE IS LIKELY TO SUCCEED ON THE MERITS.

A. The Government is entitled to deference on its factual assessment that the [REDACTED] has a legitimate interest in taking custody of Petitioner. *See, e.g., Munaf v. Geren*, 553 U.S. 674, 700-01 (2008) (“Even with respect to claims that

detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments.”); *Kiyemba v. Obama*, 561 F.3d 509, 515 (D.C. Cir. 2009) (“Judicial inquiry into a recipient country’s basis or procedures for prosecuting or detaining a transferee from Guantanamo would implicate not only norms of international comity but also the same separation of powers principles that preclude the courts from second-guessing the Executive’s assessment of the likelihood a detainee will be tortured by a foreign sovereign.”). Particularly when viewed through that deferential lens, it is clear that [REDACTED] has a sound basis for taking custody of Petitioner.

As the Declaration of [REDACTED], attached to the Notice filed in a letter to this Court on April 17, 2018, explains, the [REDACTED]

[REDACTED],” particularly [REDACTED]

[REDACTED] ¶¶ 2, 3 [REDACTED] decision to take custody of Petitioner “reflects its sovereign interest in him [REDACTED],” its “broader interest in [REDACTED]

[REDACTED],” and its determination that he “is an appropriate candidate [REDACTED]

[REDACTED] *Id.* ¶ 3. As [REDACTED] declaration explains in detail, the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] basis for taking custody of Petitioner is closely analogous to Iraq's basis for taking custody of the petitioners in *Munaf*. In *Munaf*, Iraq sought to detain and prosecute two U.S. citizens accused of committing crimes within its borders; here, [REDACTED] [REDACTED] who is accused of joining or substantially supporting an international terrorist organization that has committed numerous crimes against the people of [REDACTED]. Petitioner's alleged activities with ISIL implicate [REDACTED] national security, law enforcement, international relations, and foreign policy interests. As with Iraq in *Munaf*, [REDACTED] [REDACTED] has a direct stake in what happens to Petitioner.

And under international law, [REDACTED] jurisdiction over Petitioner is clear. Under customary international law, a sovereign has authority to exercise "prescriptive jurisdiction if there is a genuine connection between the subject of the regulation and the state seeking to regulate." Restatement (Fourth) of Foreign Relations Law of the United States—Jurisdiction § 211 (Am. Law Inst. Draft No. 2, 2016). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] who traveled abroad, was captured abroad, is being held abroad for conduct engaged in abroad, and whom the Government now seeks to transfer to [REDACTED] [REDACTED]—thus present a transfer that is as well grounded in established international legal principles as were the transfers in *Munaf*.

The fact that [REDACTED] [REDACTED] does not change the analysis. What matters is that [REDACTED] has legitimate legal authority over Petitioner and seeks to assert that authority here pursuant to its own laws. [REDACTED] subsequent decision about what to do with Petitioner once it has him in custody— [REDACTED] or simply set him free—does not alter its authority to take custody of Petitioner in the first place.

B. Petitioner’s primary counter-argument is that the Supreme Court’s decision in *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8 (1936), and the rules governing domestic extraditions apply equally to military transfers in overseas theaters of combat. But the petitioners in *Munaf* made the exact same argument and the Supreme Court unanimously rejected it. That was because, the Court explained, an overseas military transfer does not present “an extradition case.” 553 U.S. at 704. There is a fundamental difference between a battlefield detainee captured abroad and “a ‘fugitive criminal’ ... found within the United States.” *Id.* (quotation marks omitted).

Petitioner and the district court have cited two other decisions in support of the preliminary injunction against transfer, but both underscore the lack of legal basis for it. *First*, the district court found that *Wilson v. Girard*, 354 U.S. 524 (1957), involved “positive legal authority to transfer the detainee[],” ECF 87 at 3 n.2, but that is mistaken. The petitioner in *Girard* was a serviceman stationed in Japan who was accused of causing the death of a Japanese national. 354 U.S. at 525-26. The U.S. military “notified Japan that Girard would be delivered to the Japanese authorities for trial” and the petitioner filed a habeas petition in the United States seeking to block his transfer into Japanese custody. *Id.* at 526. While it is true that there was a treaty between Japan and the United States governing the presence of servicemen stationed in Japan, that treaty did not confer legal authority on the U.S. military to transfer U.S. citizens. To the contrary, the treaty gave the United States authority under certain circumstances to *refuse* transfers of U.S. citizens despite Japan’s territorial jurisdiction; it nowhere conferred additional legal authority to *effectuate* transfers. In other words, Japan agreed in the treaty to surrender some of *its* sovereign authority to the U.S. military by giving the military “the primary right to exercise jurisdiction over members of the United States armed forces,” with respect to certain offenses, while providing that the United States could waive that jurisdiction. *Id.* at 527-28. The entire premise of this treaty provision was that no special authority was necessary for U.S. forces to relinquish an individual held in Japan to the Japanese government, given Japan’s territorial jurisdiction within its borders.

Munaf explained as much when the petitioners in that case made the same argument about *Girard* that Petitioner has revived here: “Even though Japan had ceded some of *its* jurisdiction to the United States pursuant to a bilateral Status of Forces Agreement, the United States could *waive* that jurisdiction—as it had done in *Girard*’s case—and the habeas court was without authority to enjoin *Girard*’s transfer to the Japanese authorities.” 553 U.S. at 696 (emphases added). In vacating an injunction against transfer similar to the injunction here, *Girard* never suggested that the Government needed special authority to relinquish an individual held abroad to the custody of another country with lawful jurisdiction over that individual. *See Girard*, 354 U.S. at 530 (finding “no constitutional or statutory barrier” to the transfer and holding that absent “such encroachments, the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative Branches”). The same is true here, where the Government seeks to relinquish custody of a person captured and detained abroad to a country [REDACTED]

Second, the district court found that the Ninth Circuit’s decision in *In re Territo*, 156 F.2d 142 (9th Cir. 1946), turned on “positive legal authority” in the “Geneva Convention,” ECF 87 at 3 n.2, but that is likewise mistaken. The Ninth Circuit’s decision did not pass on the propriety of transferring the petitioner in that case and only referenced the Geneva Convention in reciting the district court’s finding that, “under the Geneva Convention, it is the obligation of the United States through the American military authorities to repatriate petitioner to Italy.” *Territo*, 156 F.2d at 144.

The Court nowhere suggested that the Geneva Convention supplied positive legal authority without which a transfer of that petitioner would have been unlawful. And on the issue of whether U.S. citizenship imposes special requirements on the Executive in this context, the court explained it had “reviewed the authorities with care and ... found none supporting the contention of petitioner that citizenship in the country of either army in collision necessarily affects the status of one captured on the field of battle.” *Id.* at 145. Under that reasoning, Petitioner’s status as a U.S. citizen imposes no special constraints on the U.S. military’s authority to transfer him.

C. At bottom, accepting Petitioner’s claim would lead to an extraordinary degree of judicial involvement in military operations overseas. Petitioner does not dispute that the U.S. military is engaged in active hostilities in a volatile region, or that he came into U.S. custody as a result of his choice to travel to an overseas battlefield. U.S. courts have not historically policed—via habeas proceedings or otherwise—day-to-day military operations in that context. That includes transfers of battlefield detainees, which “traditionally have occurred without judicial oversight.” *Kiyemba*, 561 F.3d at 515 (Kavanaugh, J. concurring).

The district court’s reasoning would, if adopted, essentially require the Executive to prevail in Petitioner’s habeas proceeding before it is permitted to relinquish custody of him to another sovereign despite that other sovereign’s clear and legitimate basis for taking custody of him. That is contrary not only to *Munaf*, but also the Supreme Court’s plurality opinion in *Hamdi v. Rumsfeld*. That opinion held “that initial captures on the

battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized.” 542 U.S. 507, 534 (2004). Here, the Executive has made precisely the opposite determination—seeking to *end* its custody of Petitioner and relinquish him to [REDACTED]

In this sort of context—that is, contexts other than long-term U.S. detention—the *Hamdi* plurality was careful to avoid second-guessing “the judgments of military authorities in matters relating to the actual prosecution of a war.” 542 U.S. at 535. The importance of deference to “military authorities” in this sensitive sphere is why *Hamdi* expressly exempted short-term battlefield detention from judicial oversight, and is further why *Munaf* unanimously rejected the claim that the extradition apparatus applies to every wartime military transfer of a U.S. citizen captured on an overseas battlefield. This Court should exercise similar caution here and reject Petitioner’s effort to use his habeas petition challenging continued U.S. custody as a vehicle for prolonging that custody when the Government seeks to terminate it by relinquishing Petitioner to [REDACTED]

II. PETITIONER HAS NOT SHOWN IRREPARABLE INJURY ABSENT THE DISTRICT COURT’S INJUNCTION.

Petitioner has also failed to carry his burden of establishing irreparable injury absent the district court’s preliminary injunction. The district court found irreparable harm because, absent an injunction, “Petitioner will be turned over to a foreign

government where he will be detained, and will lose his constitutional right to contest his detention in a U.S. court.” ECF 87 at 5. But Petitioner’s “constitutional right to contest his detention in a U.S. court” is not a vehicle for contesting his detention as against all custodians; it is, rather, a “right to contest his detention” *by the United States*. Should the Government’s planned transfer take place, the United States will be terminating *its* detention of Petitioner. Petitioner would not suffer irreparable harm from obtaining the very relief his habeas action seeks to obtain.

It is true that transferring Petitioner involves turning him “over to a foreign government where he will be detained,” ECF 87 at 5, but Petitioner agrees that releasing him in Iraq would provide him complete relief, even though his detention by another sovereign is entirely possible following such release. Petitioner concedes that the Government has no obligation to transport him back to the United States or to shelter him from apprehension by the Iraqi government (or any other government) if he were released in Iraq, as he has requested. Pet’r. Ans. Br. at 33-34; *see also Munaf*, 553 U.S. at 705 (“Habeas corpus does not require the United States to shelter such fugitives from the criminal justice system of the sovereign with authority to prosecute them.”). Petitioner has further conceded that the Government would need to inform Iraq of the time and location of his release should it release him there. Yet providing that notice would enable the Iraqi government (or some other government acting with the Iraqi government’s consent) to detain Petitioner immediately and to hold him in custody for as long as Iraqi law (or that other country’s law) permits.

There is thus little practical difference from the perspective of Petitioner's habeas petition between the "release" that Petitioner seeks and the "transfer" that the Government proposes to undertake. Both involve termination of U.S. custody and both accordingly extinguish Petitioner's petition by providing him with all the relief habeas can provide. And in light of that practical equivalence, it is apparent that Petitioner would not suffer irreparable harm cognizable in habeas should the U.S. military relinquish custody of him to [REDACTED]. For that reason, too, the district court's injunction should be vacated.

III. THE DISTRICT COURT'S INJUNCTION IMPOSES SUBSTANTIAL HARM ON THE GOVERNMENT.

The district court's injunction against the agreed-upon transfer to [REDACTED] [REDACTED] is imposing immediate and significant harms on the Government. As the State Department's declaration explains, a "preliminary injunction prohibiting or delaying [Petitioner's] transfer would undermine the United States' credibility with an important foreign partner," would undermine the State Department's vital "ability to make reliable representations and commitments when engaging directly with [REDACTED] [REDACTED] on a matter of such sensitivity," and could even "adversely affect [REDACTED] [REDACTED] willingness to engage with the United States on some future detainee transfers." [REDACTED] 8. These harms are real and are compounded each day that the district court's injunction remains in place.

The district court held that these harms did not outweigh those facing Petitioner because the Government “was aware of the possibility that Petitioner’s transfer could be delayed or prohibited” and “informed the receiving country of that possibility before the receiving country agreed to accept Petitioner.” ECF 87 at 6. But the fact that the Government was able to [REDACTED]

[REDACTED] ¶ 2—does not make the harms the injunction is causing any less significant. As the State Department has explained, “[w]hile [REDACTED] understands that delays may occur, it is vital diplomatically that the United States is able to follow through promptly on its commitment [REDACTED].” *Id.* ¶ 9.

The preliminary injunction risks damaging the Government’s “close, strategic bilateral ties” with [REDACTED] ¶ 10, and is interfering with military operations by preventing the military from relinquishing custody of a detainee whom it no longer wishes to detain. That injunction thus imposes greater harm on the Government than lifting it would impose on Petitioner. For that reason, too, it should be vacated.

IV. THE DISTRICT COURT’S INJUNCTION IS CONTRARY TO THE PUBLIC INTEREST.

Finally, the public interest favors allowing the Executive Branch to act without undue judicial intrusion into its constitutional sphere of responsibility. *See Munaf*, 553

U.S. at 699-700, 702-03; *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (“[I]t is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch.”). The district court’s contrary determination was based on its concern about preserving “[j]udicial authority to review habeas corpus petitions.” ECF 87 at 6. But the Government’s planned transfer does not in any way undermine judicial authority to review habeas petitions. The reason such judicial authority exists is to provide “a remedy for unlawful executive detention,” with the “typical remedy” being “release.” *Munaf*, 553 U.S. at 693. Transferring Petitioner to [REDACTED] will terminate the “executive detention” he filed his habeas petition to challenge. Transfer obviates the need for judicial review; it does not undermine its importance.

Further, petitioner came into U.S. custody after identifying himself as a U.S. citizen to the foreign military that captured him in Syria, with U.S. forces subsequently agreeing to take custody of him. App. 192. The public interest favors giving U.S. military forces broad discretion in this context, in which battlefield commanders are making decisions in the midst of active hostilities about whether to take custody of an individual captured on the battlefield, where to hold that individual after taking custody, and about the most appropriate disposition for that individual. And the public interest weighs heavily against putting the U.S. military to the stark choice of either (1) outright releasing any dual-U.S. citizen captured on the battlefield, or (2) litigating an entire

round of habeas review before it has the ability to relinquish custody of that detainee to another sovereign with a clear basis in international law for taking custody of him.

Finally, transferring Petitioner would free the U.S. military from the burden of detaining someone in an active theater of combat whom it no longer wishes to detain and would honor an arrangement made [REDACTED]

[REDACTED]. The public interest weighs in favor of our Government speaking with one voice in matters of military operations and foreign affairs. Absent a significant harm on the other side of the balance—and Petitioner has not shown one for the reasons discussed—this public interest weighs heavily against the district court’s injunction. For that reason, too, it should be vacated.

CONCLUSION

This Court should vacate the preliminary injunction. And due to the immediate, ongoing harms that injunction is causing to the United States’ foreign relations, as well as the injunction’s ongoing interference in military operations, the Government respectfully requests that this Court dissolve the preliminary injunction immediately.

Respectfully submitted,

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April 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the Court's Order on supplemental briefing because it is under 15 pages in length. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ James M. Burnham

James M. Burnham

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2018, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by causing an original and six copies to be sent to the Clerk's office via hand delivery. I also served via FedEx all parties entitled to receive the material under seal, *see* Circuit Rule 47.1(d)(2).

s/ James M. Burnham

James M. Burnham