ORAL ARGUMENT SCHEDULED ON APRIL 27, 2018

Nos. 18-5032, 18-5110

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

JOHN DOE,

Petitioner-Appellee,

v.

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

Respondent-Appellant.

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

REDACTED SECOND SUPPLEMENTAL BRIEF FOR APPELLANT

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GLOSSARY

ISIL	Islamic State of Iraq and the Levant

INTRODUCTION

Petitioner's argument reduces to the proposition that the U.S. military is confined by the strictures of extradition whenever it takes custody of someone who holds U.S. citizenship on a battlefield during active hostilities and then seeks to relinquish that individual to another sovereign involved in the conflict that has prescriptive jurisdiction over the individual under international law. Petitioner's rule appears to have no limits or exceptions, applying the moment an individual is captured by forward-deployed U.S. troops or, as here, immediately after being accepted by U.S. forces in the region. His rule, if adopted, would require an extraordinary amount of judicial oversight over decisions by military commanders, sometimes in the heat of battle, and would interpose the U.S. courts into sensitive diplomatic discussions with key foreign partners in the midst of armed conflicts. Petitioner's rule does not follow from the Supreme Court's 1936 decision in *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, concerning domestic fugitives from foreign prosecution, nor any of the other decisions from much-different contexts Petitioner has invoked. This Court should reject it.

The Government's position, in contrast, is narrow and reasonable. It is that the U.S. military has options other than detaining Petitioner until the end of hostilities, or simply turning him loose either inside Iraq or on the transnational battlefield where he was captured. Here, [redacted]—has informed the Government that [redacted].

That request is well-founded in international law and fully compliant with U.S. policies forbidding relinquishment of a detainee to a country where the detainee will not be treated humanely. Petitioner's transfer is an appropriate and lawful outcome here. The district court's injunction forbidding it was error and should be vacated forthwith.

ARGUMENT

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

A. Petitioner's latest filing defends his legal rule by citing statements in various cases that U.S. citizens do not forfeit their constitutional rights vis-à-vis the U.S. Government when they travel abroad. Pet'r. Supp. Br. 4-7. But the Government has not argued that Petitioner surrendered his constitutional rights by traveling to ISIL-controlled territory in Syria. Rather, the Government's position is that U.S. citizens voluntarily surrender certain protections available on U.S. territory when they leave that territory. An American in Paris is susceptible to arrest by the French authorities without recourse in U.S. law; an American in Washington is not. It thus did not violate U.S. law for the Syrian Democratic Forces to detain Petitioner as he fled ISIL-held territory, just as it did not violate U.S. law for U.S. forces to accept custody of Petitioner and continue detaining him without filing criminal charges, undergoing a probable cause hearing, or complying with the myriad other requirements of domestic arrest and criminal prosecution. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) ("There is no bar to this Nation's holding one of its own citizens as an enemy combatant.").

That is not because Petitioner has lost his constitutional rights, but because the scope of those rights depends on context. The two unanimous Supreme Court decisions underlying this appeal—*Valentine*, 299 U.S. 5 (1936), and *Munaf v. Geren*, 553 U.S. 674 (2008)—make that clear. The former considered the rights that citizens possess when they seek to resist extradition from within the United States. In that context, the Court explained that specific legal authority and a judicial proceeding are required to "to seize a fugitive criminal and surrender him to a foreign power." *Valentine*, 299 U.S. at 9. The latter considered the rights citizens possess when they are detained by the U.S. military in an overseas theater of combat and seek to resist transfer out of U.S. custody. In that context, the Court explained that "[h]abeas corpus does not require the United States to shelter such fugitives from the criminal justice system of the sovereign with authority to prosecute them." *Munaf*, 553 U.S. at 705. These decisions reached different outcomes because they arise in very different contexts, not because *Munaf* held U.S. citizens have no rights when they travel abroad.

As the Government has explained, the putative transfer here is much closer to the context of *Munaf* than it is to *Valentine*. Petitioner voluntarily traveled to an active theater of combat, was captured on a battlefield there, was accepted into U.S. military custody while hostilities were ongoing, and is being held by the military in that same theater of combat pursuant to the Department of Defense's good-faith determination, supported by extensive record evidence, that he is an enemy combatant. The only significant difference from *Munaf* is that the Government seeks to relinquish Petitioner

[redacted]. But under international law, [redacted] over Petitioner is clear. [redacted]. It is thus hard to see why [redacted] would make a constitutional difference.

Other than Petitioner's continued assertion that *Valentine* applies—an assertion that *Munaf* explicitly, emphatically rejected when the petitioners made it there—Petitioner's latest filing provides little to distinguish this case from *Munaf*. It does suggest that "an extradition treaty is merely one type of positive legal authority," Pet'r. Supp. Br. 9, such that some other type of legal authority might suffice. But if other authority can suffice, then *Valentine* does not apply and Petitioner is left without any basis for his proffered rule that the military cannot relinquish a battlefield detainee until undergoing a judicial proceeding to test its "positive legal authority" for doing so.

Petitioner also accuses the Government of "misleadingly" asserting that his position would require U.S. courts to "essentially adjudicate petitioner's habeas petition before the U.S. military has authority to transfer him." Pet'r. Supp. Br. 10 (quoting Gov't. Reply Br. 14). But that is indeed Petitioner's position. As he argues on the immediately preceding page, "any" reliance on the two pertinent Authorizations for Use of Military Force as a basis for relinquishing Petitioner [redacted] "would require the courts' legal conclusion that Petitioner is an 'enemy combatant' under the statute." Pet'r. Supp. Br. 9 n.7. Petitioner's view is thus that the courts must determine he is an

"enemy combatant" under *Hamdi* by adjudicating his habeas petition challenging continued U.S. custody before the Government can be allowed to terminate that custody via a transfer. That is incorrect for the reasons discussed, as well as contrary to *Hamdi* itself. *See* 542 U.S. at 534 ("[I]nitial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized.").

B. Other than the decision below and those that *Munaf* unanimously reversed, Petitioner has cited no decision in a remotely comparable context enjoining the relinquishment of a U.S. citizen captured and held abroad to a foreign sovereign. Nor do Petitioner's other authorities bolster his position. In addition to the decisions addressed in the Government's prior briefing, this Court's 1972 decision in *Holmes v. Laird*, 459 F.2d 1211, does not support Petitioner. *See* Pet'r. Supp. Br. 4, 7-8. *Holmes* is a case concerning the rights of U.S. military personnel stationed abroad, wherein this Court held that U.S. courts are not "empowered to entertain a claim of illegality in the conviction of two American soldiers in the Federal Republic of Germany with a view to enjoining their surrender for service of their sentences." 459 F.2d at 1212. The petitioners in that case were U.S. citizens serving in the Army who were convicted of attempted rape in Germany, absconded back to the United States while their appeals were pending in the German courts, and then filed habeas petitions to block their return to Germany. *Id.* at 1214.

This Court rejected those petitions on reasoning that, to the extent it is relevant here, only undermines Petitioner's position. Perhaps most clearly, this Court stated that, "had appellants been present in West Germany as militarily-unattached civilians, an exercise of West German criminal jurisdiction over them would indubitably have been appropriate." *Holmes*, 459 F.2d at 1216. This Court further explained that those petitioners had no constitutional basis to challenge "a trial for offenses under West German law allegedly committed in West Germany against a West German citizen," because "the constitutional provisions appellants invoke exerted no force of their own upon the Federal Republic [of Germany] in that exercise of its sovereignty." *Id.* at 1217-18. The Court accordingly held that "the Constitution erects no barrier to appellants' surrender to the Federal Republic …." *Id.* at 1219.

Petitioner invokes *Holmes* for a single sentence in footnote 59 of the opinion. That short passage made only the modest point that, even though those petitioners were *both* U.S. servicemen *and* physically present in the United States, they could not resist relinquishment under *Valentine* because, in that case, there were treaties requiring their transfer. *See Holmes*, 459 F.2d at 1219 n.59. But the Court never suggested that *Valentine* applies outside the context of removing a U.S. citizen from U.S. territory for foreign prosecution. Indeed, as noted above, it suggests precisely the opposite. *See also, e.g.*, *id.* at 1218 ("When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people.").

Petitioner also invokes *Reid v. Covert*, 354 U.S. 1 (1957), Pet'r. Supp. Br. 6, but that decision is even further afield. That case was about whether the U.S. military had court-martial jurisdiction over the civilian dependents of armed services personnel stationed overseas, such that it could prosecute those dependents in military proceedings with different protections than the Constitution requires in a domestic criminal case. *See Reid,* 354 U.S. at 3-5. The Court said the military did not have such jurisdiction, explaining that "persons do not lose their civilian status and their right to a civilian trial because the Government helps them live as members of a soldier's family." *Id.* at 23. Because the Government is not seeking to prosecute Petitioner in a court-martial proceeding—indeed, it is seeking to discontinue its detention of him as soon as possible—the Court's decision in *Reid* has no bearing here.

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

Petitioner agrees that releasing him in Iraq would provide complete relief even though he concedes that he might be "taken into foreign custody" immediately after that release. Pet'r. Supp. Br. 11. Petitioner has not explained, though, why he would suffer irreparable harm from a "transfer" to foreign custody despite his recognition that he would have no basis to object to the very same foreign custody immediately following his "release." The only practical difference between "transfer" and "release" seems to be the brief period between "release" and immediate recapture, as well as the possibility that Petitioner might elude foreign recapture post-"release." Neither

difference constitutes irreparable harm. Petitioner derides this suggestion as "wildly offensive" and "cynical[]," Pet'r. Supp. Br. 11-12, but that rhetoric is divorced from the reality that a suspected ISIL fighter who is released in Iraq with advance notice to the Iraqi authorities is likely to find himself in "foreign custody" shortly thereafter.

Petitioner also opaquely asserts that "foreign sovereigns" might make decisions for "fundamentally illegitimate reasons" and thereby "trump habeas's most fundamental promise." Pet'r. Supp. Br. 11. To the extent Petitioner is suggesting that [redacted] would keep him in custody at our Government's behest, he is incorrect. The transfer at issue would be total. Petitioner would remain in custody—if he remains in custody at all—solely pursuant to [redacted] laws and policies.

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

Petitioner repeats the district court's statement that the current injunction is relatively costless for the Government because [redacted] arranged to take custody of Petitioner despite knowing litigation was likely to ensue. That is mistaken. As the Government has explained, the notice requirement necessitated the expenditure of significant additional diplomatic capital, while the current injunction is interfering with bilateral relations with an important foreign partner, as well as with military operations on the ground in Iraq. The current injunction intrudes deeply into core prerogatives of the political branches and is causing significant, daily harm to the Government.

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

Finally, while it is certainly true that the public interest does not favor unlawful actions, it just as certainly favors giving broad deference to the U.S. military in how it fights overseas conflicts. The public interest further supports the specific transfer at issue, which would relinquish Petitioner to a country [redacted]

The public interest thus favors both the narrow legal rule the Government has proffered, as well as the specific outcome that rule would lead to here.

V. PETITIONER'S NEW ARGUMENTS ABOUT THE NOTICE REQUIREMENT FAIL.

Petitioner also argues that the recent district court proceedings confirm the 72-hour notice requirement was appropriate, Pet'r. Supp. Br. 13-14, but the opposite is true. The Government's submission in its prior appeal made a facially sufficient showing to support transfer to either [redacted], such that the notice requirement was improper. That requirement interfered with the Government's ability to conclude a transfer arrangement with [redacted] and the Government's ability to nonetheless secure an arrangement confirms only the importance to both countries of appropriately resolving this matter. None of the points Petitioner highlights from the district court's order change the analysis. Transferring Petitioner to [redacted] was justified on the prior record and is only more so now.

Petitioner also attempts to raise a new argument in defense of the 72-hour notice requirement—that notice is necessary to review transfer to countries where torture is likely. Pet'r. Br. 14-15. But Petitioner forfeited this argument by failing to raise it in the appeal concerning the injunction requiring 72 hours' notice before a transfer, *see, e.g.*, *Board of Regents of the Univ. of Wash. v. EPA,* 86 F.3d 1214, 1221 (D.C. Cir. 1996), and the Court should not now consider it.

Regardless of whether this new argument is properly before the Court, though, it is foreclosed by binding precedent. The excerpt from *Munaf* that Petitioner quotes referred to only an "extreme case in which *the Executive has determined* that a detainee is likely to be tortured but decides to transfer him anyway"—a circumstance that will not arise since the Executive continues to maintain the policy it had in *Munaf* to not "transfer an individual in circumstances where torture is likely to result." 553 U.S. at 702 (emphasis added). That passage accordingly cannot sustain the notice injunction here, which is, as Petitioner concedes, also foreclosed by this Court's decisions. *See, e.g.*, *Omar v. McHugh*, 646 F.3d 13, 21 (D.C. Cir. 2011) ("reviewing the conditions Omar might face in Iraqi custody … is the precise inquiry that the Supreme Court in *Munaf* already rejected"); *Kiyemba v. Obama*, 561 F.3d 509, 515 (D.C. Cir. 2009) (courts generally cannot require pre-transfer notice).

CONCLUSION

This Court should vacate the preliminary injunction immediately.

Respectfully submitted,

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April 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the Court's Order on supplemental briefing because it is under 10 pages in length. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ James M. Burnham
James M. Burnham

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2018, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by causing an original and eight copies to be sent to the Clerk's office via hand delivery. I also served via FedEx all parties entitled to receive the material under seal, *see* Circuit Rule 47.1(d)(2).

s/ James M. Burnham
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