

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3 - - - - - X
4 JOHN DOE, :
5 Appellee, :
6 v. : No. 18-5032
7 JAMES MATTIS, IN HIS OFFICIAL :
8 CAPACITY AS SECRETARY OF :
9 DEFENSE, :
10 Appellant. :
11 - - - - - X

11 Thursday, April 5, 2018
12 Washington, D.C.

13 The above-entitled matter came on for oral
14 argument pursuant to notice.

15 BEFORE:

16 CIRCUIT JUDGES HENDERSON, SRINIVASAN, AND WILKINS

17 APPEARANCES:

18 ON BEHALF OF THE APPELLANT:

19 JAMES M. BURNHAM (DOJ), ESQ.

20 ON BEHALF OF THE APPELLEE:

21 JONATHAN HAFETZ, ESQ.
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C O N T E N T S

ORAL ARGUMENT OF:

PAGE

James M. Burnham (DOJ), Esq.
On Behalf of the Appellant

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Jonathan Hafetz, Esq.
On Behalf of the Appellee

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P R O C E E D I N G S

THE CLERK: Case number 18-5032, John Doe v. James Mattis, in his official capacity as Secretary of Defense, Appellant. Mr. Burnham for the Appellant; Mr. Hafetz for the Appellee.

JUDGE SRINIVASAN: So, I have two announcements before we start. The first is Judge Henderson will give full consideration to this matter based on the briefing that's been submitted by the parties, and the audio recording of the argument we have today. And the second announcement is that we'll have a public session, which we're about to embark upon now, in which there will be no reference made to the sealed material which is the identity of the two potential receiving countries, as was discussed in the public briefing; or any discussion that could reveal the identity of those countries; and then we'll retire into a closed session in which those references can be made. With that, Mr. Burnham.

ORAL ARGUMENT OF JAMES M. BURNHAM, ESQ.

ON BEHALF OF THE APPELLANT

MR. BURNHAM: Thank you, Your Honor. My name is James Burnham, I'm here on behalf of the United States. And as Your Honor -- I want to thank the Panel for bifurcating the argument, and as a result I'll begin with the broad legal issue, and try to defer the discussion of the

1 countries to the sealed proceeding.

2 Petitioner in this case is a citizen of both the
3 United States and Saudi Arabia who chose to travel to ISIL
4 held territories spanning Syria and Iraq, where he was
5 captured on a battlefield by the Syrian Democratic Forces.
6 Petitioner told those forces that he is a U.S. citizen, and
7 they transferred him to U.S. forces, which now seek to
8 potentially transfer Petitioner again. Those efforts are
9 hindered, however, by a sweeping injunction that requires 72
10 hours notice to the District Court before relinquishing
11 custody of Petitioner to any country. The Government has
12 come to this Court seeking the narrowest possible relief
13 from that injunction that can still protect its critical
14 interests in conducting foreign affairs and in military
15 operations.

16 JUDGE WILKINS: How is an injunction that requires
17 notice a sweeping injunction?

18 MR. BURNHAM: Well, Your Honor, I think it's
19 sweeping because it applies to every country in the world.
20 I think the notice requirement, as this Court recognized in
21 Kiyemba II directly interferes with the ability of the
22 United States to engage in diplomatic discussions with other
23 countries, because any sort of agreement that we are able to
24 reach with another country would necessarily be contingent
25 on possible post-agreement litigation in the District Court,

1 possibly this Court, and possibly the Supreme Court. And
2 so, the reason why the notice requirement is an issue is
3 because it interferes with that process. And I think as
4 Petitioner himself recognizes, and Kiyemba II I think holds,
5 there cannot be a notice requirement unless there's
6 authority to enjoin the underlying transfer.

7 JUDGE WILKINS: Did you argue below that to the
8 extent that they're seeking notice it should only be with
9 respect to certain countries and not others? And wasn't
10 your position below a sweeping position in that you could,
11 the Executive could transfer him to any country in the world
12 without any judicial review?

13 MR. BURNHAM: No, Your Honor. Our position in the
14 District Court was that the Executive could transfer him to
15 a country that has a legitimate interest in obtaining
16 custody, and we identified one country in the District Court
17 below that we can talk about more in the sealed proceeding,
18 but our legal rule was the same legal rule we're talking
19 about here, which is that there needs to be a direct and
20 legitimate interest on the part of the receiving country in
21 order for the transfer to be allowed. And so, what we asked
22 the District Court to do was to, you know, not include, now,
23 it's a little complicated because the Petitioner asked for a
24 transfer injunction, not a notice injunction, so most of the
25 briefing and discussion was focused on an injunction against

1 the ultimate transfer. But what we asked the District Court
2 to do was exclude a country that has a, any country that has
3 a legitimate interest in Petitioner, in particular one
4 country that we can talk about. And so, I think we fairly
5 presented our narrow position to the District Court. In
6 this Court we've tried to narrow it even further and
7 concretize it more by limiting it to the two countries that
8 we're going to talk about. And I think it's relatively
9 clear that the Court cannot enjoin transfer to either of
10 those countries here. The United --

11 JUDGE SRINIVASAN: So, can I ask you a question
12 just as a framing question? So, in Omar II we said the
13 following, none of this means that the Executive Branch may
14 detain or transfer Americans or individuals in U.S.
15 territory at-will without any judicial review of the
16 positive legal authority for the detention or transfer. So,
17 let's just take that as a given that that's the --

18 MR. BURNHAM: Yes, Your Honor.

19 JUDGE SRINIVASAN: -- general principle under
20 which we're operating today. So, is it your submission that
21 the authority to transfer is one that the Government has
22 without any judicial review of the legality of the authority
23 to transfer?

24 MR. BURNHAM: So, I would disagree with your
25 premise, Judge Srinivasan, because --

1 JUDGE SRINIVASAN: Yes.

2 MR. BURNHAM: -- as I read that passage in Omar
3 there's no commas in the passage, and so, what the Court I
4 think was saying is you cannot detain and transfer Americans
5 or individuals in U.S. territory at-will. And so, I --

6 JUDGE SRINIVASAN: Okay. So, suppose -- I think I
7 know where you're going, which is that in U.S.
8 territories --

9 MR. BURNHAM: Yes.

10 JUDGE SRINIVASAN: -- modifies both Americans and
11 individuals.

12 MR. BURNHAM: Yes, Your Honor.

13 JUDGE SRINIVASAN: And I understand your
14 submission to that effect. Let's just assume for --

15 MR. BURNHAM: Okay.

16 JUDGE SRINIVASAN: -- present purposes that we
17 disagree with you on that, and that they're disjunctive, and
18 that Americans wherever, and others in U.S. territory. So,
19 if that's the understanding then what's your position as to
20 that? Is your position just that that's wrong and it's not
21 correct, or is it that notwithstanding --

22 MR. BURNHAM: No, no, Your Honor.

23 JUDGE SRINIVASAN: -- that reading we're still in
24 compliance with that?

25 MR. BURNHAM: No, no. I think even if that is

1 what Omar meant, and that is the law, that --

2 JUDGE SRINIVASAN: Yes.

3 MR. BURNHAM: -- that United States still has the
4 authority to transfer Petitioner, and I think it's the same
5 authority, Article II authority that the Executive uses
6 every day on the battlefield to engage in all kinds of
7 battlefield operations, troop movements, military
8 operations, establishing local bases, all of that. There
9 are lots of things that happen on the battlefield without
10 any kind of judicial review that the Executive just has the
11 authority delegated to the military commanders to engage in.

12 JUDGE SRINIVASAN: But how -- so, you just, you
13 threw in without me judicial review, and I guess my question
14 is if the statement says, and let's just ellipse out in U.S.
15 territory, because I've assumed it away --

16 MR. BURNHAM: Right.

17 JUDGE SRINIVASAN: -- and I understand you've got
18 your --

19 MR. BURNHAM: Right.

20 JUDGE SRINIVASAN: -- caveat that's wrong. So,
21 none of this means that the Executive Branch may detain or
22 transfer Americans without any judicial review of the
23 positive legal authority for the transfer. So, that's what
24 it says. And how is the without judicial review consistent
25 with the statement that says that judicial review is

1 required?

2 MR. BURNHAM: So, Your Honor, I think that the
3 position that we would -- what we would say is that there's
4 no judicial review of the legal authority portion of what is
5 going on, but I don't know that our position that is that
6 different as a practical matter because what we're saying is
7 that the Executive can only send somebody to a country with
8 a legitimate interest. And I think that there could be a
9 role for the Court to play in deciding kind of what the
10 scope of a legitimate interest is. And so, I think that's a
11 place where the Court might have a role to play. I don't
12 think the Court has a role to play in assessing whether the
13 legitimate interest as defined exists as a matter of fact in
14 a particular case. And so, you know, the analogy I would
15 draw there is to the unreviewability of whether somebody is
16 going to be, or likely to be tortured in a receiving
17 country, where the Executive Branch and Congress have, you
18 know, they're the political branches, and so the Executive's
19 determination that someone's not likely to be tortured is
20 just not reviewable, at least not in the main, I mean, maybe
21 at the extremes, but not in the sort of normal case.

22 JUDGE SRINIVASAN: So, then the type of question I
23 would ask then is that in Munaf the legal question was
24 whether a country that has a particular interest, which is
25 to say an interest in prosecuting, potentially prosecuting

1 someone for potential crimes committed within their
2 territory is the type of interest that, as to which transfer
3 is definitely allowed, and therefore --

4 MR. BURNHAM: Right.

5 JUDGE SRINIVASAN: -- unreviewable. You'd say the
6 same thing about transfer based on some other source of
7 authority by the receiving country. We won't get into the
8 particulars, but in terms of if it's not transfer for
9 purposes of enabling prosecution for crimes within
10 territory, but it's some other legal basis for the transfer,
11 the validity of that legal basis would be something that's
12 subject to judicial review.

13 MR. BURNHAM: Right. So, I think it is certainly
14 possible that the courts have a role to play in assessing
15 whether that legal basis is the sort of legal basis that
16 Munaf was talking about. So, we've tried to extrapolate
17 from Munaf a legal principle that --

18 JUDGE SRINIVASAN: Right.

19 MR. BURNHAM: -- there is a certain basket of
20 interest that, at least that basket of interest is
21 sufficient to engage in a transfer like the one we're
22 talking about here. It could be that there's a much broader
23 authority, but we don't think that the Court needs to get
24 into that in this case because the countries we've proffered
25 are so close to what was going on in Munaf.

1 JUDGE SRINIVASAN: And the legal question whether
2 that basket of interest is enough is one as to which there
3 would be judicial review --

4 MR. BURNHAM: So, I --

5 JUDGE SRINIVASAN: -- from the Government's
6 perspective.

7 MR. BURNHAM: -- disagree that it would be
8 something that is subject to judicial review because I think
9 we disagree with Your Honor about what Omar says.

10 JUDGE SRINIVASAN: Yes.

11 MR. BURNHAM: But if Omar disagrees with me about
12 what Omar says then I think that the judicial review would
13 be limited to what we've just discussed, which is --

14 JUDGE SRINIVASAN: Yes.

15 MR. BURNHAM: -- whether that interest is a
16 legitimate interest, as we conceive it under Munaf. And
17 then also, of course, under Kiyemba, which I think, you
18 know, Kiyemba is written in a sort of much more categorical
19 way than the Supreme Court's decision in Munaf. And just to
20 underscore that, I mean, there's a lot of quotes like this
21 in this Court's opinion in Kiyemba, Kiyemba II, I should
22 say, quote, Munaf precludes a court from issuing a writ of
23 habeas corpus to prevent a transfer, end quote, because of
24 either continued detention, or torture. And so, I think,
25 you know, what we read from that is if the Court cannot

1 enjoin the transfer even to prevent continued detention it
2 can't enjoin the transfer for no reason at all, just because
3 the Petitioner doesn't want to go to whatever country is at
4 stake. And then the primary distinction that's been offered
5 for Kiyemba II by Petitioner that didn't involve U.S.
6 citizens, which is true, except that this Court said in
7 footnote four that it was assuming, quote, arguendo, these
8 alien detainees have the same constitutional rights with
9 respect to their proposed transfer as did the U.S. citizens
10 facing transfer --

11 JUDGE SRINIVASAN: Right. So, but for -- but in
12 Kiyemba I thought what was principally at stake is
13 conditions in the receiving country. And so, I think you're
14 right that the footnote in Kiyemba deals, assumes that the
15 individuals there have the same rights as U.S. citizens
16 would with respect to challenging transfer based on
17 conditions in the receiving country. And if the challenge
18 doesn't have to do with conditions in the receiving country,
19 in other words, if the challenge isn't, the detainee isn't
20 saying here's why I'd like to transfer, because the
21 conditions in the receiving country are X, Y, Z, torture
22 might be one of them, there could be other things doesn't
23 comply with the laws that we hold to be fundamental here,
24 things of that nature, then that's not something that can be
25 reviewed, which might be a different claim than a challenge

1 that's based on the authority to detain here to begin with.

2 MR. BURNHAM: Right. So, I just don't think
3 Kiyemba is written solely focused on the conditions in the
4 receiving country because I wouldn't conceive of continued
5 detention under that country's laws as a condition in the
6 receiving country. I think that's a reason why the person
7 doesn't want to go there. And so just, you know, Kiyemba
8 says in another place that the District Court cannot issue a
9 writ of habeas corpus to shield a detainee from, quote,
10 detention at the hands of another sovereign on its soil, and
11 under its authority, and that's at page 516 of this Court's
12 opinion. And so, I think what the Court was saying there is
13 that even if the Petitioner is concerned about continued
14 detention, which I don't think is a condition, I think
15 that's more he's worried about -- I just think, I think
16 about that as in a different box than whether he's likely to
17 be tortured, it's just a rationale for not wanting to go to
18 whatever country we would like to transfer him to.

19 JUDGE SRINIVASAN: Yes.

20 MR. BURNHAM: Even then the Court cannot interpose
21 itself by a habeas. And so, I think when you read that in
22 conjunction with Munaf it's clear that the Executive has
23 very broad discretion in this area, at least under the
24 circumstances at issue here. And just to tick through them
25 really quickly because --

1 JUDGE WILKINS: So, if someone who is a journalist
2 for MSNBC or CNN or something like that is detained on the
3 battlefield, and the Executive makes a determination that
4 they're an enemy combatant, and, you know, they're going to
5 transfer them forthwith to Siberia, or some other remote
6 unpleasant location, and they file a writ of habeas corpus
7 in the District Court here, the Court would be without
8 jurisdiction, or without the power to review that detention
9 or that transfer.

10 MR. BURNHAM: Well, Your Honor, you know, I don't
11 think we need to -- that's certainly not our position in
12 this case because that's different from this case in several
13 I think significant respects. For one thing, I think --

14 JUDGE WILKINS: I understand it's different.

15 MR. BURNHAM: No, I -- yes, Your Honor.

16 JUDGE WILKINS: But my point is, is that your
17 argument that that would be unreviewable.

18 MR. BURNHAM: No, Your Honor. My argument today
19 is that I think the Court could play a role potentially in
20 defining the scope of what is a legitimate interest as a
21 legal matter. And so, it's hard for me, you know, I think
22 there would be a very difficult question about whether there
23 would be a legitimate interest, I don't know the citizenship
24 of the journalist Your Honor is hypothesizing.

25 JUDGE WILKINS: U.S. citizen.

1 MR. BURNHAM: No, I assumed that, but I don't know
2 if he's also a citizen of Russia, that could change the
3 calculus. But assuming he's not, and assuming this is just,
4 you know, we picked a country out of a hat, I think that
5 would be a much more difficult case.

6 JUDGE SRINIVASAN: But I thought, just to follow
7 up on Judge Wilkins' question, I thought that your threshold
8 position was if you disagree with the gloss on Omar that I
9 asked you to accept, and you think that it means that it
10 only deals with people detained in U.S. territory, even if
11 they're American citizens, then why isn't the answer to
12 Judge Wilkins' question that there is no judicial review?

13 MR. BURNHAM: I think these are just slightly
14 different concepts. So, the point in Omar was what sort of
15 legal authority in the sense of like Valentine means it, I
16 think, in the extradition sense the Executive needs, and I
17 don't think that applies here, I think Omar was not saying
18 that, and I think Munaf takes that off the table. What I
19 took Judge Wilkins to be asking me is whether there is a
20 limit on the discretion that we're talking about, and that,
21 a judicially reviewable limit, and I think if you read
22 Munaf, you know, I, you know, we don't have a firm position
23 on the outer bounds of this authority, but I certainly think
24 in the hypothetical you've offered it's a much more
25 difficult case because I think there could be a real

1 question about whether that question has a legitimate
2 interest. I would also note that on the sort of our side of
3 the equation, you know, there are a lot of circumstances --

4 JUDGE SRINIVASAN: Can I -- I'm just -- I'm sorry
5 just --

6 MR. BURNHAM: Please.

7 JUDGE SRINIVASAN: There's two different things
8 going on here, one of which is whether there's legal
9 authority.

10 MR. BURNHAM: Right.

11 JUDGE SRINIVASAN: And the second of which,
12 whether, the question of whether there's legal authority is
13 judicially reviewable. And so, it sounds like what you're
14 saying is that based on Judge Wilkins' hypo there would be a
15 serious question about legal authority, but as to judicial
16 reviewability what's your position?

17 MR. BURNHAM: So, Your Honor, I guess I just -- I
18 don't mean to be disagreeable, I just don't think about
19 it --

20 JUDGE SRINIVASAN: No, it's --

21 MR. BURNHAM: -- as a legal authority issue,
22 because I think legal authority is a concept from the
23 extradition context that just doesn't apply here, there has
24 to be a treaty with country A in order to extradite somebody
25 to country A, and I don't think that apparatus --

1 JUDGE WILKINS: So, if there's no legal authority
2 requirement then, and let's suppose that's the, if we're
3 going to operate under that premise then what role is there
4 for the courts in my hypothetical?

5 MR. BURNHAM: So, I think, Your Honor, there could
6 nonetheless be limits on the Executive's power. So, even if
7 there's not a legal authority requirement in the sense that
8 Judge Srinivasan has suggested Omar says, and that I think
9 Valentine does say for extradition, there could be limits to
10 the scope of Executive power. And so, it could be in that
11 circumstance that that is just so, that country is just so
12 far flung there's no basis in international law, there's no
13 basis in really any legitimate, any legitimate basis for
14 that country to be receiving Petitioner, that the Executive
15 just doesn't have discretion to do that.

16 JUDGE SRINIVASAN: So, maybe ask a semantic
17 question, then. Maybe I'm, we're fixated on the term legal
18 authority.

19 MR. BURNHAM: Right.

20 JUDGE SRINIVASAN: Because I understand that that
21 might raise some red flags in your view about Valentine.
22 But the way Omar discusses it is it goes on in the same
23 paragraph to explain why the concern that it had raised at
24 the outset of the paragraph was satisfied by the proceedings
25 in Munaf. And what it says is in the earlier iteration of

1 this litigation Omar raised a habeas argument that the
2 Government lacks constitutional or statutory authority to
3 transfer him to Iraqi authorities. The Supreme Court
4 addressed Omar's argument, and determined that the Executive
5 Branch had the affirmative authority to transfer Omar. So,
6 if we discuss it in terms of affirmative authority rather
7 than legal authority then are we on the same page, that
8 there's --

9 MR. BURNHAM: Yes, I think so, Judge Srinivasan.
10 I think what Munaf is saying is that the Executive Branch
11 just has the authority to do this, and I don't think Munaf,
12 because, and the Court of course does not do this in Munaf,
13 isn't, you know, going through the U.S. Code or the, or our
14 nation's treaties to try to find something more specific
15 than just the general authority that the Executive has over
16 the battlefield. But just, if I may, I know --

17 JUDGE SRINIVASAN: Yes.

18 MR. BURNHAM: -- I'm over time.

19 JUDGE SRINIVASAN: That's all right.

20 MR. BURNHAM: But to answer Judge Wilkins'
21 hypothetical, the other thing I would like to stress is
22 basically all the same predicate circumstances exist in this
23 case as existed in Munaf, so we've got -- and I think some
24 of these will apply in your hypothetical, but not all of
25 them. We have someone who voluntarily traveled to an active

1 theater of combat, was captured on a battlefield, was turned
2 over to the U.S. military during active hostilities, was
3 being held by the military in that theater of combat, and
4 then I think this is an important one, pursuant to the
5 military's good faith determination that he's an enemy
6 combatant. And then I would also note that there's ongoing
7 hostilities in the region. And so, I think it would be, I
8 mean, it's hard for me to imagine that if the United States
9 believed the person was an innocent CNN journalist who
10 hadn't engaged in acts of terrorism or participated in that
11 sort of thing that they would, that we would ever, you know,
12 transfer him to Siberia or any other country Your Honor has
13 suggested. I also certainly --

14 JUDGE SRINIVASAN: But you said good faith belief
15 that he's an enemy combatant, but I thought --

16 MR. BURNHAM: Determination. Sorry.

17 JUDGE SRINIVASAN: Good faith determination --

18 MR. BURNHAM: Yes.

19 JUDGE SRINIVASAN: Yes, thanks, good faith
20 determination that he's an enemy combatant. But I thought
21 the position you were taking in your reply brief was that
22 the enemy combatancy determination didn't matter.

23 MR. BURNHAM: So, what I think we, what I meant,
24 what we meant to say in the reply brief, Judge Srinivasan,
25 was, or what I was trying to say is that there's no judicial

1 review of his status as an enemy combatant, but that's not
2 to say that, you know, I think it's, it would be entirely
3 reasonable for this Court were to agree with our narrow
4 position in this case to say that part of the reason it's
5 doing so is because the Executive has made a good faith
6 determination that he's an enemy combatant. I don't think
7 the Court needs to try to decide what would happen in a case
8 where, you know, we haven't determined the person is an
9 enemy combatant, or they are just an innocent CNN
10 journalist, or something like that. And, because I think
11 that matters, and I think that's another reason which,
12 another aspect in which we are very similar to Munaf,
13 because in Munaf the Executive had determined through its
14 own process that the Petitioners were enemy combatants, but
15 there had been no judicial testing of that. And there had
16 been no judicial testing of that even though they were very
17 adamant that they were innocent people. I mean, the
18 Petitioners in Munaf said that they were just innocent
19 translators who had been caught up in, you know, this thing,
20 and there was no basis to prosecute them, and they were
21 Americans, I mean, many of the same claims that have been
22 raised here. And I think the Supreme Court was very clear
23 that those Petitioners did not have a right to any U.S.
24 judicial review of their status before they were transferred
25 to the Iraqis, and I think our case is similar.

1 JUDGE SRINIVASAN: So, that I think is a very
2 important question about Munaf. So, I think, as I read
3 Munaf you're correct that the detainees in Munaf were making
4 the claim that they couldn't lawfully be detained because
5 they were innocent civilians, and it seems to me the Supreme
6 Court didn't treat with that at all, and that's the basis of
7 your submission that in that case if that's true then the
8 same should be true here, and courts shouldn't treat with
9 the validity of the basis for the detention to begin with,
10 we can still address transfer without dealing with that.
11 But the other part of Munaf is that it's, one way to read
12 Munaf is that the Court, Supreme Court actually did sign off
13 on the legality of the detention, but not based on enemy
14 combatancy. What the Supreme Court said was that this
15 detention is a detention for purposes of criminal
16 proceedings to take place in Iraq, which is something as to
17 which a sovereign always has authority, and so, what was
18 going on is this person's being detained in concert with the
19 Iraqi authorities under the traditional function of
20 sovereigns, which is to hold people for potential
21 prosecution based on crimes within their territory. And so,
22 one way to read Munaf is to say the Court didn't have to
23 treat with whether the enemy combatancy was a valid basis
24 for detention because there was another basis for detention,
25 which is holding over for criminal proceedings, that's tried

1 and true, that's fine, that exists, so we get past the
2 detention question and we go to transfer.

3 MR. BURNHAM: Your Honor, I don't disagree that
4 that could be a reading of Munaf, I just don't think it's
5 the reading of Munaf this Court adopted in Kiyemba II, where
6 it applied Munaf much more broadly to a much wider range and
7 circumstances than pending criminal proceedings in another
8 country. And so, I think that Kiyemba II takes a fairly
9 broad view of Munaf, and I also think, and we should, we can
10 talk about this more easily in the closed session, I think
11 there are also, another answer to Your Honor's point is that
12 I think there are other interests that are very close to
13 what Your Honor has, to a criminal prosecutorial interest
14 that I think are very analogous, and that are present here.

15 JUDGE WILKINS: But what about the fact that Doe,
16 or in my hypothetical the reporter, or the person who
17 alleges that they're only acting as a reporter and not as an
18 enemy combatant is a U.S. citizen, I mean, aren't there
19 collateral consequences to there having been a designation
20 that they are an enemy combatant? So, let's suppose we
21 vacate this injunction, and Doe is transferred wherever, and
22 then Doe seeks to return to the U.S., there's a finding
23 that's been made that he's an enemy combatant that he wasn't
24 able to challenge, shouldn't that concern us as far as
25 whether his habeas petition is moot, as in Qassim, or what

1 do we do with that? That's just life in the big city,
2 that's just tough, he's got that designation?

3 MR. BURNHAM: So, Your Honor, let's say we did
4 transfer Doe, I think then the Government would have to file
5 a petition, I'm sorry, not petition, a motion in the
6 District Court to dismiss the case as moot, and I think that
7 would be the proceeding in which the concerns Your Honor had
8 suggested would be litigated. So, I think if there were in
9 fact collateral consequences, or at least the Petitioner
10 thought there were, he could raise those in opposition to
11 dismissal of his habeas petition and then we could litigate
12 that. Now, I obviously will, I'm sure we will take the
13 position as we have, and as this Court I think has agreed
14 with us in some cases, including Gul, that there are no
15 collateral consequences sufficient to keep the proceeding
16 alive once the person has been released from U.S. custody,
17 but I don't think this Court needs to confront that now
18 because we're not asking you to dismiss his petition, we're
19 just asking the Court to lift the transfer and the notice
20 injunction as to the two countries, and then we can, if
21 we're able to we'll, you know, if the other countries decide
22 that they'd like to take him, they'll transfer him, and then
23 there will be I am sure, or at least potentially litigation
24 in the District Court that will come back to this Court
25 about whether that transfer has in fact mooted his petition.

1 So, I think Your Honor, I mean, if those are concerns Your
2 Honor has I think we can discuss those later in the
3 proceeding.

4 JUDGE WILKINS: But aren't those concerns
5 materially different in a case when we're dealing with a
6 U.S. citizen who has a right to return, than in Munaf or
7 Kiyemba?

8 MR. BURNHAM: Right. So, you know, I just, I
9 don't have a -- the answer is they certainly could be, but I
10 don't have a firm position on behalf of the United States
11 about that yet, because I just don't think we're at that
12 point. I think those, the issues Your Honor has raised
13 would go to whether the case becomes moot following a
14 transfer, and I think that's something that we --

15 JUDGE WILKINS: But don't they also, don't those
16 issues also go to whether it's appropriate for the Court to
17 review his status as an enemy combatant if that is
18 challenged?

19 MR. BURNHAM: So, I guess I would separate the
20 concepts. So, I think there's the question of whether the
21 Court should review his possible transfer to the two
22 countries we're talking about, in which case we don't think
23 the Court, I mean, we think we've made a facially sufficient
24 showing, and we have the authority to execute those
25 transfers without judicial oversight. There's a second

1 question of whether the Court has habeas jurisdiction to
2 review the merits of his claim that we have no legal or
3 factual basis to detain him. I, you know, the District
4 Court has suggested, Petitioner has suggested, and I'm
5 confident that we believe if he is transferred out of U.S.
6 custody that would end his habeas proceeding because the
7 point of the habeas proceeding is to challenge that custody.
8 It's entirely possible that he could say there are some
9 other collateral consequences because he's an American that
10 keep it alive, that keep it from being moot, and I just
11 think that's something we can litigate then.

12 JUDGE WILKINS: So, let me make sure I understand
13 your position. Is it your position that whether or not he
14 is an enemy combatant has no legal impact or effect at all
15 on the Executive's ability to transfer him? So, if he's not
16 an enemy combatant the Executive can transfer him to any
17 state that has some sort of legitimate sovereign interest in
18 him, just the same as if he is an enemy combatant, that the
19 difference in status has no impact on the Executive's
20 authority?

21 MR. BURNHAM: So, not quite. The way I think I
22 would think about it, Judge Wilkins, is, you know, in this
23 case our position is that one of the things this Court can
24 and should, is welcome to rely on, and I think could rely on
25 and ruin for us is that we have made a good faith

1 determination, just as in Munaf, that the Petitioner is an
2 enemy combatant. But I think it is very clear from Munaf
3 that the, there's no right to judicial review of that status
4 before the transfer is effectuated. And I think that just
5 makes sense, I mean, it cannot be that he's entitled to a
6 full round of habeas review before the Executive is able to
7 relinquish custody of him to another country.

8 JUDGE WILKINS: Isn't due process always
9 situational, though? I mean, you know, you can have, you
10 know, due process without having full blown jury trial, and
11 discovery, and all of that. I mean, you know, even in a
12 criminal case when somebody is first detained, perhaps under
13 Gerstein v. Pugh, you know, all the Government has to do is
14 present some sort of sworn affidavit of probable cause that
15 it can at least be examined in court, and if the detention
16 is going to go longer than that then maybe it's a
17 preliminary hearing where they have to produce a live
18 witness, and there's some cross-examination. And then if
19 they want to convict him and hold him for, and, you know, a
20 term of years under sentence then you've got to have a full
21 panoply of rights of a trial. But you're saying that, you
22 know, here it's all or nothing, either there's no process,
23 or it's a full blown trial which is unworkable, why is that
24 the right way to look at due process?

25 MR. BURNHAM: Well, Your Honor, I think, I just

1 think that's how the Supreme Court looked at it in Munaf,
2 and so that's all, we're just echoing what the Supreme Court
3 said in Munaf where there were none of these judicial
4 proceedings about the factual accuracy of the Executive's
5 determination that those Petitioners were enemy combatants.

6 JUDGE SRINIVASAN: So, I wonder if in Munaf it's
7 because there was no determination of whether the
8 individuals in fact were enemy combatants, but that's
9 because, as you and I were discussing earlier, there was a
10 determination of the legality of the detention, it was just
11 that the detention followed from a different source of
12 authority, which is the authority to detain pending
13 prosecution. And if that's, let's just assume that that's
14 the way Munaf worked through that issue, if that's true then
15 the Munaf litigation did have a determination of the
16 legality of detention, it's just that the detention was
17 legal, was authorized for some other reason for holding over
18 for prosecution, and the Supreme Court validated that, and
19 there was no reason to look at that again once the Supreme
20 Court did.

21 MR. BURNHAM: So, I just don't think that's what,
22 that's certainly not how the detainees in Munaf conceived
23 their claims.

24 JUDGE SRINIVASAN: Yes.

25 MR. BURNHAM: I think they conceived their claims

1 as being vis-à-vis U.S. detention, and the Supreme Court
2 said there was jurisdiction to consider whether they had a
3 basis for release, vis-à-vis the United States. You know, I
4 think that's a very tricky question whether -- because I
5 think what, the result of what Your Honor has suggested I
6 think would be that the U.S. could engage in detention as
7 long as the Iraqi criminal proceedings were ongoing, and I
8 don't know that that's, I don't think that's what the
9 Supreme Court meant. I think what the Supreme Court was
10 saying was that we could give, we could relinquish these
11 people to the Iraqi criminal justice system. I don't think
12 it was saying that the basis for detention was not their
13 status as enemy combatants, but was this, you know, kind of
14 a post-Gerstein, pre-conviction incident to criminal
15 proceeding source of authority based on Iraqi law, that's
16 just now how I read the Court's --

17 JUDGE SRINIVASAN: So, here's what Munaf says at
18 697 to 698, moreover, because Omar and Munaf were being held
19 by the United States armed forces at the behest of the Iraqi
20 Government pending their prosecution in Iraqi courts,
21 release of any kind would interfere with the sovereign
22 authority of Iraq to punish offenses against its laws
23 committed within its borders. And so, it seems like the
24 Court was looking at the detention by U.S. forces in concert
25 with Iraq, and was validating it because the nature of the

1 detention was in anticipation of Iraq's sovereign authority
2 to prosecute.

3 MR. BURNHAM: So, I don't, I mean, I obviously
4 don't dispute that that's in the Court's opinion, and that
5 they talked about that, I just don't think that, I don't
6 think the Court was sort of, was moving the basis for
7 detention from enemy combatant authority to anticipatory of
8 legal proceedings, especially because I think in that case
9 the U.S. trying to relinquish custody of these individuals
10 to the Iraqi criminal justice system right then. I think --

11 JUDGE SRINIVASAN: Yes.

12 MR. BURNHAM: -- it would have been a pretty
13 different, it would have been a different case, and maybe
14 had a different --

15 JUDGE SRINIVASAN: Well, I'm not understanding the
16 significance of that point. Why does it matter?

17 MR. BURNHAM: Well, because I think the question
18 before the Court was whether the United States could
19 relinquish custody of them to the Iraqi justice system at
20 that time. And so, I just don't know what the Court would
21 have said, and I think it would be a difference case if the
22 U.S. had come in and said no, we want to keep holding them
23 in U.S. custody for as long as it takes for the Iraqi
24 criminal justice system to reach the final, the point of
25 final conviction or final acquittal. And I just don't think

1 that was what the Court had in mind, and what the parties
2 were talking about in that case.

3 JUDGE SRINIVASAN: So, this gets to one other
4 issue that I wanted to explore, which is the relationship
5 between the authority to transfer, and the authority to
6 detain.

7 MR. BURNHAM: Sure.

8 JUDGE SRINIVASAN: So, one way to look at the
9 world, and I think the way your colleagues on the other side
10 look at the world is the authority to transfer presupposes
11 an authority to detain, especially if it's transferred to a
12 third country, because in order to transfer someone to a
13 third country you have to detain them and then move them.
14 And as I understand the way you look at the world it's a
15 little bit different, which is that you don't have to think
16 about authority to detain at all if you're talking about
17 authority to transfer, they're two kind of disaggregated
18 separate things, and all we're looking at is authority to
19 transfer. And my question to you is why, because there is
20 some logical force to the intuition that in order to be able
21 to transfer someone to a different country there needs to be
22 an, in order for the U.S. to have the --

23 MR. BURNHAM: Right.

24 JUDGE SRINIVASAN: -- authority to transfer
25 someone to a different country there needs to be an

1 authority to detain that person to begin with in order to
2 facilitate the transfer.

3 MR. BURNHAM: Right. So, I think it just looks at
4 it from the wrong side of the equation, because when you
5 transfer somebody to a foreign country you are by definition
6 relinquishing them from U.S. custody. So, it's sort of odd
7 to say the U.S. needs authority to detain in order to cease
8 its detention and relinquish custody of someone to a foreign
9 country. And the way I would think about it, and I think we
10 talked about this at some length in our briefs, is when
11 Petitioner travels to a transnational battlefield that spans
12 Syria and Iraq, and let's just say hypothetically the Iraqi
13 Government wanted to take custody of that Petitioner while
14 he's there, there'd be nothing in U.S. law to prevent that.
15 His only remedies in the United States would be diplomatic
16 remedies, and that's because when you leave the United
17 States you surrender the protections you enjoy within the
18 United States. So, somebody who is captured and detained
19 abroad and then released abroad is inherently immediately
20 vulnerable to apprehension by a foreign government, whether
21 it's the country he's in, or some other country, in concert
22 with the country he's in.

23 JUDGE SRINIVASAN: So, wouldn't that equally be
24 true of somebody, let's take the Hamdi category of, you
25 know, of wayward tourist, or embedded journalist, the

1 categories that Hamdi describes as the people who would be
2 beyond legal authority to detain, and therefore there had to
3 be some review of it, that's the way the Hamdi plurality at
4 least conceived of it.

5 MR. BURNHAM: Sure.

6 JUDGE SRINIVASAN: So, if you have somebody who's
7 a dual U.S./foreign citizen, travels abroad, and it sounds
8 like your submission is that if they get, come into U.S.
9 hands abroad then, and let's just say that they're just a
10 wayward tourist, that still they would have no claim as
11 against transfer because transfer is the same thing as
12 release, and they'd be seeking release, and so then they
13 couldn't object to the transfer.

14 MR. BURNHAM: Right. So, I don't think --

15 JUDGE SRINIVASAN: Is that true?

16 MR. BURNHAM: No, no, we're not, we're not going
17 that far at all, Your Honor, because I think what we're
18 doing, we're saying is in the context of Munaf, and there's
19 a lot of things that were going on in Munaf that I think are
20 all basically the same here, in that circumstance, you know,
21 this authority, you know, I don't think there needs to be a
22 specific sort of legal authority, but this sort of authority
23 exists, and I think that's what the Supreme Court was
24 talking about.

25 JUDGE SRINIVASAN: Which authority? The

1 authority --

2 MR. BURNHAM: The authority to transfer. So,
3 we're not making the assertion --

4 JUDGE SRINIVASAN: I'm also talking about the
5 authority to transfer.

6 MR. BURNHAM: No, no, I understand, Your Honor.

7 JUDGE SRINIVASAN: Yes.

8 MR. BURNHAM: And we're not taking the position
9 that that authority is plenary, because is, transfer equals
10 release, therefore transfer is release, therefore we can do
11 this whenever we want, wherever --

12 JUDGE SRINIVASAN: Yes.

13 MR. BURNHAM: -- we want to whoever we want. That
14 is not, that's not what we're saying here, and I think there
15 could be hard questions, though, at the margin of this
16 authority for those reasons, but we're cabining our --

17 JUDGE SRINIVASAN: But why, I guess I'm trying to
18 understand why isn't it that what you're saying, because if
19 we're just hypothesizing a wayward tourist, I can't remember
20 the exact words used in Hamdi, it was something like wayward
21 tourist, but --

22 MR. BURNHAM: We'll stipulate.

23 JUDGE SRINIVASAN: Yes. If it's a wayward
24 tourist, and they get picked up on what everybody conceives
25 of is a zone of hostilities, then, and the U.S. wants to

1 transfer them, and they're a dual citizen. So, they fit a
2 lot of the boxes that we're talking about. Then it sounds
3 like your argument is that because what they're complaining
4 about is transfer, and because release is tantamount to
5 transfer there's no habeas review of the transfer, why isn't
6 that what you're saying?

7 MR. BURNHAM: Because I think what we're saying
8 here is that, what we're saying here is that there could be
9 habeas review of whether the country that was transferring
10 somebody to has a legitimate interest, at least whether the
11 legal, you know, deciding what constitutes a legitimate
12 interest, and I also think that there could be --

13 JUDGE SRINIVASAN: So, then I'll stipulate to
14 that. Let's just suppose that it's a case in which the
15 country has what the Executive used to be a legitimate
16 interest in the person.

17 MR. BURNHAM: Right. Then I think --

18 JUDGE SRINIVASAN: Yes.

19 MR. BURNHAM: -- there could also be a role for
20 the courts in assessing whether the pre-conditions to this
21 authority exist, and I, you know, I think we've tried to
22 generalize from Munaf a pretty narrow rule in which those,
23 in which that authority exists, and one of the factors that
24 I don't think is present in Your Honor's hypothetical that I
25 think the Court could rely on in ruling for us here is that

1 we've made a good faith determination here that this
2 person's an enemy combatant, and that changes this from the
3 hapless aide worker, or whatever, that we've, you know,
4 we've come into custody of and for some reason want to
5 transfer. I also would just submit that, you know, it's
6 hard --

7 JUDGE SRINIVASAN: So, you've made a good faith --
8 a lot turns on the language then, because I think we've
9 boiled it down to a good faith determination of enemy
10 combatancy. So, if that's the question, and suppose that
11 the Government had a legal view, and I know the Government
12 wouldn't do this, but just --

13 MR. BURNHAM: Yes.

14 JUDGE SRINIVASAN: -- suppose that the Government
15 had a legal view that an embedded journalist who's found in
16 a zone of hostilities is subject to detention under
17 traditional war powers, and so is effectively an enemy
18 combatant, then that's something that you say could be
19 reviewed even if the person was seeking to bar entry.

20 MR. BURNHAM: I'm sorry, say that, again, Your
21 Honor, I missed it.

22 JUDGE SRINIVASAN: Suppose that they're an
23 embedded journalist --

24 MR. BURNHAM: I got all that, I just got --

25 JUDGE SRINIVASAN: Yes, yes.

1 MR. BURNHAM: -- missed the last one.

2 JUDGE SRINIVASAN: That's something that you say
3 could be reviewed even if what they're challenging --

4 MR. BURNHAM: I certainly don't --

5 JUDGE SRINIVASAN: -- is the transfer.

6 MR. BURNHAM: -- think you have to take that off
7 the table in this case. I think --

8 JUDGE SRINIVASAN: Yes.

9 MR. BURNHAM: -- we could have a discussion in
10 that circumstance about what the scope of judicial review
11 would be.

12 JUDGE SRINIVASAN: Yes.

13 MR. BURNHAM: But we certainly are not asserting --
14 I don't think the authority we're asserting in this case
15 requires going nearly that far.

16 JUDGE SRINIVASAN: I guess my point is simply
17 this, that if we were to reach the conclusion that that is
18 something that could be reviewed, and I take your point that
19 that's a different case, we wouldn't have to reach it in
20 this case, but, you know, we're trying to draw lines and
21 figure out --

22 MR. BURNHAM: Right.

23 JUDGE SRINIVASAN: -- what the implications of a
24 ruling would be, if we're trying to carve that out and say
25 that that's something that would be reviewed, then it seems

1 like what's happening is that there the authority to detain
2 and authority to transfer questions become the same, because
3 the authority to transfer is predicated on an authority to
4 detain, and the authority to detain is predicated on whether
5 it's true that there's an authority to detain an embedded
6 journalist.

7 MR. BURNHAM: Right. So, I think I would disagree
8 with Your Honor in this respect, because in Munaf itself,
9 you know, the Petitioners in Munaf could have been embedded
10 journalists, right, I mean, they said they were translators
11 not journalists, but they said they were completely innocent
12 people, and the Supreme Court said they had no right to
13 judicial review of that determination, and then Kiyemba II I
14 think applied that in a broad circumstance. And so, I guess
15 what I was, when I was answering Your Honor's question what
16 I was thinking is, you know, in the general case this is not
17 going to be reviewable, but it's possible that at the
18 fringe, at the margin there could be a role for the courts
19 to play, with the Executive Branch's determination is just
20 facially absurd.

21 JUDGE SRINIVASAN: But I thought, what I think in
22 Munaf, a reading of Munaf, which maybe you disagree, is that
23 everything that mattered to the Supreme Court was
24 undisputed, which is that, which is to say that even the
25 detainees in Munaf --

1 MR. BURNHAM: Right.

2 JUDGE SRINIVASAN: -- didn't, Omar and Munaf
3 didn't dispute that the reason Iraq wanted to hold them is
4 because they wanted to prosecute them, and that's, and from
5 the Supreme Court's perspective that's all you need to know.
6 Once we know that a foreign sovereign --

7 MR. BURNHAM: Right.

8 JUDGE SRINIVASAN: -- wants to prosecute somebody
9 for alleged crimes committed on their soil, the authority to
10 detain, and therefore to transfer, exists.

11 MR. BURNHAM: No, that's right. But I think your
12 hypothetical presupposed that we had determined that the
13 person was an innocent journalist, and that's not --

14 JUDGE SRINIVASAN: Yes.

15 MR. BURNHAM: -- something that Munaf confronted
16 at all. In Munaf the Government had obviously thought that
17 the Petitioners were what the Iraqi Government believed that
18 they were, at least that there was sufficient evidence to
19 try them criminally. And so, I think it's just a different
20 case, when you're talking about one where the Government
21 itself believes, it has determined that the person is an
22 innocent journalist, that's just a different, a very
23 different circumstance than what we're talking about here,
24 that I think certainly distinguishes it from Munaf, and
25 really raises a lot of difficult questions that aren't

1 presented in this case, because I think all the predicates I
2 mentioned, I forget in answer, in whose question it was in
3 response to, but are undisputed here. So --

4 JUDGE SRINIVASAN: So, well, one thing is not,
5 which is that the way you drew the line I think is good
6 faith determination of, is a determination of enemy
7 combatancy --

8 MR. BURNHAM: That was one of our factors, yes --

9 JUDGE SRINIVASAN: Yes.

10 MR. BURNHAM: -- Your Honor.

11 JUDGE SRINIVASAN: Yes. So, and then the kind of
12 where we spun out what we were talking about a minute ago,
13 we arrived at a good faith determination of enemy
14 combatancy, and let's just assume that there is that here,
15 the claim that's being made on the other side is it's still
16 an incorrect determination of enemy combatancy, not
17 (indiscernible) being made that actually this person is not
18 an enemy combatant, they were a journalist, well, put that
19 to one side and assume the Government's right about that,
20 either that the Government's correct on the facts, or that
21 that's unreviewable, there's the legal proposition that's
22 being put forward which is that in order to be a correct
23 determination of enemy combatancy for purposes of detention
24 you have to conclude that the AUMF applies in this context,
25 but that's a legal question that's at issue. And that legal

1 question could be seen as not meaningfully distinct from the
2 legal question of whether there's an authority to detain
3 someone because they're, on the basis of that they're an
4 embedded journalist.

5 MR. BURNHAM: Right. So, at the beginning I
6 disagree that, I don't think the Court needs to get into all
7 of this, but I think if the Court, even if the Court thinks
8 that this is relevant on some level, I think then there's a
9 question about the authority to do things in the theater of
10 battlefield operations, and whether they're judicial
11 reviewable, as compared to the authority to detain someone
12 until the end of active hostilities under Hamdi. And I
13 think the latter type of authority is fairly specific, and
14 fairly specific to habeas corpus, and I think, you know,
15 there's certainly a difference between that type of
16 authority and the authority used to do all the other things
17 that are happening in Iraq and Syria right now. So, we
18 certainly don't think the Court needs to try to figure out,
19 basically, put the cart before the horse and figure out
20 whether we would win the habeas proceeding on the merits
21 either as to the legal basis or the factual basis in order
22 to figure out whether we're allowed to relinquish custody of
23 Petitioner now to one of the two countries that we'll talk
24 about soon.

25 JUDGE SRINIVASAN: And can I just get your

1 clarification on one line of argument that --

2 MR. BURNHAM: Sure.

3 JUDGE SRINIVASAN: -- you've espoused a few times,
4 which is if one were to read, I'm not saying this is the
5 read it, but if one were to read Munaf as validating
6 detention on the idea that based on the undisputed facts
7 there the detention was for the purpose of potential Iraqi
8 prosecution, and that's a valid basis of detention, and
9 therefore we're signing, we, the Supreme Court, are signing
10 off on authority to detain in that circumstance.

11 MR. BURNHAM: Right.

12 JUDGE SRINIVASAN: And we just get the authority
13 to transfer based on the predicate that there is an
14 authority to detain. Then you have a further argument that
15 even if that's how one were to read Munaf, that Kiyemba
16 kicks in and does something more, and I just want to make
17 sure I understand that argument.

18 MR. BURNHAM: Well, I think Kiyemba just applies
19 Munaf to a very different circumstance, which is a detainee
20 who like Petitioner is being held in U.S. custody, and in
21 fact, in Kiyemba the U.S. didn't even believe there were
22 enemy combatants anymore --

23 JUDGE SRINIVASAN: Right.

24 MR. BURNHAM: -- and that was the whole point,
25 that's why --

1 JUDGE SRINIVASAN: Yes.

2 MR. BURNHAM: -- we were trying to transfer them,
3 who doesn't want to go to the recipient country. And this
4 Court I think was very clear that there's no basis in habeas
5 corpus to interpose the courts in that transfer because the
6 detainee is worried that he's going to be detained further
7 in the receiving country, and I --

8 JUDGE SRINIVASAN: So, that's true, so let's just
9 say, because what Kiyemba has is a structure where it says
10 there's two bases of potential objections here, one is fear
11 of torture in the recipient country, and one is prosecution
12 or continued detention in the recipient country, they both
13 have to do with objections about what's going to happen in
14 the recipient country, they didn't have to do with
15 detention, continued detention at the hands of U.S.
16 authorities here, that was just kind of put off the table
17 because --

18 MR. BURNHAM: Well, because the Government
19 conceded it didn't --

20 JUDGE SRINIVASAN: Yes.

21 MR. BURNHAM: -- have authority to detain. And
22 so, I think --

23 JUDGE SRINIVASAN: Right.

24 MR. BURNHAM: But I think that answers Your
25 Honor's question, right? So, there was no authority to

1 engage in continued detention in Kiyemba II, that was the
2 point, and yet, the Court found Munaf to be controlling on
3 these questions about the scope of the authority to
4 transfer.

5 JUDGE SRINIVASAN: True. So, if Kiyemba stood for
6 the proposition that therefore there's never any review of
7 the basis for detention because it was conceded there that
8 there wasn't a basis for continued detention that would be
9 one thing, and that would be very much to your benefit. But
10 I -- one way to look at Kiyemba is to say that what it was
11 about was a situation in which nobody was asking for
12 release, because that just wasn't available because these
13 individuals didn't have any authority to be released either,
14 you know, where they were being detained into Cuba, or an
15 authority to be released into the U.S. because they were
16 aliens. So, release just was off the table, all we're
17 talking about is a practical accommodation of what to do
18 with individuals who can't be released, they have to be
19 transferred, and we're just talking about where they could
20 be transferred. Whereas, one could say that in a case like
21 this one the question of release actually is on the table
22 because they are, the individual is a United States
23 citizens, so the possibility of release in fact exists.

24 MR. BURNHAM: I guess I would just --

25 JUDGE SRINIVASAN: Does that make sense?

1 MR. BURNHAM: I'm sorry?

2 JUDGE SRINIVASAN: Does that make sense as a
3 potential basis for a distinction, and if it doesn't, why
4 not?

5 MR. BURNHAM: So, I just, I don't think -- because
6 I guess I would say that the Court's opinion in Kiyemba II
7 doesn't, the Court's opinion in Kiyemba II is not limited in
8 the way that Your Honor has suggested, even though I think
9 Your Honor has proffered a factual distinction of Kiyemba.
10 The guys, the Petitioners in Kiyemba I think did actually
11 want to come to the United States. Now --

12 JUDGE SRINIVASAN: Yes.

13 MR. BURNHAM: -- obviously there's a distinction
14 because they were not U.S. citizens, but --

15 JUDGE SRINIVASAN: Right.

16 MR. BURNHAM: -- of course, the Court assumed that
17 they had all the same rights as U.S. citizens in footnote
18 four as the U.S. citizens in Munaf. So, I think when the
19 Court says that, I mean, I think it's sort of taking this
20 distinction off the table, at least as a theoretical.

21 JUDGE SRINIVASAN: Well, they had the same rights
22 vis-à-vis objecting to a transfer to a third country based
23 on the conditions of that third country.

24 MR. BURNHAM: Right.

25 JUDGE SRINIVASAN: It didn't -- I don't know that

1 the footnote has to be read to say they had the same rights
2 vis-à-vis release because everybody agreed in Kiyemba that
3 release, at least release into the U.S. was not even --

4 MR. BURNHAM: No, I know, but I think, I
5 thought -- I took Your Honor to be linking the two, and --

6 JUDGE SRINIVASAN: Yes.

7 MR. BURNHAM: -- saying that the --

8 JUDGE SRINIVASAN: I see.

9 MR. BURNHAM: -- ability of release changes the
10 scope of the authority to transfer, and so, I guess I'm just
11 saying that if that were what the Court had meant in Kiyemba
12 II I think it would have just been written differently and
13 wouldn't have equated the Petitioners in front of it with,
14 it wouldn't have said it was assuming they had the same
15 rights as U.S. citizens, because if they were, in fact, had
16 the same rights as U.S. citizens, and it was in fact
17 significant that that would then mean they could be released
18 in the United States, and that would have changed the whole
19 analysis under the line of reasoning I think Your Honor has
20 suggested.

21 JUDGE SRINIVASAN: Okay.

22 MR. BURNHAM: So, if there's no more questions
23 I'll be back soon.

24 JUDGE SRINIVASAN: Yes. And we'll --

25 MR. BURNHAM: Thank you.

1 JUDGE SRINIVASAN: -- give you some time for
2 rebuttal, too.

3 MR. BURNHAM: Okay. Thank you.

4 JUDGE SRINIVASAN: Yes.

5 ORAL ARGUMENT OF JONATHAN HAFETZ, ESQ.

6 ON BEHALF OF THE APPELLEE

7 MR. HAFETZ: Good morning, Your Honors, may it
8 please the Court. It's a little difficult to respond
9 because the Government has shifted positions multiple times,
10 they've shifted from what they told Judge Chutkan initially,
11 they shifted from what they told this Court from their
12 initial brief, in their reply brief, and now they've shifted
13 at argument. But what they presented to Judge Chutkan was
14 this, a blank check to render, forcibly render an American
15 citizen to any country the Executive deemed had a legitimate
16 interest in him without positive legal authority, and
17 without any judicial review whatsoever. In fact, they told
18 Judge Chutkan, and this is at page 18 of the transcript from
19 January 18th, it's not in the Appendix, it's in the docket,
20 it was none of her business, that it was not their burden to
21 tell Judge Chutkan where they would be sending him. Now --

22 JUDGE SRINIVASAN: I'm not sure --

23 MR. HAFETZ: -- in light of this --

24 JUDGE SRINIVASAN: -- I understand this argument,
25 because it seems like it's just within the can of parties in

1 litigation all the time to narrow the scope of issues, and
2 that's an understanding of what the Government is doing is
3 that they're saying, you know, whatever was the case below,
4 and however this is tee'd up, we're seeking to narrow the
5 scope of the issues, and one way in which we're seeking to
6 narrow the scope of the issues is basically, and it operates
7 in your favor because it's essentially a concession that
8 we're not disputing the validity of the order that we're
9 challenging with respect to any countries other than the two
10 that remain on the table.

11 MR. HAFETZ: Yes.

12 JUDGE SRINIVASAN: And that just seems like that's
13 within --

14 MR. HAFETZ: Yes.

15 JUDGE SRINIVASAN: -- the can of what parties do
16 all --

17 MR. HAFETZ: Yes.

18 JUDGE SRINIVASAN: -- the time to narrow --

19 MR. HAFETZ: Yes. Yes. I don't want to belabor
20 the point, Your Honor, but just two quick, brief points on
21 that, one of which is one of the country, neither of the
22 countries were provided to us in the District Court, and
23 only one of them was provided to Judge Chutkan. And second,
24 just in terms of the, Judge Chutkan's exercise of her
25 powers, it was in light of this sweeping position that she

1 entered an exceedingly narrow order requiring the Government
2 to provide nearly 72 hours' notice, literally, the minimum
3 notice to provide Petitioner with an opportunity to
4 challenge the basis for his transfer, and for the Court to
5 review that transfer. And this notice requirement serves,
6 preserves judicial review for two critical functions, one is
7 which, to determine whether there is positive legal
8 authority to transfer an American citizen; and then
9 secondarily, to ensure that it's not an extreme case, to
10 preserve review in the case of an extreme case in which the
11 Executive is transferring a citizen regardless of the risk
12 of torture, both of which require prior judicial review.

13 On the positive legal authority point, this is a
14 critical point as Your Honor noted --

15 JUDGE WILKINS: How is the second issue even
16 before really in this case the torture issue?

17 MR. HAFETZ: Your Honor, we --

18 JUDGE WILKINS: I mean, given Munaf, Kiyemba, and
19 the representations made by the Government about their
20 policies in this case, how is that issue even really present
21 and on the table so far as something that can be reviewed?

22 MR. HAFETZ: I'll answer briefly, and then I think
23 it might be better to defer that to the closed session. But
24 we, at the point -- it's not, the focus of this case, the
25 main focus is authority. But the Government says that we

1 didn't raise anything about the risk of torture is because
2 we didn't know to what country the Petitioner might be sent,
3 that wasn't identified to us. And in Munaf it preserved, in
4 Munaf and Kiyemba II preserved the exception for the extreme
5 case, and in Munaf there was evidence specifically that the
6 Solicitor General pointed to, and that the Court noted about
7 the specific facilities that they were going to be
8 transferred to, and whose authority they were under.

9 So, but I want to, if I may return to positive
10 legal authority, because I think that is critical. As this
11 Court recognized in Omar II, and as the Supreme Court has
12 recognized multiple times there has to be positive legal
13 authority based on the due process clause and the separation
14 of powers to transfer an American citizen. That positive
15 legal authority can take different forms, it can take the
16 form of an extradition treaty if someone's being transferred
17 for, to a different country for criminal prosecution. It
18 also can take the form of international agreements during
19 wartime, such as the Geneva Conventions potentially, or it
20 can take the form of a treaty that authorizes the Executive
21 to enter into particular agreements, and I would call Your
22 Honor's attention to Wilson v. Girard, cited at page 33 of
23 our brief dealing with a U.S. citizen, military prisoner who
24 was being, committed a crime in Japan and was --

25 JUDGE WILKINS: But cutting to the chase --

1 MR. HAFETZ: Yes.

2 JUDGE WILKINS: -- and speaking of sweeping
3 positions, I mean, your position in the District Court, and
4 it appears to be in this Court is that there is no positive
5 legal authority for him to go anywhere, that the only option
6 is to release him, or bring him to the U.S. and charge him
7 with a crime in an Article III court, isn't that your
8 position?

9 MR. HAFETZ: Our position is that the Government
10 has not identified at this point any positive legal
11 authority to transfer.

12 JUDGE SRINIVASAN: Do you think Article --

13 MR. HAFETZ: Right?

14 JUDGE SRINIVASAN: -- II is legal authority?

15 MR. HAFETZ: No, Article II is not legal
16 authority.

17 JUDGE SRINIVASAN: Why? How can -- Article II is
18 a, it's a source of constitutional power.

19 MR. HAFETZ: But this -- but it has to be the --
20 when we're talking about the liberty of an American citizen
21 it has to be, all three branches have to be involved, it has
22 to have some, it has to root itself to some source of
23 positive authority either in a statute or in a treaty. The
24 Supreme Court, Your Honor, has never held, whatever foreign
25 affairs power the President might have it has never held in

1 any case that the President has under his Article II power
2 the authority to render an American citizen to another
3 country without legal authority --

4 JUDGE WILKINS: So, let me ask --

5 MR. HAFETZ: Yes.

6 JUDGE WILKINS: -- let me ask you this, he's
7 detained in Syria, and then transferred and further detained
8 in Iraq, was there positive legal authority for him to be
9 moved from Syria to Iraq?

10 MR. HAFETZ: Well, no, Your Honor, we don't think
11 there is because he's not -- I don't know what basis --

12 JUDGE WILKINS: So, we should release him right
13 now?

14 MR. HAFETZ: Well, the only possible positive
15 legal authority, that would be the same legal authority, I
16 think, to continue to detain him, which is the issue in the
17 habeas case. That is if he were in fact an enemy combatant
18 as a matter of fact, and a matter of law they would have the
19 authority to move him within U.S. custody, or to continue to
20 detain him. Well, he's disputed that vigorously, and that
21 is presently before the District Court. So, the power that
22 they have over his body now, over his corpus is their
23 assertion that he's an enemy combatant, he's disputing that,
24 and for that reason we are arguing he should be charged or
25 released.

1 JUDGE SRINIVASAN: But it sounds like your
2 argument is that even if we assume that he is an enemy
3 combatant, let's suppose a situation in which you couldn't
4 dispute that he's an enemy combatant, let's just, I know you
5 do dispute it, but let's just suppose that couldn't, it
6 sounds like your legal argument is that even if it's
7 somebody who's undisputedly an enemy combatant, if they're
8 an American citizen then there's no authority to transfer,
9 based on enemy combatancy, that's period, there's just no
10 authority to transfer, that sounds like that's your legal
11 argument. Is that not right?

12 MR. HAFETZ: Argument, well, argument they would
13 still, as an American citizen they would still have to
14 (indiscernible) the Geneva Conventions or somewhere else --

15 JUDGE SRINIVASAN: But the authority --

16 MR. HAFETZ: -- to transfer him, but he's not --

17 JUDGE SRINIVASAN: -- the authority is simply that
18 he's an enemy combatant, so that's the, that's predicated on
19 him being an enemy combatant, and your argument is that
20 that's not enough, that an American citizen who is validly,
21 factually, and legally validly determined to be an enemy
22 combatant nonetheless can't be transferred by the military
23 to another country.

24 MR. HAFETZ: Your Honor, we still believe there
25 would need to be a positive authority, but that question is

1 not before --

2 JUDGE SRINIVASAN: No, but that, but I think -- it
3 sounds like we're going around in a circle because what I'm
4 saying to you is that hypothesis is the positive legal
5 authority is the determination that he's an enemy combatant,
6 and the idea would be that once you've made a determination
7 that an individual is an enemy combatant, part and parcel of
8 that authority, just like the authority -- once, once --
9 let's start with this proposition, once an American citizen
10 has been validly determined to be an enemy combatant I take
11 it you wouldn't dispute that there's the authority for the
12 U.S. to detain him as an enemy combatant?

13 MR. HAFETZ: If they have authority to detain him,
14 yes. If he's an enemy combatant they would have authority
15 lawfully to detain him.

16 JUDGE SRINIVASAN: Right, that's, there's cases
17 that --

18 MR. HAFETZ: Yes, correct.

19 JUDGE SRINIVASAN: Hamdi says that.

20 MR. HAFETZ: Correct.

21 JUDGE SRINIVASAN: So, then the proposition would
22 be that part and parcel of detaining somebody as an enemy
23 combatant in connection with an ongoing conflict is
24 transfer, because that's just something that's always
25 happened in history with people who are detained as enemy

1 combatants, it's part of the give and take of warfare is
2 that countries are exchanging prisoners, they're engaging in
3 these sorts of actions all the time as part and parcel of
4 warfare. So, just like there's the authority to detain
5 somebody who's validly determined to be an enemy combatant,
6 there's also the authority to transfer someone who is
7 validly determined to be an enemy combatant, but it sounds
8 to me like your legal position is that there's just a bar on
9 transfer, a United States citizen simply can't be
10 transferred based on enemy combatancy.

11 MR. HAFETZ: Well, Your Honor, I mean, that's, the
12 Government has not, they've disavowed in their brief that
13 they're relying on his enemy combatant status as a basis to
14 transfer.

15 JUDGE SRINIVASAN: Right. No, I'm not -- I'm just
16 asking you to answer the -- we can talk about what the
17 Government has left open and has not left open, but I just
18 try to understand the contours of your legal position, and I
19 think following on what Judge Wilkins was asking, is your
20 legal position that even if you have an individual who is an
21 American citizen who's been validly determined to be an
22 enemy combatant that there's no authority to transfer that
23 person?

24 MR. HAFETZ: That authority could exist under the
25 law if he were subject to the laws of war, and he was

1 validly detained under the 2001 and 2000 AUMF, I would
2 stipulate that could certainly potentially be a basis for
3 transfer. That would be a very different case, though, Your
4 Honor, because they are assuming, to the extent that they're
5 relying on his enemy combatant status, which they seem,
6 again, seems to be a moving target, to the extent they're
7 relying on his status as an enemy combatant they're assuming
8 the answer to the question, and what the Supreme Court said
9 in Hamdi was a good faith basis is not enough, that's
10 essentially what the U.S. Government told the Supreme Court,
11 and the Supreme Court in an eight to one, eight Justices on
12 that point rejected that when it comes to the liberty of an
13 American citizen a good faith basis is not enough, it's not
14 enough to trust the Executive Branch, there has to be
15 judicial review. And so, if there has to be judicial
16 review, the United States can't circumvent Hamdi by relying
17 on his enemy combatant status, or the claim that he's a
18 battlefield detainee without an opportunity to test that,
19 and then using that power to forcibly transfer him --

20 JUDGE SRINIVASAN: So, I --

21 MR. HAFETZ: -- without legal authority.

22 JUDGE SRINIVASAN: -- think part of the
23 Government's submission is that that's looking at the wrong
24 question, because after Munaf what we know is that even if
25 there's a dispute, an asserted dispute about the validity of

1 detention as an enemy combatant that's just off the table
2 when you get to the question of whether the person can be
3 transferred, because in Munaf, Munaf and Omar contested
4 whether they were innocent civilians or enemy combatants,
5 and the Supreme Court didn't care about that, they went
6 ahead and authorized the transfer, even though there was
7 still an ongoing open dispute about whether the individuals
8 are enemy combatants.

9 MR. HAFETZ: Well, I mean, I think Your Honor
10 covered that question in the, that they were in your
11 questioning of the Government. But I would want to add, I'd
12 like to add one point there, which is that there was no
13 remedy available in Munaf. As the Chief Justice said in
14 Munaf, the last thing the Munaf Petitioners want is release,
15 there was simply no remedy. So, the Court did two things in
16 Munaf, it rejected the --

17 JUDGE SRINIVASAN: You'll be fine on time, yes.

18 MR. HAFETZ: -- it refused to bar their transfer
19 because they were being prosecuted in Iraq, and secondly, it
20 said because they are being wanted for crimes that they,
21 being prosecuted for crimes that they committed in Iraq
22 while in Iraq there was no basis for habeas relief, so there
23 was no relief that the Court could provide, and so it
24 dismissed the petition because there was no available remedy
25 in Munaf. As I said, you know, the only remedy would be

1 releasing them into Iraqi prosecution, or smuggling them out
2 of Iraq, to quote the Supreme Court, because they were
3 wanted for prosecution in Iraq. So, there was no remedy
4 available. Here, our client has been held for over six
5 months, he hasn't been charged with a crime by the United
6 States or by anyone else, and there is a remedy available.
7 In fact, as the Government says on page six of its reply
8 brief, there is a remedy that would fully vindicate his
9 habeas rights, freeing him at a safe location in Iraq, and
10 were that not possible, or there is also the remedy, as the
11 Court noted, that he could be brought to the United States,
12 a remedy that was not available either in Munaf or in
13 Kiyemba.

14 JUDGE SRINIVASAN: Can I ask you this question as
15 a practical matter? So, suppose somebody is detained on the
16 battlefield in the context of ongoing hostilities, and they
17 claim American citizenship at that point, is your position
18 that if that, that person then can't be transferred even
19 immediately on the battlefield that the minute that American
20 citizenship comes into play then essentially what happens is
21 there's a duty on the part of the United States to continue
22 to detain that person to allow a habeas claim to be
23 ventilated?

24 MR. HAFETZ: Once the United, certainly once the
25 United States has determined that person's status and

1 there's habeas jurisdiction, there's powers, there's, the
2 Court has the authority to review the legality of the
3 detention and order released, if appropriate, or to prevent
4 an unlawful transfer. Whether there's a space before a
5 court is involved, and what might happen is, I mean, it's
6 simply not before this Court about what might be done, but I
7 would say as a, I mean, the United States Government would
8 have a duty as to its own citizens.

9 JUDGE SRINIVASAN: But --

10 JUDGE WILKINS: Well, let's suppose in Judge
11 Srinivasan's hypothetical, you know, he's allowed to make a
12 phone call, and he makes a phone call to the ACLU and says
13 they've got me, I'm on the battlefield here in Syria, they
14 say they want to take me to Iraq, file a petition, and you
15 file a petition, what's our authority?

16 MR. HAFETZ: Well, the authority to hear the
17 petition is the authority that under the Court's habeas
18 statute, under Supreme Court decisions such as Hamdi that,
19 you know, that when, when a U.S. citizen is in the detention
20 of his government --

21 JUDGE WILKINS: So, yes, we have --

22 MR. HAFETZ: -- that reaches them. Yes.

23 JUDGE WILKINS: -- jurisdiction where he's in
24 custody, but the argument is I don't want to be moved to
25 Iraq, and that's before some U.S. District Court Judge on an

1 emergency habeas, what's that Judge to do?

2 MR. HAFETZ: I think, just so I understand, I
3 think it would be different, it's a different question if
4 they, if the U.S. picked that person up and then they wanted
5 to move them to Iraq, as the Government says in this case,
6 and hold them there because that's a safe place to hold
7 them. I think that would not, that would be different
8 than --

9 JUDGE WILKINS: I mean, that's what --

10 MR. HAFETZ: If they were -- that would be -- then
11 the Court would decide, the habeas petition would be
12 litigated in due course. So, there would be no, I don't
13 think there would be a role to, there wouldn't be no role --
14 excuse me, there would be no role for the Court if the
15 United States picked someone up and moved them to a U.S.
16 prison, and held them in the military prison there, that
17 decision to move them to a U.S. prison that's within the
18 purview of the Executive Branch. If the United States were
19 at that point to seek to transfer that citizen to a
20 different country there would be review. I mean, of course,
21 there would be, there's no review about --

22 JUDGE SRINIVASAN: So, which requires continued
23 detention, right? So, then the position would be that even
24 in the immediacy of a battlefield capture that the minute
25 that the citizenship becomes apparent and the person makes

1 the phone call that's hypothesized by Judge Wilkins that
2 then there's essentially then an obligation on the part of
3 the United States to continue to detain him to facilitate
4 the litigation of the habeas claim.

5 MR. HAFETZ: No, I mean, certainly the United
6 States could release the person. I mean, there's no
7 obligation, there's no obligation to remain in custody while
8 they litigate the habeas petition, if they filed a habeas --

9 JUDGE SRINIVASAN: Well, sure, I mean, I --

10 MR. HAFETZ: Yes.

11 JUDGE SRINIVASAN: -- understand the release
12 option. I'm just saying that in terms of transfer there's
13 no ability to transfer.

14 MR. HAFETZ: Involuntarily, no.

15 JUDGE SRINIVASAN: Yes, because the Government --

16 MR. HAFETZ: No.

17 JUDGE SRINIVASAN: By hypothesis the Government
18 obviously doesn't want to release the person because they
19 have a legitimate good faith belief that the person is an
20 enemy combatant, but your position would be that even if all
21 this happens in the immediacy of the battlefield that once
22 there's a capture and an assertion that then there's either
23 release or has to be continued detention, no ability to
24 transfer, even on a spur of the moment determination.

25 MR. HAFETZ: In a case of an American citizen with

1 a habeas petition that's been filed there is no authority
2 to, well, there might be authority, they might be
3 transferring them pursuant to legal authority, but that
4 would be subject to review. We're not, our position is not,
5 to be clear, also, that the United States cannot transfer
6 Doe, it's just they cannot transfer him involuntarily
7 without legal authority and review of that authority. So,
8 it doesn't matter, you know, at what point in the continuum,
9 that option is not on the table for a U.S. citizen, so if
10 the United States takes someone, captures them on a
11 battlefield, if they assert as they've asserted here that
12 he's an enemy combatant they can continue to detain him on
13 that basis, subject to judicial review under Hamdi and other
14 Supreme Court precedents, they can release him, they can
15 charge him with a crime, which they haven't done, or they
16 can transfer him pursuant to valid legal authority and
17 subject to review, they can't forcibly render an American
18 citizen without some source of authority. It has to go back
19 at its root, and this goes to Your Honor's Article II
20 question, I do want to make sure I answer that, it has to,
21 the Supreme Court said in Munaf, this Court made clear in
22 Omar II, Wilson v. Girard the Supreme Court said there it
23 has to trace itself back to some source in positive law,
24 could be a statute, as it was in Munaf, it was the 2002 AUMF
25 which authorized the United States to enforce Security

1 Council resolutions in Iraq, which included actually,
2 essentially, as Iraq's policeman and jailer. I would point
3 out to Your Honor Judge Randolph's concurring opinion in
4 Munaf in the D.C. Circuit where he discusses that, and page
5 25 of the Solicitor General's brief to the Supreme Court,
6 that's where it's most (indiscernible) detained. So, it
7 could be a treaty or a statute authorizing the Executive to
8 do something, but it has to go back to, find its source in
9 positive law, and some kind of, something that Congress has
10 approved either through a treaty or through a statute. As
11 the Court said in Hamdi when the liberty of a citizen is at
12 stake all three branches have to be involved, and that's
13 whether the United States wants to detain a person
14 indefinitely as an enemy combatant, or whether they want to
15 dispose of the liberty by forcibly transferring that person
16 to another sovereign.

17 JUDGE SRINIVASAN: Does the congressional
18 authority that you're hypothesizing, the congressional
19 engagement on this have to deal specifically with transfer?
20 Or is it just that as long as we're in a situation in which
21 the Executive is waging war that then part and parcel of
22 that authority to wage war is the authority to transfer?

23 MR. HAFETZ: Well, I think that goes, in a sense
24 that goes back to the question Your Honor was asking me
25 before. The answer is potentially, like, I think it would

1 have to do, I think for an extradition it would certainly
2 have to face charges, it would have to spell out the source
3 of authority, they'll have to spell out the transfer
4 provision. If there was some kind of power over to detain
5 enemy combatants it is possible that the Court, if the
6 person were found to be an enemy combatant that the transfer
7 authority could be potentially inferred. But the Government
8 is not relying on anything, they've not provided any
9 statute, or any treaty --

10 JUDGE SRINIVASAN: So, one thing the Government is
11 relying on is Kiyemba, and in Kiyemba there was no ongoing
12 authority to detain by assumption of the Government because
13 the conclusion had been reached that the individuals were
14 not enemy combatants, and yet, even though there was no
15 authority to detain, there was still a validation of the
16 authority to transfer, the idea that transfer could be had
17 was not disputed. So, how does that, how do you deal with
18 Kiyemba given that in Kiyemba you're dealing with a
19 situation in which there wasn't an authority to detain to
20 begin with?

21 MR. HAFETZ: Well, as Judge Kavanaugh said in his,
22 noted in his opinion in Kiyemba, Kiyemba II, that case dealt
23 with the transfer of non-citizens, wartime alien detainees
24 who by long-standing practice could be repatriated to their
25 home country, or to a safe third country either at the

1 conclusion of hostilities, or after there was no longer a
2 desire to detain them. And there was no basis for, there
3 was no remedy available in Kiyemba II because they couldn't
4 be released at Guantanamo, and they couldn't be released in
5 the United States, because as this Court said, the
6 determination with regard to aliens is, the admission of
7 aliens is a political branch determination. So, there was
8 no -- as in Munaf in that sense there was no habeas relief
9 available because there was no possible remedy, there was
10 no, there was nothing the Court could do in terms of
11 providing habeas relief, which is release from custody,
12 which is what we're asking for her.

13 JUDGE WILKINS: I want to just make sure I'm clear
14 on a record and factual question. Correct me if I'm wrong,
15 but I did not see anywhere in your petition, or anywhere in
16 your response to the factual return that was filed by the
17 Government an assertion in a pleading that Doe was not an
18 enemy combatant.

19 MR. HAFETZ: Your Honor, we dispute that. It's
20 on, I think it's page one or two or three, one of the, I
21 think it's on page two and three, or one and two of our, of
22 the response to the petition, of the, to the return, where
23 we, where Doe disputes the central allegations the
24 Government has proffered, specifically, he asserts that he
25 traveled to Syria as to learn about the conflict, report

1 about the conflict; he was tortured, captured and tortured
2 by ISIS while he was in custody, taken into custody there;
3 and that he sought his relief, and he was fleeing the
4 violence there when he was, when he was taken into custody
5 by the Kurds and then taken to the Americans. And at no
6 time does the Government even assert that he was a, that he
7 took part in hostilities against the United States, or
8 committed any violence. It's at page 97 and 98 of the
9 Appendix.

10 JUDGE WILKINS: Well, 97 says Petitioner accepts
11 the Government's allegations about him as true for the
12 limited purpose of this threshold challenge, and has
13 reserved his right to challenge those allegations at a later
14 stage. And then says that there are some inaccuracies, et
15 cetera, et cetera.

16 MR. HAFETZ: Yes. That's correct, Your Honor. He
17 accepted the allegations for purposes of challenging the
18 Government's legal authority to hold him, because if there's
19 no legal authority to hold him, which we claim there's no,
20 and which is before the District Court, there's no, the
21 facts are irrelevant. So, it's essentially a --

22 JUDGE WILKINS: But if his status as an enemy
23 combatant, I guess to get back to Judge Srinivasan's line of
24 inquiry, is a source of legal authority, and you kind of
25 assume that for the sake of argument for the position that

1 you take in the District Court in kind of, you know, where
2 we are here, then I guess we're kind of like a dog chasing
3 its tail here, or something. You put us in a -- you have
4 assumed for the sake of argument a fact that's true that
5 might be the positive legal authority that the Government
6 needs, and I guess I'm trying to get you to respond to that
7 conundrum --

8 MR. HAFETZ: Yes. Yes.

9 JUDGE WILKINS: -- or how we should deal with
10 that, the litigation posture that you are taking.

11 MR. HAFETZ: We assumed the truth of those facts
12 solely for the limited purpose of his challenge to his
13 detention. We did not assume the truth of those facts for
14 purposes of his transfer, and the Government is not relying
15 on that, they disavow that they're relying on his status as
16 an enemy combatant to transfer him. If they were, if they
17 were to --

18 JUDGE WILKINS: Well, maybe we will rely on it.

19 MR. HAFETZ: Well, I think then that, Your Honor,
20 that would be inconsistent with Hamdi because he's -- well,
21 first of all, he's reserved his right to dispute the facts,
22 but he's challenged the Government's legal authority, so if,
23 to hold him. So, in order -- if this Court were going to
24 decide that the Government had legal authority to transfer
25 Doe, assuming the facts were true, under the AUMF, it would

1 need to decide whether he was detainable under the AUMF, and
2 the Government has not relied on that. I'm sure the Court,
3 if the Court wishes to have further briefing, and a separate
4 hearing to discuss that issue we're prepared to do that, but
5 we've tested both the legal and the factual basis for his
6 detention. The Government is not relying on his status as
7 an enemy combatant, so he is exactly like the journalist
8 that Your Honor hypothesized about, the CNN, or MSNBC
9 journalist that could be sent to Siberia, they're not
10 relying on his status as an enemy combatant, and if they
11 were, that would be improper because they would just be
12 assuming the answer to the question in the habeas.

13 JUDGE WILKINS: But what processes do, then? What
14 process does Doe do now than to challenge that
15 determination?

16 MR. HAFETZ: With respect to his detention or his
17 transfer?

18 JUDGE WILKINS: Either.

19 MR. HAFETZ: Well, with respect to his detention
20 it's the process that was laid out in Hamdi, which was a
21 challenge, the challenge it encompasses first, challenge to
22 the Government's legal authority, right, do the statutes
23 that the Government is relying on cover the person in
24 question, is there independent Article II power to detain,
25 we say there's not, and even if there is, is there a factual

1 basis for that detention, is there a -- after, based on the
2 Mathews v. Eldridge balancing test, and, you know, a
3 meaningful opportunity to be heard and contest the facts, is
4 there a factual basis that the person is an enemy combatant?
5 It's not enough simply to trust the Executive, or a good
6 faith basis, that's what the Supreme Court rejected in
7 Hamdi.

8 JUDGE SRINIVASAN: So, are you drawing a
9 distinction between detention and transfer, because, in
10 response to Judge Wilkins' question you asked are you
11 talking about authority to detain or authority to transfer,
12 and your position is that, do you see a difference? I
13 thought your position was that in order to have a transfer
14 you'd have the authority, you need the authority to detain
15 to begin with, or is that not your position?

16 MR. HAFETZ: Yes, in order to transfer you need
17 the authority to detain, but as in Munaf there could be,
18 your authority to transfer could be separate from the
19 authority to detain. In other words, like in Munaf --

20 JUDGE SRINIVASAN: So, you need more authority to
21 transfer. You need at least the same authority to transfer
22 as you do to detain, but you might need more, is that
23 your --

24 MR. HAFETZ: No, it's a different source of
25 authority. It's a different source of authority. It's,

1 it's, like, for example, it could be an extradition treaty,
2 or it could be a, as in Munaf a statute that implemented an
3 international agreement that allowed for the transfer. Or
4 in Wilson v. Girard, it was a security treaty that
5 authorized an agreement between the United States and Japan
6 over which country should have jurisdiction over crimes
7 committed by service members. So, it's, it's a --

8 JUDGE SRINIVASAN: So, I guess, yes --

9 MR. HAFETZ: Yes.

10 JUDGE SRINIVASAN: -- I understand your point. I
11 guess I'm --

12 MR. HAFETZ: Okay.

13 JUDGE SRINIVASAN: -- hypothesizing a situation in
14 which the authority that's being asserted is the detention
15 as an enemy combatant, not in order, not continued detention
16 for some other reason, like potential prosecution for crimes
17 committed in the country to which the person would be, to
18 whose custody the person would be transferred.

19 MR. HAFETZ: Right. If it's detention, if they're
20 relying on the same, if the Government is relying on the
21 same power to transfer that it is --

22 JUDGE SRINIVASAN: Yes.

23 MR. HAFETZ: -- to detain then absolutely, you
24 need to find out whether the detention, the Court needs to
25 establish that the detention is proper. Right? If the

1 Government wants to transfer him based on his status, or
2 their good faith determination that he's an enemy combatant
3 under the AUMF the Court then would first need to find that
4 he is in fact an enemy combatant. And so, that, if that's
5 the basis the Government is relying on then the Government
6 is free to present that argument to the District Court, and
7 the District Court can adjudicate if he's an enemy
8 combatant, and then if he is an enemy combatant that --

9 JUDGE SRINIVASAN: So, some --

10 MR. HAFETZ: -- that may well justify his
11 transfer.

12 JUDGE SRINIVASAN: Yes. So, this goes back to
13 where we were at the beginning --

14 MR. HAFETZ: Yes.

15 JUDGE SRINIVASAN: -- of the argument to some
16 extent, but so, anytime the Government wants to say we're
17 detaining somebody who is an enemy combatant, we picked them
18 up on the battlefield, they were engaged in hostilities
19 against our troops, and they're claiming U.S. citizenship,
20 and we want to transfer them in the give and take of warfare
21 to a different country, your submission is that the Hamdi
22 process for legality of detention is required in every
23 instance in which that's the case, that you have to go,
24 short of release, you've got the caveat of release, but
25 short of release, in every instance the person is entitled

1 to the Hamdi process before they could be transferred.

2 MR. HAFETZ: If the basis for detain is enemy
3 combatant, yes, that's correct, because otherwise, Your
4 Honor, it would leave, it would, it would present the -- and
5 the rule the Government is asking for, they try to obscure
6 it, but the rule the Government is asking for is that if
7 they determine someone is a battlefield detainee, a
8 reporter, embedded journalist, errant tourist, to use the
9 language from Hamdi, if they determine that person is a
10 battlefield detainee, then the Government has unilateral and
11 unreviewable authority to transfer that person to any
12 country in which they determine has a legitimate interest in
13 him --

14 JUDGE SRINIVASAN: So, here the --

15 MR. HAFETZ: -- even if they're a citizen.

16 JUDGE SRINIVASAN: -- plurality in Hamdi said this
17 at 534, the parties agree the initial captures on the
18 battlefield need not receive the process we have discussed
19 here, that process is due only when the determination is
20 made to continue to hold those who have been seized. So,
21 for detention purposes it seems like the plurality in Hamdi
22 was drawing a distinction between captures and immediate
23 detentions, and battlefield, and continued detentions, and
24 why wouldn't the same be true of transfers, that if you have
25 a capture and immediate battlefield determination, or

1 something, I mean, I don't know what the exact time frame
2 is, but, you know, presumably the military has some
3 discretion in determining how to deal with people they pick
4 up on the battlefield, that there could be a determination
5 made with some immediacy that under the Hamdi calculus
6 wouldn't be subject to habeas review in the same way as
7 continued detention, which as a practical matter could
8 accommodate this sort of review that Hamdi contemplated.

9 MR. HAFETZ: So, I think the question, the answer
10 boils down to, the answer to your question boils down to
11 when habeas rights attach. Once habeas rights attach, and
12 once, and --

13 JUDGE SRINIVASAN: Well, they might attach, but
14 then the question would be what process is due? And the way
15 I understood the plurality's statement in Hamdi is that you
16 could draw a distinction between something that happens in
17 the immediacy of the battlefield, and something that becomes
18 continued detention. And I guess my question is could one
19 draw the same kind of divide with respect to transfers?

20 MR. HAFETZ: Yes, well, I think that's what the
21 passage in Hamdi suggests. The question -- well, here it's
22 possible that, you know, that Your Honor could draw that
23 distinction, I think if there was no basis for a court to
24 review the detention, you know, in the immediacy of a
25 battlefield capture there might not, you know, there might

1 not be a basis for a court to review the transfer. But
2 here, and this was an issue that we, was explored in the
3 District Court when the Court was determining whether or not
4 there was habeas jurisdiction, and the issue is once, what
5 Hamdi says, and I think what's clarified in Boumediene is
6 once the Executive determines the status of some individual,
7 they put the label of enemy combatant on them, at the very
8 latest, at that point habeas jurisdiction attaches. And
9 once habeas jurisdiction attaches and the court has power
10 over the custodian and over the detainee, the detention and
11 the forcible transfer are both subject to judicial review.
12 So, what happens --

13 JUDGE SRINIVASAN: So, let me ask you one other
14 question --

15 MR. HAFETZ: Yes.

16 JUDGE SRINIVASAN: -- which is a potential basis
17 of distinction that hasn't been aired so far this morning as
18 far as I can tell, but in Justice Scalia's dissenting
19 opinion in Hamdi who, and Justice Scalia, of course, adopted
20 a position that was if anything more favorable to American
21 citizens, he drew a distinction based on where the person,
22 or a potential distinction based on where the person is
23 being held, because he said where the citizen is captured
24 outside and held, where the citizen is captured outside and
25 held outside the United States, the constitutional

1 requirements may be different. And that's this case,
2 because Doe was held and captured outside the United States.
3 And so, I'm just wondering if that's the basis of drawing a
4 different constitutional line than the one drawn in Hamdi in
5 terms of the kind of protections that would be owing for the
6 reason that Justice Scalia suggested in the dissenting
7 opinion.

8 MR. HAFETZ: Yes. I mean, it was Justice Scalia's
9 position, the position that he was articulating there was
10 whether a citizen had to be subjected to full criminal
11 process, or could be detained as an enemy combatant subject
12 to what the, the plurality holding of the Mathews v.
13 Eldridge balancing test. So, the answer is it's irrelevant
14 to the extent that, because for our client who was captured
15 outside the United State under Hamdi, under the plurality,
16 Justice O'Connor's opinion, and the concurring opinion of
17 Justice Souter, he is entitled to at a minimum the
18 meaningful opportunity to challenge the legal and the
19 factual basis for his detention. So, where his locus of
20 capture matters only with respect to Justice, for Justice
21 Scalia in terms of whether he gets full blown criminal
22 process --

23 JUDGE SRINIVASAN: Criminal process.

24 MR. HAFETZ: -- or can be held --

25 JUDGE SRINIVASAN: That's your reading.

1 MR. HAFETZ: -- as an enemy combatant. So, the
2 holding of the Court of Justice O'Connor and Justice Souter
3 is that he gets the meaningful opportunity to challenge the
4 factual and legal basis of his detention. And I would add,
5 also, Justice, note Justice Kennedy's comment in Boumediene
6 at page 765 that the political branches have no power to
7 switch the Constitution on and off at will by where they
8 physical move the prisoner. So, it can't, Justice O'Connor
9 said in Hamdi, make a determinative constitutional
10 difference as to Doe's rights because they have decided to
11 keep him in Iraq, as opposed to whether they move him to the
12 United States. It's where the military wants to hold him
13 within U.S. custody, we will concede that's a military
14 matter, but it can't affect the rights that he is due as an
15 American citizen.

16 JUDGE WILKINS: But let's suppose the military
17 says well, you know, Doe has contested his status, and we
18 don't know, maybe he is an enemy combatant, maybe we're
19 wrong about that, bottom line is, though, we don't want to
20 hold this guy anymore, and let's say for the sake of his
21 hypothetical, you know, he can't be released in Iraq because
22 Iraq says we don't want you to release him here, we don't
23 want him in our country. So, the U.S. spins a globe and
24 puts their finger down and says okay, Namibia, they're an
25 ally, and we call them up and they say okay, fine, we'll

1 take him, why can't they just release him to Namibia and
2 then he can, he's released, and he can seek to return to the
3 U.S., or he can seek to go wherever else, but, you know, he
4 traveled out of the U.S., and went to, voluntarily to Syria,
5 well, maybe involuntarily he ended up in Namibia, but, you
6 know, at least he's released, why couldn't the U.S. just at
7 this point say we want to wash our hands of the matter and
8 release him some place, and why does that particular
9 decision require some sort of positive legal authority, if
10 there's no indication at all that Namibia has any interest
11 in prosecuting him, or anything, and he can seek to return
12 home from there, just like he could seek to return home from
13 anywhere else?

14 MR. HAFETZ: Well, the United States does not
15 under the due process clause and the separation of powers
16 cannot dispose of the liberty of a U.S. citizen through a
17 forcible transfer because the United States, the Executive
18 Branch has never had, there's no case the Government cites
19 that said the Executive Branch can wash their hands of an
20 American citizen, an American citizen by forcibly
21 transferring him to another country. A forcible transfer is
22 not equivalent to release, it's not equivalent to release as
23 a matter of law, or common sense. If it was the same,
24 equivalent as a matter of law there would literally be no
25 extradition and no immigration case law. And as a matter of

1 common sense, Your Honor, I'm sure can appreciate --

2 JUDGE WILKINS: But he went to a place where he
3 can't, he can't be released to that place; he voluntarily
4 traveled there, and let's suppose it was legally appropriate
5 for him to be moved, removed from Syria to Iraq, and Iraq
6 says at that point we don't want him anymore, and the
7 military doesn't want to hold him anymore, they have to
8 transfer him, right? Involuntarily transfer him.

9 MR. HAFETZ: No, because he can as a U.S. -- that
10 may be true as a, if there's no possibility of release for a
11 non-citizen and they don't want to detain the non-citizen
12 anymore, and they can't release the non-citizen where they
13 are, they may have at that point, like in Kiyemba they have
14 to find another country to send that person to. But for a
15 U.S. citizen has an absolute right to come back to the
16 United States.

17 JUDGE WILKINS: He has a right to return, but does
18 he have a right to have the military, you know, put him on a
19 plane and fly him back here?

20 MR. HAFETZ: Well, the District -- he's been
21 unlawfully detained, and so the District Court in the
22 exercise of its equitable habeas powers in fashioning a
23 remedy appropriate to the circumstances of the particular
24 case has the power and has had the power for like 800 years,
25 courts, judges, to produce the body in the courtroom, that's

1 what happened in Kiyemba, the judge, Judge Urbina ordered
2 that the Petitioners be brought exercising their habeas
3 powers to D.C., that was illegal, or found to be illegal or
4 improper because they were non-citizens and it conflicted
5 with powers over immigration. But this is an American
6 citizen, there's no, I mean, there's nothing that would bar
7 a court if necessary from ordering that prisoner be brought
8 back here.

9 That said, Your Honor, that's a hypothetical
10 that's not presented by this case. The Government has said
11 in its brief that release to a safe location in Iraq would
12 give Petitioner the relief he's asking for. Our petition is
13 simple, Doe has not done anything wrong, he believes he has
14 not committed any crime against the United States, and he is
15 asking merely to be charged with a crime or released. The
16 Government after six-plus months of custody has not charged
17 him with a crime, nor has Iraq, nor has any other country.

18 JUDGE SRINIVASAN: Now, in this case, so, I think
19 it's undisputed in this case that when he was initially
20 captured he claimed United States citizenship so that he
21 could get the protection of U.S. forces, right?

22 MR. HAFETZ: He identified himself as a U.S.
23 citizen, correct.

24 JUDGE SRINIVASAN: Yes. Yes. And so, I take it
25 then when someone does that they assume that, what they

1 don't, I don't think they're necessarily assuming that the
2 U.S. is going to come and protect me as a U.S. citizen, and
3 then, you know, necessarily keep me right where I am, or
4 keep me right where I am, but then give me some, a Secret
5 Service detail to protect me as I go where I want to go. I
6 think what they are asking for when they assert U.S.
7 citizenship is come take me somewhere, so it necessarily
8 presupposed that he was going to be moved --

9 MR. HAFETZ: Correct.

10 JUDGE SRINIVASAN: -- by the U.S., right? So,
11 it's part and parcel of his claim of U.S. citizenship was
12 that he was going to be taken somewhere. It wouldn't
13 necessarily mean take me back to the U.S., it just means
14 take me, get me out of here --

15 MR. HAFETZ: Yes.

16 JUDGE SRINIVASAN: -- take me somewhere, and that
17 could be wherever the U.S. decides it's appropriate to take
18 me. Isn't that necessarily what's going on in a situation
19 in which somebody asserts United States citizenship in a
20 context like this?

21 MR. HAFETZ: Well, he asserts his citizenship, he
22 asserted his rights or protections of U.S. citizen, sacred
23 protections, and then he was brought by the United States to
24 Iraq, he's been detained now for six months. He's not, his
25 claim is he's not asking, the petition does not ask to be

1 released in the United States, it's simply to release
2 simplicitor, it's the polar opposite of Munaf, Your Honor,
3 he's asking to be, for the United States simply to open the
4 jailhouse doors and let him go, they could not do that in
5 Munaf because the Petitioners there were being prosecuted
6 for ongoing criminal charges, they were literally being
7 brought by the United States and a multi-national force to
8 the Iraqi court every day, and the court enjoined that, the
9 lower courts enjoined that, and they halted the trial. He
10 could not be released, the Munaf Petitioners could not be
11 released in Iraq. We are simply asking after now six months
12 of detention that he be freed. The United States doesn't
13 have the power to forcibly transfer him to another
14 government, and so he was asking for the protections of the
15 United States, he did not, he was not, by virtue of claiming
16 his U.S. citizenship he was not inviting the United States
17 to render him to any country it deemed suitable without any
18 kind of review. He's not, he claims and maintains he has
19 not done, committed any crime or done anything wrong, no
20 one's charged him with a crime, and there's no barrier to
21 his release.

22 JUDGE SRINIVASAN: Okay. Thank you.

23 MR. HAFETZ: Yes.

24 JUDGE SRINIVASAN: Thank you. Thank you, Counsel.

25 It's customary in this situation that we ask whether

1 Appellant's Counsel has any time remaining. I think we know
2 the answer to that, but we'll give you three minutes for
3 rebuttal, anyway.

4 MR. BURNHAM: Your Honor, I think it might be more
5 useful for the Court if we just move to the sealed
6 proceeding --

7 JUDGE SRINIVASAN: That's fine. That's --

8 MR. BURNHAM: -- if that's okay with Your Honors?

9 JUDGE SRINIVASAN: Yes.

10 MR. BURNHAM: Thank you.

11 JUDGE SRINIVASAN: That's certainly fine with us.
12 Okay. We'll take a recess while we go into, and then go
13 into closed session.

14 MR. BURNHAM: Thank you, Your Honor.

15 (Whereupon, at 11:14 a.m., the proceedings were
16 concluded.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Paula Underwood

Paula Underwood

April 12, 2018
Date

DEPOSITION SERVICES, INC.