

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued April 5, 2018  
Reargued April 27, 2018

Decided May 7, 2018

No. 18-5032

JOHN DOE,  
APPELLEE

v.

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

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Consolidated with 18-5110

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

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*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

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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 merits; (ii) whether the party opposing the injunction is likely to be irreparably harmed if the injunction is not granted; (iii) whether the public interest would be served by granting the injunction; and (iv) whether the party opposing the injunction has an adequate legal remedy. See *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 359, 371 (2009).

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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)-

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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.





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







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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., enuncng

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**KAREN LE CRAFT HENDERSON, Circuit Judge, dissenting**  
**A reader, having just reviewed the majority opinion, might well**  
**be thinking it declares a lead pipe result. Caveat lector: The**  
**opinion treats all but silently the judiciary's dispositively**  
**downsized role in the theater of war. See *Al Bahlul v. United***  
**States**, 792 F.3d 1, 28 (DC Cir. 2015) (Henderson, J.,  
**dissenting) (in the "thicket" of international politics and**  
**"waging war," "our lack of competence is naked," "our**

**Affirmance portends a hazardous expansion of the judiciary's role in matters of war and diplomacy. In defending the Order, Doe relies on *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), by which a habeas court reviews the lawfulness of a U.S. citizen's extended military detention. But *Hamdi* does not empower a court to enjoin our military from transferring a battlefield captive not facing extended detention. Much less**





profona assertion is contrary to all evidence of record. For our purpose today, he was found in a foreign war zone during active hostilities and he admitted training with and working for a terrorist organization. Accordingly, for our purpose today, he is on far different ground from a tourist, tax evader or political dissident. **Maj. Op 4 18 2022**

**Doe is a citizen of Saudi Arabia. He is also a citizen of the United States but has not lived here since 2006 and has not visited since 2014<sup>2</sup>**

**In July 2014, Doe voluntarily traveled to Syria to join the Islamic State of Iraq and the Levant, a terrorist organization better known as ISIS. ISIS has committed**

**systematic abuses of human rights and violations of international law including indiscriminate killing and deliberate targeting of civilians, mass executions and extrajudicial killings, persecution of individuals and entire**

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**of sexual violence, along with numerous other  
atrocities**

**Dept of State, The Global Coalition to Defeat ISIS (Sept. 10)**



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**On October 5, 2017—i.e., 23 days after our Armed Forces  
took custody of Doe—the American Civil Liberties Union**

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**On April 16, 2018—pending an expedited appeal of the**

absent of preliminary relief, [3] the balance of equities tips in his favor; and [4] an injunction is in the public interest.” Mem Op, Dkt. No. 91-1 at 2 (unsealed Apr. 23, 2018) (quoting *Winter v. NRDC*, 555 U.S. 7, 20 (2008)) (ellipses omitted). The court concluded that Doe meets all four requirements. In the court’s view

- Doe is likely to succeed on the merits because the government is required to, and has failed to, “present positive legal authority for his transfer.” Mem Op 3 (internal quotation omitted).
- Doe will suffer irreparable harm absent the Order because, upon transfer to another country, he “will lose his constitutional right to contest his detention in a U.S. court.” *Id.* at 5
- The equities favor blocking the transfer because “the potential harm to bilateral relations between the United States and its strategic ally does not outweigh [Doe’s] constitutional right to seek habeas relief.” *Id.* at 6
- Similarly, the public interest favors blocking the transfer because the government’s military and diplomatic interests do not override “citizens’ rights to contest the lawfulness of their detentions and transfers.” *Id.*

**As a threshold matter, Doe misunderstands his burden. He says “the government . . . must show” his transfer will be “lawful.” Appellee’s Br. 14 (emphasis added). He asks that, in deciding whether the government has made that showing, we let**

**Obama, 677 F.3d 1175, 1178 (DC Cir. 2012) (internal quotation omitted).**

**With Doe's burden in mind, I turn to the leading cases and their application vel non here.**

**Relying heavily on *Hamdi*, Doe argues that the Executive Branch cannot transfer him absent "positive legal authority" or ex ante judicial review of the military's determination that he is an enemy combatant. The government argues that, under *Munaf* and *Kiyemba II*, principles of comity and separation of powers prevent the district court from blocking Doe's transfer. I agree with the government.**

**Yaser Hamdi, an American citizen, allegedly took up arms with the Taliban before September 11, 2001 and remained with his unit afterward. *Hamdi*, 542 U.S. at 512-13 (plurality**



authority if Hamdi was in fact an enemy combatant, *id.* at 516-24. The Court turned then to “the question of what process is constitutionally due to a citizen who disputes his enemy combatant status.” *Id.* at 524. Balancing the competing interests under *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court concluded “that a citizen detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”

released' (quoting *In re Terito*, 136 F.2d 142, 145 (9th Cir. 1946)).





the court's jurisdiction over their underlying claims of unlawful detention" *Id.* at 513 n3. Treating the order as a preliminary injunction, this Court vacated it because the Uighurs did not "make the required showing of a likelihood of success on the merits" *Id.* at 516.

Even "assum[ing] arguendo these alien detainees have the same constitutional rights with respect to their proposed transfer as did the U.S. citizens facing transfer in *Munaf*," 561 F.3d at 514 n4, this Court held that "*Munaf* precludes the district court from barring the transfer of a Guantanamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipient country," *id.* at 516. The Court accepted the government's representation that "any prosecution or detention the petitioners might face would be effected 'by the foreign government pursuant to its own laws and not on behalf of the United States.'" *Id.* at 515 (quoting declaration of Defense Department official). And the Court reasoned that, under *Munaf*

**Under the foregoing framework, Doe has not shown—in fact, cannot show—that he will likely succeed on the merits**

**As Judge Brown recognized in *Oniz*, “we must first [ask] in what sense” a putative transferee “must be likely to**

Executive has determined that detainee is likely to be tortured but decides to transfer him anyway"). Doe's case is by no means extreme in that sense. Indeed, it tracks *Muraf* in two crucial respects:

First, as in *Muraf*, the receiving country here has a facially asserted<sup>2</sup> for all but undisputed interest in the transfer.<sup>7</sup> Granted, the particular interests here are slightly different from that in *Muraf*. There, the Court relied on Iraq's "sovereign right to prosecute Onar and Muraf for crimes committed on its soil." *Id.* at 694. Here, by contrast, Iraq did not (as far as the record discloses) commit crimes within the receiving country's territory and has not (to date) been charged with any offense there. But the difference in the two cases is not as stark as Doe would have it recall that Onar had

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equitable principles” including “prudential concerns . . . such as comity.” (internal quotations omitted); see *id.* at 698-99 (relying on “principles of comity and respect for foreign sovereigns” (quoting *Oniz*, 49 F.3d at 17 (Brown, J., dissenting in part))).

Comity is “[c]ourtesy” towards “the laws and usages” of another nation. III OXFORD ENGLISH DICTIONARY 539 (2d ed. 1989). By definition, it counsels “mutual recognition of legislative, executive, and judicial acts” that go well beyond prosecutive (negative) Black’s *ius cogens* or *ius cogens* (10 *Ched.* 14). *Ius cogens* is a . . . *ius cogens* *ius cogens* . . .



likely to be tortured or subject to further prosecution or detention in the recipient country.”<sup>8</sup> *Kiyenba II*, 561 F.3d at 516 (emphasis added).

Second, the separation of powers considerations highlighted in *Munaf* also apply here. When “adjudicating issues inevitably entangled in the conduct of our international relations,” a court is “to proceed with . . . circumspection.” *Munaf*, 553 U.S. at 689 (quoting *Rosen v. Irl*, 1 *Terminal Operating Co.*, 358 U.S. 354, 383 (1959)). Far from circumspect, the Order upsets the Executive Branch decision to relinquish Doe to a country the district court acknowledges is a “strategic ally.” Mem. Op. 6. Much as in *Munaf*, the Executive’s decision was informed by the ally’s sovereign interest in Doe and by our military’s good faith determination that he committed “serious hostile acts” in “an active theater of



invoked the concept of sovereign to sovereign transfer only once, equating it with repatriation or release rather than detention. 542 U.S. at 518-19. Reading the cases together, I can only conclude that detention and transfer are not flip sides of the same coin but two entirely different currencies. *Hamdi*, in short, does not apply to Doe's transfer. It is a case about detention potentially "for the duration of the relevant hostilities." *Id.* at 519. To reiterate, the Court excepted "initial captures on the battlefield" from "the process we have discussed" emphasizing that such "process is due only when the determination is made to continue to hold those who have been seized." *Id.* at 534 (emphasis altered); see *id.* at 529 (*Hamdi*'s "liberty interest[]" was "in being free from physical detention by [his] own government").

Nevertheless, according to Doe, whenever one draws the line between battlefield captive and long-term detainee, he falls on the latter side. In his telling this case involves an Executive Branch decision to detain him without charge for an extended period, now exceeding six months. Appellee's Second Suppl. Br. 6 (asserting "government decid[ed] not to release him . . . six months ago" when it moved to dismiss his habeas petition). I reject that characterization.

Revisit to September 12, 2017, when our military took custody of Doe. In an active combat zone, it faced the real-time decision of what to do with a battlefield captive who admitted affiliation with ISIS. Should it detain him indefinitely as an enemy combatant? Transport him to the United States and charge him with a crime? Transfer him to a country with a sovereign interest in him? When the ACLUF filed the habeas petition on October 5, "the Government was still engaged in this decisional process" and had yet to choose a course of action. App. 161. No surprise that the government had had at least 23 days to investigate Doe. Since













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of combat as his captives, and the receiving country's facially compelling interest in his transfer:

If these facts differed, the prudential considerations might differ and the district court might have equitable authority to block a transfer. For instance, *Munaf* reserves the possibility of judicial intervention if the Executive Branch “determine[s] that a detainee is likely to be tortured but decides to transfer him anyway.” 553 U.S. at 702. Similarly, the government appears to concede “that the courts have a role to play” in ensuring that the Executive Branch does not transfer a battlefield captive to a country that lacks a “legitimate basis” in law to receive him. Public Oral Arg. Tr. 10:17, 31 (Apr. 5, 2018).

Here, however, we have no record base on which to assume Executive Branch bad faith or negligence. Rather, as the Supreme Court admonished in *Munaf*, “we need not assume the political branches are oblivious” to a transferee’s well-being. 553 U.S. at 702 (quoting *Onar*, 479 F.3d at 20 n.6 (Brown, J., dissenting in part)). Nor should we be distracted by any “far-fetched hypothetical[],” *Gutiérrez v. Wateman Steamship Corp.*, 373 U.S. 206, 210 (1963), that “was far from the case before us,” *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 781 (2018); see, e.g., Public Oral Arg. Recording 34:20-34:48 (Apr. 27, 2018) (Doe hypothesizes transfer “to Bolivia or Madagascar” or some other country with no sovereign interest in him); see also, e.g., *Maj. Op.* 20:22 (majority hypothesizes transfer to Thailand based on political criticism).

The long and short of it is that Doe does not dispositively differ from the petitioners in *Munaf*. Necessarily, I do not read that opinion the same way my colleagues do. On their view “the varied related context” of *Munaf* “did not diminish” the military’s discretion to transfer *Onar* to Iraqi authorities, at

least as compared to the military's discretion to transfer Grad to Japanese authorities during peacetime. *Maj. Op.* 15. If my colleagues imply that the war context of *Munaf* made no difference, I disagree: the Supreme Court was explicit that “none [was] at issue” in *Munaf* than in *Wilson*, which did not involve a petitioner captured on a battlefield in “an active theater of combat” “during ongoing hostilities.” *Munaf*, 563 U.S. at 699–700 (accepting government’s characterization to that effect). Although my colleagues do not mention it, those are the very circumstances that gave rise to the Court’s “concerns about unwarranted judicial intrusion into the Executive’s ability to conduct military operations abroad.” *Id.* at 700. Those same circumstances—and thus, those same separation of powers concerns—are equally in play here.

**Irreparable harm** This Court “has set a high standard” for irreparable harm “the injury must be both certain and great” and “must be actual and not theoretical.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (DC Cir. 2006) (internal quotation omitted). On this requirement, Doe falls short.

The district court finds that Doe will suffer irreparable harm absent the Order because, once transferred, he “will lose his constitutional right to contest his detention in a U.S. court.” Mem Op 5. That is half right: because Doe’s petition challenges his detention by the Executive Branch, he will no longer have a viable habeas case once it divests itself of custody.

let him go' in Iraq. Public Oral Arg. Tr. 80 (Apr. 5, 2018). He does not ask to be transported to the United States. He concedes that the Executive Branch is free to notify Iraqi authorities upon his release and that, immediately thereafter, the Iraqi government or other foreign authorities are free to apprehend him.

These are major concessions, and necessary ones. See *Munaf*, 553 U.S. at 689 (district court could not forbid Executive from “sharing” with Iraqi government “details concerning any decision to release Onar”); *id.* at 694 (it could not require Executive to “shelter” Onar from prosecution in Iraq); *id.* at 697 (it could not order Executive to “smuggle” Onar “out of Iraq”). As the government aptly observes, the concessions mean there is “little practical difference . . . between the ‘release’ that [Doe] seeks and the ‘transfer’ that the Government proposes to undertake.” Appellant’s Suppl. Br. 11.

Doe resists this logic because it is “speculat[ive].” Appellee’s Suppl. Br. 11. For all we know he says, no one will seek to detain him if our military lets him go. This is classic wishful thinking. Because of his admitted affiliation with ISIS [REDACTED] I believe it is all but certain he will again be held abroad if the United States releases him.<sup>12</sup> And any uncertainty on that

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<sup>12</sup> I recognize that [REDACTED] circumstances of such further detention might differ if the United States were to relinquish Doe [REDACTED] instead of “simply . . . oper[ing] the jailhouse doors” and subjecting him to recapture. Public Oral Arg. Tr. 80 (Apr. 5, 2018). But Doe does not allege, let alone show, that the conditions of detention in the latter scenario would be cognizably preferable to the conditions in the former. In any event, judges are ill positioned to compare conditions of detention. Cf. *Munaf*, 553

score operates against Doe, not for him. After all, he must prove that, absent the Order, he will suffer "certain" "great" and "actual" harm. England, 454 F.3d at 297 (internal quotation omitted). He has failed that task.

**Balance of equities.** The district court finds that "the potential harm to bilateral relations between the United States

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governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary in order to prevent an irreparable injury” (quoting *Huley v. Kincaid*, 285 U.S. 95, 104 n.3 (1932)).

**The public interest.** Most of what has already been said also goes to the question of where the public interest lies. But some final observations are in order. The district court concluded that a citizen is right to contest his military transfer outweighs the government’s military and diplomatic priorities. Mem. Op. 6. That conclusion is shortsighted for at least two reasons.

**First, judicial intrusions like the Order cost the Executive Branch valuable diplomatic capital.** App. 153-54 (declaration of State Department official); [REDACTED]

[REDACTED] see *Kryenball*, 561 F.3d at 515. Within bounds that have otherwise been exceeded in Doe’s case, Executive Branch officials have wide discretion to spend that limited capital as they see fit. Judges ought not lightly cause them to waste it, especially if it might better be spent on ensuring that the United States, in future negotiations, obtains custody of persons in whom it has a compelling sovereign interest.

**Second, contrary to Doe’s hypothesis, the Order and its affirmance will not necessarily favor “the emart tourist, embedded journalist, or local aid worker [whose seeks] to prove military error.”** Appellee’s Br. 24 (quoting *Hend*, 542 U.S. at 534). What if our military had known before taking custody of Doe that it would not be permitted to relinquish him to an ally with a facially strong interest in him unless it first litigated—in state courts, for months, if not years, or encl—the ability to do so? Would our commanders in the field have declined custody, leaving a citizen to the actions of other

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**countries or, even worse, to the chaos of the battlefield? It seems to me that today's result gives the military an incentive to avoid custody when possible, especially if it is not immediately clear in the heat of combat that the captive is a U.S. citizen. And I doubt that the innocent American citizen who finds himself on a foreign battlefield could fare better than in the custody of our military.**

**To honor an undisturbed, the Order is "not appropriate" *Miner*, 533 U.S. at 688. I would vacate it. Accordingly, I respectfully dissent.**