United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 5, 2018 Decided May 7, 2018
Reargued April 27, 2018

No. 18-5032

JOHN DOE,
APPELLEE

v.

JAMES MATTIS, IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE,
APPELLANT

Consolidated with 18-5110

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-02069)

James M. Burnham, Attorney, U.S. Department of Justice, argued the cause for appellant. With him on the briefs were *Jessie K. Liu*, U.S. Attorney, *Matthew M. Collette* and *Sonia*

Before: HENDERSON, SRINIVASAN, and WILKINS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SRINIVASAN, with whom *Circuit Judge* WILKINS joins.

Dissenting opinion filed by *Circuit Judge* HENDERSON.

SRINIVASAN, *Circuit Judge*: This case involves a United States citizen who has been detained by the United States military in Iraq for several months. He seeks release from military custody in a habeas corpus action brought under the pseudonym John Doe. Doe is a citizen not only of the United States but also of Saudi Arabia.

Doe was initially captured in Syrian territory controlled by the Islamic State of Iraq and the Levant (ISIL). The Department of Defense determined that he is an enemy combatant for ISIL, and the Department has been detaining him at a military facility in Iraq. Doe's habeas petition contends that he must be released because, he claims, ISIL combatants do not come within any existing authorization for use of military force. He also contends that he is not in fact an ISIL combatant. At this stage of the proceedings, no court has addressed the merits of those claims.

In the first order, the court required the government to give 72 hours' notice before transferring Doe to the custody of any other country. The notice period was meant to afford the court an opportunity to review the circumstances of a planned transfer before it takes place. The government seeks to set aside any obligation to give advance notice with regard to two specific countries. We will refer to those countries as Country A and Country B because of the government's desire to withhold public release of their identities due to apparent sensitivities associated with ongoing or future diplomatic discussions.

The district court's second order came about after the government reached an agreement with Country B to transfer Doe to its custody. The government gave the district court the requisite notice of its intent to transfer Doe to that country. The court then enjoined the government from effecting the transfer. In the court's view, the government had failed to demonstrate the necessary legal authority (specifically, a statute or treaty) for the transfer.

We sustain both of the district court's orders. In claiming the authority to forcibly transfer an American citizen held abroad to the custody r12c 0.25 Tw -1.71 -1.15 Td [(r)]To4 (us)-1 d a. 70 Tc 0 Tw

determination that he is an enemy combatant fighting on behalf of that enemy. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 517, 533 (2004) (plurality opinion); *Omar v. McHugh*, 646 F.3d 13, 24 (D.C. Cir. 2011). Neither the legal inquiry nor the factual inquiry has taken place in this case. In the absence of those inquiries, we see no basis to set aside the district court's injunction barring the forcible transfer of Doe to Country B.

What about the district court's order requiring the government to give 72 hours' notice before transferring Doe to either Country A or Country B? Because the government gave notice of the proposed transfer to Country B, the government's appeal of the notice order as it applies to Country B is now moot. With regard to Country A, the government has yet to come forward with any information about the circumstances of a prospective transfer to that country, including the specific purpose or interest that will give rise to the transfer. The government instead seeks ex-ante, carte-blanche authorization to transfer Doe to Country A, regardless of the particular circumstances or reasons, and without any opportunity for judicial review. We conclude that the district court did not err in denying the government that sort of blanket preapproval.

While we sustain the district court's orders, we do so respectful of—and with appreciation for—the considerable deference owed to the Executive's judgments in the prosecution of a war. That latitude of course extends to military decisions about what to do with enemy combatants captured overseas in a zone of active hostilities. Virtually all such decisions will be unaffected by our decision today.

But when an alleged enemy combatant—even one seized on a foreign battlefield—is an American citizen, things are different. *See Hamdi*, 542 U.S. at 532-33, 535-37 (plurality); *id.* at 558-59 (Scalia, J., dissenting). In that "surely . . . rare"

The court determined that Doe had proven a likelihood of success because the government had failed to demonstrate that it had the requisite legal authority to transfer him to another country. The court further concluded that Doe had shown

who averred that Country B had expressed a "strong interest" in taking custody of Doe and continuing to detain him in some form. *Doe v. Mattis*, No. 17-cv-2069, Notice attach. 1 at 4-5 (D.D.C. Apr. 17, 2018), ECF No. 80. Doe moved for a preliminary injunction or temporary restraining order to block the proposed transfer.

On April 19, 2018, the district court granted the preliminary injunction, barring the government "from transferring [Doe] from U.S. custody." *Doe v. Mattis*, No. 17-cv-2069, Prelim. Inj. (D.D.C. Apr. 19, 2018), ECF No. 88. While the order could be read to bhe Divnui-1 (es (a)4 pos)-1 (e)4tF1Cthe

II.

The government appeals two orders granting injunctive relief to Doe: the order requiring the government to give 72 hours' notice before transferring Doe to Country A or B (the only countries as to which the government appeals the notice obligation); and the order prohibiting the government from transferring Doe to Country B. While both orders are denominated preliminary injunctions, the latter appears to function as a permanent injunction.

A district court facing a request for a preliminary injunction must balance four factors: (i) whether the party seeking the injunction is likely to succeed on the me-8 ( )]TJ 0s t (e)4 r.15 Td 4o sueliminc

1.

In assessing whether Doe has succeeded on the merits, the relevant question is whether, in the circumstances of this case, involuntarily transferring Doe to Country B would be unlawful. We hold that it would be.

The government makes two species of arguments as to why the Executive has the power to transfer Doe to Country B without his consent. The first rationale has no necessary connection to Doe's designation as an enemy combatant, or even to the wartime context of this case. It instead relies on a general understanding that, when a foreign country wants to prosecute an American citizen already in its territory for a crime committed within its borders, the Executive can relinquish him to that country's custody for criminal proceedings. The government's second rationale, unlike the first, hinges on Doe's status as an enemy combatant. That second strand of the argument relies on the military's asserted authority under the law of war to transfer an enemy combatant (including an American citizen) to an allied country in the conflict.

Neither of the government's rationales, we conclude, supports the involuntary transfer of Doe to Country B, at least as things currently stand. In reaching that conclusion, we rely on the same undisputed facts as our dissenting colleague: that Doe is an American citizen, that he is in U.S. custody in Iraq, that the government believes he is an ISIL combatant, and that he objects to the government's forcible transfer of him to the custody of Country B. Dissent, at 3-4, 27. While our colleague would conclude that the Executive can forcibly transfer Doe to Country B in those circumstances, we respectfully disagree for the reasons explained in this opinion.

the Due Process Clause. *Id.* at 692. The Court rejected their arguments and allowed the military to relinquish them to Iraqi custody. *Id.* at 705.

Relying on *Wilson*, the Court emphasized that a country has a "sovereign right to 'punish offenses against its laws committed within its borders.'" *Id.* at 692 (quoting *Wilson*, 354 U.S. at 529). That sovereign entitlement, the Court observed, was one that the Court had long and repeatedly recognized. *Id.* at 694-95 (citing, *e.g.*, *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *Neely v. Henkel*, 180 U.S. 109 (1901); *Kinsella v. Krueger*, 351 U.S. 470 (1956)). An order prohibiting the Executive from transferring the two petitioners to Iraqi authorities would infringe that time-honored right. 553 U.S. at 697-98. The Executive thus could transfer the petitioners to Iraqi custody without violating the Due Process Clause. *Id.* at 699-70.

In both *Munaf* and *Wilson*, the authority of the Executive to transfer U.S. citizens had no roots in any military authority over enemy combatants under the law of war. *Wilson*, after all, concerned "the peacetime actions of a [U.S.] serviceman," not the wartime actions of an enemy combatant. *Id.* at 699. In *Munaf*, meanwhile, it is true that the alleged crimes involved insurgent acts committed in a time of war, for which both suspects had been designated "security internees" and one had been deemed an enemy combatant. *See id.* at 681-84, 705. But the Court's recognition of the Executive's power to transfer the two men did not depend on those designations or on the nature of the alleged crimes. That is evident from the Court's heavy reliance on *Wilson*, a case having nothing to do with military authority in wartime.

In accordance with that understanding, the Court in *Munaf* observed that "[t]hose who commit crimes within a sovereign's

Relying on *Valentine*, Doe contends that the Executive

In arguing that it can forcibly transfer Doe, the government reads *Valentine*, *Munaf*, and *Wilson* to yield the following set of rules. Under *Valentine*, an American citizen in the United States cannot be forcibly transferred to a foreign country absent a statute or treaty (such as an extradition treaty) authorizing the transfer. But under *Munaf* and *Wilson*, the government says, once a citizen voluntarily leaves the United States, the Executive can pick her up and deliver her to any foreign country that has a "legitimate sovereign interest" in her. No. 18-5032, Gov't Opening Br. 27; No. 18-5032, Gov't Reply Br. 15; No. 18-5110, Gov't Supp. Br. 5; No. 18-5110, Gov't Second Supp. Br. 3. And a country's interest in a person qualifies as "legitimate," the government submits, if, under international law, the country would have "prescriptive jurisdiction" over her—that is, the power to prescribe legal rules regulating her pertinent conduct. No. 18-5032, Gov't Opening Br. 23 (citing Restatement (Fourth) of the Foreign Relations Law of the United States § 211 (Am. Law Inst. Draft No. 2, 2016)); *see also* No. 18-5032, Gov't Reply Br. 15; No. 18-5110, Gov't Supp. Br. 4-5; No. 18-5110, Gov't Second Supp. Br. 4.

We cannot accept the government's submission. *Munaf* and *Wilson* do not suggest a general prerogative on the part of the Executive to seize any American citizen voluntarily traveling abroad for forcible transfer to any country with some legitimate sovereign interest in her. Consider again the facts of *Valentine*. There was no doubt of the legitimacy of France's interest in the U.S.-citizen petitioners in that case: they had

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Under the government's theory, though, everything would have changed the moment one of the *Valentine* petitioners voluntarily ventured outside the United States—say, on a family vacation to the Canadian side of Niagara Falls. At that

reason, then, to proceed with considerable caution before recognizing such a power as a unilateral (although apparently never-before-exercised) prerogative of the Executive.

The implications of the government's reading of *Munaf* and *Wilson* amplify the reasons to reject it. Consider, for example, a U.S. citizen who becomes a journalist, travels to Thailand for a multi-year assignment, and, on returning to the United States, writes articles critical of the Thai King that are alleged to play some role in sparking demonstrations in Thailand. Thailand might well argue that she falls within its prescriptive jurisdiction. And its arguments would have force if, for instance, she underpaid her Thai taxes while there, or her articles were deemed to have had a "substantial effect" within Thailand. *See* Restatement (Fourth) of the Foreign Relations Law of the United States §§ 211 & cmt. f, 213 (Draft No. 2, 2016).

If the government were right about *Munaf* and *Wilson*, then the moment the journalist stepped outside the United States, (ni)-2 (t)-2(s)-5 eesive je(d ha)4 (ve)4 ( )]TJ -0.00 Tc -0.002 Tw [(f)-5 upoel

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Royalty, BBC.com (Oct. 6, 2017) (discussing recent lèse-majesté prosecutions).

We cannot accept that, if Thailand were to accuse the American journalist of underpaying taxes or penning articles critical of the King, the Executive would have unilateral power to apprehend and forcibly (and irrevocably) transfer her to Thai custody whenever she ventures outside the United States. Indeed, the implications of the government's argument are more far reaching still. Imagine that the journalist is a dual citizen of the United States and Thailand. If so, Thailand would have prescriptive jurisdiction over her regardless of any violation of Thai law, because, like all sovereigns, it has an "interest in retaining control over its nationals and residents, wherever they may be." Restatement (Fourth) of the Foreign Relations Law of the United States § 214 cmt. a (Draft No. 2, 2016). Under the government's theory, then, the Executive could forcibly transfer the journalist to Thai custody for *any* reason Thailand saw fit, including, say, that she would be a useful witness in a Thai trial. *Cf. Blackmer v. United States*, 284 U.S. 421, 436-37 (1932).

Thailand's mere desire to have one of its citizens back cannot give the Executive the unilateral authority to forcibly transfer an American there, just because she steps outside the United States. After all, a dual citizen "is entitled to all the rights and privileges of [U.S.] citizenship." *Perkins v. Elg*, 307 U.S. 325, 349 (1939). That includes the "right to return to and remain" in the United States after having left. *Mandoli*, 344 U.S. at 139.

To be sure, if Thailand asked the United States for help in delivering the journalist to its custody (Thailand presumably would be reluctant to seize a U.S. citizen on its own), the Executive could (and presumably would) decline to do so as a

matter of discretion. But the question for us is an antecedent one: whether, in the first place, the Executive would have the unilateral power to forcibly transfer an American citizen to another country merely because she travels abroad. We think the answer is no.

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The government emphasizes that, on the facts of this case, Doe is not just any citizen who traveled someplace abroad and is suspected of conduct like tax evasion. Rather, he went to an active battlefield; and Country B, a "coalition partner[] in an ongoing armed conflict" against ISIL, has, the government says, "an obvious and legitimate interest in taking custody of" him. No. 18-5032, Gov't Reply Br. 6.

Those circumstances, however, do not give the Executive transfer power under *Munaf* and *Wilson* that it would otherwise lack. *Munaf* and *Wilson*, as explained, do not rest on the military's authority under the law of war. And we have declined to read those decisions tncnu4 (c)4 Tf 0.00(e)4 (s)-1 (t)-2 (on t)-1.9 (. A)-

b.

The government, as noted, has said in this case that its "determination that [Doe] is an enemy combatant . . . is not the basis for the U.S. military's authority to transfer" him to Country B. No. 18-5032, Gov't Reply Br. 8. At the same time, though, the government has also said that "battlefield detainees" like Doe are "lawfully transferrable under the laws of war." *Id.* at 11; *see also id.* at 13 ("[P]etitioner's status as a U.S. citizen imposes no special constraints on the U.S. military's ability to transfer him consistent with the laws of war."); No. 18-5110, Gov't Second Supp. Br. 3 (arguing that transfer is permissible, in part because of "the Department of Defense's good-faith determination . . . that [Doe] is an enemy combatant").

We now take up the latter facet of the government's claim of authority to transfer Doe: that it can do so pursuant to the Executive's wartime powers under the law of war. We conclude that the Executive does generally possess authority under the law of war to transfer an enemy combatant to the custody of an ally in the conflict. But that authority, we hold, could potentially support a transfer of Doe only if the government (i) demonstrates that it is legally authorized to use military force against ISIL, and (ii) affords Doe an adequate opportunity to challenge the Executive's factual determination that he is an ISIL combatant.

i. The starting point for our analysis is the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). (Because the plurality in *Hamdi* issued the controlling opinion, which our court has treated as binding, *see Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010), we will treat the plurality opinion as that of the Court for purposes of this opinion.) There, the Court spoke directly to the military's authority over

an American citizen under the law of war. The case involved Yaser Esam Hamdi, who, like Doe, was captured on a foreign battlefield, where the government alleged he had fought with the Taliban against the United States. *Id.* at 510, 512-13. Hamdi, again like Doe, was a dual citizen of the United States and Saudi Arabia. *See Man Held as Enemy Combatant to Be Freed Soon*, CNN.com (Sept. 22, 2004.)

The military initially detained Hamdi in Afghanistan and at Guantanamo Bay, and then, upon learning he was an American citizen, brought him to the United States for continued detention. 542 U.S. at 510. Hamdi then filed a habeas petition seeking release from his military custody, alleging that his dete

After *Hamdi*, we know that if there is legal authority to exercise military force against an enemy, that authority encompasses detention of an enemy combatant for the duration of the conflict. And we further know that the detention authority more generally extends to an enemy combatant who is an American citizen. But a citizen, *Hamdi* instructs, must have a meaningful opportunity to challenge the factual basis for his designation as an enemy combatant in accordance with the procedures set forth by the Court.

ii. Whereas *Hamdi* addressed whether the Executive can detain an alleged enemy combatant who is a citizen, this case (at least at this stage) instead involves whether the Executive can transfer him to the custody of another country. That naturally raises two sets of questions. First, is the Executive's transfer authority (this case) on par with its detention authority (*Hamdi*) as a fundamental incident of waging war? Second, if so, is the Executive's exercise of transfer authority against a U.S. citizen subject to the

affirmed that the AUMF grants detention authority pending decision of an enemy combatant's "disposition under the law

Even if transfers of alien combatants have been a regular feature of warfare, does the traditional authority to transfer enemy combatants extend to a U.S. citizen? On this score, the

Italian citizen who was a member of the Italian forces in World War II. *Id.* at 524 (discussing *In re Territo*, 156 F.2d 142 (9th Cir. 1946)); *see also* Ronald D. Rotunda, *The Detainee Cases of 2004 and 2006 and Their Aftermath*, 57 Syracuse L. Rev. 1, 13 n.73 (discussing Territo's dual citizenship). That decision also contemplated that he would be sent from the United States back to Italy at the war's end. *See* 156 F.2d at 144. True, that contemplated transfer would have been a "repatriation" to the enemy state, which, under the law of war, is distinct from a transfer to an ally (and which, presumably, would result in release rather than continued detention). *Compare* Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 12, Aug. 12, 1949, 6 U.S.T. 3316, *with id.* at art. 118. And Territo's repatriation might well have been voluntary, especially given his family and other connections to Italy (he sought release from his detention in the U.S, and the opinion gives no indication that he wanted to stay here if relm a

prerogative to dispose of the liberty of the individual" by way of extradition); *Landon v. Plasencia*, 459 U.S. 21, 36 (1982). *Cf. Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (deportation from the United States can be viewed a more "severe penalty" for criminal misconduct than imprisonment in the United States).

Given that transfers involve fundamental liberty interests, we see no basis for concluding that, for the transfer of a citizen (as opposed to the detention of a citizen), the Executive need not satisfy the *Hamdi* conditions. The 2012 NDAA is instructive in this regard. There, Congress set out four types of "disposition[s] under the law of war" that the Executive could choose for an enemy combatant, including "[d]etention under the law of war without trial until the end of the hostilities," and "[t]ransfer to the custody or control of the person's country of origin [or] any other foreign country." Pub. L. No. 112-81 § 1021(c)(1), (4). The statutory structure indicates that Congress saw transfer and detention as two options falling on largely the same plane—not as one option (transfer) broadly available in circumstances in which the other (detention) would not be.

Significantly, our decisions draw an equivalence between transfer of citizens and detention of citizens. We have rejected the notion "that the Executive Branch may *detain or transfer* Americans or individuals in U.S. territory at will, without any judicial review of the positive legal authority for the *detention or transfer*." *Omar*, 646 F.3d at 24 (emphases added). And we have said that "Congress cannot deny an American citizen or detainee in U.S. territory the ability to contest the positive legal authority (and in some situations, also the factual basis) for his *detention or transfer* unless Congress suspends the writ." *Id.* (emphasis added). For either "detention or transfer," then, an

"American citizen" is entitled to challenge both "legal authority" and "factual basis," as *Hamdi* envisions.

The government reads the just-quoted language from our decision in *Omar* to say that an American citizen can bring a "legal authority" or "factual basis" challenge to her "detention or transfer" only if she is in the United States. *See* No. 18-5032, Gov't Reply Br. 14. That is an unsustainable reading. *Hamdi* itself rejects the notion that it could "make a determinative constitutional difference" if an American citizen were detained overseas rather than in the United States. 542 U.S. at 524. The Court understood that any such conclusion would "create[] a perverse incentive" to hold American citizens abroad. *Id.*

The *Omar* court's reference to a challenge brought by "an American citizen or detainee in U.S. territory" thus plainly speaks to a challenge brought by a citizen *anywhere* or by an alien detained in U.S. territory (such as Guantanamo Bay). *Omar*, 646 F.3d at 24 (citing *Boumediene v. Bush*, 553 U.S. 723, 785-86 (2008)); *see also Al Bahlul v. United States*, 767 F.3d 1, 65 n.3 (D.C. Cir. 2014) (Kavanaugh, J., concurring in the judgment in part and dissenting in part) ("As a general matter, the U.S. Constitution applies to U.S. citizens worldwide and to non-U.S. citizens within the 50 states and the District of Columbia[.]"). There is no basis for thinking that a citizen relinquishes her right to bring a legal challenge to her detention—or, equivalently, to her transfer—if she is detained in (or transferred from) a foreign country. That is why the court in *Omar* went on to explain that Omar (one of the two *Munaf* petitioners), who was still being held in Iraq, had the requisite opportunity to contest the legal authority for his transfer. *Id.* That discussion would have been entirely unnecessary if he had no right to bring that challenge in the first place since he was held overseas.

Consider the implications if there were, in fact, an asymmetry between transfer and detention, such that the Executive could transfer a U.S. citizen to another country without meeting the *Hamdi* conditions. With regard to legal authority, the military could irrevocably transfer a citizen thought to be an enemy combatant even if judicial review would have revealed that the Executive lacked lawful authority to use military force against the particular enemy. In that event, detainees in U.S. custody—and thus protected by U.S. law—would need to be released or criminally charged. But for those who had already been transferred to another country, an American court could not order their return or grant them comparable relief.

With regard to a factual-basis challenge, the *Hamdi* Court sought to "meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error." 542 U.S. at 534. The procedural guarantees prescribed by the Court were intended to guard against an undue risk of an erroneous military determination. *See id.* But if the transfer of a citizen could be accomplished without affording her those protections, a risk of error thought unacceptable for continued detention would be present for an irrevocable transfer to another country. An "errant tourist" might then be protected against detention but unable to avoid an irrevocable transfer to another country's custody. *Compare* 31A Am. Jur. 2d Extradition § 120 (2d ed. 2018) (describing process granted to persons subject to extradition); 18 U.S.C. § 3191.

The government, in that respect, relies on its having made a "good-faith determination, supported by extensive record evidence, that [Doe] is an enemy combatant." No. 18-5110, Gov't Second Supp. Br. 3. We do not doubt the government's good faith. Nor do we discount the importance of the need to

first afforded the process the Court held he was constitutionally due.

[redacted] Nor do we question the Executive's assessment of Country B's interests. *See Kiyemba*, 561 F.3d at 515. But the strength of Country B's interests in Doe [redacted] does not diminish the force of Doe's rights as a U.S. citizen: here, the right to resist the Executive's forcible seizure and transfer of him to the custody of another country. [redacted] And the limits on unilateral Executive authority ultimately "protect the individual." *Bond v. United States*, 564 U.S. 211, 222 (2011).

Recall, for instance, the example introduced earlier based on the facts of *Valentine*: while *Valentine* held that the Executive lacked unilateral authority to extradite the petitioners to France, the Executive, under the government's theory, would have gained that authority the moment one of the petitioners stepped across the border into Canada.

Now imagine that the same petitioner had been [redacted] And it still would be anomalous to suppose that the Executive gained the ability to transfer him merely because he set foot in Canada.

[redacted] does not affect our conclusion that the transfer authority recognized in *Munaf* and *Wilson* is inapplicable in this case.

ii. We now turn to whether the forcible transfer of Doe to Country B can be supported by the Executive's wartime

authority over enemy combatants under the law of war. That authority, as we have explained, encompasses transfers of enemy combatants to an allied country. But before the Executive could exercise that transfer power against Doe, the two *Hamdi* conditions would need to be met.

The first condition is a determination that the Executive has legal authority to wage war against ISIL. "For wartime military transfers," we have said, "Article II and the relevant Authorization to Use Military Force generally give the Executive legal authority to transfer." *Omar*, 646 F.3d at 24. Second, Doe would need to be afforded a meaningful chance to rebut the government's factual assertion that he is an ISIL combatant, per the requirements set out in *Hamdi*.

Neither condition has been met at this point. Until those conditions are satisfied, the Executive lacks power under the law of war to transfer Doe to Country B on the basis of his status as an alleged ISIL combatant.

2.

Having addressed Doe's success on the merits of his claim that a forcible transfer to Country B would be unlawful, we now consider whether he has shown he would be irreparably injured absent the injunction. *See Winter*, 555 U.S. at 20. We conclude he has made that showing.

A forcible transfer of Doe to the custody of Country B, the government explains, would be "bona fide and total," in that "[o]nce transfer is effectuated," he "would be entirely in [Country B's] custody," without any continuing oversight by—or recourse to—the United States. No. 18-5032, Gov't Reply Br. 15. Doe, wishing to avoid that irrevocable change in his station, objects to his proposed transfer to the custody of

Country B. No more is required to demonstrate that he would face irreparable injury if he were involuntarily (and irreversibly) handed over to Country B in violation of his constitutional rights.

In contending that Doe fails to establish irreparable injury, the government observes that the point of a habeas petition is to obtain release from U.S. custody. And if the planned transfer of Doe to Country B goes forward, the government observes, he would no longer be in U.S. custody. So transfer, the government says, is thus tantamount to release, and there can be no "irreparable harm from obtaining the very relief his habeas action seeks to obtain." No. 18-5110, Gov't Supp. Br. 10.

The government's position cannot be correct. It would mean that any habeas petitioner objecting to a planned extradition of him would be unable to demonstrate irreparable injury if he were extradited. We know that is not the case. *See Belbacha v. Bush*, 520 F.3d 452, 456 (D.C. Cir. 2008) (collecting cases granting stays of extradition); *Demjanjuk v. Meese*, 784 F.2d 1114, 1118 (D.C. Cir. 1986) ("extradition of petitioner to Israel may qualify as a threat of irreparable harm"); *see also Nken v. Holder*, 556 U.S. 418, 434-35 (2009) (noting "irreparable nature of harm from removal before decision on a petition for review"). Of course, a transfer to a foreign country's custody necessarily ends U.S. custody; but

the release sought by Doe and a transfer to another

level of generality some possible

None of this is to say that, in the end, Doe necessarily will be able to show that any agreed-upon transfer is unlawful. He may or may not be able to do so, depending on considerations such as:

At this point, without any information about an agreed-about transfer, we decline to set aside the notice requirement with regard to Country A.

* * * * *

We affirm the district court's injunction barring the government from transferring Doe to Country B, and we also affirm the district court's injunction requiring the government to give 72 hours' notice before transferring him to Country A.

Our disposition will constrain the government's ability to transfer an American citizen believed to be an enemy combatant more than the government would like. That is an important consideration in this case in light of the deference owed to military judgments in wartime. But "such cases,"—*i.e.*, those in which "a United States citizen [is] captured in a foreign combat zone"—"must surely be rare." *Hamdi*, 542 U.S. at 571 n.3 (Scalia, J.,emnuncng

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