PUBLIC COPY—SEALED MATERIAL DELETED

ORAL ARGUMENT SCHEDULED ON APRIL 5, 2018

No. 18-5032

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

PUBLIC REPLY BRIEF FOR APPELLANT

CHAD A. READLER
Acting Assistant Attorney General

JESSIE K. LIU
United States Attorney

JAMES M. BURNHAM
Senior Counsel

MATTHEW M. COLLETTE
SONIA M. CARSON
Attorneys, Appellate Staff
Civil Division, Room 7234
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 616-8209

TABLE OF CONTENTS

Page

GLOSSARY

INTRODUCTION AND SUMMARY 1

ARGUMENT 7

I. PETITIONER HAS NOT SHOWN HE IS LIKELY TO SUCCEED ON THE MERITS 7

II. PETITIONER HAS NOT SHOWN IRREPARABLE INJURY ABSENT THE DISTRICT COURT'S INJUNCTION 20

III. THE DISTRICT COURT'S INJUNCTION IMPOSES SUBSTANTIAL HARM ON THE GOVERNMENT 21

IV. THE DISTRICT COURT'S INJUNCTION IS CONTRARY TO THE PUBLIC INTEREST 23

CONCLUSION 24

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

MATERIAL UNDER SEAL DELETED

TABLE OF AUTHORITIES

Cases: **Page(s)**

[redacted]

Kiyemba v. Obama,
561 F.3d 509 (D.C. Cir. 2009) 1, 4-5, 6, 7, 12, 16, 18, 21

Munaf v. Geren,
553 U.S. 674 (2008) ..... 3, 4, 5, 8, 9, 10, 12, 13, 14, [redacted] 17, 23

Omar v. Harvey,
479 F.3d 1 (D.C. Cir. 2007),
vacated by Munaf v. Geren, 553 U.S. 674 (2008) 8, 9

Omar v. McHugh,
646 F.3d 13 (D.C. Cir. 2011) 14

People's Mojahedin Org. of Iran v. U.S. Dep't of State,
182 F.3d 17 (D.C. Cir. 1999) 23

[redacted]

Sherley v. Sebelius,
644 F.3d 388 (D.C. Cir. 2011) 7

In re Territo,
156 F.2d 142 (9th Cir. 1946) 12, 13

Valentine v. United States ex rel. Neidecker,
299 U.S. 5 (1936) 3, 4, 8, 10, 11, 12

Other Authorities:

[redacted]

GLOSSARY

ISIL	Islamic State of Iraq and the Levant

INTRODUCTION AND SUMMARY

Petitioner is a dual citizen of the United States and Saudi Arabia who traveled to Syria on (at least) two separate occasions to territory controlled by the Islamic State of Iraq and the Levant ("ISIL"). App. 201, 210-11. Petitioner traveled to Syria of his own volition, willingly abandoning the legal protections afforded to U.S. citizens on U.S. soil. Having made that choice—a choice that ended with petitioner being captured on an active battlefield by the Syrian Democratic Forces, who then transferred petitioner to U.S. military forces after he identified himself as a U.S. citizen—petitioner has no basis to object to the possibility of being transferred again into the custody of another sovereign with a legitimate and direct interest in him.

The district court nonetheless issued a sweeping Order that hinders the Government's ability to engage with other countries and negotiate an appropriate and just disposition of petitioner. Rather than heed this Court's instruction that requiring the Executive to give notice prior to transferring custody of a detainee would improperly "interfere[] with the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for detainees," *Kiyemba v. Obama*, 561 F.3d 509, 515 (D.C. Cir. 2009) (*Kiyemba II*), the district court required the Government to provide seventy-two hours' notice before transferring custody of petitioner to any other country, for the express purpose of permitting the court to review the validity of any transfer. Whatever the merits of that Order in the context of countries with no legitimate connection to a detainee, it is plainly inappropriate in the context of the two

sovereigns— [redacted] —that may ultimately determine to take custody of *this* petitioner. This Court should accordingly vacate that Order as applied to those two countries and free the Government from the prospect of months' more litigation before it can relinquish custody of petitioner into the hands of either [redacted][1]

The district court's Order fails on all four components of the preliminary injunction standard: petitioner is not likely to succeed in blocking any eventual transfer to [redacted]; petitioner would not suffer irreparable harm if he were released from U.S. custody (as release from U.S. custody is the core relief in habeas); the pre-transfer notice requirement imposes considerable costs on the Government; and the public interest strongly favors expeditious relinquishment of wartime detainees like petitioner to [redacted]

[1] In the interest of narrowing and simplifying the issues presented on appeal, the Government is expressly limiting its appeal to challenge the district court's Order as applied to [redacted]. The Government thus makes clear that it is not challenging that Order as applied to transfers of custody to nations other than [redacted]. This appeal therefore provides no occasion for this Court to address the validity of that Order in any other respect.

Because the identities of the potential receiving countries remain sealed, the Government respectfully requests the Court's permission to refer to them using pseudonyms at oral argument. The Government suggests that [redacted] referred to as Country A, while [redacted] be referred to as Country B.

[redacted] rather than requiring their continued detention by the U.S. military.

1. The Supreme Court's decision in *Munaf v. Geren*, 553 U.S. 674 (2008), makes clear two things about Americans who travel to a foreign war zone and end up in U.S. military custody: (1) they cannot use habeas to prevent the Government from relinquishing custody of them to another sovereign with a direct and legitimate interest in receiving them, and (2) they cannot use habeas to conscript the Government into sheltering them from being taken into custody by another sovereign while there. There are fundamental differences between a U.S. citizen arrested and held on U.S. soil and a U.S. citizen who has voluntarily traveled to ISIL-controlled territory in Syria and been captured by military forces. When a private citizen travels overseas—particularly to an active war zone—that citizen submits to the sovereign authority of the country the citizen visits and surrenders some of the protections he or she would otherwise have enjoyed on U.S. soil.

Petitioner ignores this reality and argues that the Supreme Court's 1936 decision in *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, requires extradition proceedings whenever the U.S. military wishes to relinquish custody of a U.S. citizen captured on an overseas battlefield to any foreign sovereign. But the *Valentine* rule for extradition from the United States does not apply to areas of armed conflict outside the United States. The Supreme Court said as much in *Munaf*, which explained that *Valentine* "involved the extradition of an individual *from the United States*," as opposed to the transfer of "an

individual captured and already detained" abroad. 553 U.S. at 704 (emphasis added). Rather than establish one set of rules for all custody transfers worldwide, *Valentine* stood for the basic proposition that the United States cannot *remove* a U.S. citizen from within the United States and deliver that citizen to a foreign country without legal authority for the citizen's removal. That makes sense, as a domestic prisoner who is released from U.S. custody on U.S. soil remains within U.S. territorial jurisdiction and is protected from foreign apprehension by virtue of his presence here.

Petitioner's brief confirms the significance of the distinction between a citizen in the United States and a citizen overseas by conceding that the Government could grant petitioner complete relief by releasing him in Iraq. Doe Br. 33-34, 41. If petitioner were released into Iraq, *Munaf* makes clear that he would have no legal entitlement to subsequent U.S. protection from detention by either [redacted]. But petitioner has provided no explanation for why, if habeas does not entitle him to be free from detention by [redacted] following his "release" in Iraq, it nonetheless entitles him to not be "transferred" to [redacted] instead. It does not.

Should this Court conclude that the district court does not have authority to enjoin a transfer of petitioner to [redacted], the notice requirement, which hinders the Government's ability to negotiate and effectuate such a transfer, must be vacated as applied to those countries. That was one of this Court's holdings in *Kiyemba*

MATERIAL UNDER SEAL DELETED

II, 561 F.3d at 515, as petitioner recognizes: "*Kiyemba II* stands for the limited proposition that where a court cannot enjoin a petitioner's transfer on any ground, that petitioner is not entitled to pre-transfer notice." Doe Br. 37. And because petitioner has not shown he is likely to succeed on the merits of enjoining a transfer to [redacted], the Court should vacate the notice requirement as to those countries.

2. In addition to failing to show a likelihood of success on the merits, petitioner has failed to establish that he would suffer irreparable harm absent preliminary relief. "Habeas is at its core a remedy for unlawful executive detention," and "[t]he typical remedy for such detention is, of course, release." *Munaf*, 553 U.S. at 693. Relinquishing custody of petitioner to [redacted] would include releasing him from U.S. custody, which is all his habeas action could obtain. Petitioner disagrees, characterizing habeas relief as omnibus protection of his "liberty" against all sovereigns who might detain him. Doe Br. 42-43. But that is not something habeas furnishes, or, indeed, something that U.S. courts have authority to provide. As *Munaf* explained, habeas petitioners cannot obtain "court order[s] requiring the United States to shelter them from the sovereign government seeking to have them answer for alleged crimes committed within that sovereign's borders." 553 U.S. at 693. Relinquishing custody of petitioner to [redacted] would thus provide him all he is entitled to (release from U.S. custody), while "denying" him only something he cannot obtain in habeas regardless (protection from foreign custody when he has voluntarily traveled abroad). Petitioner would accordingly not suffer irreparable harm absent preliminary relief.

3. As the Declaration filed below explains, judicial interference with international diplomacy imposes significant harm on the Government. This Court recognized as much in *Kiyemba II* when it held that district courts cannot require pre-transfer notice. *See* 561 F.3d at 515 (such requirements "interfere[] with the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for detainees"). Petitioner does not dispute this interest, instead claiming his interest in fully litigating his habeas petition outweighs it. Doe Br. 46-50. But that argument again assumes petitioner could obtain something in habeas *beyond* his release from U.S. custody in Iraq. Whether the Government releases petitioner to the custody of [redacted], or simply frees him at a safe location in Iraq, it will have fully vindicated his legal interests here. Transferring petitioner would thus not impose any legal harm on him, such that the balance of harms favors the Government.

4. Finally, the public interest weighs in favor of the Government's speaking with one voice in foreign relations, as well as the Executive's having broad discretion over battlefield operations where lives are at stake. Those interests are not outweighed where, as here, a habeas petitioner seeks a judicial decree keeping him in U.S. military custody solely so he can continue litigating his habeas petition. All the Executive seeks is the ability to relinquish custody of an individual captured on an active battlefield to one of two coalition partners in an ongoing armed conflict—sovereigns with an obvious and legitimate interest in taking custody of that person. The public interest decisively supports that modest and reasonable position.

MATERIAL UNDER SEAL DELETED

ARGUMENT

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

The district court's requirement that the Government provide 72 hours' notice before any transfer of petitioner to any country could be permissible only if the underlying transfer could itself be enjoined. This Court held in *Kiyemba II*—and petitioner agrees here—that a notice requirement is improper if the courts "cannot enjoin [the underlying] transfer on any ground." Doe Br. 37; *see also Kiyemba v. Obama*, 561 F.3d 509, 515 (D.C. Cir. 2009) ("*Kiyemba II*"). Petitioner has not shown that he would be likely to succeed in blocking a transfer to either [redacted]. Likelihood of success on the merits is a "free-standing requirement for a preliminary injunction," *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011), and petitioner's inability to satisfy this requirement is alone sufficient basis to vacate the preliminary injunction as to those two countries. And because the district court's Order applies to *all* countries, petitioner must carry that burden as to the two countries at issue here. After all, if it is improper to apply the Order to [redacted]—the only countries as to which the Government is appealing—those applications must be set aside regardless of whether the Order might arguably be valid in this circumstance as to some other unspecified country that has never been at issue in this litigation.

1. The Supreme Court's decision in *Munaf* makes clear that the U.S. military has the authority to transfer petitioner to [redacted]. Petitioner disagrees,

invoking the rules for domestic extradition and rehashing the same argument the detainees made in *Munaf*, which was, as this Court put it: "(1) that the military may not transfer [them] to Iraqi authorities without treaty or statutory authorization, and (2) that the military lacks such authorization." *Omar v. Harvey*, 479 F.3d 1, 10 (D.C. Cir. 2007) ("*Omar I*") (citing *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8 (1936), *vacated by Munaf v. Geren*, 553 U.S. 674 (2008)). But the Supreme Court rejected that argument in *Munaf*, explaining "this is not an extradition case," since battlefield detainees captured abroad are different in kind from "a 'fugitive criminal' … found within the United States." 553 U.S. at 704 (quoting *Valentine*, 299 U.S. at 102).

Petitioner argues that the Government's determination that he is an enemy combatant is insufficient to deprive him of his liberty via a transfer to [redacted]. *See* Doe Br. 23-26. But that determination is not the basis for the U.S. military's authority to transfer petitioner; indeed, the petitioners in *Munaf* were just like petitioner here. They were dual citizens of the United States and another country (Jordan for Omar, Iraq for Munaf) who had been captured in Iraq and were being held by the U.S. military there. *Munaf*, 553 U.S. at 681, 683. Like petitioner, the Executive Branch had deemed both of them lawfully detainable, but no court had tested that assessment. *Id.* at 681-85. *Munaf* held that no habeas proceeding was necessary for the Executive to hand them over to another sovereign that had a legitimate legal interest in taking custody of them. In that case, Iraq's legitimate interests were territorial sovereignty, military alliance, and criminal prosecution. Here, the legitimate interests are [redacted]

[redacted]

In other words, neither Munaf nor Omar was entitled to a federal court's determination (1) whether the Government had legal authority to detain him, or (2) whether the Government had a sufficient factual basis to exercise that authority. Challenging the Executive's asserted legal and factual basis for their detention was the *entire point* of their habeas petitions. As this Court put it in one of the cases that became *Munaf*, that petitioner sought "to test the lawfulness of his extrajudicial detention in Iraq, where he has remained in the control of U.S. forces for over two years without legal process." *Omar I*, 479 F.3d at 8; *see also id.* ("Omar is neither detained nor convicted by a foreign nation."). In the face of those arguments, *Munaf* held that the U.S. military could transfer those citizens without the courts ever "test[ing] the lawfulness of [their] extrajudicial detention in Iraq," *Omar I*, 479 F.3d at 8, as they desired there and as petitioner desires here.

Petitioner also argues that application of the domestic extradition rules does not depend on "the happenstance of a citizen's location," Doe Br. 21, but that is incorrect. *Munaf* made clear that the happenstance of a citizen's location is a paramount consideration in assessing what legal rights a citizen possesses. In particular, for citizens who have "voluntarily traveled to Iraq and are being held there," *Munaf*, 553 U.S. at 704—or citizens like petitioner who "voluntarily traveled" to an active battlefield

spanning Iraq and Syria and are "being held" in the area—"location" is a critical reason why the domestic extradition rules do not apply.

Petitioner's assertion that the Supreme Court "exercised habeas review over the lawfulness of the proposed transfer" in *Munaf*, Doe Br. 36, is also mistaken. The Court did hold that "American citizens held overseas by American soldiers subject to a United States chain of command" have the right to "fil[e] habeas petitions" challenging their detention by U.S. forces. *Munaf*, 553 U.S. at 688. But the Court did *not* hold that the U.S. courts have authority to exercise "habeas review" over every proposed relinquishment of custody from U.S. forces to another sovereign. To the contrary, the Court's opinion explained why such review is improper in the context of ongoing operations conducted by U.S. forces overseas where the receiving sovereign has a direct and legitimate interest in the detainee and accordingly held that "petitioners state no claim in their habeas petitions for which relief can be granted," such that "those petitions should have been promptly dismissed." *Id.* at 705.

2. Petitioner's contrary argument depends almost entirely on over-reading the Supreme Court's eighty-year-old decision in *Valentine*. According to petitioner, *Valentine* "articulated foundational constraints on the executive's freedom 'to dispose of the liberty' of a citizen," Doe Br. 21 (quoting *Valentine*, 299 U.S. at 9), regardless of where that citizen is captured or being held. As petitioner sees it, *Valentine* requires applying the rules governing extradition—in particular, a statutory or treaty-based justification for extradition and judicial review of whether that justification applies—

whenever the U.S. military seeks to transfer a citizen captured on an active battlefield to another sovereign.

That is incorrect, as nothing in *Valentine* suggests that the same principles apply to military commanders in overseas war zones as to prison wardens in the United States. *Valentine* involved "native-born citizens of the United States" who were "charged with the commission of crimes in France." 299 U.S. at 6. Those citizens "were arrested in New York City, on the request of the French authorities," and sought to challenge the legal propriety of their removal from the United States and deportation to France for criminal prosecution. *Id.*

Valentine is a paradigmatic "extradition" case. Its context was so clear that the Government did not even "challenge the soundness" of the basic proposition that, "in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power." *Id.* at 8-9. This proposition makes sense, as foreign countries cannot unilaterally seize U.S. citizens *from within U.S. territory*. If the Government intends to divest its citizens of their protection from such seizures and forcibly remove citizens to foreign countries, it must have legal authority to do so.

Individuals captured by opposing forces on a foreign battlefield during an armed conflict are not "fugitive criminals." They are battlefield detainees, properly detainable and lawfully transferrable under the laws of war. Petitioner's case is a straightforward example: he was captured by opposing forces on a conventional battlefield after having

traveled of his own volition to that battlefield. Nothing in *Valentine* even hinted that the Court intended its analysis to constrain the U.S. military's authority over such a paradigmatic battlefield detainee; as *Munaf* indicated, "*Valentine* is readily distinguishable" from this context. 553 U.S. at 704. There is simply nothing in *Valentine* that precludes petitioner's potential transfer to either of the two foreign sovereigns at issue here.

The judiciary's experience applying *Valentine* confirms as much. There have been numerous armed conflicts since *Valentine*, including the Second World War. Yet petitioner has not unearthed any decision from any court applying *Valentine* to the wartime transfer of a detainee held in military custody abroad. That is because, as the Government's opening brief explained, the Court's decision in *Valentine* established the rules for removing domestic prisoners from the United States, not for transferring wartime detainees captured abroad and held abroad during an ongoing armed conflict. *See, e.g.*, *Kiyemba II*, 561 F.3d at 520 (Kavanaugh, J. concurring) ("[W]ar-related transfers traditionally have occurred without judicial oversight.").

Indeed, the only decision petitioner cites in a remotely similar context contradicts his theory. *See* Doe Br. 26 n.4 (citing *In re Territo*, 156 F.2d 142, 143 (9th Cir. 1946)). *Territo* involved a native-born American citizen who grew up in Italy, was captured serving in a non-combatant role in the Italian Army during World War II, and was subsequently brought to the territorial United States as a prisoner of war. *Territo*, 156 F.2d at 143. There, the petitioner filed a habeas petition, arguing that his status as a

U.S. citizen meant he was not "legally a prisoner of war." *Id.* at 145. Far from conducting the analysis *Valentine* prescribes for domestic extradition, the *Territo* court simply noted in passing that "under the Geneva Convention, it is the obligation of the United States through the American military authorities to repatriate petitioner to Italy." *Id.* at 144. The court "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 the reasoning of that decision, petitioner'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.

3. It is clear that the U.S. military similarly has the authority to relinquish custody of petitioner to [redacted] without having to first establish a basis in a judicial proceeding for detaining him until the end of hostilities, prevailing on the merits in habeas review, or undergoing any comparable judicial proceeding. It was enough in *Munaf* that "the detainees were captured by our Armed Forces for engaging in serious hostile acts against an ally in what the Government refers to as 'an active theater of combat.'" 553 U.S. at 699-700. The Court never specified a treaty, statute, or other enactment as the "legal authority" underlying those transfers, *id.* at 704, because no specific authority was necessary. And here, although petitioner may have a variety of excuses for how he came to be captured by opposing forces on an active battlefield in ISIL-controlled territory, he does not dispute that he was, in fact, captured on a battlefield during an armed conflict. That is dispositive under *Munaf*. To hold

otherwise—to require, for example, an extradition proceeding before our military transfers a detainee in these circumstances—would raise serious "concerns about unwarranted judicial intrusion into the Executive's ability to conduct military operations abroad." *Id.* at 700.

For that same reason, petitioner is wrong to suggest this Court's decision in *Omar v. McHugh*, 646 F.3d 13 (D.C. Cir. 2011) ("*Omar II*"), held that U.S. courts must essentially adjudicate petitioner's habeas petition before the U.S. military has authority to transfer him. Doe Br. 21-22. *Omar II* carefully hewed to the distinction between *Valentine* and *Munaf*, explaining that the Executive cannot "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." 646 F.3d at 24 (emphasis added). And it explained in passing that, when troops are deployed overseas and have custody of an individual captured on the battlefield, "Article II and the relevant Authorization to Use Military Force generally give the Executive legal authority to transfer." *Id.* Nowhere did *Omar II* purport to overturn *Munaf*'s rejection of the argument offered by the citizens there—which petitioner repeats nearly verbatim here—that "the Executive lacks the discretion to transfer a citizen absent a treaty or statute." 553 U.S. at 705.

In any event, even assuming *arguendo* that the Government would need legal authority beyond the Executive's constitutional and statutory authority to conduct military operations (in accordance with the laws of war), ample authority exists here. The United States military is lawfully present in Iraq and clearly has authority simply to

release petitioner there,[2] or, as discussed here, to relinquish custody of him to another sovereign with a legitimate interest in receiving him. Both [redacted] have legal jurisdiction over petitioner. [redacted]

4. This Court's decision in *Kiyemba II* confirms both that *Munaf* applies here and that the district court's categorical notice requirement is invalid as applied to [redacted]

[2] Of course, as discussed in the Government's opening brief, before releasing petitioner in Iraq, the United States would have to confer with the government of Iraq about that release.

MATERIAL UNDER SEAL DELETED

[redacted]. *First*, on transfer, this Court was clear: "The Supreme Court's ruling in *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." *Kiyemba II*, 561 F.3d at 516. If courts cannot enjoin transfers to avoid future detention or to review Executive determinations that individuals will not be tortured, they cannot enjoin transfers where, as here, the petitioner has not even raised a specific objection.

Petitioner's principal distinction of *Kiyemba II* is that it involved foreign nationals, whereas he is a U.S. citizen with, as he puts it, a "right to return" to the United States. Doe Br. 34, 40-41. But it makes no difference whether petitioner has "an affirmative right to return" to the United States. Doe Br. 34. Whatever such "right" petitioner may possess, it plainly does not include the right to force the Government either to transport him back to this country from the region he voluntarily traveled to, or to conscript the Government into sheltering him from detention by another country in accordance with that country's laws while he tries to travel back himself—a right no American possesses, as reflected by the many Americans who have been detained abroad and held pursuant to the laws and policies of other countries.

There is thus no pertinent difference between petitioner, a citizen who voluntarily traveled to a foreign war zone and came into U.S. custody there, and the petitioners in *Kiyemba II*. None had a "right" to be brought to the United States, as petitioner recognizes when he concedes that the "traditional remedy of relief pursuant

to his habeas action" is "release from U.S. custody," including release from that custody "in Iraq." Doe Br. 33-34. And should the Government provide that relief to petitioner, it would have no legal obligation to shield him from apprehension by the [redacted] ([redacted]) that seeks to take custody of him in compliance with Iraqi law, as petitioner concedes. *See, e.g.*, Doe Br. 33 (denying that petitioner is seeking "a court order requiring the United States to shelter" him from the Iraqi government (quoting *Munaf*, 553 U.S. at 694)). That is because Iraq—not the United States—has sovereign control within Iraq's borders. Part of that sovereign control is the authority to [redacted]

In contrast with petitioner here or the petitioners in *Kiyemba II*, citizens who are detained in the United States and then later released in the United States remain, once freed, subject to the United States' territorial jurisdiction. Because those citizens remain in the United States, they are protected against apprehension by a foreign government outside the extradition process provided in U.S. law. It was *that* legal interest—the interest in not being divested of the protections a citizen enjoys when present in the United States—that underlay *Valentine* and that distinguishes *Valentine* from this petitioner and the petitioners in *Kiyemba II*. Petitioner surrendered that interest when he traveled to a battlefield that spans Syria and Iraq, taking himself outside the United States and within a foreign jurisdiction.

MATERIAL UNDER SEAL DELETED

And petitioner would not, of course, have any recourse against the U.S. Government after it released him even if [redacted] independently took him into custody thereafter, as he essentially concedes. Doe Br. 33. Yet petitioner provides no rationale for the proposition that something which is *lawful* when it occurs by the happenstance of [redacted] apprehension after his release in Iraq suddenly becomes *unlawful* when it occurs via a coordinated hand-over to [redacted]. That is because there is no meaningful difference between the two situations, nor any basis in habeas to resist either of them.

In addition, *Kiyemba II* explicitly said that its analysis would be the same for U.S. citizens captured and held in an active war zone. This Court "assume[d] 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*." *Kiyemba II*, 561 F.3d at 514 n.4. By its terms as well as by its reasoning, *Kiyemba II* thus applies fully to petitioner.

Second, this Court's decision in *Kiyemba II* was also clear that courts cannot require pre-transfer notice where, as here, they lack the power to enjoin the ultimate transfer. That is because "the requirement that the Government provide pre-transfer notice interferes with the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for detainees." *Kiyemba II*, 561 F.3d at 515. While petitioner disagrees about whether the Executive has authority to relinquish custody of him to [redacted], he agrees that *Kiyemba II* forecloses the district court's notice requirement to the extent that the court would lack authority to enjoin the

underlying transfer. *See* Doe Br. 37 ("*Kiyemba II* stands for the limited proposition that where a court cannot enjoin a petitioner's transfer on any ground, that petitioner is not entitled to pre-transfer notice.").

5. Finally, this would be a very different case if the Government were to maintain constructive control over petitioner post-transfer, such as if the receiving sovereign were detaining petitioner solely at the U.S. Government's behest. The transfers contemplated here would be bona fide and total. Once transfer is effectuated, petitioner would be entirely in [redacted] custody and would be released from that custody as soon as the legal system in the receiving country deemed it proper.

Petitioner's contentions about "rendition" or the Government "restrict[ing] the liberty of a U.S. citizen on its own say-so," Doe Br. 25, thus respond to an argument the Government has not made. Petitioner lost his liberty because he voluntarily traveled to a battlefield spanning Syria and Iraq and was captured by a military force there, which transferred him to U.S. forces in the region at his invitation. All the Government currently proposes is that, rather than release petitioner into Iraq or detain him as an enemy combatant, it transfer him again, this time to [redacted]—both countries with a sound basis in common sense and international law for receiving petitioner, which would then assess according to their own laws and policies whether it is appropriate to restrict his liberty. If either country detains petitioner, it will be because it has independently determined that detaining him is appropriate—not because of the U.S. Government's "say-so." Petitioner has thus failed to show he is

likely to succeed in blocking such a transfer and cannot justify the requirement of 72 hours' notice before it happens. For that reason, this Court should vacate the preliminary injunction as 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. In its Order, the district court found that petitioner would be irreparably harmed because a transfer would mean he would "no longer be in U.S. custody, and will likely be unable to pursue his habeas petition." Op. 6 (App. 47). But the only relief petitioner could obtain via "his habeas petition" *is* release from "U.S. custody." Petitioner would not suffer irreparable harm from obtaining the very relief his habeas action seeks to obtain.

Petitioner disagrees, calling this point "laughable" and claiming that his habeas action seeks not only release from U.S. custody, but, more broadly, protection of his "liberty." Doe Br. 42-43. But as explained above, petitioner has already conceded both (1) that releasing him in Iraq would provide complete relief, and (2) that he is not asking the U.S. military to "shelter" him from apprehension by the [redacted] post-release. Those concessions make clear that habeas corpus cannot protect petitioner's "right to regain his liberty," Doe Br. 44, as against all sovereigns at all times wherever petitioner goes. That is because, as also explained above, while U.S. may citizens have some right to *return* to the United States, they do not have the right to

compel the United States to *guard* them from other sovereigns when they decide, as petitioner did, to travel to a foreign sovereign's territory and allegedly join or otherwise substantially support a terrorist organization.

Petitioner never grapples with this basic point. He instead cites scattered statements in a few cases that in no way suggest habeas is anything other than a mechanism for obtaining "release" from a particular custodian over whom the court has jurisdiction. Doe Br. 43. Petitioner has no right to a judicial decision on whether continued U.S. custody would be warranted once the United States decides to end that custody. And petitioner accordingly would not suffer irreparable harm should the U.S. military release him from its custody and relinquish him to [redacted]. For that reason, too, the district court's injunction should be vacated as applied to those two countries.

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

The district court's prohibition against the United States' relinquishing custody of petitioner without 72 hours' notice, and its suggestion that it might enjoin any agreed-upon transfer, impose real harms on the Government. As explained in the declaration the Government filed below, other countries are reluctant to agree to accept detainees like petitioner absent assurance that any agreed-upon transfer can be implemented quickly. That is why this Court held in *Kiyemba II* that district courts cannot require pre-transfer notice. *See* 561 F.3d at 515 ("[T]he requirement that the Government provide

pre-transfer notice interferes with the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for detainees."). Such requirements have the effect of stymieing diplomatic discussions, while also interfering with the ability of other sovereigns to receive someone in whom they have a clear and legitimate interest.

Petitioner largely credits this interest, Doe Br. at 46-47, but claims his right to "pursue his habeas petition" outweighs it. Doe Br. 47 (quoting JA 47). Again, petitioner has no right to "pursue his habeas petition" independent from his interest in obtaining release from U.S. custody. Should the Government provide that release by relinquishing petitioner to [redacted], it would not deprive petitioner of any underlying legal entitlement. That is, again, different from the domestic prisoners' situation in *Valentine*, where delivery to a foreign sovereign required removing the prisoners from the territorial United States and thus divesting those prisoners of the protections Americans enjoy when they are physically on U.S. soil. Petitioner surrendered *those* protections when he traveled to Syria; the only interest cognizable in habeas that petitioner still possesses is his liberty vis-à-vis the U.S. Government. And because that is precisely what a transfer would provide, transferring petitioner would impose no legal harm on him, such that the balance of harms favors the Government. For that reason, too, the district court's injunction should be vacated as applied to [redacted].

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 intrusion within 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."). Petitioner disagrees, relying largely on his accusation that the Government's position depends on "unfettered and unreviewable power … to dispose of a citizen's liberty by its own *ipse dixit*." Doe Br. 51. That is, as detailed above, mistaken.

The Government's position is narrow and reasonable. It is that the Executive's constitutional and statutory authority over overseas military operations—authority that includes the power to direct troop movements, to use lethal force, to capture detainees on the battlefield, to establish military bases, to enter into agreements with other nations, and the like—includes the authority to relinquish someone captured on that battlefield, including a U.S. citizen, to a coalition partner in that conflict with a direct and legitimate legal interest in that person. Here, that at least includes [redacted]

[redacted]. The public interest weighs heavily in favor of that narrow position.

CONCLUSION

For the foregoing reasons, the preliminary injunction should be vacated as applied to a transfer to [redacted]

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

JESSIE K. LIU
United States Attorney

s/ James M. Burnham
JAMES M. BURNHAM
Senior Counsel, Civil Division

MATTHEW M. COLLETTE
SONIA M. CARSON
Attorneys, Appellate Staff
Civil Division, Room 7234
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
james.m.burnham@usdoj.gov

March 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,232 words. 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 March 16, 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. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system

s/ James M. Burnham
James M. Burnham