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Does Doe v. Mattis Open the Door to Citizen-Detainee Transfer?

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INTRODUCTION

Whether the Executive of the United States is allowed to forcibly transfer a U.S. citizen-enemy combatant to a foreign nation—a foreign nation without jurisdiction over that citizen—to be adjudicated for terrorism-related crimes is a question that remains open following the United States Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) decision in *Doe v. Mattis*.[1] In that decision, the D.C. Circuit upheld the United States District Court for the District of Columbia's (district court) injunction that enjoined the U.S. government from transferring John Doe,[2] a U.S. citizen, to Country B[3] and ordered the

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p 1. Doe v. Mattis, 889 F.3d 745 (D.C. Cir. 2018). On June 28, 2019, the D.C. Circuit reissued its opinion without any substantial changes to the previously published opinion. For that reason, this paper cites to the recorded opinion. To see the reissued opinion, visit: https://www.cadc.uscourts.gov/internet/opinions.nsf/6CE73195C9DC8F1285258427004F9D3C/$file/18-5032.pdf [https://perma.cc/ELT2-V4NJ].

2. John Doe is now known to be Abdulrahman Ahmad Alsheikh. *See* Charlie Savage et al., *American ISIS Suspect Is Freed After Being Held More Than a Year,* N.Y. TIMES (Oct. 29, 2018), https://www.nytimes.com/2018/10/29/us/politics/isis-john-doe-released-abdulrahman-alsheikh.html [https://perma.cc/49ZL-R3R3]. However, for the purposes of this paper, and to remain consistent with the language used throughout the course of this case, Mr. Alsheikh will be referred to as John Doe.

3. Country B is purported to be Saudi Arabia. *See id.*

government to provide seventy-two hours' notice before transferring Doe to Country A.[4] Specifically at issue was whether the Executive has the general transfer authority or the wartime authority to "forcibly—and irrevocably—transfer [John Doe or another citizen Islamic State ("ISIS") fighter] to the custody of another country."[5] The D.C. Circuit decision provided a possible roadmap to determine how *Doe* may have been resolved by the Supreme Court of the United States (the Court) through the D.C. Circuit's application of *Hamdi v. Rumsfeld*[6] and *Munaf v. Geren*[7] to the facts of Doe's case.

This Comment will examine the D.C. Circuit's application of *Munaf* to the facts of *Doe* to propose a rationale to be considered should the Court grant certiorari for a similar case in the future.[8] Specifically, this Comment argues that the D.C. Circuit's narrow interpretation of *Munaf* in *Doe* was an important but inadequate protection of the constitutional rights of U.S. citizen-enemy combatants. Additionally, this Comment asserts that the D.C. Circuit's extension of the *Hamdi* requirements for detaining a

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4. *Doe*, 889 F.3d at 768. Country A is purported to be Syria. *See* Savage et al., *supra* note 2.

5. *Doe*, 889 F.3d at 747. Following the D.C. Circuit's decision, the district court would have heard the merits of the case, but the parties reached an agreement on October 28, 2018, leaving the many pressing issues raised in *Doe* undecided. *See* Doe v. Mattis—*Challenge to Detention of American by U.S. Military Abroad*, ACLU, https://www.aclu.org/cases/doe-v-mattis-challenge-detention-american-us-military-abroad [https://perma.cc/3YHJ-SK6H] (last updated Oct. 29, 2018); *see also* Robert Chesney, Doe v. Mattis *Ends with a Transfer and a Cancelled Passport: Lessons Learned*, LAWFARE (Oct. 29, 2018, 11:14 AM), https://www.lawfareblog.com/doe-v-mattis-ends-transfer-and-cancelled-passport-lessons-learned. The government frequently used the acronym "ISIL" to describe the Islamic State of Iraq and the Levant in its court filings, while the ACLU used "ISIS." To remain consistent, this paper will use the term "ISIS" to encompass ISIS, ISIL, and *Daesh*.

6. *Doe*, 889 F.3d at 758. The D.C. Circuit majority opinion relied heavily on the analysis in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

7. Munaf v. Geren, 553 U.S. 674 (2008). The majority in *Doe* distinguished *Munaf* from *Doe*. *See Doe*, 889 F.3d at 753, 758. The dissent relied heavily on *Munaf* to justify the transfer of Doe. *See id.* at 769 (Henderson, J. dissenting).

8. Recognizing, however, that given *The N.Y. Times* reporting discussed below, the government is unlikely to attempt to bring such a suit, and in fact, "several officials said the Pentagon would try hard to avoid taking custody of citizens who may be captured by allies in the future—unless prosecutors say they can be charged." Savage et al., *supra* note 2.

citizen-enemy combatant applies to the forcible transfer of those citizen-enemy combatants, which creates an additional safeguard to ensure that the government cannot circumvent said requirements when the particular circumstances of *Munaf* do not apply.

Part I of this Comment will introduce the facts and travel of *Doe v. Mattis*, beginning with a background as to how Doe came into U.S. custody, how the ACLU discovered Doe, and how the subsequent legal proceedings unfolded. Part II will briefly introduce *Hamdi* and analyze the application of *Hamdi* to the central issue in *Doe*. Part III will introduce the facts and opinion of *Munaf*. Part IV will identify the areas where *Munaf* can be compared to and where it must be differentiated from *Doe*. Part IV will also suggest a plausible outcome in the event that a case like *Doe* ever returns to the D.C. Circuit or reaches the Court.

I. FACTS AND TRAVEL OF *DOE V. MATTIS*

Doe is a dual citizen of the United States and Saudi Arabia.[9] On or around September 11, 2017, the Syrian Democratic Forces (SDF) captured Doe "at a checkpoint on an active battlefield adjacent to territory controlled by [ISIS]."[10] Doe was alone and traveled on foot, wearing non-traditional clothing for the region.[11] The SDF turned Doe over to U.S. forces after he requested to "speak to the Americans."[12] He was subsequently detained and interrogated in an American prison in Iraq.[13]

The United States Department of Defense (DoD) alleged that Doe was a registered ISIS fighter between 2014 and his capture in 2017, as gleaned through interrogation and investigation.[14] More specifically, DoD alleged that Doe

> joined ISI[S], attended an ISI[S] training camp, swore bayat to ISI[S]'s leader, and worked for ISI[S] in various

9. Respondent's Factual Return at 2, Doe v. Mattis, 288 F. Supp. 3d 195 (D.D.C. 2018) (No. 1:17-cv-2069).

10. *Id.* However, recent reporting indicates that Doe was actually captured by Kurdish forces operating in Syria. *See* Savage et al., *supra* note 2.

11. Respondent's Factual Return, *supra* note 9, at 32.

12. *Id.* at 33.

13. *See id.* at 2.

14. *Id.* at 31, 33. According to the Respondent's Factual Return, ISIS has its members fill out registration forms for new recruits. *Id.* at 31.

> capacities, including as an Administrator responsible for distributing vehicles and money to other ISI[S] members; as a guard for an oil field under ISI[S] control; as a monitor ensuring adherence by Imams and prayer callers to Sharia requirements; and as a monitor of civilians working in ISI[S]'s heavy equipment office.[15]

Additionally, Doe purportedly used social media to promote ISIS messages, viewed ISIS videos on YouTube, and Googled ISIS information.[16] The DoD also noted that Doe claimed that he had been kidnaped by ISIS and was only released from prison because he agreed to work for ISIS; he also claimed that he had attempted to escape from ISIS control.[17] However, the DoD was skeptical about Doe's tale of escape given that Doe was allegedly entrusted with money, equipment, and the protection of mosques by ISIS leaders afterwards.[18] Moreover, the DoD offered evidence allegedly linking Doe to ISIS, including thumb drives containing records of ISIS casualty reports and ISIS-related social media engagement.[19] The DoD claimed the preceding facts established its burden of showing by a preponderance of the evidence that Doe "[was] part of or substantially supported [ISIS]."[20] Thus, the DoD classified Doe as an enemy combatant.[21]

In September 2017, the American Civil Liberties Union (ACLU) "express[ed] deep concern" over the reported detention of an American citizen in a U.S. military prison in Iraq.[22] The ACLU determined that the DoD was holding an "Unnamed U.S. Citizen" (Doe) as an enemy combatant in an unnamed location in unknown conditions.[23] Though the International Committee for the Red Cross had been allowed to visit Doe, the ACLU asserted that he was

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15. *Id*. at 33.
16. *Id*. at 44–49.
17. *Id*. at 39–40.
18. *See id*. at 40.
19. *Id*. at 41, 44.
20. *Id*. at 53.
21. Doe v. Mattis, 889 F.3d 745, 747 (D.C. Cir. 2018).
22. *See* Letter from Anthony D. Romero, Exec. Dir., ACLU, to Gen. James N. Mattis & Att'y Gen. Jefferson B. Sessions III, Trump Admin. (Sept. 29, 2017) https://www.aclu.org/letter/aclu-letter-trump-administration-detained-american-suspected-fighting-isis [https://perma.cc/U933-28LE].
23. Petition for a Writ of Habeas Corpus at 4–5, ACLU Found. v. Mattis, 286 F. Supp. 3d. 53 (D.D.C. 2017) (No. 1:17-cv-2069).

being held "without access to a lawyer, without access to any court, and without a meaningful opportunity to challenge his detention before a neutral decisionmaker."[24] The ACLU sent a letter to the DoD urging the government to transfer Doe to the United States and bring criminal charges against him in a "proceeding governed by the constitutional safeguards due to all criminal defendants."[25] The DoD did not respond. Shortly thereafter, the ACLU filed its next friend Petition for a Writ of Habeas Corpus (Petition) against General Mattis (Mattis) in his official capacity as Secretary of Defense in the district court on October 5, 2017.[26]

In its Petition, the ACLU made five claims to support the relief it sought for Doe. First, the ACLU argued that Doe had been detained in violation of the Non-Detention Act and the Federal Habeas Corpus statute because Congress had not expressly authorized the detention of alleged ISIS fighters, nor had it suspended habeas corpus.[27] Second, the ACLU averred that the DoD was violating Doe's Fourth Amendment right to be presented before a judicial officer, to have charges brought against him, and to have probable cause shown to justify his detention.[28] Third, the ACLU contended that Doe had been denied the opportunity to be heard and to contest his detention in front of a "neutral decisionmaker."[29] Fourth, the ACLU asserted that Doe had been denied the right to counsel, a right that the Court has extended to alleged enemy combatants.[30] The ACLU's final claim was that Doe had been unlawfully detained for the purposes of interrogation, violating the Court's holding in *Hamdi*.[31] Accordingly, the ACLU requested that the district court order the DoD to: (1) allow the ACLU to meet with Doe; (2) cease all interrogations of Doe; (3) provide notice to the district court and the ACLU prior to any transfer of Doe to another U.S. facility, jurisdiction, or another nation's custody; (4) provide information about Doe's transfer should a transfer occur; (5) declare unconstitutional and unlawful

24. *Id.* at 6.
25. *Id.*
26. *Id.* at 3.
27. *See id.* at 8–9.
28. *Id.* at 10.
29. *Id.* at 10–11.
30. *Id.* at 11.
31. *Id.* at 11–12.

the indefinite detention of Doe; and (6) order the DoD to charge Doe with federal crimes in an Article III court or release him.[32]

In response, Mattis filed a motion to dismiss for three primary reasons. First, Mattis raised the procedural question of allowing the ACLU to bring suit without identifying the "name of the real party in interest."[33] Next, Mattis challenged the ACLU's next friend status, claiming that the ACLU had no relationship with Doe and did not seek Doe's best interests, and thus lacked standing to bring the Petition.[34] Finally, Mattis argued that if the court granted the next friend status to the ACLU, the court should dismiss the Petition because it would cause the court to interfere with the executive branch's power over military operations.[35] Further, Mattis stated that Doe did not have a right to counsel while the DoD was "in the process of determining what its final disposition of this individual would be" or while Doe was being held in an armed conflict zone in Iraq.[36]

In the district court, Judge Chutkan held that the ACLU qualified as next friend and had standing to file the Petition on Doe's behalf.[37] She also held that Doe was entitled to have access to counsel because the government at that point had three months to ascertain the status of Doe.[38] In addition, the government could not strip Doe of his right to an attorney because the inconvenience and challenging circumstances for the government should not "outweigh the necessity of providing the detainee with the access to the counsel he requested months ago."[39] Judge Chutkan then issued an order denying the government's motion to dismiss and demanding that it provide the ACLU with "immediate and unmonitored access" to Doe, and that it "refrain from transferring [Doe] until the ACLU[] inform[ed] the court of [Doe's] wishes."[40] Doe agreed to representation by the ACLU and the case continued.

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32. *Id.* at 12–13.

33. Respondent's Motion to Dismiss and Response to Court's Order of October 19, 2017 at 3, Doe v. Mattis, 288 F. Supp. 3d 195 (D.D.C. 2018) (No. 1:17-cv-2069).

34. *Id.* at 5.

35. *See id.* at 2.

36. *See id.* at 16–17, 21.

37. ACLU Found. v. Mattis, 286 F. Supp. 3d 53, 60 (D.C.C. 2017).

38. *Id.*

39. *Id.*

40. *Id.*

In January of 2018, the government gave an indication that it was considering transferring Doe to two possible countries.[41] In response, the ACLU filed a motion for continued relief seeking to enjoin the government from transferring Doe.[42] On January 23, 2018, Judge Chutkan denied the ACLU's request to enjoin transferring Doe until the merits of the Petition had been decided, but granted a seventy-two hour notice requirement before the government could transfer Doe.[43] Judge Chutkan limited her ruling to the notice requirement because the government was considering a number of options as to Doe's disposition, and she could not deny the government entirely of an option it had not yet exercised.[44] However, Judge Chutkan did actively, if briefly, question the government's authority to transfer Doe, suggesting that the government could potentially lose on the transfer issue should it choose to exercise that option.[45] The government eventually came to an agreement with Country B and provided notice to Doe and the district court.[46] On April 19, 2018, Judge Chutkan enjoined the government from effectuating the transfer.[47]

The government filed an appeal following the issuance of Judge Chutkan's January order requiring that the government give both Doe and the court seventy-two hours' notice before executing a transfer.[48] Meanwhile, Doe asked the D.C. Circuit to enjoin the government from forcibly transferring him while the habeas petition was pending.[49] The government also appealed Judge Chutkan's April injunction requiring the government to provide

41. *See* Savage et al., *supra* note 2. Country A is purported to be Syria and Country B is purported to be Saudi Arabia. *See id.*

42. Doe v. Mattis, 288 F. Supp. 3d. 195, 197 (D.D.C. 2018).

43. *Id.*

44. *Id.* at 199.

45. *See id.* at 198–99.

46. Doe v. Mattis, 889 F.3d 745, 748 (D.C. Cir. 2018). This transfer was most likely to Saudi Arabia where Doe would be imprisoned. *See* Savage et al., *supra* note 2. Additionally, the government seemed to have wanted to avoid the Petition by releasing Doe in Syria. *See id.* Both were blocked by the D.C. Circuit ruling. *See id.*

47. Preliminary Injunction Order, *Doe*, 288 F. Supp. 3d 195 (No. 1:17-cv-2069).

48. *Doe*, 889 F.3d at 747.

49. *Id.*

notice as to an impending transfer of Doe.[50] The D.C. Circuit upheld both the seventy-two hour notice requirement and the injunction enjoining the government from transferring Doe to Country B.[51] Additionally, the D.C. Circuit held that the government could not forcibly transfer Doe to Country A without notice.[52] Upon the D.C. Circuit's decision, Mattis and Doe returned to the district court to further navigate the Petition process.

Between May and October 29, 2018, the government and Doe remained in dialogue to arrive at an agreement. *The New York Times* reported that "prosecutors raised concerns that if they brought [Doe] to the United States and charged him with providing material support to a terrorist group, a judge might rule their evidence inadmissible—and then they would have to free him on domestic soil."[53] Further, the government decided that Doe was "unimportant" in the national security world; thus, "[government officials] were keen to avoid a ruling on whether they had legal authority to indefinitely detain a suspected Islamic State member as a wartime prisoner, lest an adverse decision in the detention case undermine the broader war effort."[54] With these concerns in mind, Doe and the government negotiated an agreement, finalized on October 29, 2018, where Doe forfeited his American passport, though not his citizenship, and was released in Bahrain where his wife and child are residing.[55]

II. ANALYSIS OF THE D.C. CIRCUIT'S APPLICATION OF *HAMDI* IN *DOE*

In the *Doe* majority decision, the D.C. Circuit based much of its analysis on the Supreme Court's decision in *Hamdi*.[56] Before reaching the issues outlined in *Hamdi*, the court stated that "the fact that a foreign country may have prescriptive jurisdiction over an American citizen who is outside its territory hardly means that, as long as the citizen is somewhere else abroad, the Executive has power to seize her and deliver her to that foreign country."[57] The

50. *Id.* at 750.
51. *Id.* at 748.
52. *See id.* at 768.
53. *See* Savage et al., *supra* note 2.
54. *Id.*
55. *See id.*
56. *See Doe*, 889 F.3d at 758–68.
57. *Id.* at 756.

Executive does not have "the unilateral power to forcibly transfer an American citizen to another country merely because she travels abroad."[58] However, the D.C. Circuit concluded that the Executive has the authority to transfer U.S. citizen enemy combatants to allied countries during an armed conflict through the Executive's wartime powers under the law of war.[59] It was because of that principle that the D.C. Circuit turned to *Hamdi* for further guidance on the issue.[60]

A. *Facts and Travel of* Hamdi

Yaser Hamdi, an American citizen, was captured and detained in Afghanistan in 2001 during U.S. military action against the Taliban.[61] The Court granted certiorari to address whether the U.S. government could detain a U.S. citizen as an enemy combatant for the duration of the conflict with the Taliban and "to address the process that is constitutionally owed to one who seeks to challenge his classification as [an enemy combatant]."[62] The Court first held that Congress authorized the Executive to detain U.S. citizen-enemy combatants during armed conflict through its passage of the 2001 Authorization for Use of Military Force (AUMF).[63] Secondly, the Court held that upon the capture, detention, and classification as an enemy combatant abroad, the citizen-detainee retains his due process rights.[64] Thus, the Executive must give notice of the factual basis of the citizen's enemy combatant status to the detainee and provide the detainee "a fair opportunity to rebut the government's factual assertions before a neutral decisionmaker."[65] The Court

58. *Id.* at 757.

59. *Id.* at 758.

60. *See id.*

61. Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

62. *Id.* at 509.

63. *Id.* at 518 (citing Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)). The Court reasoned that detention "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Id.* However, the Court declined to reach the question of whether the President has Article II powers to detain U.S. citizen enemy combatants. *Id.* at 516–17. For a full discussion of the 2001 AUMF, see *infra* p. 22.

64. *See Hamdi*, 542 U.S. at 537.

65. *Id.* at 533. The Court noted that the due process requirement for citizen detainees applied absent the suspension of habeas corpus by Congress.

emphasized that "the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the government's case and to be heard by an impartial adjudicator."[66]

B. *The D.C. Circuit's Application of the* Hamdi *Analysis to* Doe

In *Doe,* the D.C. Circuit held that the Executive's authority to detain citizens and its authority to transfer citizens "essentially rise [and] fall together."[67] The court relied on *Hamdi* to find that the government could *only* transfer Doe if it could show that "it [was] legally authorized to use military force against ISI[S]" and that it had "afford[ed] Doe an adequate opportunity to challenge the Executive's factual determination that he [was] an ISI[S] combatant."[68] In large part, the D.C. Circuit's reasoning was predicated on the notion that the *Hamdi* Court allowed a citizen to challenge *both* the military authority to detain him *and* the factual basis for his detention—the latter of which is a changeable status.[69] The logical extension of that holding, the court reasoned, must be that it would apply to the irrevocable process of transferring a citizen-detainee to a foreign country.[70] Through the engagement of *Hamdi* in its decision, the D.C. Circuit established that *Hamdi* must be part of the analysis courts conduct when reviewing transfers of U.S. citizens. Additionally, the D.C. Circuit's decision

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See id. at 537. Furthermore, the Court stated that when due process is required, the processes by which such notice and opportunity to be heard are effectuated may differ due to the exigencies of armed conflict. *Id.* at 533.

66. *Id.* at 535. Justice O'Connor continued:

> [A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. . . . [I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge.

Id. at 536–37.

67. Doe v. Mattis, 889 F.3d 745, 759 (D.C. Cir. 2018).

68. *Id.* at 758.

69. *Id.* at 763–64.

70. *Id.* See *Munaf* and the analysis below for more details about the Court's holding that the United States can transfer a U.S. citizen to *some* foreign countries depending on the circumstances. The courts analyze the issue of transfer by examining whether a treaty or statute exists or whether territorial jurisdiction, passive personality jurisdiction, and dual citizenship apply.

highlighted the need to tailor judicial review to ensure that the Executive cannot circumvent the procedural protections the Court imposed in *Hamdi* when it wants to transfer a citizen enemy combatant.[71]

III. FACTS AND TRAVEL OF *MUNAF V. GEREN*

In its analysis of Doe's transfer, the D.C. Circuit engaged in a deep discussion of the Court's holding in *Munaf v. Geren*, and that opinion's relationship to the central issue in *Doe*—the transfer of an American citizen to another country.[72] Chief Justice Roberts authored the Court's unanimous decision in *Munaf*.[73] He stated that the central issue was whether district courts "may exercise their habeas jurisdiction to enjoin our Armed Forces from transferring individuals detained within another sovereign's territory to that sovereign's government for criminal prosecution."[74] In particular, the Court contemplated how the analysis of this issue changes when the detention and transfer occur "in the context of ongoing military operations conducted by American Forces overseas."[75] The allegations against defendants Munaf and Omar[76] were that they "ha[d] committed hostile or warlike acts in Iraq, pending investigation and prosecution in Iraqi courts under Iraqi law."[77]

Shawqi Omar, a dual citizen of the United States and Jordan, claimed he voluntarily traveled to Iraq to find "reconstruction-related work" following the U.S. invasion of Iraq in 2004.[78] The

71. *See id.*

72. *See id.* at 752. Indeed, the lone dissent, written by Judge Henderson, relied primarily on *Munaf* as a justification to transfer Doe. *See id.* at 769–70 (Henderson, J., dissenting).

73. Munaf v. Geren, 553 U.S. 674, 679 (2008).

74. *Id.* at 689.

75. *Id.*

76. *Munaf* as heard by the Court was the result of two district court cases, *Omar v. Harvey* and *Munaf v. Geren*, with very similar facts that yielded two different decisions. *See* Mohammed v. Harvey, 456 F. Supp. 2d 115 (D.D.C. 2006); Omar v. Harvey, 416 F. Supp. 2d 19 (D.D.C. 2006). Both defendants appealed to the D.C. Circuit, and the court again came to two different results. *See* Munaf v. Geren, 482 F.3d 582 (D.C. Cir. 2007); Omar v. Harvey, 479 F.3d 1 (D.C. Cir. 2007). The Court then granted certiorari and the cases were joined under *Munaf v. Geren*, 553 U.S. 674 (2008).

77. *Munaf*, 553 U.S. at 679.

78. *Omar*, 479 F.3d at 3.

U.S. government stated that U.S. military forces, as part of Multi-National Force-Iraq (MNF-I), captured Omar while conducting a raid on Abu Masab al-Zarqawi, an infamous former leader of Al Qaeda Iraq (AQI).[79] The government asserted that Omar "facilitated terrorist activities both inside and outside of Iraq,"[80] and "commit[ed] militant acts" against the U.S. and its allies.[81] A three-member "MNF-I tribunal" of American military officers determined Omar was a "security internee" because he posed a threat to Iraq, and that Omar was an "enemy combatant" in the war on terrorism because of his alleged affiliation with AQI.[82] The government claimed this panel was conducted in accordance with Article 5 of the Geneva Convention, where Omar heard the evidence against him, was able to make a statement, and was allowed to bring in "immediately available witnesses."[83] Omar's case was re-assessed later by the Combined Review and Release Board (CRRB), including American members of MNF-I, and the CRRB determined Omar remained a threat to Iraq.[84] The CRRB later referred Omar to the Central Criminal Court of Iraq (CCCI) to be charged and tried.[85] Omar's wife and son filed a motion to enjoin the transfer in the district court.[86] The district court granted and the D.C. Circuit upheld the injunction.[87] At the time *Munaf* was heard by the Court, Omar had not yet been charged with any crimes by the CCCI.[88]

Mohammad Munaf, a dual citizen of the United States and Iraq, claimed he voluntarily traveled to Iraq in 2005 to serve as an interpreter for Romanian journalists.[89] Shortly after their arrival in Iraq, the journalists were kidnaped and held captive for two

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79. *Id.*
80. *Id.*
81. *Munaf*, 553 U.S. at 681.
82. *See id.* at 681–82.
83. *Id.* at 681.
84. *Id.* at 682.
85. *Omar*, 479 F.3d at 4. The Court noted that Omar would have already been charged and possibly tried by the CCCI but for his habeas petition. *Munaf*, 553 U.S. at 693–94.
86. *Munaf*, 553 U.S. at 682.
87. *Id.* (citing *Omar*, 479 F.3d at 1).
88. *Id.*
89. *Id.* at 683.

months.[90] MNF-I forces detained Munaf because they suspected him of "orchestrating" the kidnapings.[91] Munaf then underwent the same military tribunal process described above.[92] He was referred to the CCCI where he was subsequently convicted of kidnaping and sentenced to death.[93] His sentence was later vacated and a new trial was granted.[94] Munaf remained in the custody of the U.S. military while he awaited a new trial in the CCCI.[95] Munaf's family filed a habeas petition that was dismissed by the district court for lack of jurisdiction.[96] The D.C. Circuit then affirmed the dismissal.[97] Munaf appealed, and the Court granted certiorari, consolidating *Munaf* and *Omar* into *Munaf v. Geren*.[98]

In *Munaf*, the Solicitor General argued that the U.S. military, as part of MNF-I, was not acting as the United States, but rather as a part of a "multinational force," depriving Article III courts of jurisdiction to hear habeas petitions from detained American citizens in Iraq.[99] The Solicitor General used *Hirota v. MacArthur*, a 1948 Court decision, to support that position.[100] Because members of the U.S. military were not accountable to a separate MNF-I authority, but instead to the U.S. military command structure, the Court gave little weight to the multi-national character of MNF-I.[101] The Court then distinguished Munaf and

90. *Id.*
91. *Id.*
92. *Id.*
93. Munaf v. Geren, 482 F.3d 582, 582 (D.C. Cir. 2007), *vacated*, *Munaf*, 553 U.S. 674 (2008).
94. *Munaf*, 553 U.S. at 684.
95. *Id.*
96. *Id.* (citing Mohammed v. Harvey, 456 F. Supp. 2d 115, 118, 122 (D.D.C. 2006)).
97. *Id.* (citing *Munaf*, 482 F.3d at 582).
98. *Id.* at 685.
99. *Id.*
100. *Id.* at 686–87. The *Hirota* decision stated that the Court did not have jurisdiction to hear habeas claims by Japanese citizens detained, tried, and convicted in Japan by the International Tribunal for the Far East, and thus denied their petitions. *Id.* at 686–87; *see also* Hirota v. MacArthur, 338 U.S. 197 (1948).
101. *See Munaf*, 553 U.S. at 687–88 (citing *Hirota*, 338 U.S. at 198–99).

Omar's circumstances from those of the petitioners in *Hirota*,[102] holding that citizens detained overseas "by American soldiers subject to a [U.S.] chain of command" shall not be precluded from filing habeas petitions in U.S. courts.[103]

Next, the Court considered whether "United States district courts may exercise their habeas jurisdiction to enjoin [U.S.] Armed Forces from transferring individuals detained within another sovereign's territory to that sovereign's government for criminal prosecution" during "ongoing military operations."[104] After reviewing the lower courts' decisions, the Court examined the merits of both habeas petitions because there were "sensitive foreign policy issues" being litigated that required them to do so.[105] The Court held that the U.S. government could transfer Omar and Munaf to the Iraqi authority and the CCCI to be adjudicated.[106] To support this opinion, the Court reviewed both statutory and precedential history.

First, the Court discussed international law and the accepted principle that "[a] sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders,

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102. *Id.* at 688. The majority rejected the government's argument that *Hirota* held the appropriate gravitas on which to place a case such as *Munaf*. *See id.* at 686–88.

103. *Id.* at 688. The Court noted that while the government of Iraq retains ultimate responsibility for "the arrest, detention and imprisonment of individuals who violate its laws," it is the MNF-I that "maintains physical custody" of any such individuals during Iraqi criminal proceedings. *Id.* at 698. The detention facilities are "under the command of United States military officers who report to General David Petraeus," thus the United States retained its authority over Munaf and Omar, answering the jurisdiction question. *Id.* at 681, 686.

104. *Id*. at 689.

105. *Id.* at 692 (citing Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 584–585 (1952)). The Court noted in the case of Omar that the lower courts erroneously granted an injunction to enjoin Omar's transfer when they declared the *jurisdictional* issues "so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation" before a transfer could occur. *Id.* at 690 (quoting Omar v. Harvey, 416 F. Supp. 2d 19, 23–24, 27 (D.D.C. 2006)). The Court suggested that hard jurisdictional issues are not enough to use the "extraordinary and drastic remedy" of an injunction. *Id.* at 676. The lower courts erred in dismissing Munaf's habeas petition due to lack of jurisdiction, as the Court had found that Article III courts can hear petitions from American citizens held by the American military overseas. *Id.* at 688, 691.

106. *See id.* at 692.

unless it expressly or impliedly consents to surrender its jurisdiction."[107] A sovereign's right to adjudicate crimes committed within its borders or against its people[108] exists "whether or not the pertinent criminal process comes with all the rights guaranteed by our Constitution."[109] Chief Justice Roberts stated that "[n]ot only have we long recognized the principle that a nation state reigns sovereign within its own territory, we have twice applied that principle to reject claims that the Constitution precludes the Executive from transferring a prisoner to a foreign country for prosecution in an allegedly unconstitutional trial."[110] Judicial review of such cases requires an examination of whether a statute or the Constitution precludes an American citizen from being transferred or extradited.[111] In particular, the Court asserted that it would not issue a court order "requiring the United States to shelter [citizens] from the sovereign government seeking to have them answer for alleged crimes committed within that sovereign's borders."[112]

One of the cases referenced above in which the Court rejected a claim that the Constitution precluded the Executive from transferring a prisoner to a foreign country was *Wilson v. Girard*. In *Wilson*, an American citizen and member of the U.S. military killed a Japanese woman.[113] Japan wanted to exercise its right to adjudicate the matter in order to vindicate the rights of its own citizen, but it had ceded some of its (normally exclusive) jurisdiction to adjudicate crimes committed within its borders to the United States as a part of an international treaty.[114] The Court reviewed that treaty to determine if the United States waiving a possible claim to adjudication jurisdiction over Wilson was *precluded* by a

107. *Id.* at 694–95 (quoting Wilson v. Girard, 354 U.S. 524, 529 (1957)).

108. *See* Am. Soc'y Int'l L., *Jurisdictional, Preliminary, and Procedural Concerns*, *in* BENCHBOOK ON INTERNATIONAL LAW § II.A (Diane Marie Amann ed., 2014), www.asil.org/benchbook/jurisdiction.pdf [https://perma.cc/ V69Z-U9H9] (discussing bases upon which sovereigns found power to adjudidcate individuals).

109. *Munaf*, 553 U.S. at 695.

110. *Id.*

111. *See* Wilson v. Girard, 354 U.S. 524, 530 (1957) (per curiam).

112. *Munaf,* 553 U.S. at 694.

113. *Wilson*, 354 U.S. at 525.

114. *See id.* at 526–28.

statute or the Constitution.[115] If the waiver was not precluded, the United States wanted to carry it out for comity-related reasons and to avoid a dispute over which country truly had "primary jurisdiction."[116] The Court found that nothing in the Constitution nor any statute enacted subsequent to the treaty prevented the United States from waiving its jurisdiction.[117] The Court in 2008 applied similar reasoning—that nothing in the Constitution nor any statute or treaty allowed an American court to prevent a foreign country from adjudicating a crime committed within its borders—to hold that the United States could transfer Omar and Munaf to Iraqi custody so that Iraq could exercise its sovereign right to prosecute crimes committed within its own borders.[118]

Second, the Court discussed Omar and Munaf's argument that *Valentine v. United States*[119] was the more appropriate precedent to apply to their case.[120] In particular, the petitioners argued that the "Executive may not extradite a person held within the United States unless 'legal authority' to do so 'is given by act of Congress or by the terms of a treaty.'"[121] That was essentially the inverse of the government's argument in *Wilson*. The Court's analysis in *Valentine* differed from that in *Wilson* because the American citizens to be transferred had already returned to the United States, so *Wilson* was not an extradition case while *Valentine* was.[122] While it is possible for the President and Congress to allow American citizens to be extradited to foreign sovereigns for prosecution, the Court in *Valentine* held that this Executive

115. *Id.* at 530.

116. *See id.* at 529.

117. *See id.* at 530.

118. *See* Munaf v. Geren, 553 U.S. 674, 696 (2008). The Court also discussed *Neely v. Henkel*, 180 U.S. 109 (1901), where the United States permitted an American citizen accused of violating Cuban law to be transferred to Cuba for adjudication even though "Cuban law did not provide the panoply of rights guaranteed [Neely] by the Constitution of the United States." *Id.*

119. Valentine v. United States *ex rel* Neidecker, 299 U.S. 5 (1936). Two American citizens were accused of committing crimes in France and had already returned to the United States when France approached the United States to request transfer. *Id.* at 6. The Court held that the Executive did not have the inherent power to transfer U.S. citizens already on U.S. soil to France without Congressional authorization through treaty or statute. *Id.* at 18.

120. *Munaf*, 553 U.S. at 704.

121. *Id.* (quoting *Valentine*, 299 U.S. at 9).

122. *Id.*

authority *solely* comes from Congressional action, (i.e., ratifying treaties or passing laws) and is not part of the Executive's constitutional authority.[123]

The Court distinguished *Munaf* from *Valentine*.[124] Chief Justice Roberts asserted that there is a major difference between the Executive extraditing a citizen held in the United States and the Executive transferring to a sovereignty "an individual captured and already detained in that country's territory."[125] Munaf and Omar voluntarily traveled to Iraq and allegedly committed crimes therein, thus they were "subject to the territorial jurisdiction of that sovereign, not of the United States."[126] Additionally, the petitioners were being held by the U.S. military acting as part of MNF-I and on behalf of the Iraqi government, making it all the more absurd that the petitioners could not be transferred to the CCCI for adjudication.[127] Indeed, the Court referred back to *Wilson* as the appropriate precedent to apply to *Munaf*: it sought statutory or constitutional language that would *preclude* the petitioners' transfer and found none.[128] Thus, the Court held that the two men had no claim for relief.[129]

IV. APPLYING *MUNAF* TO *DOE* TO ANALYZE THE GOVERNMENT'S AUTHORITY TO TRANSFER AN ALLEGED U.S. CITIZEN-ENEMY COMBATANT

In a two-to-one decision, the D.C. Circuit foreclosed the government's efforts to transfer Doe to Country B, and required seventy-two hours' notice if it intended to transfer him to Country A.[130] However, this issue could well arise again given the potential for the capture of another American citizen fighting for ISIS

123. *Valentine*, 299 U.S. at 9.
124. *Munaf*, 553 U.S. at 704.
125. *Id*.
126. *Id*.
127. *Id.*
128. *Id.* at 705.
129. *Id.*
130. *See* Doe v. Mattis, 889 F.3d 745, 768 (D.C. Cir. 2018). Again, Country A and Country B likely were Syria and Saudi Arabia. Savage *et al.*, *supra* note 2.

overseas[131] and the strength of Judge Henderson's dissent, which could very well become the majority opinion in another such case.[132] To that end, this section will examine further the ways in which *Munaf* is analogous to or can be distinguished from *Doe* in order to supply a better rationale that is more protective of individual rights than the D.C. Circuit's method.

Justice Souter wrote a separate concurrence in *Munaf* in which he outlined the eight "circumstances essential to the Court's holding," offering a narrow reading of the decision. The list is helpful in analyzing the application of *Munaf* to the facts in *Doe*. Justice Souter wrote:

> (1) Omar and Munaf "voluntarily traveled to Iraq." They are being held (2) in the "territory" of (3) an "ally" of the United States, (4) by our troops, (5) "during ongoing hostilities" that (6) involv[e] our troops." (7) The government of a foreign sovereign, Iraq, has decided to prosecute them "for crimes committed on its soil." And, (8) "the State Department has determined that . . . the department that would have authority over Munaf and Omar . . . as well as its prison and detention facilities have generally met internationally accepted standards for basic prisoner needs."[133]

The first seven of the eight circumstances are highly relevant factors that could impact the fate of another John Doe and are fully examined below.

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131. *See* ALEXANDER MELEAGROU-HITCHENS ET AL., THE TRAVELERS: AMERICAN JIHADISTS IN SYRIA AND IRAQ 2, 75, 77 (2018), https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/TravelersAmericanJihadistsinSyriaandIraq.pdf [https://perma.cc/2HBJ-8MDL]; *see also* Mark Berman, *Young Men Left America to Join ISIS. They Ended Up Cooking and Cleaning for the Caliphate.*, WASH. POST (Feb. 8, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/02/08/young-men-left-america-to-join-isis-they-fled-when-it-didnt-live-up-to-their-expectations/ [https://perma.cc/P7YN-NTRH].

132. *Doe*, 889 F.3d at 784 (Henderson, J., dissenting) (arguing that *Munaf* should control the *Doe* decision, thus Doe's petition should be denied and the government may either continue to detain Doe or transfer him to "an ally with a facially strong interest in him").

133. *Munaf*, 553 U.S. at 706 (Souter, J., concurring) (alteration in original) (citations omitted).

First, Justice Souter noted the issue of voluntary travel. In *Munaf,* Omar and Munaf had traveled to Iraq of their own volition.[134] Similarly, Doe voluntarily traveled to Syria.[135] In both cases, the petitioners advanced innocent explanations for their travels in an attempt to counter the alleged purpose advanced by the government.[136] The Court seemed to put significance on this factor in *Munaf* because it assigned some weight to the fact that petitioners had voluntarily entered a sovereign land, allegedly committed crimes therein, and then tried to evade accountability for those crimes within the country.[137] However, while Doe entered Syria voluntarily, Syria was not seeking to prosecute him.[138]

Numbers two through four in Justice Souter's list include that the U.S. citizens were being held "in the 'territory' of [] an 'ally' of the United States" by U.S. troops."[139] As with Omar and Munaf, Doe was held in Iraq, an ally of the United States, by U.S. forces. While all three men were in "the immediate 'physical custody' of American soldiers [or American law enforcement officers] who answer[ed] only to an American chain of command," the story of Doe diverged from those of Omar and Munaf.[140] Omar and Munaf were held by the U.S. military on behalf of the Iraqi Interim Government while *Iraq* conducted investigations and brought or sought to bring charges against Omar and Munaf for activities allegedly committed *inside* Iraq as part of *Al Qaeda*.[141] In contrast, Doe was held by the U.S. military on behalf of the U.S. military

134. *Id.* at 694 (majority opinion).

135. Respondent's Factual Return, *supra* note 9, at 35.

136. Munaf claimed to have entered Iraq to serve as a translator for Romanian journalists. *Munaf*, 553 U.S. at 683. Omar claimed he entered Iraq in 2002 to find work in the reconstruction effort. *See Urgent Action: Man Arbitrarily Held After Serving Sentence*, AMNESTY INT'L (Nov. 14, 2013), https://www.amnesty.org/download/Documents/16000/mde140182013en.pdf [https://perma.cc/GYS4-GWZ7]. Doe claimed to have entered Syria as a journalist seeking to report on ISIS. Petitioner's Response to the Respondent's Factual Return at 1, Doe v. Mattis, 889 F.3d 745 (D.C. Cir. 2018) (No. 1:17-cv-2069).

137. *Munaf*, 553 U.S. at 694.

138. Nothing in the materials submitted by the ACLU or the government suggested that Iraq or any other nation was actively seeking to prosecute as a right of its sovereignty.

139. *Munaf*, 553 U.S. at 706 (Souter, J., concurring).

140. *Id.* at 685 (majority opinion).

141. *See id.* at 680–81.

while the *DoD* conducted investigations to determine Doe's status, stating Doe had allegedly committed crimes *in Syria* as part of *ISIS*.[142] Just as the Court held in *Munaf*, the D.C. Circuit held that because Doe was detained by the U.S. military under an American chain of command and the "[U.S.] official charged with his detention ha[d] 'the power to produce' him," the federal district courts had jurisdiction to hear Doe's Habeas Petition.[143] However, the distinction regarding who was investigating the respective defendants, and for what purpose, is critical regarding whether the court will affirm or deny the transfer of U.S. citizens to a foreign government for adjudication.

Numbers five and six of Souter's list stated that the citizens were captured and detained "during ongoing hostilities" that "involv[e] our troops."[144] Omar and Munaf were captured in 2004 and 2005 respectively by U.S. forces operating under the authority of MNF-I that were undertaking a military mission sanctioned by Congress through both the 2001 AUMF[145] and the 2002 AUMF,[146] as well as the United Nations Security Council (UNSC) resolutions

142. Doe v. Mattis, 889 F.3d 745, 749 (D.C. Cir. 2018).

143. *Munaf*, 553 U.S. at 686.

144. *Id.* at 706 (Souter, J., concurring) (alteration in original).

145. Congress passed the 2001 AUMF to authorize the Executive's use of "necessary and appropriate force" against "nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001). The ACLU contended that Congress was very specific in its authorization, limiting the President to use force only against those who perpetrated or aided in the perpetration of the September 11, 2001 attacks. Petitioner's Response to the Respondent's Factual Return, *supra* note 136, at 10–12.

146. In 2002, Congress passed an AUMF to authorize the Executive's use of "necessary and appropriate" force to defend the United States from the threat of Iraq and "to enforce all relevant United Nations Security Council resolutions regarding Iraq." Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107–243, 116 Stat. 1498 (2002). The ACLU argued that, based on its review of the legislative history, the 2002 AUMF was not intended to extend to terrorist groups operating in Iraq, or to extend beyond the Iraqi borders, but instead was solely intended to provide Congressional authorization to overthrow Hussein and eliminate the threat Hussein posed to the United States and the rest of the world, per the UNSC resolutions. Petitioner's Response to the Respondent's Factual Return, *supra* note 136, at 29–33.

enacted between 1996 and 2007.[147] Between 2004 and 2005, Iraq's fledgling Interim Government was in place and the U.S. had transitioned from occupier to member of MNF-I to assist the Interim Government.[148] The Iraqi Interim Government was an ally to the United States in its efforts to stabilize Iraq and suppress the militant opposition to both the American occupation and the Interim Government.[149] The U.S. military fought alongside twenty-six other nations and Iraqi government forces, all with authorization from Congress and a mandate from the UNSC.[150] Thousands of U.S. troops were on the ground in active combat from 2003 through 2011.[151] However, in 2011, President Obama officially ended the Iraq War, withdrawing thousands of U.S. troops and transitioning U.S. forces to training and strategic support roles.[152]

As the government noted in its Factual Return in *Doe*, Al Qaeda, the Taliban, and their related local subsidiaries were the primary targets of U.S. forces in both Iraq and Afghanistan.[153] When both Omar and Munaf were captured between 2004 and 2005, the Iraqi Interim Government and MNF-I forces were

147. *See U.N. Documents for Iraq: Security Council Resolutions*, SECURITY COUNCIL REP., https://www.securitycouncilreport.org/un_documents_type/security-council-resolutions/page/2?ctype=Iraq&cbtype=iraq%2F#038 [https://perma.cc/KAH9-7572] (last visited Nov. 7, 2019). The earlier resolutions related to Iraq's attempts to generate nuclear weapons and its unwillingness to comply with disarmament. *Id.* In 2002, the resolution was related to Iraq's unwillingness to allow inspectors in to determine the nature of the weapons. *Id.* The resolutions passed from 2003 through 2007 related to occupation and the creation of MNF-I. *Id.*

148. *Iraq Profile—Timeline*, BBC (Oct. 3, 2018), https://www.bbc.com/news/world-middle-east-14546763 [https://perma.cc/LE8D-JJQG].

149. *Id.*; *see also* Kyle Crichton et al., *Timeline of Major Events in the Iraq War*, N.Y. TIMES, https://archive.nytimes.com/www.nytimes.com/interactive/2010/08/31/world/middleeast/20100831-Iraq-Timeline.html#/#time111_3262 [https://perma.cc/FS5W-PKG2] (last visited Nov. 7, 2019); *The Iraq War: 2003-2011*, COUNCIL ON FOREIGN REL., https://www.cfr.org/timeline/iraq-war [https://perma.cc/7BNJ-6FA5] (last visited Nov. 7, 2019).

150. *See* Munaf v. Geren, 553 U.S. 674, 679 (2008); Authorization for Use of Military Force Against Iraq Resolution of 2002.

151. *The Iraq War: 2003-2011*, *supra* note 149.

152. Press Release, The White House, Remarks by the President on Ending the War in Iraq, (Oct. 21, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/10/21/remarks-president-ending-war-iraq [https://perma.cc/KG5K-C6BA].

153. Respondent's Factual Return, *supra* note 9, at 5–9.

intensely fighting against Al Qaeda and insurgent attacks in Iraq.[154] Omar was suspected of participating in Al Qaeda, and Munaf of "pos[ing] a serious threat to Iraqi security" as an insurgent.[155] The U.S. government argued that both AUMFs and UNSC resolutions provided the necessary authority for the United States capture and detention of Omar and Munaf; the Court agreed.[156]

In *Doe*, the government argued that the 2001 AUMF and 2002 AUMF authorized the Executive to fight ISIS because ISIS "[o]riginated from the Al-Qa[e]da Terrorist Organization," the very group the 2001 AUMF was specifically targeting.[157] Because ISIS originated from Al Qaeda, it reasoned, the AUMFs authorize the military detention of those who are "part of" or "substantially support" ISIS.[158] Further, it asserted that Congress has affirmed that use of the AUMFs by "repeatedly and specifically fund[ing] military actions against ISI[S] through an unbroken stream of appropriations over multiple years."[159] The government concluded that the DoD, during active hostilities involving U.S. troops acting on behalf of the President, had the authority to both detain and transfer Doe.[160]

The ACLU did not contest the fact that there are ongoing hostilities between the United States and ISIS, or that American troops are involved in those hostilities. Instead, the ACLU questioned the Executive's authority to use military force against ISIS. The ACLU argued that the Executive, in fact, did not have the authority to indefinitely detain or forcibly transfer an American citizen classified as an ISIS enemy combatant.[161] Furthermore, the ACLU asserted that in 2017, a full sixteen years after September 11, 2001, and when Doe was captured as an alleged ISIS fighter,

154. *The Iraq War: 2003-2011*, *supra* note 149.
155. *Munaf*, 553 U.S. at 680–81, 683–84.
156. *Id.* at 679–80.
157. Respondent's Factual Return, *supra* note 9, at 5–12.
158. *Id.* at 12–22.
159. *Id.* at 22.
160. *Id.* at 53–54.
161. Petitioner's Response to the Respondent's Factual Return, *supra* note 136, at 3–4. That challenge also extended to the U.S. military's denial of Doe's access to an attorney and to a hearing in front of a neutral arbiter to challenge his designation of enemy combatant. Petition for a Writ of Habeas Corpus, *supra* note 23, at 4–6.

neither the 2001 AUMF nor the 2002 AUMF authorized the President to indefinitely detain an American citizen without congressional suspension of habeas corpus because that violates both habeas law and the Non-Detention Act.[162] Instead, the ACLU asserted the government was obligated to either release Doe or bring Doe to the United States to be charged and tried in an Article III court in accordance with his constitutional rights as a U.S. citizen.[163]

Finally, Justice Souter highlighted that "[t]he government of a foreign sovereign . . . ha[d] decided to prosecute [U.S. citizens] 'for crimes committed on its soil.'"[164] Omar and Munaf, as noted above, were captured and detained by U.S. forces acting on behalf of the Iraqi Interim Government, had allegedly committed crimes in Iraq, and Iraq, as a sovereign, sought to vindicate its sovereign right to prosecute crimes committed within its boundaries and against its citizens.[165] The Court allowed the transfer of Omar and Munaf, both American citizens, to Iraq because of this trifecta, and because there were no statutes or constitutional provisions in operation to preclude such a transfer. Thus, Omar and Munaf's petitions were denied because "[h]abeas corpus does not require the United States to shelter fugitives from the criminal justice system of the sovereign with authority to prosecute them."[166] Doe's situation differs greatly from that of Omar and Munaf. "Doe did not . . . commit crimes within the receiving country's territory and he has not (to date) been charged with any offense there."[167] The government stated

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162. Petitioner's Response to the Respondent's Factual Return, *supra* note 136, at 3–4, 36–39. Additionally, the ACLU argued that the National Defense Appropriations Act of 2012 and other appropriations acts do not give the government authority to detain indefinitely or forcibly transfer American citizens. *Id.* at 33–36. According to the ACLU, Article II of the Constitution does not give the President authority to "detain [citizens] indefinitely without congressional authorization," which, it argued, the President does not have with regard to ISIS fighters. *Id.* at 36–40.

163. *Id*. at 2.

164. Munaf v. Geren, 553 U.S. 674, 706 (2008) (Souter, J., concurring).

165. *Id*. at 694–95 (majority opinion).

166. *Id*. at 705.

167. Doe v. Mattis, 889 F.3d 745, 777 (D.C. Cir. 2018) (Henderson, J., dissenting). Judge Henderson followed this statement with a qualification that "the difference between the two cases is not as stark as Doe would have it" because Omar had also not yet been charged with a crime by Iraq at the time his petition was heard. *Id.* at 777. However, this qualification seems negligible

that Doe was working with ISIS while in Syria, a country with whom the United States is frequently in conflict.[168] However, the government does not claim that Doe ever took up arms against the United States or other forces, or that he committed acts of violence against civilians inside or outside of Syria.[169]

Unlike in *Munaf*, where the Iraqi government actively sought to prosecute Omar and Munaf because the alleged crimes were committed on its territory, the U.S. government in *Doe* acknowledged that no country, including Syria, was actively seeking to vindicate its sovereign rights to prosecute Doe. In fact, the government stated they were in the

> process of determining the appropriate disposition of [Doe], including whether the appropriate course of action is to prosecute [Doe] criminally [in the United States] (such as for material support of terrorism), to continue detaining [Doe] as an enemy combatant, or *to relinquish custody of [Doe] to another sovereign with its own legitimate interest in him*.[170]

However, in her dissent, Judge Henderson stated that Country B "ha[d] a facially strong—for that matter, all but undisputed—interest in the transfer."[171] This "facial" or "legitimate" interest seemed to be a significantly lesser interest than the threshold interest the Court recognized in *Munaf*—territoriality.[172] Judge Henderson argued for the extension of the comity aspect of the *Munaf* decision.[173] She stated:

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given that the country that would be bringing the charges did so because it had a sovereign right to prosecute crimes *committed within its territory*. *Id.* at 753 (majority opinion).

168. Respondent's Factual Return, *supra* note 9, at 4–5; *see* Bureau of Near Eastern Affairs, *U.S. Relations with Syria: Bilateral Relations Fact Sheet*, U.S. DEP'T ST. (Jul. 23, 2018), https://www.state.gov/r/pa/ei/bgn/3580.htm [https://perma.cc/WYH6-VU62].

169. Petitioner's Response to Respondent's Factual Return, *supra* note 136, at 3–4.

170. Respondent's Factual Return *supra* note 9, at 2 (emphasis added).

171. *Doe*, 889 F.3d at 777 (Henderson, J., dissenting).

172. *See* Munaf v. Geren, 553 U.S. 674, 692–93 (2008). In *Wilson* and *Neely*, the Court also recognized the sovereign rights and interests of both Japan and Cuba "in prosecuting crimes committed within its borders, [and the] Court found no 'constitutional or statutory' impediment to the United States's waiver of its jurisdiction under the agreement[s]." *Id.* at 705.

173. *Doe*, 889 F.3d at 777 (Henderson, J., dissenting).

> Comity is 'a courtesy' towards 'the laws and usages' of another nation. By definition it counsels 'mutual recognition of legislative, executive, and judicial acts' that go well beyond prosecutorial prerogatives. In some cases, then, comity weighs against blocking a captive's transfer even if the receiving country claims no immediate interest in prosecuting him for a territorial offense.[174]

In Doe's case, comity might have been a plausible argument for the government to support the transfer of Doe to Saudi Arabia because both Saudi Arabia and the United States can claim jurisdiction over Doe as a citizen;[175] comity would appear to be barred as a basis for transferring Doe elsewhere given the precedent set by *Munaf*, *Wilson*, and *Valentine*. And, they are dangerous precedents to overturn.

In *Munaf*, the Court distinguished the situation of Munaf and Omar from that of the petitioner in *Valentine*, and instead applied *Wilson*, because Iraq already had control over the petitioners, even if through MNF-I.[176] This reasoning is not as easily applied in *Doe*. Doe was not captured by or held in the country in which he committed his alleged crimes, as was the defendant in *Wilson*.[177] Doe had not perpetrated his alleged acts of material support against the country or the citizens of the country to which the Executive desired to transfer him, unlike the petitioners in *Valentine* and *Munaf*.[178] Doe was detained by the United States—

174. *Id.* (citations omitted).

175. *Id.* at 747 (majority opinion).

176. As noted above, the Court in *Munaf* emphasized that the petitioners in that case were captured and detained in the sovereign territory of the country with the sovereign right to adjudicate them for their crimes, thus there was no need for a treaty or statute to exist to support the transfer. *Munaf*, 553 U.S. at 704. In *Valentine*, the U.S. citizens had already returned to the United States after allegedly committing crimes in France and the Court held that the Executive "may not extradite a person held within the United States unless 'legal authority' to do so 'is given by act of Congress or by the terms of a treaty.'" *Id.* (quoting Valentine v. United States, 299 U.S. 5 (1936)).

177. *See id.*; *see also Doe*, 889 F.3d at 747.

178. Doe's acts were committed in Syria. *Doe*, 889 F.3d at 747. Conceivably, Iraq could argue that it should have jurisdiction over Doe because he was acting as a part of ISIL, the arm of ISIS that emanated from Iraq and whose actions often cross over into the territorial bounds of Iraq; however, nothing in the case record suggests that Iraq was one of the transfer locations being considered.

a country that currently had physical custody of Doe, of which Doe was a citizen, and in which laws against the material support of terrorism existed.[179] Given the foregoing, any case resembling *Doe* must be distinguished from *Munaf* to preclude the application of the government's justification for transfer as asserted in *Doe* and the circumvention of the protections established in *Hamdi* as extended in *Doe*.

CONCLUSION

While *Doe v. Mattis* has been resolved, and Doe received the release from detention he sought, a case like this could well arise again. If it does, it seems likely the Court would hold that the transfer of an American citizen to a foreign government is barred without territorial, personal, or national jurisdiction to adjudicate him, regardless of labeling that citizen an enemy combatant and detaining him in a foreign country. As Jonathan Hafetz, lead lawyer in *Doe*, noted:

> The most chilling proposition of this case is that the government thought it could dispose of the liberty of an American citizen without any involvement of lawyers or courts. A resounding message [from this case] is that the government is going to think long and hard before it tries to detain [and transfer] an American citizen without charges again—and it should.[180]

This case has left its mark and only time will reveal its impact.

179. *Doe*, 889 F.3d at 747; *see* 18 U.S.C. § 2339A-2339B (2009). Doe's circumstances were a bit muddled by the fact that he was a dual citizen, where Saudi Arabia and the United States had equal claim to prosecute their own citizen. *See* Am. Soc'y Int'l L., *supra* note 108, § II.A.

180. Savage et al., *supra* note 2.