PUBLIC COPY—SEALED MATERIAL DELETED

ORAL ARGUMENT SCHEDULED FOR APRIL 27, 2018

No. 18-5032 (consolidated with No. 18-5110)

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 SUPPLEMENTAL RESPONSE BRIEF FOR APPELLEE

Arthur B. Spitzer
American Civil Liberties Union
of the District of Columbia
915 15th Street, NW, 2nd Floor
Washington, DC 20005
Tel: 202-457-0800
Fax: 202-457-0805
aspitzer@acludc.org

Hope R. Metcalf
127 Wall Street
New Haven, CT 06511

Counsel for Petitioner–Appellee

Jonathan Hafetz
Brett Max Kaufman
Hina Shamsi
Anna Diakun
Dror Ladin
American Civil Liberties Union
Foundation
125 Broad Street—18th Floor
New York, New York 10004
Tel: 212-549-2500
Fax: 212-549-2654
jhafetz@aclu.org

[*continued on next page*]

Tel: 203-432-9404
Fax: 203-432-8260
hope.metcalf@yale.edu

bkaufman@aclu.org
hshamsi@aclu.org
adiakun@aclu.org
dladin@aclu.org

TABLE OF CONTENTS

MATERIAL UNDER SEAL DELETED

TABLE OF AUTHORITIES

Cases

Statutes

GLOSSARY

AUMF: Authorization for Use of Military Force

ISIS: Islamic State of Iraq and Syria

MNF-I: Multinational Force-Iraq

SOFA: Status of Forces Agreement

I. Petitioner has established a likelihood of success on the merits.

A. The executive cannot dispose of a citizen's liberty by forcibly transferring him to a foreign government, by extradition or otherwise, without positive legal authority—a treaty or a statute—and without the opportunity for judicial review. *See Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936); Pet. Br. 16–41; Pet. Suppl. Br. 3–10. The government claims "the Supreme Court unanimously rejected" this argument in *Munaf v. Geren*, 553 U.S. 674 (2008), when it distinguished *Valentine*, Gov't Suppl. Br. 5, but that is not accurate for two reasons. First, when it distinguished *Valentine*, the Court in *Munaf* was responding to petitioners' argument that the 1936 extradition treaty between Iraq and the United States "provide[d] the governing rule of decision," and that the treaty "affirmatively bar[red] the government from transferring" petitioners to Iraqi custody because it did not permit the transfer of citizens. Br. for Petitioners 49–50, *Munaf*, 553 U.S. 674 (Nos. 07-394 & 06-1666), 2008 WL 503592. But because *Munaf* involved "the transfer to a sovereign's authority of an individual captured and already detained in that sovereign's territory," 553 U.S. at 704; *see* Pet. Br. 28–33, the Court concluded that an *extradition treaty* was not required, as it was in *Valentine*, to detain and then transfer them, 553 U.S. at 704. And second, in *Munaf*, the government *had* other positive legal authority: U.S. law, in conjunction with applicable UN Security Council resolutions, authorizing the United States, "acting

as part of the MNF-I," to serve as Iraq's jailor and detain petitioners "at the request of and on behalf of the Iraqi government," which had initiated criminal proceedings against them. *Id.*; *see* Pet. Suppl. Br. 8–9 (discussing *Omar v. McHugh*, 646 F.3d 13, 24 (D.C. Cir. 2011) (government had positive legal authority to transfer the *Munaf* petitioners)); Pet. Br. 36–37.

The government seeks to distinguish *Wilson v. Girard*, 354 U.S. 524 (1957), arguing that the security treaty between the United States and Japan "did not confer legal authority on the U.S. military to transfer U.S. citizens." Gov't Suppl. Br. 6–7. But the treaty did exactly that: it expressly authorized the executive to enter into administrative agreements with Japan governing criminal jurisdiction over U.S. servicemembers on a U.S. military base in Japan. 354 U.S. at 526–29 (agreement specified that U.S. would have jurisdiction over its servicemember's offenses, but could waive jurisdiction in a specific case). The government suggests that because the treaty did not explicitly "confer[] additional legal authority to *effectuate* transfers," the transfer lacked positive legal authority. Gov't Suppl. Br. 6. But as the Court made clear, the power under the agreement to waive U.S. jurisdiction and allow Japanese prosecution implied the power to physically "deliver[]" the petitioner to Japan for that purpose. 354 U.S. at 526, 530.[1] Here, the government

[1] That is the same reason the positive legal authority in *Munaf* and in *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972), permitted the petitioners' transfers in those cases. *See Munaf v. Geren*, 482 F.3d 582, 586 (D.C. Cir. 2007) (Randolph, J.,

assumes the conclusion of its own argument when it says that "[t]he entire premise of this treaty provision was that no special authority was necessary for U.S. forces to relinquish an individual held in Japan to the Japanese government, given Japan's territorial jurisdiction within its borders." Gov't Suppl. Br. 6. But the treaty itself is what ensured that no *additional* authority was required.

The government argues that *In re Territo*, 156 F.2d 142 (9th Cir. 1946), "nowhere suggest[s] that the Geneva Convention supplied positive legal authority without which a transfer of that petitioner would have been unlawful." Gov't Suppl. Br. 7–8. That misreads the case. In *Territo*, the petitioner's claim was that the Geneva Convention "was not intended to cover" his situation, and he sought release from U.S. custody on that basis. 156 F.2d at 145. The Ninth Circuit rejected that claim, setting out "pertinent parts of [the] Geneva Convention" and affirming that he was "properly held as a prisoner of war." *Id.* at 146–47. And it followed from his status and detainability under the Geneva Convention that he could be transferred in accordance therewith. *See id.* at 145 n.2. The government is correct that the Ninth Circuit remarked that U.S. citizenship is no bar to detention as a prisoner of war if there is a sufficient legal and factual basis for such a conclusion.

---

concurring) (power to effectuate transfer stems from 2002 AUMF, in connection with applicable UN Security Council resolutions, which authorized the United States to arrest and detain individuals pending investigation and prosecution in Iraqi courts under Iraqi law); *Holmes*, 459 F.2d at 1219 & n.59 (NATO SOFA and Supplemental Agreements authorized physical transfer of U.S. servicemembers to Federal Republic of Germany for crimes committed there).

See id. at 145; *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 532–35 (2004). But Petitioner has not argued that his citizenship immunizes him from detention as an enemy combatant—he is simply demanding that the government prove the legal and factual basis for such detention. *See* JA 88–149. And just because citizenship is not determinative of *that* question does not mean that it "imposes no special constraints on the U.S. military's authority to transfer" a U.S. citizen to foreign custody, Gov't Suppl. Br. 8. *See, e.g.*, *Hamdi*, 542 U.S. at 532 ("[I]t is . . . vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship."); *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950) ("Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished [its] importance.").

B. Even if positive legal authority were not required to forcibly transfer a U.S. citizen, the government would still lack a lawful basis to transfer Petitioner to [redacted] under *Munaf*. The government almost exclusively relies on that case for its novel "legitimate sovereign interest" test, arguing that "[redacted] basis for taking custody of Petitioner is closely analogous to Iraq's basis for taking custody of the petitioners" in *Munaf*. Gov't Suppl. Br. 4. But the government stretches *Munaf* beyond recognition. As the Deputy Solicitor General framed the issue before the Supreme Court in *Munaf*:

MATERIAL UNDER SEAL DELETED

> Under this Court's precedents and universal international law norms, the government of Iraq, like all sovereign nations, has a sovereign right and jurisdiction to try and punish individuals, including American citizens, who voluntarily enter its borders, commit crimes in its country, and remain there.

Tr. of Oral Argument 4, *Munaf*, 553 U.S. 674 (Nos. 06-1666 & 07-394), 2008 WL 779245. And those factors formed the outer bounds of the Court's decision. *See Munaf*, 553 U.S. at 689, 694; Pet. Br. 28–33. To be sure, [redacted] might have authority to exercise prescriptive jurisdiction over Petitioner under international law, as might potentially dozens of states based on Petitioner's alleged—but unproven—connection to ISIS. But nothing about Petitioner's proposed transfer brings his case within *Munaf*'s narrow holding and the unique sovereign interest of [redacted]. Certainly, the Supreme Court did not suggest that an [redacted] was relevant to the analysis, Pet. Br. 30–31,[2] or that it would have permitted the transfer of [redacted].

Any transfer [redacted] would likewise fall outside *Munaf*'s narrow compass.[3]

---

[2] The government also cites [redacted].

[3] Though this issue was discussed at the previous oral argument, Petitioner has not had the opportunity to brief it since the government first articulated its argument in its reply brief. And critically, the district court has not had the opportunity to assess not only the asserted legal authority for any proposed transfer [redacted], but also the

MATERIAL UNDER SEAL DELETED

Unlike the U.S. citizens in *Munaf*, Petitioner did not [redacted], is not [redacted], and is not [redacted]. Indeed, the only similarity between this case and *Munaf* is that Petitioner [redacted]. That the United States [redacted] is within the executive's purview. But that decision cannot then become the justification for forcibly transferring him [redacted]. Otherwise, the United States would be free to [redacted]

C. The government argues that Petitioner's position is "contrary" to the plurality opinion in *Hamdi* because "'process is due only when the determination is made to *continue* to hold those who have been seized.'" Gov't Suppl. Br. 8–9 (quoting *Hamdi*, 542 U.S. at 534). But the quoted passage surely does not mean that the executive has unconstrained and temporally unlimited authority to detain a citizen until it decides what to do with him. Rather, the critical moment identified in *Hamdi* is when the government decides *not to release* him. And here, the government made *that* determination six months ago. Mot. to Dismiss 1 (Oct. 30, 2017), ECF 11. To argue that the district court's injunction violates a "sphere" of

---

concrete terms of such a transfer, the respective harms to the parties, and the nature of that country's interest. *See* Pet. Suppl. Br. 14–15.

"deference to military authorities . . . exempting short-term battlefield detention from judicial oversight," Gov't Suppl. Br. 9, has the meaning of *Hamdi* (and the circumstances of this case) backwards. The government—which continues to claim the authority to detain Petitioner until the end of hostilities—asks the courts to step aside as it attempts to eviscerate Petitioner's constitutional path to seek his freedom from unlawful detention by shunting him off to [redacted]. This Court should not acquiesce to such a perversion of the judiciary's role. *See Hamdi*, 542 U.S. at 536 ("[I]n times of [armed] conflict, [the Constitution] most assuredly envisions a role for all three branches when individual liberties are at stake.").

II. Petitioner will suffer irreparable harm if transferred.

The government continues to conflate release into a foreign sovereign's territory with transfer into its custody. While the government argues that it "is entirely possible" that Petitioner may be detained by [redacted] after he is freed from U.S. custody, Gov't Suppl. Br. 10, Petitioner's detention at the hands of a foreign sovereign following release is far from assured. In *Munaf*, "release of *any* kind" would necessarily have "interfere[d] with the sovereign authority of Iraq," 553 U.S. at 698; here, however, it is far from clear that [redacted] would have any interest or authority over Petitioner if he wins his freedom through his habeas petition. Indeed, neither country has charged him with a

crime—just like the United States. The government assumes that because it has branded Petitioner an enemy combatant—even as it seeks to avoid having to prove it—[redacted] are so likely to seek to detain him upon his release from U.S. custody that any potential harm from his transfer is a nullity. Gov't Suppl. Br. 11 ("There is thus little practical difference from the perspective of Petitioner's habeas petition between the 'release' that Petitioner seeks and the 'transfer' that the Government proposes to undertake."). That assumption is not just wrong. *See* ECF 87 at 4 ("transfer was not initiated by the receiving country"). It is also offensive to the Constitution. *See* Pet. Suppl. Br. 11–12; *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[A]lthough a plaintiff seeking equitable relief must show a threat of substantial and immediate irreparable injury, a prospective violation of a constitutional right constitutes irreparable injury for these purposes." (quoting *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998))).

Additionally, if Petitioner demonstrates that is he not an enemy combatant and is entitled to his freedom, the district court plainly possesses the authority to order his safe release in the United States. Pet. Br. 40–41; *see* 28 U.S.C. § 2243 (habeas court "shall . . . dispose of the matter as law and justice require"). If not, any citizen detained in a war zone would lack a habeas remedy *even if* the government lacked authority to detain him. In short, the government asks this Court to deny an American citizen the opportunity to seek his freedom—and

approve a forcible transfer with certain irreparable harm—based on the government's mere speculation that Petitioner might face some future harm if he obtains the relief he seeks. The Court should decline that invitation.

III. The balance of the equities favors Petitioner.

The government claims the injunction is already "imposing immediate and significant harms on the Government." Gov't Suppl. Br. 11. But the government explained to the [redacted] that litigation over Petitioner's transfer could take some time, and that the courts might block it. *See* ECF 87 at 6 (citing Decl. ¶ 9). In any event, the executive cannot suffer cognizable harm if the judiciary enjoins it from carrying out an unlawful act. *See* Pet. Suppl. Br. 13. An American's fate is not a diplomatic game of "Let's Make a Deal."

IV. The public interest favors an injunction barring Petitioner's transfer.

The government warns that leaving the injunction in place would be an "undue judicial intrusion into [the executive branch's] constitutional sphere of responsibility." Gov't Suppl. Br. 12. But it would not be undue because the courts' role is essential, including in wartime, when a citizen's liberty is at stake. *Hamdi*, 542 U.S. at 536. At the same time, the government assures the Court that allowing Petitioner's transfer would "not in any way undermine judicial authority to review habeas petitions." Gov't Suppl. Br. 13. But of course it would, because it would signal that in any case in which the government could not prove it had detention

authority but did not wish to release a detainee, it could simply transfer him to a cooperative country. And it would have a particularly sharp incentive to do so when it anticipated that a court would likely reject its claim of detention authority. As a practical matter, it would mean that the government could detain a U.S. citizen, even mistakenly, and transfer him or her to foreign custody before permitting him or her to reach a habeas court at all. *See Hamdi*, 542 U.S. at 534 (emphasizing the need to ensure "the errant tourist, embedded journalist, or local aid worker has a chance to prove military error"). That is not in the public interest.

The government further suggests that because "[t]he public interest favors giving U.S. military forces broad discretion in this context," it also favors overturning the injunction. Gov't Suppl. Br. 13. But one has little to do with the other. Prohibiting Petitioner's transfer to [redacted] would not put the military to the false choice of "outright releasing [redacted] captured on the battlefield" or "litigating an entire round of habeas review before it has the ability to relinquish custody of th[e] detainee to another sovereign." Gov't Suppl. Br. 13–14 (emphasis added). To transfer a citizen, including Petitioner, the military could simply identify positive legal authority. If the injunction affects the military's "discretion" at all, that is because the military may not exercise discretion to curtail U.S. citizens' constitutional rights. The public interest is best served when the government's power to dispose of citizens is constrained by law.

Dated: April 26, 2018

Respectfully submitted,

/s/ Arthur B. Spitzer
Arthur B. Spitzer
American Civil Liberties Union
of the District of Columbia
915 15th Street, NW, 2nd Floor
Washington, DC 20005
Tel: 202-457-0800
Fax: 202-457-0805
aspitzer@acludc.org

Hope R. Metcalf
127 Wall Street
New Haven, CT 06511
Tel: 203-432-9404
Fax: 203-432-8260
hope.metcalf@yale.edu

/s/ Jonathan Hafetz
Jonathan Hafetz
Brett Max Kaufman
Hina Shamsi
Anna Diakun
Dror Ladin
American Civil Liberties Union
Foundation
125 Broad Street—18th Floor
New York, New York 10004
Tel: 212-549-2500
Fax: 212-549-2654
jhafetz@aclu.org
bkaufman@aclu.org
hshamsi@aclu.org
adiakun@aclu.org
dladin@aclu.org

Counsel for Petitioner–Appellee

CERTIFICATE OF COMPLIANCE

1. This brief complies with this Court's order dated April 20, 2018, because it contains ten pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Jonathan Hafetz
Jonathan Hafetz
Counsel for Petitioner–Appellee

Dated: April 26, 2018

CERTIFICATE OF SERVICE

On April 26, 2018, I filed the foregoing PUBLIC SUPPLEMENTAL RESPONSE BRIEF FOR PETITIONER–APPELLEE with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit via the Court's electronic docketing system.

Dated: April 26, 2018

Respectfully submitted,

/s/ Jonathan Hafetz
Jonathan Hafetz
Counsel for Petitioner–Appellee