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

JOHN DOE, Petitioner-Appellee, v. JAMES MATTIS, in his official capacity as SECRETARY OF DEFENSE, Respondent-Appellant.	No. 18-5032

MOTION OF THE NEW YORK TIMES COMPANY AND CHARLIE SAVAGE TO INTERVENE FOR LIMITED PURPOSE OF UNSEALING REDACTED PORTIONS OF THIS COURT'S MAY 9, 2018 OPINION, AND TO UNSEAL

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MOTION OF THE NEW YORK TIMES COMPANY AND CHARLIE SAVAGE TO INTERVENE FOR LIMITED PURPOSE OF UNSEALING REDACTED PORTIONS OF THE COURT'S MAY 9, 2018 OPINION, AND TO UNSEAL

The New York Times Company and its reporter Charlie Savage respectfully move (1) for leave to intervene for the limited purpose of being heard on their application for access to sealed portions of the opinion and dissent entered on May 9, 2018 (collectively, the "opinions"), and (2) to unseal the opinions fully, or in the alternative to obtain a summary of legal reasoning and conclusions in the sealed portions of the opinions .

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AND UNSEAL

Preliminary Statement

The opinion and dissent issued by the Court in this appeal decided a fundamental constitutional question concerning the contours of the Government's wartime authority to supersede the due process rights of a U.S. citizen. In answering this question, the Court considered a number of legal arguments advanced by the Government to support its claim of broad powers. Unfortunately, neither the legal arguments advanced, nor the Court's resolution of them, can be fully discerned from the published opinions because key passages are redacted.

The redaction of the Court's legal reasoning and conclusions from the opinions should be re-visited. While the Government may once have had a

compelling national security interest in protecting diplomatically sensitive facts relating to John Doe's transfer, information that has come to light since the Court's decision substantially diminishes that interest. Doe is no longer in U.S. custody and key details surrounding his case have become public over the past year. As a result, no remaining national security interest justifies the on-going limitation on the public's right of access to judicial opinions.

Unsealing is particularly needed because the redactions in this case are not limited to classified facts; the Court's legal reasoning and conclusions have also been obscured. The partial sealing of the opinions creates a form of "secret law," and does so on fundamental constitutional issues. Rulings concerning the constitutional due process and habeas rights of U.S. citizens and the boundaries of the Executive's wartime powers should not remain permanently under seal. Accordingly, Movants respectfully ask the Court to unseal the May 9, 2018 opinions in full, or to provide a summary of the legal reasoning and conclusions in the currently sealed portions of those opinions.

BACKGROUND

A. The Parties

Movant The New York Times Company is a national news organization and the publisher of *The New York Times* ("the Times"). As of late 2018, The Times has over four million digital and print subscribers.

Movant Charlie Savage is a Pulitzer Prize-winning journalist and a correspondent for the Times based in Washington, D.C. As a Times reporter, Mr. Savage has researched and written numerous stories pertaining to national security, individual rights, and the rule of law. Since October, 2017, Mr. Savage has closely reported on the detention, attempted transfer, and subsequent habeas petition of John Doe, an American suspected of joining the Islamic State of Iraq and the Levant ("ISIL"). *See, e.g.*, Eric Schmitt & Charlie Savage, *American Held as ISIS Suspect, Creating a Quandary for the Trump Administration*, The New York Times (Oct. 6, 2017), https://www.nytimes.com/2017/10/06/world/middleeast/american-isis-suspect-indefinite-detention.html. *See* Savage Affidavit Ex. B.

Petitioner-appellant John Doe is an American-Saudi dual citizen who was held for over thirteen months in extra-judicial detention by the U.S. military in Iraq. *Pet. for Writ of Habeas Corpus,* No. 1:17-cv-02069 (D.D.C filed Oct. 05, 2017) ("Habeas Pet.") ¶ 1; *Respondent Factual Return,* No. 1:17-cv-0269 (D.D.C. filed Feb. 14, 2018) ("Return") ¶ 2. Doe is alleged to have joined ISIL as a fighter in 2014; he began living in Syria in 2015 but attempted to flee in 2017 in the face of military offensives into ISIL territory. *Id.* ¶ 7. In September, 2017, he was captured by Syrian Democratic Forces at a checkpoint in Syria; he was transferred to the custody of U.S. forces in Iraq after he identified himself as an American citizen. *Id.*

On October 28, 2018, with his consent, the United States released John Doe in Bahrain. *Stipulation of Dismissal,* No. 1:17-cv-02069 (D.D.C filed Nov. 07, 2018).

B. Procedural Posture

On October 5, 2017, the American Civil Liberties Union Foundation ("ACLU") filed a petition for writ of habeas corpus as next friend on behalf of Doe. *Pet. for Writ of Habeas Corpus,* No. 1:17-cv-02069 (D.D.C filed Oct. 05, 2017).

In an order entered December 23, 2017, the district court denied the Government's motion to dismiss, ordering the Government to permit access to Doe and to refrain from transferring him until the ACLUF could confer with the detainee. *Memorandum and Opinion: Re Defendant's Motion to Dismiss,* No. 1:17-cv-02069 (D.D.C filed Dec. 23, 2017). A number of procedural motions followed, including sealed filings by both the ACLU and the Government that were subsequently redacted and made public.

On April 19, 2018, the district court granted Doe's motion for preliminary injunction and enjoined the Government from transferring Doe from U.S. custody. The injunction was promptly appealed to this Court. All public filings in the appeal contained redacted material.

C. The Redacted Opinions

On May 9, 2018, this Court issued a split decision resolving the legality of Doe's proposed transfer. *See Doe v. Mattis*, 889 F.3d 745 (D.C. Cir. 2018). The majority affirmed the district court's injunction barring the Government from transferring Doe to a third country and resolved a dispute about the military's authority to transfer a U.S. citizen to an allied country. In particular, the majority rejected the Government's claim of transfer authority under the precedent of *Wilson v. Girard*, 354 U.S. 524 (1957), and *Munaf v. Geren*, 553 U.S. 674 (2008), which held that the Government may transfer a U.S. citizen to a foreign country for prosecution when he or she is accused of committing a crime in that country. The reasons for this conclusion are not fully disclosed, however, as passages that apparently explain the basis for rejecting the Government's assessment of its authority are redacted. *See Doe v. Mattis*, 889 F.3d at 764-765. The redacted material is key to the Court's holding, and it appears to involve a specific point of contention between the majority and dissent. *See Doe v. Mattis*, 889 F.3d at 777 (redactions to Judge Henderson's dissent).

ARGUMENT

Movants are proper parties to assert a First Amendment right of access to the material redacted from this Court's opinions and should be permitted to intervene for this limited purpose. Consistent with the First Amendment access right, this

Court should unseal the legal reasoning and holdings currently redacted from the majority and dissenting opinions. Alternatively, the Court should release a summary of the legal holdings. The public's First Amendment right to court opinions is beyond dispute, and no compelling interest justifies continued sealing of the Court's legal reasoning and conclusions in this case.

I.
MOVANTS MAY PROPERLY INTERVENE TO ENFORCE THE RIGHT OF PUBLIC ACCESS TO JUDICIAL RECORDS

The Times and Mr. Savage should be permitted to intervene for the limited purpose of enforcing the right of public access to court records. Intervention is the appropriate vehicle for non-parties to vindicate their access rights in the context of judicial proceedings. *See, e.g.*, *Ameziane v. Obama*, 2012 WL 5381654 (D.C. Cir. Oct. 9, 2012) (per curiam) (granting press intervenors' motion to unseal appellate opinion); *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045-46 (D.C. Cir. 1998) (Rule 24 allows intervention "for the limited purpose of seeking access to materials that have been shielded from public view either by seal or by a protective order"); *United States v. Moussaoui*, 65 Fed. App'x 881, 884, 891 (4th Cir. 2003) (unpublished) (granting news organizations' motion to intervene in appeal for limited purpose of obtaining access to records).

Both the Supreme Court and this Court have recognized that members of the press may properly intervene to assert a First Amendment access right on behalf of

the public. *See, e.g., Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982); *Ameziane v. Obama*, 2012 WL 5381654 at *1; *see also, In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986). The Times and Mr. Savage are a national newsgathering organization and a professional journalist, respectively, who closely covered the *Doe v. Mattis* litigation after Doe's initial capture in October 2017. *See* Savage Decl. ¶¶ 8-10. They also report regularly on legal issues surrounding the government's national security powers, such as those raised by this case. *Id*. ¶ 18. The partial sealing of the opinions prevent them from fully understanding the basis for the Court's holding, assessing its import for future cases, and informing the public. Movants should be permitted to intervene. *See, e.g., United States v. El-Sayegh*, 131 F.3d 158, 160 (D.C. Cir. 1997) (recognizing the right of the press to aspects of court proceedings); *Wash. Post Co. v. Robinson*, 935 F.2d 282, 288-290 (D.C. Cir. 1991) (recognizing standing of press to enforce public right of access).

II.
THE FIRST AMENDMENT ACCESS RIGHT PLAINLY APPLIES TO COURT OPINIONS

The First Amendment indisputably provides an affirmative right of public access to judicial proceedings and records in both criminal prosecutions and civil litigation. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81 (1980) (recognizing a public right of access to criminal trials); *Press- Enter. Co. v.*

Super. Ct., 478 U.S. 1, 13-14 (1986) ("*Press-Enterprise II*") (recognizing constitutional right of access to pretrial hearings and transcripts in a criminal case); *Lugosch v. Pyramid Co.*, 435 F.3d 110 (2d Cir. 2006) (recognizing constitutional right of access to pre-trial motion papers in civil litigations). As this Court has observed, "[t]he [F]irst [A]mendment guarantees the press and the public a general right to court proceedings and court documents unless there are compelling reasons demonstrating why it cannot be observed." (*Washington Post Co. v. Robinson,* 935 F.2d 282, 287 (D.C. Cir. 1991). Court opinions plainly fall within this right's purview.[*]

Richmond Newspapers and its progeny hold that the First Amendment right of access extends to government proceedings and information that historically have been available to the public, and where public access plays a "significant positive role" in the functioning of government. *E.g.*, *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 605-07 (1982); *Press-Enterprise II*, 478 U.S. at 8-9; *ABC v. Stewart*,

[*] The public's right to access court opinions is also enshrined in the common law. *Nixon v. Warner Commc'ns, Inc*., 435 U.S. 589, 597 (1978) ("the courts of this country recognize a general right to inspect and copy . . . judicial records and documents"); *In re Nat'l Broad. Co.*, 653 F.2d 609, 612 (D.C. Cir. 1981) ("existence of the common law right to inspect and copy judicial records is indisputable"); *Lugosch III. v. Pyramid Company of Onandaga*, 435 F.3d 110, 120 (2006)(same). Given the higher standard imposed to abridge the constitutional right that plainly applies, Movants evaluate the propriety of continued sealing under the First Amendment. *See, e.g.*, *New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 299 (2d Cir. 2012) (evaluating plaintiffs' First Amendment right of access without first considering the common law right).

360 F.3d 90, 98 (2d Cir. 2004). Under this "experience" and "logic" analysis, the right of access "has special force" when it carries the "favorable judgment of experience," but what is "crucial" in deciding where an access right exists "is whether access to a particular government process is important in terms of that very process." *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring).

The right of access to court records and proceedings protects the overriding societal interest in open justice. Public access directly improves the functioning of the courts by ensuring that proper procedures are being followed, inhibiting judicial abuse, and creating incentives for all participants to perform well. *Richmond Newspapers*, 448 U.S. at 569-70. Public access also educates the public about the judicial process, and fosters an informed electorate. *E.g.*, *Richmond Newspapers*, 448 U.S. at 592-93; *Globe Newspaper Co.*, 457 U.S. at 604-05.

Under this experience and logic analysis, the First Amendment right incontrovertibly attaches to court opinions, orders, and judgments. This Court has underscored that the presumption of access is "especially strong" when access is sought to a court's order: "A court's decrees, its judgments, its orders, are the quintessential business of the public's institutions." *EEOC v. National Children's Center, Inc.*, 98 F.3d at 1409. Courts routinely hold that the access right applies to those court records that form the basis for judicial action. *E.g.*, *Lugosch*, 435 F.3d at 119 (access right applies to summary judgment records); *Republic of the*

Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 663-64 (3d Cir. 1991) (same); *In re Cont'l Ill. Secs. Litig.*, 732 F.2d at 1308-09 (access right applies to report relied upon by court on motion to terminate case). *A fortiori* the access right applies to judicial action itself to opinions that explain a court's reasoning and embody its rulings. Court orders constitute the exercise of judicial power; access to them is essential for development of the common law and *stare decisis*, and is needed for meaningful public oversight of the judiciary.

Accordingly, the constitutional right of access applies with special force to the opinions in *Doe v. Mattis*.

III.
NO GOVERNMENT INTEREST JUSTIFIES CONTINUED SEALING OF THIS COURT'S REASONING AND CONCLUSIONS

Because the constitutional right of access applies to the majority and dissenting opinions in *Doe v. Mattis*, continued redaction of those opinions is proper only if the Government can meet the strict First Amendment standards that apply to any limitation of the access right. Specifically, the Government must demonstrate that:

1. There exists a substantial probability that unsealing will cause harm to a "compelling" governmental interest, *see*, *e.g., Richmond Newspapers*, 448 U.S. at 580- 81; *Press-Enterprise II*, 478 U.S. at 13-14.
2. There exists no alternative to adequately protect the threatened interest, *see, e.g.*, *Press-Enterprise II*, 478 U.S. at 13-14;

3. Any denial of access is "narrowly tailored to serve that interest," *Robinson*, 935 F.2d at 287; and

4. A denial of access would prevent the harm sought to be avoided. *Press-Enterprise II*, 478 U.S. at 14; *see also, In re The Herald Co.*, 734 F.2d at 101 (closure order cannot stand if "the information sought to be kept confidential has already been given sufficient public exposure"); *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1146 (9th Cir. 1983) (must be "a substantial probability that closure will be effective in protecting against the perceived harm") (citation omitted).

The Government cannot meet these burdens.

A. There Is No Substantial Probability That Unsealing Now Would Prejudice A Compelling Government Interest

The constitutional access right applies to judicial records, even when they contain classified information. *Washington Post*, 807 F.2d at 392-93. While national security concerns can constitute a "compelling" state interest, their presence does not *per se* justify the permanent sealing of court records. National security is a broad concept that "should not be invoked to abrogate the fundamental law embodied in the First Amendment." *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971). Moreover, national security interests change with the passage of time and should not be permitted to serve as a blanket, perpetual reason to keep court opinions under seal. Rather, when a sealing order is challenged, courts should determine whether restrictions imposed on access to protect the national security remain essential to guard against a specific national security risk established by the Government. *Cf., Press- Enterprise I*, 464 U.S. at 510.

To continue to seal any portion of the Court's opinions, the Government must demonstrate that the limitation on access remains "essential to preserve higher values." *Press Enterprise I*, 464 U.S. at 510. This requires not merely a likelihood of harm, but a demonstration that disclosure would create a *substantial probability* of harm to a compelling interest. *Press-Enterprise II*, 478 U.S. at 14-15. The Government cannot make this showing because the redactions appear intended to conceal facts that are now largely public. There can be no compelling need to conceal now-public facts, and no proper basis to do so where continued redaction obscures the Court's legal reasoning. *See, e.g.*, *N.Y. Times Co. v. DOJ*, 756 F.3d at 119-20 (rejecting the government's argument that harm would result from releasing a legal memorandum whose contents were publicly available).

For example, legal conclusions in the majority opinion at 889 F.3d 764, 765 and the dissent at 889 F.3d 777 are apparently deleted to avoid identifying the country then being considered for Doe's transfer. The identity of that country is public knowledge. *See* Savage Dec. ¶ ¶ 9 - 12. Among other disclosures, this fact was disclosed by the district court judge in open court. Responding to the Government's description of transfer from U.S. custody as the relief Doe sought, Judge Chutkin asked, "if the government were to turn over the detainee to Saudi Arabia, that would be the relief that the ACLU seeks for him, his release from U.S. custody?" *See* Exhibit I at 23. A public footnote comparing the legal systems of

the United States and the proposed transfer country in Doe's April 18, 2018 application for a Temporary Restraining Order also confirmed that the country was Saudi Arabia. *Petitioner's Memorandum in Support of his Application for a Temporary Restraining Order and Motion for Preliminary Injunction*, No. 1:17-cv-02069 (D.D.C filed April 18, 2018).

Discussions by legal scholars about the implications of the Court's ruling in this case are also based on the understanding that "Country B" is Saudi Arabia. Law professor Robert Chesney, for example, has characterized the identity of Saudi Arabia as the intended transfer country as the "worst-kept secret in the world." *See, e.g.*, Robert Chesney, *Enjoining the Transfer of a US-Saudi Citizen to Saudi Arabia: A Doe v. Mattis Update and Initial Preview*, Lawfare (April 23, 2018, 7:00 AM), https://www.lawfareblog.com/enjoining-transfer-us-saudi-citizen-saudi-arabia-doe-v-mattis-update-and-initial-preview; Steve Vladeck, *Two (Premature) Cheers for Doe v. Mattis,* Just Security (May 8, 2018), https://www.justsecurity.org/55878/premature-cheers-doe-v-mattis/. There is no proper basis to deny access to the Court's reasoning to conceal this publicly disclosed and widely understood fact.

Since this Court handed down its opinion in May 2018, other facts surrounding John Doe's transfer have also come to light. An Islamic State intake form proffered by the government as evidence of Doe's connection to ISIL

disclosed that John Doe's name is Abdulrahman Ahmad Alsheikh. *See* Savage Dec., Exhibit J. Reporting has since revealed many facts about Doe's family, his educational background, and conditions of his life in the United States. *See* Savage Dec., Exhibit G. It is also public knowledge that Doe was released from U.S. custody on October 28, 2018, and subsequently moved to Bahrain where his wife and child reside. *Id.* The parties' stipulation of dismissal, filed on November 7, 2018, confirmed Doe's move to Bahrain. Savage Dec., Exhibit A.

Even if there exists among the redactions information that is *not* publicly known, the Government must establish a compelling interest in the continued sealing of that information, and has not done so to date. Since the Government has not, and cannot, demonstrate a compelling interest in continuing to redact facts that are now publicly known, there is also no basis for continuing to seal legal analysis and conclusions tethered to those facts.

B. The Redactions Are Overly Broad

The Supreme Court has long recognized that even "legitimate and substantial" governmental interests "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Thus, any limitation imposed on public access must be no broader than necessary to protect the threatened interest

and must be limited in both time and scope. *See, e.g.*, *Press-Enterprise II*, 478 U.S. at 13-14; *Robinson*, 935 F.2d at 287; *Lugosch*, 435 F.3d at 124.

As discussed above, since this Court handed down its opinion last year, several key facts surrounding John Doe and his transfer have become public. The same changed factual context that has eliminated the national security justification for partial sealing of the Court's opinion has also rendered the redactions overbroad in both time and scope. There is no legitimate government interest in redacting legal reasoning and conclusions to conceal facts that have already been publicly revealed.

C. The Redactions Are Not Effective

Any barriers to access must be effective in protecting the interest for which the limitation is imposed. *Press-Enterprise II*, 478 U.S. at 14. The Government must demonstrate that closure would actually prevent the harm sought to be avoided, and limitations cannot stand if "the information sought to be kept confidential has already been given sufficient public exposure." *In re Herald*, 734 F.2d at 101. Again, for the reasons discussed above, the redactions in the majority opinion and dissent no longer effectively protect any compelling interest—the passage of time and the release of information to the public have rendered the redactions unnecessary. For this reason, too, the opinions should be fully unsealed.

IV.
IF A COMPELLING GOVERNMENT INTEREST IN SEALING PERSISTS, AN ALTERNATIVE TO SEALING MUST BE FOUND TO PREVENT THE CREATION OF SECRET LAW

Keeping a court's legal reasoning and conclusions under seal produces secret law, which by definition creates rights and obligations without informing the public of what those rights and obligations are. *See, e.g.*, *Cuneo v. Schlesinger*, 484 F.2d 1086, 1090 (D.C. Cir. 1973) (defining secret law as information that "either creates or determines the extent of the substantive rights and liabilities of a person"). The redactions to the opinions in this case seal just such determinations of substantive rights.

The context of redactions in the majority and dissenting opinions strongly suggests that the redactions contain holdings on important legal issues. For example, the redactions at 889 F.3d 764 begin with the phrase, "The [G]overnment contends that the transfer nonetheless should be allowed because Doe . . . ," but seals the Government's reasons for believing it has authority to transfer a U.S. citizen to foreign state custody and the Court's reasons for rejecting the government's view of its constitutional authority. Similarly, the redactions at 889 F.3d 765 occur during the Court's discussion of "the limits on unilateral Executive authority [that] ultimately 'protect the individual,'" and apparently conceal legal conclusions central to understanding the contours of Executive power over U.S. citizens—including a hypothetical ("Now imagine . . . .") that presumably

illustrates this Court's logic in formulating its decision. The redactions to the dissent apparently take issue with the majority's legal analysis on these points. *See* 889 F.3d at 777 (appearing to discuss how principles of comity should influence limitations on the Executive's wartime powers).

The redactions in this Court's opinions give rise to secret law that implicates the constitutional due process and habeas rights of U.S. citizens, as well as the boundaries of the Executive branch's authority under the law of war. The development of such secret law violates fundamental precepts of our legal system, including requirements of open justice, fair notice, and commitment to precedent—tenets the First Amendment right of access specifically protects. *See*, *e.g.*, *Richmond Newspapers*, 448 U.S. at 569-70; 592-93. When courts' legal conclusions on constitutional questions are sealed, the public is left ignorant as to the scope of its rights and prosecutors and courts may apply them inconsistently in future cases.

This Court has repeatedly observed that the maintenance of secret law by an administrative agency "would weigh heavily against the public interest." *Sterling Drug, Inc. v. F.T.C.*, 450 F.2d 698, 716 (D.C. Cir. 1971). Indeed, a "strong theme" of this Court's jurisprudence in the context of the Freedom of Information Act "has been that an agency will not be permitted to develop a body of 'secret law.'" *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980)

(citing *Sterling Drug*, 450 F.2d at 708; *Schwartz v. IRS*, 511 F.2d 1303, 1305 (1975); *Ash Grove Cement Co. v. FTC*, 511 F.2d 815, 818 (1975)). These admonitions against secret law apply with even greater force to the rulings of Article III courts.

Thus, even if the Government could meet its burden to establish that a substantial probability of harm to national security would result from unsealing the opinions' redactions, an alternative must be found to prevent the creation and perpetuation of secret law. *See, e.g.*, *Press-Enterprise II*, 478 U.S. at 13-14 (obligation to consider alternatives to restriction on access right); *see also In re The Herald Co.*, 734 F.2d 93, 100 (2d Cir. 1984) (same).

Congress recognized just this in reforming the USA FREEDOM Act in 2015 to prevent the creation of secret law by the Foreign Intelligence Surveillance Court. 161 Cong. Rec. S3642-01 (daily ed. June 3, 2015) (statement of Senator Merkley), *see also,* 161 Cong. Rec. S3421-03, S3430 (Statement of Senator Blumenthal) (to keep law secret "is a disservice to the American people and to our legal system."). The 2015 USA FREEDOM Act specifically recognizes this imperative against using national security concerns to conceal judicial pronouncements of the law. It mandates the declassification of any opinion of the Foreign Intelligence Surveillance Court that includes "a significant construction or interpretation of any provision of law." USA FREEDOM Act, Pub. L. No. 114-23, § 402 (2015).

Where such declassification is not possible without endangering national security, the Act instructs the FIS Court to prepare and release an unclassified summary of its legal interpretations using alternate language. *Id.*

The First Amendment access right requires no less when opinions of other courts must be redacted to protect compelling national security interests. The right exists, in part, to protect the public's ability to know judicial determinations of the scope and proper application of legal rights. Given the foundational imperative against secret law, legal conclusions reached by a court in a national security context must be disclosed using language that protects national security to the extent possible. If the current wording of the redacted portions of the opinions cannot be disclosed, even at this late date, a summary of the legal conclusions reached must be released.

CONCLUSION

For the foregoing reasons, this Court should (1) grant Movants' leave to intervene in this proceeding for the limited purpose stated herein, and (2) unseal redactions from its May 9, 2018 opinions in this case or, in the alternative, release an unclassified summary of the redacted reasoning and legal conclusions.

Dated: April 9, 2019
New Haven, CT

Respectfully submitted,

MEDIA FREEDOM & INFORMATION ACCESS CLINIC

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27, the undersigned counsel for movants certifies that this motion:

(i) complies with the type-volume limitation of Rule 27(d)(2) because it contains 4,378 words; and

(ii) complies with the typeface requirements of Rule 27(d)(1)(E) because it was prepared using Microsoft Word 2016 and is set in Times New Roman 14-point font, a proportionally spaced typeface.

April 9, 2019 _/s/ *David A. Schulz*_

David A. Schulz

CERTIFICATE PURSUANT TO D.C. CIRCUIT RULE 27

Pursuant to D.C. Circuit Rule 27, I hereby certify that the following is a list of all persons who appear on the docket as parties, intervenors, or *amici* in this Court:

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John Doe

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Dated: April 9, 2019
New Haven, CT

__/s/ *David A. Schulz*____
David A. Schulz

RULE 26.1 DISCLOSURE STATEMENT BY THE NEW YORK TIMES COMPANY

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, The New York Times Company makes the following disclosures:

The New York Times Company is a publicly traded corporation. It has no parent company and has no affiliates or subsidiaries that are publicly owned. No publicly held corporation owns 10% or more of its stock.

Dated: April 9, 2019
New Haven, CT

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of April, 2019, a true and correct copy of the foregoing was served on counsel for all parties via the Court's ECF system.

_/s/ *David A. Schulz*_____
David A. Schulz

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

JOHN DOE, Petitioner-Appellee, v. JAMES MATTIS, in his official capacity as SECRETARY OF DEFENSE, Respondent-Appellant.	No. 18-5032

DECLARATION OF CHARLIE SAVAGE IN SUPPORT OF MOTION TO INTERVENE AND MOTION TO UNSEAL

I, CHARLIE SAVAGE, state and declare as follows under penalty of perjury:

1. I have been a professional journalist for twenty years and am currently employed as a Washington correspondent at *The New York Times* ('the *Times*').

2. I began my career in 1999 as a reporter for *The Miami Herald*. From 2003 until 2008 I worked as a reporter in the Washington bureau of *The Boston Globe*. I joined the *Times*' Washington bureau in 2008.

3. Since 2003, my career has focused on reporting about issues related to national security, individual rights, and the rule of law, especially in the post-9/11 context. In 2007, I received a Pulitzer Prize in National Reporting for a series of articles about the Bush administration's post-9/11 push to expand executive power, including through the use of presidential signing statements.

4. As part of my work, I have closely followed and written regularly about post-9/11 legal-policy dilemmas arising from the detention of terrorism suspects. My reporting has

covered the habeas corpus rights of wartime detainees held indefinitely at Guantanamo Bay, Cuba, and at Bagram Air Base, Afghanistan; efforts to prosecute terrorism suspects in the military commissions system instead of civilian trials; recurring disputes over interrogation issues like the use of torture and the reading of Miranda warnings to newly arrested terrorism suspects; the problem of ISIS detainees from around the world held by the Kurds in Syria; and various fights over the still-unresolved scope of and limits on the government's authority to deem American citizens "enemy combatants" and hold them in military detention without trial. I have traveled to Guantanamo on numerous occasions, and once to Syria, to help readers explore these topics. See Charlie Savage, *I've Been Covering the Detention of Terrorism Suspects for 15 Years. What Have We Learned?* The New York Times (July 26, 2018), https://www.nytimes.com/2018/07/26/insider/guantanamo-syria-terrorism-detainees-prisons.html

5. In addition to my newspaper reporting, I have authored two books: "Takeover," published in 2007, which chronicles the Bush administration's efforts to expand presidential power, and "Power Wars," published in 2015, which is an investigative history of national-security legal policymaking in the Obama administration. Issues related to the wartime detention of terrorism suspects are a major focus of both books.

6. I have also twice taught a seminar on the intersection of the national security and constitutional law at Georgetown University, with a co-teacher who is a retired former general counsel of the Senate Select Committee on Intelligence. The curriculum we jointly developed for that class included several weeks in which we focused student reading assignments, class lectures, and class discussions on detainee issues.

SIGNIFICANT PUBLIC INTEREST IN DOE V. MATTIS

7. As a Washington correspondent at the *Times*, I have contributed to reporting on both the underlying facts of this case and on the ensuing legal proceedings surrounding "John Doe." This began with Doe's initial capture in September 2017, continued as his case spawned complex litigation, and followed through to the U.S. government's release of Doe from custody in October 2018. Attached hereto as Exhibit A is a true and correct copy of the parties' Stipulation of Dismissal: Stipulation of Dismissal, *Doe v. Mattis*, No. 1:17-cv-2069 (TSC)(D.D.C.).

8. My reporting on *Doe v. Mattis* included a number of stories on the government's plans to transfer Doe to foreign state custody and the parties' associated court filings, this Court's decision to bar the transfer, and John Doe's subsequent release from U.S. custody, among others.

9. Some of these stories were written with colleagues and some I wrote by myself. Of particular interest to these motions, my reporting includes:

a. Eric Schmitt & Charlie Savage, *American Held as ISIS Suspect, Creating a Quandary for the Trump Administration*, The New York Times (Oct. 6, 2017), https://www.nytimes.com/2017/10/06/world/middleeast/american-isis-suspect-indefinite-detention.html. (A true and correct copy of this article is attached as Exhibit B.)

b. Charlie Savage, Eric Schmitt, & Adam Goldman, *Officials Weigh Sending American Detainee to Saudi Arabia*, The New York Times (Dec. 20, 2017), https://www.nytimes.com/2017/12/20/us/politics/american-detainee-saudi-arabia.html. (A true and correct copy of this article is attached as Exhibit C.)

c. Charlie Savage, *U.S. Seeks to Send American ISIS Suspect to Another Country's Custody*, The New York Times (Apr. 17 2018), https://www.nytimes.com/2018/04/17/us/politics/american-isis-suspect-transfer-planned.html. (A true and correct copy of this article is attached as Exhibit D.)

d. Charlie Savage, *Judge Halts Transfer of American ISIS Suspect to Other Country*, The New York Times (April 19, 2018), https://www.nytimes.com/2018/04/19/us/politics/american-isis-suspect-ruling.html. (A true and correct copy of this article is attached as Exhibit E.)

e. Charlie Savage, *Appeals Court Bars U.S. From Transferring American ISIS Suspect*, The New York Times (May 9, 2018), https://www.nytimes.com/2018/05/09/us/politics/american-isis-suspect-appeals-ruling.html. (A true and correct copy of this article is attached as Exhibit F.)

f. Charlie Savage, Rukmini Callimachi, & Eric Schmitt, *American ISIS Suspect Is Freed After Being Held More Than a Year*, The New York Times (Oct. 29, 2018), https://www.nytimes.com/2018/10/29/us/politics/isis-john-doe-released-abdulrahman-alsheikh.html. (A true and correct copy of this article is attached as Exhibit G.).

10. I have written a number of other articles relating to John Doe and his legal rights, including the following (true and correct copies of which are collectively attached as Exhibit H):

a. Charlie Savage, *American Detained by Military Wants a Lawyer, Government Acknowledges*, The New York Times (Nov. 30, 2017), https://www.nytimes.com/2017/11/30/us/politics/american-citizen-detained-isis-hearing.html.

b. Charlie Savage, *American ISIS Suspect Held in Iraq Has Right to Lawyer, Judge Rules,* The New York Times (Dec. 24, 2017), https://www.nytimes.com/2017/12/24/us/politics/isis-aclu-case.html.

c. Charlie Savage, *American Detained by U.S. Military Says He Wants to Sue*, The New York Times (Jan. 5, 2018), https://www.nytimes.com/2018/01/05/us/politics/american-isis-suspect-military-detention.html.

d. Charlie Savage, *Military Ordered to Notify A.C.L.U. Before Transferring American ISIS Suspect*, The New York Times (Jan. 24, 2018), https://www.nytimes.com/2018/01/24/us/politics/american-isis-suspect-transfer-ruling-aclu.html.

e. Charlie Savage, *American ISIS Suspect Said He Wanted to Report From Syria, Filing Shows*, The New York Times (Feb. 15, 2018) https://www.nytimes.com/2018/02/15/us/politics/american-isis-suspect-syria.html.

f. Charlie Savage, *American ISIS Suspect Fights Plan to Release Him in Syria*, The New York Times (June 7, 2018), https://www.nytimes.com/2018/06/07/us/politics/american-isis-suspect-syria-release-plan.html.

11. During the course of this litigation my colleagues and I brought to light several important but undisclosed facts about John Doe's identity and potential transfer.

12. For example, we reported that American officials were initially trying to transfer custody of John Doe to Saudi Arabia, where he is a dual citizen. *See* Exhibit C. (Later, during a

district court hearing in this case that I attended, the presiding judge, Judge Tanya Chutkan, United States District Judge for the District of Columbia, also identified Saudi Arabia in open court as the country of prospective transfer. Attached hereto as Exhibit I is a true and correct transcript of that hearing. Tr. of Mots. Hr'g, at 23, *Doe v. Mattis*, No. 1:17-cv-2069 (D.D.C.).)

13. Our reporting also revealed that Doe's true name is Abdulrahman Ahmad Alsheikh, a fact we initially determined by comparing a redacted version of his Islamic State intake form, released by the government in a court filing, with an unredacted version of that same document in a digital archive of such documents The New York Times had separately acquired. This fact, in turn, allowed us to surface new details about Doe's former life in the United States. *See* Exhibit G and Respondent's Factual Return, at 102, *Doe v. Mattis,* No. 1:17-cv-2069 (D.D.C.); ISIS Intake Form, N.Y. TIMES, https://int.nyt.com/data/documenthelper/316-isis-intake-form/b036738b2b3dd8d2ae39/optimized/full.pdf#page=1 (last visited Mar. 24, 2019) (True and correct copies of the intake forms are attached as Exhibit J.)

14. When the government announced that it had transferred Doe out of its custody, but without saying where, we reported that Doe had been released to "Bahrain, where his wife and daughter are living." *See* Exhibit G.

15. The government has not publicly confirmed either Doe's name or where he was sent, and portions of the official record relating to this extraordinary episode remain hidden from public view, including in the redacted portions of this Court's ruling at issue on these motions.

16. Throughout my reporting on *Doe v. Mattis* the legal implications of this case for the rights of U.S. citizens has been an issue of significant public concern. The issue of whether the government can or should imprison American terrorism suspects without trial as enemy combatants, rather than prosecuting them, has prompted recurring debate since the George W.

Bush administration, and the scope and limits of the government wartime detention power continue to be subjects of public controversy. *See* Exhibit G.

17. During the litigation, it was also recognized that Doe's transfer could render moot several important and unresolved legal questions raised by his case. These included "whether the Obama and Trump administrations' claim that Congress's authorization to fight Al Qaeda covers the Islamic State" was a correct interpretation of that statute, and "whether the judge overseeing the man's lawsuit, . . . had legitimate authority to order the government to give him at least 72 hours' notice before any transfer." *See* Exhibit D.

PUBLIC INTEREST IN THE LEGAL ISSUES DECIDED BY THIS COURT

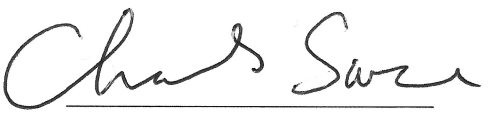
18. The passages redacted from this Court's decision in *Doe v. Mattis* are of particular interest to me as a journalist who covered the case and who reports on legal issues surrounding the limits of the government's national security powers generally.

19. In particular, the redaction of passages on pages 36 and 37 of the majority's opinion and pages 17, 18 and 19 of the dissent apparently conceal certain legal arguments advanced by the government and the Court's reasons for prohibiting the transfer of a detained American citizen to a third country against his will.

20. This suppression not only hampers my reporting, it leaves the public unable to fully know the reasons for Court's disposition of a significant constitutional issue presented in the *Doe v. Mattis* litigation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Washington, D.C. this 1st day of April 2019.



CHARLIE SAVAGE
Washington Correspondent
The New York Times

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE, Petitioner, v. GEN. JAMES N. MATTIS, in his official capacity as SECRETARY OF DEFENSE, Respondent.	)	Civil Action No. 1:17-cv-2069 (TSC)

STIPULATION OF DISMISSAL

The parties hereby give notice that, with Petitioner's consent, the U.S. Department of Defense released Petitioner in Bahrain on October 28, 2018. Accordingly, it is hereby stipulated and agreed, by and between the parties, that this action shall be dismissed with prejudice, each party to bear their own costs and fees.

November 7, 2018

Respectfully submitted,

/s/ Jonathan Hafetz

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EXHIBIT B

The New York Times

American Held as ISIS Suspect, Creating a Quandary for the Trump Administration

By Eric Schmitt and Charlie Savage

Oct. 6, 2017

WASHINGTON — Trump administration officials are divided over how to handle a United States citizen that the military has held in Iraq for more than three weeks as a suspected Islamic State fighter, according to an official familiar with internal deliberations, raising a dilemma that could resurrect some of the biggest wartime policy questions of the post-9/11 era.

Providing the first details about a predicament that the Trump administration has kept draped in near-total secrecy, the official said the problem facing Pentagon and Justice Department officials is how to ensure that the man — who surrendered on Sept. 12 to a Syrian rebel militia, which turned him over to the American military — will stay imprisoned.

It may not be possible to prosecute the man because most of the evidence against him is probably inadmissible, the official said. But holding a citizen in long-term wartime detention as an enemy combatant — something the military has not done since the George W. Bush administration — would rekindle major legal problems left dormant since Mr. Bush left office and could put at risk the legal underpinnings for the fight against the Islamic State.

Admissible evidence is sparse, said the official, who spoke on the condition of anonymity to discuss sensitive information without authorization, adding that the F.B.I. and Justice Department were working to build the case. Spokesmen for the National Security Council, the Justice Department and the Pentagon declined to comment on the specifics of this account but did not contest its details.

But the pressure to make a decision is mounting. On Thursday, the American Civil Liberties Union filed a habeas corpus petition asking a judge to order the Pentagon to let its lawyers visit the prisoner and to rule that the government's holding of him in detention without due process and unable to communicate is unconstitutional.

"The U.S. government cannot imprison American citizens without charge or access to a judge," said Jonathan Hafetz, an A.C.L.U. lawyer. "It also cannot keep secret the most basic facts about their detention, including who they are, where they are being held and on what authority they are being detained. The Trump administration should not resurrect the failed and unlawful policy of 'enemy combatant' detentions."

But it is unclear whether the group has standing to bring that complaint without the man agreeing to let it represent him. Because Trump administration officials have refused to disclose his name, rights groups have been unable to track down any close relative to grant that assent on his behalf.

The Trump administration has said almost nothing about the detainee beyond acknowledging that he exists and was recently visited by the International Committee of the Red Cross. Spokesmen at the White House, the Pentagon and the Justice Department have repeatedly demurred when asked for even basic facts about what is happening.

When asked about the case at a security conference at Georgetown University on Sept. 14, two days after the suspect surrendered, John J. Mulligan, the deputy director of the National Counterterrorism Center, said he presumed that the individual would probably be charged with material support to terrorism.

The senior administration official partly opened a window onto the matter. The prisoner, the official said, was born on American soil, making him a citizen, but his parents were visiting foreigners and he grew up in the Middle East. The near total lack of contact with the United States slowed efforts to verify his identity, the official said.

The prisoner was interrogated first for intelligence purposes — such as to determine whether he knew of any imminent terrorist attacks — without being read the Miranda warning that he had a right to remain silent and have a defense lawyer present. The government then started a new interrogation for law-enforcement purposes, but after the captive was warned of his Miranda rights, he refused to say any more and remains in military custody in Iraq, the official said.

Investigators have also identified a personnel file in a cache of seized Islamic State documents that appears to be about the captive, the official said. But prosecutors could have difficulty getting that record, which was gathered under battlefield conditions, admitted as evidence against him under more rigorous courtroom standards.

As a result, while the Pentagon wants the Justice Department to take the prisoner off its hands, law enforcement officials have been reluctant to take custody of him unless and until more evidence is found to make it more likely that a prosecution would succeed, the official said.

There is a limit to how long the military can hold a citizen without at least letting him talk to lawyers, said Stephen Vladeck, a law professor at the University of Texas, Austin, who specializes in national security matters, acknowledging the government's predicament.

"It would be one thing if this were a cooperating witness who was being kept in incommunicado detention to protect his safety and his intelligence value," Mr. Vladeck said. "But keeping someone in these circumstances simply because they don't know what to do with him is not going to help them in court, if and when it gets there."

The Pentagon spokesman, Maj. Ben Sakrisson, said that "captured enemy fighters may be detained" as part of the armed conflict against the Islamic State.

"A U.S. citizen may lawfully be subject to military detention in armed conflict under appropriate circumstances," he added, pointing to a 2004 decision in which the Supreme Court upheld the indefinite wartime detention of an American citizen captured in the Afghanistan war, Yasser Hamdi.

Still, there are questions that were not answered by that 2004 ruling and would be raised again by trying to hold the new detainee indefinitely.

Mr. Hamdi, like the new captive, was born in the United States but raised abroad — in his case, Saudi Arabia. After he was captured in Afghanistan, the Bush administration moved him, along with hundreds of other wartime detainees, to the prison at Guantánamo Bay, Cuba. Only there did officials discover his citizenship.

They transferred him to a brig in South Carolina and continued to hold him as an enemy combatant under the laws of war. In 2004, the Supreme Court ruled that his detention as a wartime prisoner was lawful — but also that he had a right to challenge the evidence that he was an enemy fighter in a hearing before a neutral decision maker.

Instead of granting him such a hearing, the Bush administration sent him to Saudi Arabia. The Supreme Court has never ruled on what kind of hearing — or how much or what type of evidence — is sufficient to hold an American in indefinite wartime detention. Attempting to hold the new detainee in that fashion would raise those questions anew.

The Trump administration would also face political risks in holding an American as a long-term enemy combatant. The Bush administration's decision to detain Mr. Hamdi without trial, along with an American and a Saudi on a student visa who were arrested in Illinois and transferred to military custody, was controversial across the ideological spectrum.

It is not clear whether the administration is also weighing transferring the captive to Iraqi or Kurdish custody. The Obama administration sent a previous high-profile Islamic State prisoner, Umm Sayyaf, to Iraq — but she was not an American.

The new case also raises the prospect of a fight over the law authorizing the battle against the Islamic State.

In Mr. Hamdi's case, the Supreme Court ruled that the military's legal power to detain a citizen captured fighting on the Afghan battlefield flowed from Congress's authorization to use military force against the perpetrators of the Sept. 11, 2001, attacks. But it is in dispute whether that aging law encompasses the fight against the Islamic State in Iraq and Syria, as the executive branch has argued since the Obama administration.

The Justice Department has fought in court to prevent a judge from ruling on that notion, and legal experts have warned the Trump administration not to bring Islamic State detainees to Guantánamo to avoid the issue. But litigation over whether an American member of the Islamic State is subject to wartime detention would squarely raise that question, potentially jeopardizing the basis for the broader war effort.

"They don't want this habeas case," Mr. Vladeck said. "This is not the hill the government wants to fight the ISIS or the U.S. citizen questions on."

On Twitter, follow Eric Schmitt @EricSchmittNYT and Charlie Savage @charlie_savage.

A version of this article appears in print on Oct. 7, 2017, on Page A8 of the New York edition with the headline: American Held as ISIS Suspect, Creating Quandary for Trump Administration

READ 83 COMMENTS

EXHIBIT C

The New York Times

Officials Weigh Sending American Detainee to Saudi Arabia

By Charlie Savage, Eric Schmitt and Adam Goldman

Dec. 20, 2017

WASHINGTON — Senior national security officials in the Trump administration are embracing a proposal to transfer to Saudi Arabia an American citizen being held in Iraq as a wartime detainee, according to officials familiar with internal deliberations.

A meeting last week of the National Security Council's "deputies committee" — the No. 2 leaders of national security departments and agencies — found its members united around a goal of pursuing such a transfer for the detainee, suspected of being a low-level Islamic State fighter, who has been held in military custody as an "enemy combatant" for the past three months, the officials said.

The man, whose name the government has refused to make public, was born in the United States to visiting Saudi parents, the officials said.

A spokesman for the National Security Council declined to comment. The officials spoke on the condition of anonymity to describe the internal deliberations.

The Trump administration has been wrestling with what to do with the man since a Syrian militia turned him over to American forces in mid-September. Legal pressure to resolve his fate has been building since the American Civil Liberties Union filed a habeas corpus lawsuit in October challenging his detention on his behalf.

The government initially wanted to prosecute the man in a civilian court for providing material assistance to terrorism, but the F.B.I. was unable to assemble sufficient courtroom-admissible evidence against him.

After interrogating the man for intelligence purposes, F.B.I. agents switched to questioning to gather courtroom evidence and read the man the Miranda warning. But after the man heard he had a right to have a lawyer present, the Justice Department disclosed as part of the A.C.L.U. case, he asked for one, so the agents ceased their questioning.

Robert M. Chesney, a national security law professor at the University of Texas, Austin, said that repatriating the detainee to Saudi Arabia, where he was raised and is apparently a dual citizen, was "the most desirable outcome for all parties concerned."

Mr. Chesney noted that there has been no claim that the man did or knows anything important, and he said that holding the man in longer-term military custody would give courts an opportunity to weigh in on unresolved legal questions, including whether Congress properly authorized the war against the Islamic State and the limits of the government's power to hold American citizens as enemy combatants.

“Why would you want to open that can of worms in the first place when you have a perfectly plausible, indeed attractive, disposition option?” Mr. Chesney said.

The officials at the deputies committee meeting agreed that as part of reaching out to the Saudi government, the Trump administration would request diplomatic assurances about what would happen to the man after any transfer.

Previous repatriation deals for lower-level detainees have included assurances that their ability to travel would be restricted, as well as other security measures. Saudi Arabia also operates a custodial rehabilitation program for low-level Islamist radicals.

It was not clear whether such a deal would require the detainee to renounce his American citizenship, eliminating his right to enter the United States. In 2004, when the Bush administration repatriated a former Guantánamo detainee who had similarly been born in the United States to visiting Saudi parents, Yaser E. Hamdi, the man agreed to renounce his citizenship as part of the arrangement.

By then, Mr. Hamdi had a lawyer. The Trump administration has been fighting to keep a lawyer from reaching the current detainee.

Jonathan Hafetz, the lead A.C.L.U. lawyer in the habeas corpus lawsuit, said that whatever happens, the man should be given access to a lawyer first “to advise him on fundamental questions, including renouncing his citizenship, if that’s an issue.”

Although the International Committee for the Red Cross has visited the detainee twice, the government has kept secret the most basic facts about him. That he is a dual citizen of Saudi Arabia was earlier reported last week by The Hill, and was subsequently confirmed by officials.

The government has asked the judge overseeing the A.C.L.U.’s case, Judge Tanya S. Chutkan of the Federal District Court of the District of Columbia, to dismiss the lawsuit, saying the rights organization lacks standing because it has no connections to him or his relatives.

But the A.C.L.U., noting that the government is responsible for keeping the man’s identity secret and not letting lawyers visit him, has asked Judge Chutkan to order the government to ask the detainee whether he wants to file a habeas corpus lawsuit himself and, if so, whether he wants the A.C.L.U. to represent him. She has not yet ruled.

On Twitter, follow Charlie Savage @charlie_savage, Eric Schmitt @EricSchmittNYT and Adam Goldman @adamgoldmanNYT.

A version of this article appears in print on Dec. 21, 2017, on Page A10 of the New York edition with the headline: Officials Weigh Sending American Held as ISIS Fighter to Saudi Arabia

EXHIBIT D

The New York Times

U.S. Seeks to Send American ISIS Suspect to Another Country's Custody

By Charlie Savage

April 17, 2018

WASHINGTON — The United States military intends to transfer an American citizen who has been detained in Iraq for more than seven months to the custody of another country in several days, the Justice Department told a judge on Tuesday.

But the man, whose name has not been made public, does not want to go to that country and intends to fight the proposed transfer in court, according to his lead lawyer, Jonathan Hafetz of the American Civil Liberties Union.

"The Trump administration has been detaining this American citizen unlawfully for more than seven months, and forcibly rendering him to another country would be an unconscionable violation of his constitutional rights," Mr. Hafetz said in a statement.

The government redacted the name of the country that would take custody of the man in its new court filing. But officials have said the Trump administration was asking Saudi Arabia to take him off American hands. He could also be transferred to Iraqi custody.

Transferring the man would render moot several important and unresolved legal questions raised by his case. They include whether the Obama and Trump administrations' claim that Congress's authorization to fight Al Qaeda covers the Islamic State, and whether the judge overseeing the man's lawsuit, Tanya S. Chutkan of the Federal District Court for the District of Columbia, had legitimate authority to order the government to give him at least 72 hours' notice before any transfer.

The man was born in the United States to visiting Saudi parents, making him an American citizen, but raised in Saudi Arabia, where he became a dual citizen.

He was captured by a Syrian militia in September and turned over to American forces as a suspected low-level Islamic State member, raising a dilemma about what to do with him. While security officials wanted him to remain locked up somewhere, Justice Department officials struggled to assemble sufficient courtroom evidence to prosecute him.

In the court filing on Tuesday, the Justice Department redacted details about the proposed transfer. But it said that after "extensive discussion" with his lawyer about the option, the man had decided not to consent to the transfer. Nevertheless, the government wants to proceed and urged Judge Chutkan not to interfere, saying that it was "imperative that the transfer occur quickly and smoothly."

A court order delaying or blocking the transfer "would undermine the United States' credibility with an important foreign partner that has agreed to this request," and could lead the other country to reconsider its agreement to take the man "or could adversely affect its willingness to engage with the United States

on some future detainee transfers," the filing said.

But Mr. Hafetz said the government had no right to send his client to the other country against his will, saying, "He should either be charged or freed, not handed over to an unnamed foreign government."

Judge Chutkan has scheduled a hearing for Thursday morning.

When captured, the man apparently told interrogators that he had worked for the Islamic State guarding a gas field and monitoring civilians, and captured recruiting files indicate that he registered with the group as a fighter in July 2014, a court document filed earlier said.

But the man also insisted to his interrogators that he had traveled to Syria intending to work as a journalist and was arrested, later agreeing to work for the Islamic State to gain release from prison, it also showed. The court filing did not accuse him of having fought for the group.

Follow Charlie Savage on Twitter: @charlie_savage.

EXHIBIT E

The New York Times

Judge Halts Transfer of American ISIS Suspect to Other Country

By Charlie Savage

April 19, 2018

WASHINGTON — A federal judge blocked the Trump administration on Thursday from transferring an American citizen detainee — who has already been held in Iraq as a suspected Islamic State member for seven months — to the custody of another country against his will.

The decision, by Judge Tanya S. Chutkan, of the Federal District Court for the District of Columbia, was a significant ruling in a case that has raised novel questions about national security and individual rights. It was also a milestone in the unusual case of the man, whose name has not been made public, and which will now most likely go before a federal appeals court.

The man was captured by a Syrian militia in September and turned over to the American military. This week, the government notified the man that it intended to transfer him to another country, but he has decided to fight that plan in court.

While that country's name has been redacted as classified in court filings, the man is also a citizen of Saudi Arabia. Officials familiar with his case have said the Trump administration decided to ask Saudi Arabia to take custody of him after concluding that there was insufficient courtroom-admissible evidence to prosecute him.

Judge Chutkan issued a brief order granted the man's request for a preliminary injunction blocking any transfer late Thursday evening, just minutes before a 72-hour notice period was set to expire that would have cleared the way for the government to proceed.

The judge wrote that she would later make public a full opinion explaining her reasoning. But at a hearing earlier on Thursday, she had made clear that she worried that the transfer would set a troubling precedent, and suggested that the government's argument that it had a diplomatic need to swiftly carry out the deal probably did not outweigh the man's constitutional rights to contest the legality of his detention.

In a statement, the man's lead lawyer, Jonathan Hafetz of the American Civil Liberties Union, celebrated the blocking as a victory for the rule of law.

"The court is rightly protecting this U.S. citizen's constitutional rights and checking the Trump administration's excessive claims of executive power," he said. "The government cannot do whatever it pleases with a U.S. citizen without judicial review and a basis in law."

Earlier, at the hearing, Mr. Hafetz had said the government's only options, if it could not come up with a transfer deal his client would assent to, were to charge his client with a crime or release him.

One of the oddities of the case is that were the military to open his cell door, he would risk being immediately rearrested by Iraqi authorities who have been swiftly prosecuting and executing people associated with the Islamic State. Judge Chutkan said the man would have no right to make the United States bring him out of Iraq.

The man has admitted to working for the Islamic State, including guarding a gas field and monitoring civilians, and the recruiting files for the extremist group indicate that he was registered as a fighter, court filings have shown. But the man has insisted he went to Syria for journalistic reasons and was arrested, then agreed to work for the group to get out of prison. The government has not accused him of fighting for the Islamic State.

Mr. Hafetz also argued at the hearing that the government had no legal authority to send his client to another country against his will. He noted that the United States does not have an extradition treaty with the proposed receiving country and that the man is not accused of committing a crime on its soil.

He also noted that the court had not yet had an opportunity to rule on whether the man is indeed an enemy combatant, which his client contests. One of the novel questions raised by the case is whether the legal authority Congress granted the executive branch to fight Al Qaeda can be legitimately stretched to include the Islamic State.

Follow Charlie Savage on Twitter: @charlie_savage.

A version of this article appears in print on April 20, 2018, on Page A10 of the New York edition with the headline: Judge Blocks Bid to Move A U.S. Citizen Held in Iraq

EXHIBIT F

The New York Times

Appeals Court Bars U.S. From Transferring American ISIS Suspect

By Charlie Savage

May 9, 2018

WASHINGTON — The United States cannot forcibly transfer an American citizen being held in Iraq as an Islamic State suspect to the custody of another country without first proving that he is an enemy combatant, a federal appeals court has ruled.

A major decision on presidential war powers and individual rights, the ruling was handed down by a three-judge panel of the United States Court of Appeals for the District of Columbia on Monday and unsealed on Wednesday. It rejected the Trump administration's argument that it has the authority to transfer the man against his will.

"We cannot accept the government's argument," Judge Sri Srinivasan wrote. "We know of no instance — in the history of the United States — in which the government has taken an American citizen found in one foreign country and forcibly transferred her to the custody of another foreign country."

The man, an American-born dual citizen of Saudi Arabia whose name has not been made public, was captured by a Syrian militia in September and turned over to the American military. The Trump administration wants to transfer the man to another country — apparently Saudi Arabia — but he has objected.

However, Judge Srinivasan wrote, if a review were to find that the government is lawfully holding the man as an enemy combatant, that would likely give American officials the legal authority to transfer the man to an ally in the fight against the Islamic State, also known as ISIS.

The man has apparently said he went to Syria to be a journalist and was arrested by the Islamic State, then worked for the group as a condition of being freed from prison. But the government has said it seized Islamic State records that show he registered with the group as a fighter.

The majority ruling upheld a decision last month by Judge Tanya S. Chutkan of the Federal District Court to block the Trump administration from transferring the man.

Asked whether the Justice Department will appeal again or proceed to a hearing before Judge Chutkan over the merits of the man's claim that he is not being lawfully detained, Kerri Kupec, a department spokeswoman, said it was still considering its next steps.

The activities the man is accused of with the Islamic State "implicate numerous national security, law enforcement, international relations and foreign policy concerns," Ms. Kupec said. "Both domestic and international law confer on the U.S. military broad discretion over battlefield operations, including the transfer of individuals captured on overseas battlefields."

Judge Srinivasan was joined by Judge Robert L. Wilkins. Both are appointees of former President Barack Obama. But their ruling was not unanimous. The third judge on the panel, Karen L. Henderson, an appointee of President George Bush, dissented, arguing that the administration should be able to transfer the battlefield captive without further ado.

The majority's ruling, she argued, was itself without precedent, and risked disrupting "military operations and sovereign-to-sovereign relations half a world away."

Jonathan Hafetz, an American Civil Liberties Union lawyer representing the man, invoked the Supreme Court's landmark 2004 ruling in the case of Yaser Esam Hamdi, a dual American-Saudi citizen who was captured in Afghanistan. In that case, the court ruled that the man could be held indefinitely without trial as a wartime detainee, but only if he got a hearing at which the government presented sufficient evidence to show he was part of the enemy.

"It's a bedrock requirement of the Constitution that the president does not have the sole and unreviewable power to act as judge and jury over the fate of an American citizen," Mr. Hafetz said. "This ruling affirms the enduring principle that a state of war is not a blank check when it comes of the rights of Americans."

Follow Charlie Savage on Twitter: @charlie_savage.

A version of this article appears in print on May 10, 2018, on Page A18 of the New York edition with the headline: U.S. Barred From Moving ISIS Suspect, An American

EXHIBIT G

The New York Times

American ISIS Suspect Is Freed After Being Held More Than a Year

By Charlie Savage, Rukmini Callimachi and Eric Schmitt

Oct. 29, 2018

WASHINGTON — The Trump administration has freed an American citizen whom the military imprisoned without trial for more than 13 months as a suspected Islamic State member, United States officials said on Monday. His release brings a close to a legal saga that raised novel issues about the scope of the government's national security powers and individual rights.

The man, a dual American and Saudi citizen, was captured in September 2017 by a Kurdish militia in Syria. The Kurds turned him over to the American military, which held him as a wartime detainee at a base in Iraq while a court battle over his fate played out. The officials, who spoke on condition of anonymity, said he was released in Bahrain, where his wife and daughter are living.

The identity of the man at the center of the extraordinary case has been kept secret, so he has been called "John Doe" in court filings and public debates. But his real name is Abdulrahman Ahmad Alsheikh, The New York Times has learned, in part by obtaining an unredacted version of his Islamic State intake form and identifying public records about him.

His release means that a major question his detention raised about how the United States fights war — whether the government has authority to use wartime powers against the Islamic State without explicit congressional authorization — will evade a definitive court ruling, for now. Even so, his case established an important historical precedent: The American government locked up a citizen for more than a year without charging him with a crime.

The issue of whether the government can or should imprison American terrorism suspects without trial as enemy combatants, rather than prosecuting them, has prompted recurring debates since the George W. Bush administration. The scope and limits of the government wartime detention power has never been resolved.

Sending Mr. Alsheikh to Bahrain was a good outcome after a year of wrangling over "fairly terrible alternatives," said Robert Chesney, a law professor at the University of Texas. But he said it was "disturbing" that the detention lasted so long without any court ruling on whether he was being detained legally.

"The case was pending for a long time before the government tried to transfer him, and the court seemed in no rush to rule on it even though it was an American citizen," he said. "This gave the government a de facto authority to hold for many months, at least."

The State Department has canceled Mr. Alsheikh's American passport, officials said, but he did not relinquish his American citizenship as part of the release deal, as an American-Saudi detainee captured in the Afghanistan war zone, Yaser Esam Hamdi, did in 2004. His detention led to a landmark Supreme Court

case.

“It has always been very important to him that he remain a U.S. citizen,” said Jonathan Hafetz, a lawyer with the American Civil Liberties Union who is representing Mr. Alsheikh. He did not confirm or challenge his client’s identity or that he has been released. “He has been fighting to regain his freedom, and he looks forward to putting this ordeal behind him,” Mr. Hafetz said.

Mr. Alsheikh was born in the United States but raised in the Middle East, officials have said. He attended college in Louisiana from 1999 to 2004, then left the country on a flight from Baton Rouge in 2006, a government court filing said. Someone with his name attended classes at Southern University in Baton Rouge from 2000 to 2005 but never graduated, a registrar said.

In early July 2014, after his wife gave birth to their daughter, Mr. Alsheikh returned to the United States. While he told interrogators he stayed for months, a government court filing says travel records indicate instead that later that month he went to Turkey near the border with Syria, where the Islamic State was seizing territory amid the Syrian civil war and had just declared itself a caliphate.

Officials think he crossed over; the ISIS registration form, which recruits typically filled out in ISIS dormitories across the Turkish border in Syria, is dated July 15, 2014.

The court filing also attributed to Mr. Alsheikh a Twitter account that in 2014 took part in ISIS hashtag campaigns and shared photos of the ISIS insignia in front of landmarks around the world, behavior that security officials said looked like that of an ISIS member. (The filing did not name the account, but The Times identified it: @AbinAlAbbas.)

In fall 2014, Mr. Alsheikh came back to the United States — this time with his wife and baby, whom he wanted to register for citizenship, the filing said. Soon after, by his own account, he went to Syria.

He spent the next few years working for ISIS, first in an administrative role and later as an oil field guard, he told investigators. But Mr. Alsheikh denied that he had done so willingly.

Instead, he told interrogators that he went to Syria intending to be a freelance journalist but was instead arrested by the Islamic State, then began working for the group seven months later to get out of prison. He applied for a journalistic credential before his trip, the court filing shows.

Kurdish forces in Syria arrested Mr. Alsheikh in September 2017 and turned him over to the American military, saying he had identified himself as an American citizen and as “Daesh,” another term for the Islamic State, the filing said. He was carrying thumb drives with files about weapons and internal ISIS administrative records.

The Pentagon soon announced that it was holding an unnamed American citizen as an “enemy combatant,” prompting alarm among A.C.L.U. lawyers that the Trump administration was imprisoning an American without trial.

While lawyers there initially did not know Mr. Alsheikh, the A.C.L.U. filed a habeas corpus case on his behalf. The government argued that the group had no standing to file the case since it had no relationship with him, but Judge Tanya S. Chutkan of the Federal District Court in the District of Columbia ordered the military to let A.C.L.U. lawyers talk to him, clearing their way to pursue a case.

Through his lawyers, he eventually asked a judge to keep his identity confidential.

The Times identified Mr. Alsheikh in part through a trove of uncensored ISIS intake forms it has obtained. One matched the redacted form filed in his court case. It said he was born in the United States on July 16, 1980. (A handful of Baton Rouge traffic tickets that someone with his name received from 1999 to 2006 indicate instead that he may have been born on July 14 or July 18.)

Though that form indicates he signed up to be a "fighter," the other two choices were the more extreme options of suicide fighter or shock trooper; he is not accused of having fought for ISIS.

Mr. Hafetz said that the government's assertions about his client "were riddled with inaccuracies, and had the government been forced to put their case on trial consistent with the Constitution, it would have painted a very different picture."

During internal deliberations, prosecutors raised concerns that if they brought Mr. Alsheikh 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.

For example, the intake form came from a thumb drive found by Kurdish forces in the war zone, so no witness can attest to its authenticity. And Mr. Alsheikh stopped talking to interrogators after being warned of his constitutional rights.

National security officials saw Mr. Alsheikh as unimportant, and they 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.

But as they looked for another way to stop holding Mr. Alsheikh, his habeas corpus case complicated those deliberations. An appeals court ruled that the government could not forcibly send him to another country without proving that it had authority to hold him as a wartime detainee in the first place. As a result, Mr. Alsheikh was able to block plans to send him to a Saudi prison or release him inside the war zone in Syria.

Mr. Alsheikh proved to be such a headache that 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.

"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," Mr. Hafetz said. "A resounding message is that the government is going to think long and hard before it tries to detain an American citizen without charges again — and it should."

Karam Shoumali contributed reporting from Berlin and Katy Reckdahl from Baton Rouge, La. Alain Delaquérière contributed research.

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EXHIBIT H

The New York Times

American Detained by Military Wants a Lawyer, Government Acknowledges

By Charlie Savage

Nov. 30, 2017

WASHINGTON — An American citizen who has been held in military custody in Iraq for 11 weeks refused to talk to F.B.I. interrogators without a lawyer after he was warned of his Miranda rights to remain silent and have a lawyer present, the Justice Department told a federal judge on Thursday.

"The individual stated he understood his rights, and said he was willing to talk to the agents but also stated that since he was in a new phase, he felt he should have an attorney present," the department said in a court filing Thursday afternoon. "The agents explained that due to his current situation, it was unknown when he would be able to have an attorney, and the individual stated that it was O.K. and that he is a patient man."

The filing came in response to an order by Judge Tanya S. Chutkan of the Federal District Court of the District of Columbia, after a contentious hearing earlier on Thursday during which she warned that the Trump administration seemed to be claiming "unchecked power that is, quite frankly, frightening."

The case centers on an American who was captured by a Syrian militia in mid-September, apparently fighting for the Islamic State, and turned over to American military forces. Although the International Committee for the Red Cross has visited the detainee twice, the government has kept secret even the most basic facts about him, including his name.

But a senior administration official has told The New York Times that the detainee was born in the United States to foreign parents and raised in an unidentified Middle Eastern country. The official also said that after being interrogated for intelligence purposes, the detainee was read the Miranda warning and had not talked since then.

But Judge Chutkan said on Thursday that she did not want to rely on news reports and wanted the government to disclose such information.

The detainee has raised a dilemma because national security officials believe the man was an Islamic State fighter and do not want to release him, but they lack sufficient evidence to charge him with a terrorism-related crime, officials have said.

At the same time, keeping him in long-term wartime detention without trial as an enemy combatant is seen as unpalatable inside the government, in part because it would give a judge an opportunity to rule that the congressional authorization to fight Al Qaeda does not extend to the Islamic State.

Judge Tanya S. Chutkan of United States District Court for the District of Columbia.
United States Courts

The hearing centered on a habeas corpus lawsuit filed by the American Civil Liberties Union in October on behalf of the man. The rights group is asking Judge Chutkan to order the government to give its lawyers access to the detainee and, more broadly, to declare that his continued indefinite detention without charges is unlawful.

But the Justice Department has argued that the A.C.L.U. has no standing to bring the lawsuit because it has no relationship with him and has not even gained permission from his relatives to represent his interests in court. For that reason, it said, Judge Chutkan lacks jurisdiction and must dismiss the case.

During the hearing, Judge Chutkan, a 2014 appointee of President Barack Obama, signaled discomfort with that position. She accused the Justice Department of employing “circular reasoning” since the government’s own actions have prevented him or his relatives from having contact with the lawyers.

The judge also expressed incredulity that the government, two and a half months into the man’s detention, was still trying to decide what to do with him, asking whether there was any limit to how long officials could take.

“I don’t have an answer,” a Justice Department lawyer, Kathryn Wyer, replied. She said the government was “diligently” working on the problem.

The judge also suggested the government was saying it could “snatch any U.S. citizen off the street and hold him as an enemy combatant in another country” indefinitely without letting him or her talk to a lawyer. She then made her comment about frighteningly unchecked power, and she also portrayed the government as essentially saying, “Just trust us; we know what we’re doing.”

Ms. Wyer pushed back, emphasizing that the government took custody of him on a battlefield. Citing a 2008 case about Guantánamo detainees, she said the Supreme Court had said that the government has a right to take some time to decide what to do with prisoners captured in wartime before they may file habeas petitions.

Jonathan Hafetz, an A.C.L.U. lawyer, told the judge that the case was a “nightmare scenario” and urged her not to dismiss the case, saying that at a minimum she should ask the detainee whether he wanted to file a habeas corpus petition and, if so, wanted the A.C.L.U. to represent him.

But Ms. Wyer argued that Judge Chutkan lacked the authority to carry out even that kind of intervention if the A.C.L.U. had no standing to file the case in the first place.

The court filing suggested that American officials had not raised the issue of a habeas corpus case with the detainee, saying the Justice Department was “not currently aware of any additional information regarding the individual’s wishes in connection with his invocation of constitutional rights or pursuit of remedies in U.S. courts.”

Follow Charlie Savage on Twitter: @charlie_savage.

A version of this article appears in print on Dec. 1, 2017, on Page A12 of the New York edition with the headline: American Detained by Military Won’t Talk Without Lawyer, Justice Dept. Says

The New York Times

American ISIS Suspect Held in Iraq Has Right to Lawyer, Judge Rules

By Charlie Savage

Dec. 24, 2017

Calling the Trump administration's position "disingenuous" and "troubling," a federal judge on Saturday ordered the Pentagon to permit a lawyer for the American Civil Liberties Union to meet with a United States citizen who has been imprisoned in military custody for three months after being deemed an enemy combatant.

In a novel case pitting the individual rights of citizens against government wartime powers, Judge Tanya S. Chutkan of the Federal District Court of the District of Columbia also ordered the Pentagon not to monitor that conversation — and told it not to transfer the man, who is being held in Iraq, until the A.C.L.U. conveys his wishes to her.

A Syrian militia captured the American citizen in mid-September and turned him over to American forces as someone suspected of fighting for the Islamic State. The government has refused to identify the man, but officials familiar with the matter have said he is a dual citizen of the United States and Saudi Arabia who was born on American soil to visiting Saudi parents and raised in Saudi Arabia.

The A.C.L.U. has filed a habeas corpus lawsuit on the man's behalf challenging his indefinite detention without charges or a lawyer. The Trump administration has asked Judge Chutkan to dismiss the case, arguing that the rights organization lacks standing to file suit on the detainee's behalf since it has not met with the man, has no relationship with him and does not know his wishes.

In a 12-page ruling, Judge Chutkan sharply criticized the government's position as "disingenuous at best" since the Defense Department is preventing lawyers for the group from conferring with the man. She also noted that the government has acknowledged that the man asked for a lawyer after being read the Miranda warning when interrogators shifted from questioning him for intelligence purposes to questioning him in hopes of gathering evidence that is admissible in a courtroom.

"Having informed the detainee of his right to counsel, and the detainee having asked for counsel, the department's position that his request should simply be ignored until it decides what to do with the detainee and when to allow him access to counsel is both remarkable and troubling," she wrote.

Wyn Hornbuckle, a Justice Department spokesman, declined to say whether the government would comply with the ruling or file an appeal.

"We're reviewing the ruling and will decline to comment," he said.

But Jonathan Hafetz, the lead A.C.L.U. attorney on the case, praised the judge's decision.

“This is a landmark ruling that rejects the Trump administration’s unprecedented attempt to block an American citizen from challenging his executive imprisonment,” Mr. Hafetz said. “Ensuring citizens detained by the government have access to a lawyer and a court is essential to preserving the Constitution and the rule of law in America.”

National security officials initially wanted to prosecute the man in an American court for providing material support for terrorism, according to officials. But that proved difficult because of a lack of courtroom-admissible evidence — in part because questioning of him ceased after he was read his rights and asked for a lawyer.

The New York Times reported last week that officials have now decided to try to transfer the man to Saudi Arabia, according to officials. That decision was reached on Dec. 15 at a meeting of the National Security Council’s “deputies committee,” which is composed of the No. 2 officials of national security departments and agencies.

Such a transfer would be contingent on diplomatic assurances. Other repatriations and resettlements of former Guantánamo Bay detainees have typically included promises not to let former detainees travel abroad and other security measures. Saudi Arabia also runs a custodial rehabilitation program for low-level Islamist extremists.

It is not clear whether the United States government would seek to make the man renounce his American citizenship — and with it his right to enter the United States — as part of any such transfer. In 2004, when the Bush administration sent to Saudi Arabia a Guantánamo detainee who similarly was born on American soil to visiting Saudi parents, the detainee, Yaser E. Hamdi, agreed to renounce his citizenship as part of the deal. But by then, Mr. Hamdi had a lawyer.

Mr. Hafetz filed last week’s Times article with the court in support of the A.C.L.U. request for immediate access to the man, and Judge Chutkan on Friday ordered the government to respond. The Justice Department told her later that day that no official has talked with the detainee about renouncing his citizenship.

But it also told the judge that “there appears to be no case law suggesting that an individual must be provided counsel before he relinquishes citizenship.”

Follow Charlie Savage on Twitter: @charlie_savage.

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The New York Times

American Detained by U.S. Military Says He Wants to Sue

By Charlie Savage

Jan. 5, 2018

WASHINGTON — An American citizen who has been held in military custody in Iraq for four months has told lawyers with the American Civil Liberties Union that he wants to bring a lawsuit challenging his detention and wants the group to represent him, the organization said in a court filing on Friday.

The statements came from a man who, in September, surrendered to a Syrian militia, which then turned him over to American forces as a suspected Islamic State fighter. He made the statements in an unusual videoconference with A.C.L.U. lawyers on Wednesday, the court filing said. A federal judge last month had ordered the military to let the lawyers talk to the detainee.

The court filing was sparse on details, saying that during the Jan. 3 videoconference, the man informed the A.C.L.U. lawyers that "he wishes to continue this habeas corpus action" challenging the legality of his detention and asking to be released, and for the group to represent him.

The military has refused to identify the man other than to say that he existed and was being held as an enemy combatant. In October, the A.C.L.U. filed a lawsuit on his behalf challenging his detention. In an interview, Jonathan Hafetz, the lead A.C.L.U. lawyer on the case, said he was one of three attorneys who spoke to the man, and that they conversed in English.

Mr. Hafetz said the man asked them not to publicly disclose his name. Other than saying he was indeed born on American soil, he declined to confirm that the man was born to visiting Saudi parents and raised in Saudi Arabia, as officials familiar with the matter have said.

The Justice Department had asked the judge overseeing the case, Tanya S. Chutkan of the Federal District Court of the District of Columbia, to dismiss the case, arguing that she lacked jurisdiction to oversee the man's detention because the A.C.L.U. lacked standing to bring the lawsuit. The Justice Department had argued that the A.C.L.U. had no prior relationship with the prisoner and did not know if he wanted the case brought or whether he wanted the rights group to represent him.

The A.C.L.U. had urged Judge Chutkan to order the military to let its attorneys speak with him, arguing that the government should not be able to hold an American citizen in indefinite wartime detention without charges and thwart habeas review of the legality of that step by refusing to identify the prisoner or let lawyers contact him.

What to do with the prisoner has posed a dilemma for national-security officials, who want to find a way to keep him locked up but apparently lack courtroom-admissible evidence to charge him with providing material support to terrorism. The government has said that after interrogating him for intelligence purposes, he was read the Miranda warning and asked for a lawyer before he would talk for law enforcement purposes, upon which questioning ceased.

Mr. Hafetz declined to say whether the A.C.L.U. had advised the man to continue not talking.

The government also does not want to bring the man to the wartime prison at Guantánamo Bay, in part because he is considered relatively unimportant in terms of threat or intelligence, officials have said.

In addition, bringing him there would open the door to legal headaches, including giving a judge an opportunity to rule on a disputed question: whether the government has lawful authority to wage war against the Islamic State under the authority granted by Congress to fight the perpetrators of the Sept. 11, 2001, terrorist attacks.

But if the habeas case continues with the man held on Iraqi soil, the same legal question could now be presented to Judge Chutkan.

Last month, after The New York Times reported that the Trump administration had decided to ask Saudi Arabia to take custody of the man, Judge Chutkan had ordered the government not to transfer him until the A.C.L.U. talked with him.

In the court filing, Mr. Hafetz asked Judge Chutkan to extend that restriction until the litigation could be resolved. In the interview, he declined to say whether the man wanted to go to Saudi Arabia specifically, saying that his legal case is asking only to be released from military custody.

Later on Friday, Judge Chutkan ordered the government to respond to the filing by 5 p.m. on Monday. A Justice Department spokesman declined to comment beyond saying: “We are reviewing the filing.”

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A version of this article appears in print on Jan. 6, 2018, on Page A9 of the New York edition with the headline: American Held by U.S. Military in Iraq Tells A.C.L.U. He Wants to Sue

The New York Times

Military Ordered to Notify A.C.L.U. Before Transferring American ISIS Suspect

By Charlie Savage

Jan. 24, 2018

WASHINGTON — The Trump administration must give lawyers with the American Civil Liberties Union 72 hours notice before transferring a United States citizen imprisoned in Iraq as an enemy combatant for more than four months, a federal judge has ruled.

The man, whose name has not been released, was captured by a Syrian militia in September and turned over to American forces as a suspected Islamic State fighter, raising a dilemma about what to do with him. He is said to have been born in the United States to visiting Saudi parents, making him an American citizen, but raised in Saudi Arabia, where he apparently also is a citizen.

After law enforcement officials concluded that they had insufficient courtroom-admissible evidence to bring criminal charges against the man, Trump administration officials in December decided to try to transfer him to Saudi custody, according to officials familiar with deliberations.

But the eight-page ruling late on Tuesday by the judge, Tanya Chutkan of the Federal District Court for the District of Columbia, ensures that if such a diplomatic deal is reached, the man could fight his transfer in court.

“Absent a showing that the government — for international relations reasons or otherwise — needs to transfer petitioner *now*, the court does not find that the government’s interests outweigh the petitioner’s right to challenge his detention without fear of his transfer to another country,” she wrote.

The Justice Department had argued that there was no legal basis for inhibiting the government’s ability to release the detainee from American custody by transferring him to the custody of another country, should a diplomatic deal be reached. The government has not publicly confirmed that it is talking to Saudi Arabia, specifically, about a transfer.

A Justice Department official said the Trump administration had not yet decided whether to appeal the ruling.

The A.C.L.U. had asked the judge to block the government from transferring the man until that litigation was complete. While her order stopped short of such a ban, Jonathan Hafetz, an A.C.L.U. attorney representing the man, praised it.

“The U.S. can’t lawlessly hand over Americans to other countries,” he said in a statement. “This ruling helps to ensure that this citizen’s rights are respected and that he will receive due process in an American court.”

The case has raised novel issues about the rights of American citizens and government national-security powers. The government has refused to identify the man and initially resisted letting him meet with lawyers, but the A.C.L.U. filed a lawsuit on his behalf.

The government argued that the case should be thrown out since the A.C.L.U. had no connection to the man. But after the government acknowledged that the man had indicated that he wanted a lawyer after interrogators eventually informed him of his Miranda rights, Judge Chutkan ordered the government last month to let the A.C.L.U. lawyers speak with him via teleconference.

The A.C.L.U. reported back to the judge this month that the man had told them he wanted to pursue the habeas corpus lawsuit challenging his detention and that he wanted the rights group to represent him.

Follow Charlie Savage on Twitter: @charlie_savage.

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The New York Times

American ISIS Suspect Said He Wanted to Report From Syria, Filing Shows

By Charlie Savage

Feb. 15, 2018

WASHINGTON — The American citizen imprisoned by the military for five months as an enemy combatant told interrogators that he worked for the Islamic State guarding a gas field and monitoring civilians, and captured recruiting files indicate that he registered with the group as a fighter in July 2014, a newly declassified court document said.

But the man also insisted to his interrogators that he traveled to Syria intending to work as a journalist and was arrested, later agreeing to work for the Islamic State to gain release from prison, the document also showed. The court filing does not accuse him of having fought for the group.

The document, made public late Wednesday, was a description of facts about the man's case as gathered by the F.B.I. While it did not make his name public, it lifted much of the secrecy with which the government has draped his case since acknowledging that a Syrian militia had captured him and transferred him to American custody.

The capture of the citizen, and the Trump administration's decision to hold him in wartime detention as an enemy combatant, has revived a legal and policy debate about the scope of executive power and individual rights that had subsided since the Bush administration claimed a right to hold two American citizen terrorism suspects indefinitely and without trial. The Obama administration rejected that approach.

The filing publicly acknowledged for the first time the basic outline of the man's life, which has been previously reported based on unnamed sources — including that he was born in the United States but raised in Saudi Arabia, where he is a dual citizen — while filling in many new details about him.

They include that he attended college in Louisiana — apparently studying electrical engineering — but did not earn a degree there. He is married and has a 3-year-old daughter, and he took two trips to the United States in 2014, shortly after her birth, in an effort to register her as an American citizen.

The filing also contends he likely went to Syria in 2014 for several months and then returned there in March 2015. It says that he lied to the F.B.I. about several details, noting that travel records contradict his account of how long he was in the United States. And it cites Twitter posts and YouTube and Google searches that it portrays as indicating that he was a supporter of the Islamic State.

Last September, as the Islamic State's self-declared caliphate in Syria and Iraq was collapsing, the man was captured by a Syrian militia at a checkpoint and identified himself as an American citizen before being turned over to the United States military. The filing said he was carrying $4,200 in American currency, a Global Positioning System device, a Quran, thumb drives with numerous files about weapons, and — in an odd detail it did not explain — a scuba mask and snorkel.

The evidence "is more than enough to carry the government's burden of showing by a preponderance of the evidence that petitioner is part of or substantially supported ISIL and is thus properly detained as an enemy combatant," the filing said, using an acronym for the Islamic State.

The American Civil Liberties Union has filed a habeas corpus lawsuit challenging the man's detention, winning a right to speak with him and gain his consent to represent him. It is asking a Federal District Court judge to order the Justice Department to either charge him with a crime or release him.

People familiar with the case have said that the government lacks sufficient courtroom-admissible evidence to charge the man. Although he spoke freely during an initial interrogation conducted for intelligence purposes — a summary of that conversation is attached to the new court filing — he stopped talking and asked for a lawyer after being warned of his Miranda rights for a law-enforcement interrogation.

The Trump administration is now trying to persuade Saudi Arabia to take custody of him, according to officials familiar with internal deliberations. A judge has ordered the government to give the A.C.L.U. three days notice before any such transfer so that he could challenge it, if he wants — an order the Justice Department is appealing.

Meanwhile, the underlying case is continuing. In a filing rebutting the government's factual account, the A.C.L.U. argued for a more favorable interpretation of the disputed facts about the scope and meaning of his involvement with the Islamic State, which is also called ISIS.

"Contrary to the thrust of the government's contentions that petitioner is an ISIS fighter, and as petitioner told the government, he sought to understand firsthand and report about the conflict in Syria; was kidnapped and imprisoned by ISIS; and tried numerous times to escape — and not even the government alleges that he ever took up arms against the United States or anyone else," the A.C.L.U. rebuttal said.

In an interview on Thursday, Jonathan Hafetz, the lead A.C.L.U. lawyer on the case, maintained that the Trump administration lacked the legal authority to keep holding his client indefinitely in military custody.

"The government has made numerous allegations which are inaccurate and misleading in many respects," he said. "But the fundamental flaw in its position is that it has no legal authority to hold this citizen in military custody. If the government wants to detain him, it needs to charge him with a crime. Otherwise it must release him."

But the Justice Department filing argued that the government has legal authority to hold Islamic State members as wartime detainees — even if they are citizens. It cited laws enacted by Congress in 2001 and 2002 to authorize using military force against the perpetrators of the Sept. 11 attacks and Saddam Hussein-era Iraq, saying they cover the Islamic State. That theory was first put forward by the Obama administration and has been disputed, but no court has ruled on whether it is correct.

The Justice Department's court filing also backstopped that theory by claiming that President Trump, as commander in chief, wields inherent constitutional authority, independent of any act of Congress, to detain wartime enemies when they are captured on a battlefield where American forces are fighting.

That claim recalled sweeping assertions of executive power made by the George W. Bush administration after the Sept. 11 attacks. The Obama administration shied away from invoking purported commander-in-chief powers — instead generally relying only on congressional statutes — but it also did not disavow them.

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The New York Times

American ISIS Suspect Fights Plan to Release Him in Syria

By Charlie Savage

June 7, 2018

WASHINGTON — An American citizen detained by the military in Iraq as a suspected Islamic State member will be released back into Syria, the Trump administration has told a judge — a plan that his lawyers called "a death warrant."

The move would avoid a fight in court over the high-stakes question of whether the government has the legal authority to put Islamic State suspects in indefinite wartime detention as enemy combatants. If a judge were to rule against the government on that question in the detention case, it would jeopardize the underpinnings of the entire war effort against the Islamic State.

But lawyers for the man, whose name has not been made public, vowed to fight the planned transfer in court. The plan was the latest twist in a habeas corpus case that has raised novel legal issues about the rights of individual Americans and the government's wartime powers.

The American Civil Liberties Union planned to file an emergency request for a temporary restraining order against the military on Thursday, said Jonathan Hafetz, an A.C.L.U. lawyer who is the lead attorney for the man.

In its filing late Wednesday disclosing the government's Syria release plan, the Justice Department said the military intended to release the man in an unidentified Syrian city after at least 72 hours had passed.

The Pentagon, it said, had decided that releasing the man in Syria would be consistent with traditional military practice and with the department's obligations under the law of war. It had given the man two options — release "either in a town or outside an internally displaced person camp" — but the man had balked at both, so the Pentagon picked the town option for him.

In a declaration that was partially unsealed on Thursday afternoon, Mark E. Mitchell, a senior Pentagon official, provided further details about the plan. The man, he said, would be given a new cellphone "in its original sealed packaging," enough food and water to last for several days, his legal papers, and $4,210 in cash — the same amount he had when captured.

Mr. Mitchell further said that the Pentagon would notify the Syrian Democratic Forces, military allies of the Americans, that the man would be released and was likely to be traveling through its checkpoints, and tell them that the United States "is not seeking and/or requesting" that the man be detained again.

It is not clear whether the man would have a right to a court order requiring some safer outcome. Judge Tanya S. Chutkan, who is overseeing the habeas corpus case, has already made clear that she does not think he has a right to be brought back to the United States.

The man is a dual citizen of the United States, where he was born, and Saudi Arabia, where he was raised. He was captured by a militia in Syria in September and turned over to the American military, which has been holding him at a base in Iraq as an enemy combatant for nearly nine months.

The man said he went to Syria to be a journalist and was arrested by the Islamic State, then worked for the group as a condition of being freed from prison. But the government has said that Islamic State records show he registered with the group as a fighter, and his social media postings indicate he sympathized with the group. It has not accused him of fighting for the group.

What to do with the man has been a dilemma. Prosecutors have deemed his case difficult to charge in civilian court; much of the evidence against him may not be admissible under courtroom standards. As an American, he is also not eligible for charges before the troubled military commissions system. But security officials have wanted to keep him locked up, or at least out of the United States.

This spring, the government struck a deal with another country — apparently Saudi Arabia — to take custody of him. But the man balked at the proposed arrangement, and Judge Chutkan blocked the military from carrying out the transfer to that country against his will — a decision upheld last month by the United States Court of Appeals for the District of Columbia Circuit.

It has not been clear how or where the man would be released if he won his lawsuit. There is no evidence the man was in Iraq before the American military brought him there, and it would apparently require the consent of the Iraqi government to release him on its soil. Moreover, he would risk being immediately rearrested there, and the Iraqi courts have been giving 10-minute trials and death sentences to Islamic State members.

Mr. Hafetz maintained that if the government wanted to release his client, it must do so “to a location that is not a war zone, and he has to be provided with some identity documents or something that establishes that he is in the territory legally and he has to not be subject to physical harm and basically almost automatic re-detention.”

He added, “They have to find a safer place, and if they can’t, they have to release him in the United States.”

The court rulings blocking the man’s forcible transfer to apparent Saudi custody had seemed to clear the way for a hearing later this month on the most important issue raised by the case: whether it is lawful for the government to indefinitely detain the man without charges as part of a wartime enemy force.

The Obama and Trump administrations argued that the government needed no new authorization from Congress to fight the Islamic State. But that claim is contested.

“The government has sought to throw up one roadblock after another to avoid the basic question of whether they are holding this man legally,” Mr. Hafetz said. “If they are not, or if they don’t want to charge him or hold him, the answer is to release him in a way that guarantees his safety and doesn’t condemn him to danger or possible death.”

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EXHIBIT I

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION FOUNDATION . Plaintiff, . vs. . Docket No. CA 17-2069

JAMES N. MATTIS . Defendant. . Washington, D.C. . Thursday, January 18, 2018 . 11:31 a.m.

TRANSCRIPT OF MOTIONS HEARING

BEFORE THE HONORABLE JUDGE TANYA S. CHUTKAN

UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by machine shorthand, transcript produced by computer-aided transcription.

P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor, this morning we have Civil Action Number 17-2069, the American Civil Liberties Union Foundation versus James N. Mattis. Will counsel for the parties please approach the lectern and identify yourselves for the record and the party that you represent.

MR. HAFETZ: Good morning, your Honor. Jonathan Hafetz for Petitioner. I'm joined by my colleagues Hina Shamsi and Dror Ladin from the ACLU National office and Art Spitzer from the ACLU for the District of Columbia.

THE COURT: Good morning.

MR. BURNHAM: Good morning, your Honor, James Burnham here on behalf of Respondent. I'm here with Terry Henry and Kathryn Wyer from the Justice Department.

THE COURT: Good morning. Happy New Year, everyone. I have two new interns starting today. I just wanted to make sure they had an opportunity to come in.

All right. Thank you for arranging to be here. I know we've had several hearings in this matter. I've ordered briefing on a relatively tight schedule given the holidays, so I appreciate everyone's hard work in trying to prepare for this matter.

I reviewed all of the pleadings. I have some questions. What I think I'll do is let the parties get to

the argument and I'll hop in as I tend to do when you reach the appropriate point. Mr. Hafetz.

MR. HAFETZ: Good morning, your Honor, again. The motion relief sought in this motion is supported by a bedrock principle that the United States cannot transfer an American citizen from its jurisdiction, from the United States unless it is positively authorized by law.

Here respondents have provided no basis, no legal basis on which they could transfer the petitioner. And we are seeking to preserve the Court's jurisdiction so that the Court can decide this habeas challenge to the petitioner's detention. The petitioner is not seeking as respondents incorrectly claim continued custody. He's seeking release, and handover to another sovereign is not release from custody.

The cases that respondent relies principally on the Supreme Court's decision in *Munaf* and D.C. Circuit's decision in *Kiyemba II* do not support its position.

THE COURT: Let me ask you, Mr. Hafetz, and I know you know *Munaf* because I saw you were on the brief in that case. That case involved a handover or the government's desire to transfer the petitioner to Iraqi authorities who the, he was in the custody of multinational forces. The allegation was he had committed, petitioner had committed crimes under Iraqi law in Iraq. So if the government here

were able to demonstrate or proffer that another country to which they wish to transfer the petitioner had a legitimate interest in receiving the detainee as did Iraq in *Munaf* would this court be able to prohibit transfer of the petitioner under the circumstance?

MR. HAFETZ: Well just to clarify, your Honor, no such basis is in the record now.

THE COURT: I don't know. I'm going to have to ask the government some questions on that, but hypothetical speaking.

MR. HAFETZ: Well, your Honor, it would need to be authorized by law. So if there were a -- in other words, it would have to be just a handover because of some claim for a desire or some -- it would have to be authorized by law. It would have to a statute or treaty. The background rule is *Valentine*, that is the starting point which says where the court says that any transfer to surrender of a citizen to a foreign government has to be positively granted by law.

THE COURT: I understand. What I'm asking you is if the government proffered in this case that the detainee here had allegedly committed crimes in the country to which they sought to transfer him, and that country was making a, by all appearances a legitimate request for his transfer to prosecute him on those charges, which is what was the case in *Munaf*, wouldn't I -- I mean your position would be very

different, don't you agree?

MR. HAFETZ: I think your Honor's question there are two different parts because *Munaf* is different in another respect. In *Munaf*, you had two citizens who traveled to the country and committed crimes there. In addition, they were being held by the United States as the Supreme Court said quote as the jailer for Iraq. The United States was essentially an agent or an arm of the Iraqi criminal justice system, so it was not a -- so essentially they were hold -- and a sovereign now says it's a narrow --

THE COURT: That isn't controlling. That was one of the factors certainly that the Court considered in deciding that the transfer was permitted, but as I read that case, even more important the Court's consideration was the fact that the two detainees had committed crimes in the jurisdiction in which they were being held. And had they been released would simply have been facing prosecution for those offenses, which isn't the case here as far as I know, correct?

MR. HAFETZ: That's correct. That's correct. And so essentially *Munaf* rested on the principle that a sovereign has exclusive criminal jurisdiction within its borders. Here though the petitioner was forcibly brought to Iraq. And there's --

THE COURT: All I know, all I have in the record

was that, and this is based on what the government has put in their papers, is that he was turned over to U.S. forces by I believe Syrian armed forces. I'm not even sure. I may not be stating correctly. He was turned over to U.S. forces.

What if the government, and again this is a hypothetical, but if the government asserts that they're seeking to transfer him to a country in which he is alleged to have committed crimes, does that change your analysis? Does that change what I have to do? I mean, does that make my job clearer?

MR. HAFETZ: So if hypothetically, and none of this is in the record. The government is opposing a transfer without, sorry, is opposing a restriction on transfer without any lawful basis. But hypothetically let's say that a person he was, the petitioner was accused of committing crimes in say France, okay, hypothetically right. And France had charged him, which was the situation in *Munaf*, where we have criminal proceedings. France had formally submitted a request to prosecute him for crimes committed within its jurisdiction. The Court at that point would evaluate whether there was a lawful basis to extradite or transfer the person. And if there was, the case would be, that would be the issue.

But here there has to be a lawful basis. You

can't just simply take an American citizen and hand him over to a foreign jurisdiction absent some authorization by statute or by treaty that authorizes the transfer.

THE COURT: Is your argument that, that the, any transferring sovereign or jurisdiction would have to have -- there would have to have been a crime committed? Or is any legitimate interest in receiving the detainee enough?

MR. HAFETZ: No, it would have to be a legal basis. It would have to be for simply to a, to a criminal charge, which is the situation in *Munaf*. Because remember, your Honor, the government basically -- they rely on their wartime authority to transfer him as an enemy combatant. The entire question in dispute here, the merits question is whether he is or is not properly detained as an enemy combatant. If he's not detained as an enemy combatant the remedy is release.

This is different than *Munaf* because in *Munaf* release would have been as your Honor pointed out he would have been picked up by the Iraqis because he was facing proceedings in Iraq. Here release is freedom, and that is the difference. And so we're only asking for relief.

Also on *Munaf* just --

THE COURT: I think it needs to be made clear that's not what you're asking for today. What you're asking for today is the preservation of the status quo until his

petition for release can be ruled on, correct?

MR. HAFETZ: Correct, correct. And if the government were to come forward with a lawful basis for transfer, say something like your Honor of a person extradition request the court can evaluate it at this point. But at this point we're merely seeking a restriction on a unauthorized, lawless handover to another sovereign. The government has to come forward with some kind of basis to, a lawful basis to transfer.

Even in *Munaf* there was review of the transfer decision. And your Honor, just to sharpen the *Munaf* point, because it's not entirely clear from the Supreme Court's decision but as you might familiar case and also with the lower court's decisions. In both cases the individuals were detained by the MNF-1, the international force on behalf of Iraq because of the threat they posed to Iraq having entered the country. They were -- Iraq initiated criminal proceedings against those individuals.

There was refer of charges for Omar one of the petitioners. And in *Munaf*, proceedings were underway. There'd been multiple court hearings. And then, only then the habeas petitions were filed seeking to enjoin the transfer. Here you have a situation where the United States is, there are no proceedings, although the United States has simply detained this individual as an enemy combatant. And

he's seeking release. As the Court said -- sorry, respondent acknowledges in *Munaf* the petitioners were not seeking release and that's the remedy in habeas.

THE COURT: I'll let you continue, Mr. Hafetz.

MR. HAFETZ: Well, I want to, unless your Honor has more questions on *Munaf* I just want to address Kemba II, which is the other case that the government relies principally on. That case addressed as the DC Circuit said the transfer of wartime alien detainees. So these individuals had no right to enter the United States because they were noncitizens, and thus there was no possibility of release. The remedy in habeas.

And so consistent with longtime historical practice when there were individuals who were in the United States no longer regarded as enemy combatants the practice is transfer to their home country or to a safe third country. Here, this is a United States citizen with a right to return to the United States should he choose. And when citizens are released from unlawful executive detention the result is not repatriation or transfer but release from custody.

THE COURT: I want to go back to *Munaf* for a minute as well as ***Kemba. The Supreme Court recognized in *Munaf* that courts have traditionally been reluctant to intrude on the authority of the executive in military and

national security affairs and I share that hesitancy. I would rather not. That's not my lane. And I'd rather not interfere in those workings, but why should I do so here?

MR. HAFETZ: Well --

THE COURT: Obviously, I have jurisdiction in a petition for habeas corpus, but habeas corpus was not traditionally used in military matters. And this is a case where an individual designated as an enemy combatant by the United States has been held overseas as a, and has been questioned for I assume law enforcement -- well, no longer a question for law enforcement but being questioned for military purposes, and they seek his transfer for some strategic, military strategic reason which I am not party to. Why should I start telling the U.S. military where they can move prisoners? Where they can move prisoners to and from?

MR. HAFETZ: So --

THE COURT: I recognize it's a large question. I am, you know, the courts and I, but the courts are truly reluctant to weigh in to these areas. And I am cautioned by the Supreme Court's reminder that we should only do so in extraordinary circumstances.

MR. HAFETZ: Let me address your question first at the broader level. I respectfully, your Honor, disagree when it comes to the rights of United States citizens.

These cases are not directly on point because they raise different issues, but they get exactly your Honor's question. One of the most celebrated cases in the United States history *ex parte Milligan* dealt with the, a military matter, the military trial of a United States citizen. And the Supreme Court by the Lincoln administration and the Supreme Court invalidated that and issued some of the most I think important language about the importance of the Bill of Rights for American citizens.

Ex parte Quirin another case which while on the merits upheld the recent military commission on those facts. The Supreme Court intervened promptly, heard two days of argument on an emergency session because the case involved the trial of an American citizen. I'm going to come to *Munaf* in a second, but I just want to, you know, it's the notion that when we're talking about the rights of American citizens and military you know the Supreme Court has not been reluctant to interfere.

THE COURT: I don't dispute for a minute that I don't have the authority here, or that habeas doesn't apply to U.S. citizens held by the U.S. military. They're in the detention of the government and obviously does. I think the concern that I have is as I've expressed in other cases where traditionally executive functions are involved, which I am reluctant to get down to a very granule level in

deciding who goes where and what visas are issued. I mean it's not a traditional role of the courts to make those kinds of decisions, and I'm always very caution about getting down to that level where you can transfer people and what you can do with them who are in the custody of the military.

MR. HAFETZ: Let me respond with just a couple of additional points focused on this case. In *Munaf* which is the closest case in some regards not as we say on the transfer question, but on the fact of the court's exercise of habeas jurisdiction. In *Munaf*, the Supreme Court was unanimous saying the court had habeas jurisdiction in a case that was frankly ten times more complicated as a jurisdictional matter because the petitioner, petitioners in that case were being held by an international force. And what Chief Justice Roberts said is as long as the United States holds the keys to the jailhouse for an American citizen this court has habeas jurisdiction.

Then, your Honor, *Hamdi*, some of those same arguments were made by the government in *Hamdi*, a case of an American citizen, arguments by the government that courts should not second guess the executive, not be in the business of reviewing detentions during wartime even of American citizens. And the Supreme Court rejected that very clearly in saying that the United States citizen has a right

to due process, and that even a state of war is not a blank check when it comes to the rights of American citizens.

And so this is not a question of micromanagement or what U.S. facility this person might be under. For example, if the government proposed to transfer him to a different U.S. facility where they've held other prisoners, for example, in the United States the Court would retain its habeas jurisdiction under arguendo, but that would be the type of sort of micromanagement. Here we're talking about a lawless handover without any legal basis to a foreign country. Again, the Supreme Court was clear in *Valentine*.

THE COURT: Slow down a little bit.

MR. HAFETZ: So it would a lawless -- here what the government is seeking is an unrestricted blank check to terminate this challenge to detention and hand over a citizen to another government or country without any kind of review, and without needing to show any lawful basis. And there's nothing in the record that suggests there's any legal basis for this transfer. This is not a case where he committed -- this is not *Munaf*. And this is not a case where he's been confirmed to be an enemy combatant.

THE COURT: Yeah, I agree with you that the record is sparse here, but I'll have some questions for the government on that. Let you get back to your argument on *Kemba*. I think I interrupted you when you had moved there.

And if not, I do have some questions on your response to the government's All Writs Act argument.

MR. HAFETZ: Sure. I don't have much more to say on Kemba. Just again the main points being that these were wartime alien detainees to quote the DC Circuit, who had no right to enter the United States and could not be released.

So in a sense there's a parallel here with *Munaf*. The release was not a remedy in either of those cases. In *Munaf* it wasn't a remedy because the sovereign on whose territory the citizens had voluntarily entered and allegedly committed crimes that sovereign was prosecuting those citizens for crimes committed on its territory. So the release, they were essentially seeking release, but to be sheltered.

THE COURT: Right. Release would have been a friction. Release would have meant immediate prosecution.

MR. HAFETZ: Right, and the same for Kemba. There's no, release was not possible. They were being held in a military base in Guantanamo. Release on Guantanamo was not possible, and there was no right of release into the U.S. as alien wartime detainees as the D.C. Circuit said. So transfer to another country was the only possible remedy.

Here release is a remedy. The government could open the jailhouse doors tomorrow and let this American citizen who has, there's no basis to detain we argue, free.

And that simply is the essential remedy on habeas. There's nothing in *Munaf* or *Kiyemba* that suggests that this court can't maintain its jurisdiction to ensure the citizen who has been locked up for over four months now has a right to be released from custody.

THE COURT: All right.

MR. HAFETZ: If you have a few questions on that?

THE COURT: I noticed that you did not respond to the government's argument unless I missed to their All Writs argument.

MR. HAFETZ: So, your Honor, we agree that under DC Circuit law on the *Winter* factors apply. We've explained why. We've shown a likelihood of success as well as why the other factors of irreparable harm, and the balance of the equities weigh strongly in our favor. The All Writs Act however reinforces this Court's authority to enter the requested of relief in light of the showing that we've made on the *Winter* preliminary injunction factors.

THE COURT: All right.

Thank you, Mr. Hafetz. Give me one moment. I'm sorry.

MR. BURNHAM: Thank you, your Honor, good morning. My name is James Burnham again here on behalf of the respondent. Petitioner in this case is a citizen of the United States. He's also a citizen of Saudi Arabia. He's a

dual national, who is here today because of his voluntary decision to travel Syria where he was ultimately captured by the Syrian democratic forces in ISIL controlled territory.

Because petitioner hold U.S. citizenship the Syrian democratic forces did turn him over to American forces stationed in the country of Iraq. The United States military is currently holding petitioner at a location in Iraq, though the specific location of which is classified. As the Court knows the petitioner is seeking a preliminary injunction enjoining the United States from relinquishing custody of him to another country with the legitimate interest in taking that custody.

THE COURT: Let me stop you right there.

MR. BURNHAM: Yes, your Honor.

THE COURT: You made a statement that I haven't seen any support for in the record which is that the petitioner seek to prevent a transfer to a country with the legitimate interest in him. What is there in the record -- I mean other than your statement here what is there in the record to support that statement?

MR. BURNHAM: Well, your Honor, it's in the record that he was captured in Syria in ISIL controlled territory. And it's in the record that he's currently being held in the nation of Iraq. I would say that Iraq at the very least --

THE COURT: Yes. We don't even know, we don't

have anything in the record that says what country the United States is seeking to transfer him to, so your statement they're seeking to transfer him to a legitimate interest in his transfer tells me nothing.

MR. BURNHAM: Respectfully, your Honor, it's not our burden to tell you what country he's going to. It's petitioner's burden to --

THE COURT: Right, but you still have to proffer what the legitimate interest is.

MR. BURNHAM: No, we don't, your Honor. There's no legal requirement that the United States proffer anything to defeat a preliminary injunction when it's the petitioner's burden.

THE COURT: Okay. Wait a minute. Slow right down here. The government holds the key to the petitioner's jail cell.

MR. BURNHAM: Yes.

THE COURT: In fact, until I ordered the ACLU to have access to the petitioner, the ACLU is prevented from even learning the detainee's name. We certainly don't know where he's being held because that's a legitimately classified information, and no one would argue that it wasn't. I haven't heard anyone argue that it wasn't and I certainly wouldn't find that.

However, if what you're seeking to do is to

transfer the petitioner to another unnamed country, which would serve to defeat or make meaningless his petition for habeas corpus over which this Court has jurisdiction, are you saying that the ACLU somehow has the burden to determine what that country is and what their legitimate interest is?

MR. BURNHAM: No, it's not, your Honor.

THE COURT: So is it then your position that all you have to say is we're transferring him to a country with a legitimate interest and that should suffice to meet the burden set forth under *Munaf*?

MR. BURNHAM: Respectfully, your Honor, under *Munaf* the government didn't have to carry a burden at all. If I could --

THE COURT: No. My question is in Munaf the record before the Court was that the petitioners had committed, allegedly committed crimes in the jurisdiction in which they were being held, that if they were released in that country they would be prosecuted, that country sought to prosecute them for the crimes for which they had allegedly committed in that country.

So the record was far more complete than it is here. There wasn't a ruling either way as to what the government was required to show or not because the record was far more fulsome than it is in this case. And so my question to you again is, is it your position that you do

not have to provide any further information other than to state that the transfer country has a legitimate interest in the detainee?

MR. BURNHAM: So, your Honor, again that's why I think you have to read *Munaf* in conjunction with *Kiyemba II*.

THE COURT: I have.

MR. BURNHAM: I understand. And *Kiyemba II* itself says, your Honor, that *Munaf*, and this is a quote from the D.C. Circuit's decision, "Precludes a Court of issuing a writ of habeas corpus to prevent a transfer on either the grounds that the petitioner in the case would be subjected to further detection or torture." Now my friend has distinguished that case on the ground that it doesn't involve U.S. citizens, but the DC Circuit said that doesn't matter.

THE COURT: But again, the ACLU here has distinguished both *Munaf* and *Kiyemba* on their facts which is *Munaf* involved detainees who had been charged with crimes in the country in which they were being held. And *Kiyemba* involved noncitizens who could not have been released in the United States.

MR. BURNHAM: Your Honor, I understand that factual distinction, but the D.C. Circuit held that distinction doesn't matter. If I can just read it to your Honor. The court assumed arguendo these alien detainees

have quote, "The same constitutional rights with respect to their proposed transfer as did the U.S. citizens in *Munaf*." And so in that case the court said the District Courts cannot enjoin transfer to another country because that is equivalent to release which the relinquishment of custody from the United States government and U.S. military.

THE COURT: It doesn't say that it can't do that in all circumstances. I read that footnote. I read both cases and the DC Circuit's opinion. And in nowhere does it say the Court is precluded from enjoining transfer in every circumstance. That's why we're here.

MR. BURNHAM: No, your Honor, actually it said that the Court is precluded from enjoining transfer on two bases. One that the petitioner will be continued to be detained in the other country, and two that he'll be subjected to torture --

THE COURT: And the ACLU has not made any of those arguments here.

MR. BURNHAM: The only other argument I think the ACLU has made, your Honor, is the same argument they made in *Munaf* which is that the court should enjoin transfer to preserve its jurisdiction which is something the Supreme Court unanimously rejected in *Munaf*. If I could --

THE COURT: As I see it and Mr. Hafetz is going to, I'm sorry, will make his own argument when he stands up.

What you're proposing would allow the government in every case of a United States being held by the government where there's been a petition for habeas corpus to be filed. The government would be allowed to do an end run on every single petition by simply moving the detainee to another country, and saying we can't tell you what it is, but they've got a legitimate interest in his transfer.

I'm certainly -- are you saying that that's doable?

MR. BURNHAM: No, your Honor. What I'm saying, your Honor, is the remedy for habeas corpus is release from U.S. custody. And that --

THE COURT: Wait, maybe we need to go back. You're not challenging that the detainee here is in U.S. custody?

MR. BURNHAM: Of course not, your Honor. What I was going to say is that when the United States relinquishes custody of an individual into the bona fide custody of another country he's no longer under our control. And there's no --

THE COURT: What's different here there's a petition for habeas corpus over which you agree with me I appropriately have jurisdiction?

MR. BURNHAM: Oh, of course. Absolutely.

THE COURT: So it is your position that during the

pendency of a petition for habeas corpus before a Court that is pending the government can simply moot that petition or do an end run around that petition by simply transferring the detainee, a United States citizen, to another country and saying they have a legitimate interest? Wouldn't that always give the government a way to evade habeas review?

MR. BURNHAM: Your Honor, it's not evading habeas review to grant the petitioner the relief he's seeking. The relief he's seeking is release from U.S. custody. So if the United States releases the petitioner which is what a -- but, your Honor, that's what a transfer is. And if another sovereign took control of him. Let's say the Iraqis arrested outside of the facility where he's currently being held after we opened the door he would have no right to habeas corpus in the United States.

THE COURT: I doubt very strongly that Mr. Hafetz is going to stand up and say that the relief that they seek on behalf of the detainee is for him to be released to Saudi Arabia.

MR. BURNHAM: Well, your Honor, I have no idea what Mr. Hafetz is going to say. But it sounds like what he's going to say the relief he seeks is what the Court in *Munaf* said they cannot get, which is for the United States to quote smuggle him out of Iraq. In this case, Mr. Hafetz I assume will ask that petitioner be brought to the United

States. If all that he's asking is that he be released from the facility in Iraq then as soon as he's recessed from U.S. custody the Court would lose jurisdiction and whether the Saudis take custody of him, the Iraqis or the Syrian democratic forces the habeas case would be gone.

THE COURT: That's a very literal reading of release, don't you think? I mean is what you're saying if I ordered -- say I considered his petition for habeas corpus found that it was merited and ordered his release then is it your position that the government simply has to open the door of the facilities in which he's being detained in Iraq and let him walk out the door?

MR. BURNHAM: Your Honor, I haven't thought about the mechanics of that. But I think if the Court ordered us --

THE COURT: It seems to me that's what you are saying. Release in this case would simply mean opening the door and letting in the first person who could grab him and take him.

MR. BURNHAM: Your Honor, I guess I'm not trying to make it so literally. I guess I'm trying to make a conceptual point, release from U.S. custody and that's what relinquishment of custody to another country is. And that's why I think *Kiyemba II* said everything in the opinion applies equally to U.S. citizens as it does to foreign

nationals. That's where the D.C. Circuit I think made that point. Because the central holding of *Munaf* was that habeas corpus provides release. It doesn't provide a vehicle to retain custody to have a habeas ruling about release later. It just provides you to be released from U.S. custody.

THE COURT: You're saying then, Mr. Burnham, that if the government were to turn over the detainee to Saudi Arabia that would be the relief that the ACLU seeks for him, his release from U.S. custody?

MR. BURNHAM: If we hypothetically relinquished custody of petitioner to the nation of Saudi Arabia, a nation in which he is a citizen that would be complete relief in a habeas proceeding, seeking release from U.S. custody. As long as your Honor the relinquishment of custody was total. So I think it's a different case certainly if the United States is still in control if we're still calling the plays.

In other words, as Mr. Hafetz put it I think if we still control the keys to the jailhouse door I do think that would be a different case. And there would be a typical question about whether this court still has jurisdiction over him. Because in effect he would still be held by the United States even if it was in another country, but that's not what we're contemplating here. What we're talking about here I think is a complete surrender of U.S. custody for

disposition according to the laws and policies of another country which I think is exactly what the Court was talking about in Munaf.

Just to drill down a little on the distinctions that have been offered from Munaf. The petitioners in Munaf had been subjected to no U.S. judicial proceedings whatsoever. They had not been designated enemy combatants by a U.S. court. They had not had a U.S. court find that there was a factual basis for their detention. They had only been given some executive branch process internally.

THE COURT: Mr. Burnham, is the petitioner in this case facing criminal charges in another country?

MR. BURNHAM: Not to my knowledge, your Honor.

THE COURT: Is there an ongoing criminal proceeding taking place in another country?

MR. BURNHAM: Not to my knowledge, your Honor, but I'm not sure why it would matter.

THE COURT: Is the United States government holding the petitioner on behalf of a foreign government?

MR. BURNHAM: I can't answer that.

THE COURT: Wait you said you can't answer that.

MR. BURNHAM: I just don't know, your Honor. I don't mean to be coy. I don't, as far as I know, no, but I can't.

THE COURT: In *Munaf* those were all conditions

that were present. In *Munaf* the petitioners were facing criminal charges in another country. There was an ongoing criminal proceeding taking place in another country, I think. Why would *Munaf* bar this Court from prohibiting a transfer of petitioner even though none of these circumstances are present in *Munaf* or present here?

MR. BURNHAM: It's not about what facts were present in *Munaf*. It's about what the Supreme Court held. And what the Supreme Court held was that habeas is a remedy for unlawful detention the remedy for which is release. And I think that's why the court has to read Munaf in conjunction with *Kiyemba II* because I think *Kiyemba II* is much more categorical about what *Munaf* means. And this is just another quote that decision. Quote, "The District Court may not issue a habeas corpus to shield a detainee from detention at the hands of another sovereign on its soil and under its authority." And that's at page 516 of the D.C. Circuit's opinion in *Kiyemba II*.

Another quote from the D.C. Circuit's opinion, "To the extent the detainee seek to enjoin their transfer based upon the expectation that a recipient country will detain or prosecute them *Munaf* bars release." And that's on page 515 here. And so I just think when you --

THE COURT: That's not the argument here. There's no argument the ACLU has not made the argument that the

country to which the United States seeks to transfer, and in this case the government concedes it's Saudi Arabia.

MR. BURNHAM: I have not said that, your Honor. It's just a hypothetical. I was speaking hypothetically about countries that may have had a legitimate interest in petitioner. If I misspoke I apologize.

THE COURT: The government agrees he's a citizen of --

MR. BURNHAM: Oh yes, your Honor, I definitely meant to say that. I just didn't mean to suggests, I'm telling you what our intentions are.

THE COURT: No one has made the argument on behalf of petitioner that I have read or heard that the petitioner should not be transferred because he would be tortured or for any other reason. They're simply saying he shouldn't be transferred during the pendency of this petition for habeas corpus. As I understand it what the ACLU seeks here is not an open ended you can't move him anywhere ever, but to release him to the United States. What the ACLU seeks is a stay or an order staying any transfer until this Court has had an opportunity to rule on his petition.

MR. BURNHAM: I think in that respect their case is much weaker than the petitioners had in *Munaf*. At least in *Munaf* and *Kiyemba* they were making an argument about why transfer would be adverse to their interest. They would be

continued to be detained or they would be tortured or something bad would happen. Petitioner hasn't even done that.

THE COURT: Why should they? In other words, why is it not enough to want a ruling on their petition for habeas corpus to prevent the government from simply mooting or doing an end run or somehow evading review?

MR. BURNHAM: I guess I'm confused by that, your Honor. Because the mechanism by which we would evade review is by providing complete relief. And so --

THE COURT: I guess if your position is by transferring him to another sovereign nation you're providing petitioner with complete relief. If that's your argument then certainly yes, you're giving the petitioner complete relief. I somehow suspect that Mr. Hafetz is going to stand up and take a different prospective on whether that constitutes complete relief.

MR. BURNHAM: But that's not my position, your Honor, that's the position of the amicus Supreme Court in *Munaf*. I'm quoting from the Court's opinion, "Habeas at its core is a remedy for unlawful detention." Another quote, "The typical remedy for such detention is of course release."

THE COURT: For a U.S. citizen.

MR. BURNHAM: Yes.

THE COURT: Relief for a U.S. citizen would be release to the United States.

MR. BURNHAM: Your Honor, they were U.S. citizens in *Munaf*, and the Supreme Court said it was complete relief to release them to Iraq.

THE COURT: What you are doing, Mr. Burnham, is you are picking and choosing nuggets. It's not that you're reading them in conjunction. You are picking and choosing nuggets from each of those cases which suit your argument. But the fact of the matter is that release in *Munaf* would have been a completely different thing from release here. Because release in *Munaf* would have meant immediate prosecution by Iraqi authorities. It could have been nothing else.

Release in this case as I said taking a very literal reading which means that they open the detention facility and whoever can take this man takes him. But if release of a U.S. citizen in the traditional habeas sense is to apply to this case release would mean the transfer of this petitioner to the United States. And is it your position that's wrong?

MR. BURNHAM: Yes.

THE COURT: And that is because you'd have to physically transport him to the United States?

MR. BURNHAM: No, your Honor, my position is that

that's wrong because all that the habeas right provides is relinquishment of United States custody. And so whether that's relinquishment to the custody of Saudi Arabia or Iraq or the Syrian democratic forces --

THE COURT: Do you have a single case that says that?

MR. BURNHAM: Yes, of course, *Kiyemba II*. *Kiyemba II* says that the --

THE COURT: *Kiyemba II* did not involve the detention of United States citizens, so naturally it couldn't provide relief to the United States. Those noncitizen combatants could not have been released to the United States. It was an illegal impossibility. So *Kiyemba* does not provide the support which you seek. *Kiyemba* is not a case that says habeas relief for a United States citizen is just relief from custody. It doesn't have to be the United States. In *Kiyemba* could not have been to the United States.

MR. BURNHAM: I understand the facts of *Kiyemba*, but the D.C. Circuit said that that fact didn't matter. So the D.C. Circuit held that its opinion was equally applicable to U.S. citizens as it was to foreign nationals.

THE COURT: Did you make this argument in your brief?

MR. BURNHAM: I believe so. It's Footnote IV of

the Court's decision. We certainly rely on the Court's decision extensively. And this case involves a U.S. citizen.

THE COURT: Did you make this argument in your opposition to petitioner's argument?

MR. BURNHAM: Of course we did, your Honor. We cited *Kiyemba II*, and we said that *Kiyemba II* applies *Munaf*, and that *Kiyemba II* makes clear petitioner's argument is meritless. I don't recall if we cited Footnote IV of *Kiyemba II*, but I certainly make the argument that *Kiyemba II* applies to U.S. citizens like petitioner. And in Footnote IV of the D.C. Circuit explains in very clear terms.

THE COURT: Can you direct me to the page in which you say that release from custody in the habeas sense just means release from custody and not release to the United States?

MR. BURNHAM: It's on page 1, your Honor, carrying over to page 2. Quote, "The remedy that habeas corpus furnishes is release from custody of the United States government. It is not a device for requiring continued custody by that government or preventing release by that government to another sovereign with a legitimate interest."

THE COURT: But that does not -- I see it here. And that's where you're saying is your argument that by

transferring the petitioner to another country would be granting the habeas relief that he seeks?

MR. BURNHAM: I wouldn't put it quite like that, but yes, I think it's the same thing. It's conceptually the same thing that he would be released from U.S. custody which is the purpose of this proceeding which is to decide whether the United States has a legal and factual basis to continue its custody of petitioner. And so I think that relinquishing custody to another country would be complete relief.

If I could talk briefly about the All Writs Act. We've talked about this some. So the DC Circuit in the, one of the two cases that became *Munaf* this case is called *Omar* made the same point that we've talked about today, which was that the Court should be able to enjoin transfer to preserve its own jurisdiction over the habeas petition because the petitioner in *Omar* had made the same argument petitioner is making here, which is the United States cannot lawfully hold me, and therefore, I have a right to habeas relief here in the United States District Court. And the Court should preserve its jurisdiction rather than allow the United States to turn me over to the Iraqis.

And as you said with the review with the case. The D.C. Circuit said, and I'm quoting from its opinion that was reversed in *Munaf*. "The petitioner sought an injunction

prohibiting his transfer to Iraqi authorities in order to preserve the District Court's jurisdiction to entertain his habeas petition." And that's at *Omar versus Harvey*, 479 F.3rd 1 at page 11.

THE COURT: What's your response to the argument that any transfer would be lawless absent a valid extradition request, or some other legal justification? Why shouldn't the government be required to file an extradition request prior to transferring the petitioner?

MR. BURNHAM: Your Honor, I heard Mr. Hafetz make that argument, and it was interesting because it's literally the same argument he made in *Munaf*. I'm quoting from the Supreme Court --

THE COURT: *Munaf* was different. There was no need for an extradition request in *Munaf* because the detainees were already in Iraq. Nobody was seeking to extradite them anywhere, and they were in the custody of multinational forces. And the issue is whether they should be released -- whether Iraqi authorities should be allowed to prosecute them after they're released from the custody of multinational forces. There would be no need for an extradition request in *Munaf*.

MR. BURNHAM: Right, but there's not a need for one here because petitioner is not being held in the United States.

THE COURT: Why hasn't there been an extradition request from the country to which you seek to transfer him?

MR. BURNHAM: Because he's not being held in the United States. And so what the Supreme Court held in *Munaf* --

THE COURT: He's being held in the custody of the United States. U.S. forces are holding him.

MR. BURNHAM: I know. Certainly your Honor. What the Court said in *Munaf* was that it's not extradition when you're being held by the military in a foreign country. Very clear.

THE COURT: Can you articulate to me any prejudice the United States government would suffer as a result of a temporary injunction on -- I don't mean temporary injunction because that's, I don't want to use a legal term of art. If the government is precluded from transferring the detainee for the pendency of his habeas petition, not indefinitely but for the pendency of his habeas petition, what prejudice does the government suffer?

MR. BURNHAM: Your Honor, we would suffer immense prejudice. Petitioner is a dual national of two countries, captured in Syria by the Syrian democratic forces --

THE COURT: What's the prejudice?

MR. BURNHAM: Oh, the prejudice would be to our international relations with all the countries with an

interest in this person. The war against ISIL is a pretty broad conflict involving a lot of nations --

THE COURT: Stop, I'm not trying to get into geopolitical realities here.

MR. BURNHAM: Oh.

THE COURT: But articulated interest other than it would be bad. I don't know what the countries are that have an interest in this detainee. I don't know what his value is and certainly that may be a matter of classified information. But if the government is asking, if the government is opposing a temporary holding of the status quo. In other words, if the government is opposing a transfer for a limited period of time can you articulate why the government would be prejudiced if that transfer were not allowed to go forward?

MR. BURNHAM: If your Honor would permit let me answer in two steps. I think in sort of the abstract there is a serious harm to our relations with other countries when the -- let me be more specific because I think I get, that one is not moving your Honor.

THE COURT: I rather not have the abstract.

MR. BURNHAM: How about this, the government would be happy to by I hope by end of day if not tomorrow provide ex parte and under seal a classified declaration explaining to the Court to reassure the Court kind of what we're

thinking about with, as to petitioner.

THE COURT: I would welcome that.

MR. BURNHAM: Okay.

THE COURT: But you know it's got to be more than -- it's got to be specific.

MR. BURNHAM: I understand, your Honor. I think you can anticipate my abstract answer, but I'm hoping we can provide you something a little more satisfying if we're allowed to be more specific.

THE COURT: Why shouldn't that information be provided to petitioner's counsel under seal?

MR. BURNHAM: Well, for one it's classified. I have to talk -- maybe we could. I'd have to talk my colleagues.

THE COURT: I would be more comfortable with that. They're his arguments. They obviously can't make arguments on his behalf if they're not given information as to the government's position. But given that I find this, the record in this case is sparse and it's not sparse because of the ACLU's efforts. It's sparse because I've been given limited information about this detainee. And I understand there are always national security and military intelligence reasons for not wanting to reveal information, but we are talking about a United States citizen who does have rights.

So yes, I would, whatever additional information

you're inclined to provide I would prefer that it be under seal and provided to his lawyers. I would require that information by the end of the today.

MR. BURNHAM: We'll do everything we can, your Honor.

THE COURT: Thank you.

MR. BURNHAM: Thank you.

THE COURT: Mr. Hafetz.

MR. HAFETZ: Your Honor, first just to state clearly we would oppose any filing that's ex parte. If the government wants to file under seal it can so do, but we're talking about the liberty of an American citizen here. The liberty of his detention and the liberty of his handover rendition based on some vague assertions and unspecified assertions of interest elsewhere, so I think we have an absolute right as a matter of due process to be able to see what that information is.

THE COURT: Mr. Burnham, you can redact to the extent you can redact any information with any document to render the, you know, to deal with the issue of classification I would appreciate that, but I think Mr. Hafetz does have a point. I would appreciate your attempts in that regard.

MR. BURNHAM: We will do everything we can.

THE COURT: All right.

MR. HAFETZ: Counsel, I do and one of my co-counsel have security clearance so if it's classified that's not a basis to keep it from us.

Your Honor, whatever the government files just so your Honor understands you know our position on the framework. Under *Valentine* there is no executive discretion quoting the decision, to surrender a U.S. citizen to a foreign government unless that discretion is granted by law, so there has to be a legal basis. And the DC Circuit in the case the government was referring to *Omar 2*, the file on case from *Munaf* says quote at page 24, "None of this the foregoing discussion about inquiring into conditions on the end, receiving end. None of this means that the executive branch may detain or transfer Americans or individuals in U.S. territory at will without judicial review of the positive legal authority for the detention or transfer."

So mere expressions of interest are not a lawful basis. It has to be an extradition or its functional equivalent. *Munaf* is, *Munaf* recognizes as your Honor recognized a limited exception to that rule where a petitioner, a person voluntarily travels to a country, is arrested in that country for violating that country's laws, and is subject, and is subject to prosecution there. Because that country has exclusive jurisdiction over crimes committed in its territory. So in that sense it's not an

extradition. In the sense of *Valentine* they understood sense a transfer to another country.

There has to be positive legal authority. We're not here at this point nothing, we've not raised any issue about what conditions might be like. That's not before the Court, but there has to be a legal basis for the, for the transfer.

So you know otherwise I mean the United States can't forcibly bring people in, I'll just, I'll stick with what's in the record. But as the counsel for the government said brought him in to another country from Syria into Iraq, and if that's a different situation than *Munaf*.

THE COURT: Maybe you were going to get to this, but how do you respond to Mr. Burnham's argument that transferring the detainee to another country is in fact relief because they are being released from custody?

MR. HAFETZ: Thank you, your Honor, I do want to address that. That is not release. Transfer, handover to another country is not release. Release is release. It's a relinquishment of custody resulting in the petitioner's freedom. It is opening the jailhouse doors.

THE COURT: What about Mr. Burnham's argument that they could basically just open the door of the facility to which he's being detained and tell him he's free to go and that would constitute relief under the petition for habeas

corpus? Or do you think it requires more? In other words, it's possible that the United States could simply say okay, here, you're free to leave and the detainee is picked up by another country's forces immediately, but as far as the government is concerned he's been granted complete relief.

Is that, is that how it is supposed to work?

MR. HAFETZ: We're seeking -- the release from custody does not -- if this Court were to grant the habeas petition and order his release it would mean opening the jailhouse doors. At that point what else might or might not be required depending on what the government said or represented is not before the Court, but essentially yes, he's seeking release from U.S. custody. And that is really night and day with *Munaf*. *Munaf* because they were pending criminal proceedings. And so relief there --

THE COURT: Was not possible.

MR. HAFETZ: Was not possible. What the Court said was effectively -- it was essentially harboring someone a fugitive from justice because Iraq had a sovereign interest in prosecuting them for crimes committed on their soil.

THE COURT: This Court does not have before it the mechanics or logistics of what that release would entail other than release, but I was curious as to your response that transfer was equivalent to the response to the argument

that transfer to another country is equivalent to release.

MR. HAFETZ: No, I don't think if someone said you're released, you're free to go. Release is not we're releasing you, but we're handing you over to the custody of another government. I don't think anyone would understand that as release, and that's not how the cases look at it.

In *Munaf*, remember the Court talked about habeas as in equitable remedy. And so, in that case what the Court said was release was essentially, release and keeping information from Iraq which wanted to prosecute the detainees was not consistent with habeas as an equitable remedy. What a release order might look like here if the Court were to ultimately order one is a different question, but at bottom release is not transfer to another country nor are we asking for continued U.S. custody. The United States could terminate these proceedings today by authorizing his release, but they want to continue holding him, and or hand him over to another government. That's not release.

I just, we talked about *Hamdi* before in response to your Honor's order about the role of the courts. And again just to reiterate the language from *Hamdi* that the, absent suspension of habeas and there's no suspension here the Constitution envisions a role for all three branches when the liberty of a citizen is at stake. I'm paraphrasing but that's essentially the quote. And it's all three

branches that's the court's. It's also Congress. There has to be a legal basis to hand over a citizen. Typically that's an extradition statute or a treaty or some form of positive legal authority which as I read before is reiterated in *Omar II*.

I have, if your Honor doesn't have more questions I have just two final points to make. One is that the, as your Honor pointed out, the government does not get to do an end run around this Court's habeas jurisdiction. It cannot circumvent this jurisdiction by pretending that transfer is the same as release. Release is the way if the government wants to moot a habeas petition it can release the citizen from custody. There's no, you know, we cannot stand in the way of that and that is what, that is the -- because that's the remedy that this petitioner seeks.

THE COURT: Or they can charge him?

MR. HAFETZ: Well, they can charge him, correct, your Honor. They can charge him with a crime. Again, they have to have a lawful basis to detain him or transfer him. There's no charges against him by the United States. Were the United States to charge him he would have a right under the Constitution to a trial and the various other rights your Honor is familiar with. But to contest those charges, but that would be a basis to detain him. It can't operate outside the boundaries of law. And, your Honor, as your

Honor noted we're merely seeking limited relief until the injunction until the Court can decide his habeas petition.

And to conclude in light of the government's representations today which reiterate what was in its briefs that it is under no obligation or no restriction to transfer the petitioner to any country at anytime, we respectfully request that the Court order the, prohibit the respondent in addition to the ultimate relief we've asked for in our papers, prohibit his transfer until the Court can decide this motion.

THE COURT: Thank you, Mr. Hafetz. Mr. Burnham, let me ask you, I know that the ACLU has requested -- their motion is for, for an order prohibiting the transfer of the detainee pending his resolution of his petition for habeas corpus. With regard to the last request Mr. Hafetz just made, which is a request that the government be prohibited from transferring the detainee pending my ruling on this motion for preliminary injunction, is it the government's intention to transfer the detainee within the next 48 hours?

MR. BURNHAM: You mind if I just speak with my co-counsel for a second?

THE COURT: Please.

[Brief pause.]

MR. BURNHAM: Your Honor, I have no basis to think that's going to happen. But our -- so I'm not aware of any

intention to do that, but our position is right now we have the authority to relinquish custody of him to another sovereign as soon as another sovereign is ready.

THE COURT: Thank you. Your last request I will, I'll rule on it within the, probably shortly.

MR. HAFETZ: Thank you, your Honor.

THE COURT: Thank you, all.

[Thereupon, the proceedings adjourned at 12:33 p.m.]

CERTIFICATE

I, Cathryn J. Jones, an Official Court Reporter for the United States District Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, the proceedings had and testimony adduced in the above case.

I further certify that the foregoing 45 pages constitute the official transcript of said proceedings as transcribed from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name, this the 22nd day of February, 2018.

/s/_Cathryn J. Jones
Cathryn J. Jones, RPR
Official Court Reporter

MR. BURNHAM: [59]
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EXHIBIT J

الإدارة العامة للحدود

بسم الله الرحمن الرحيم
الدولة الإسلامية في العراق والشام
الإدارة العامة للحدود
بيانات المجاهدين

لا إله إلا الله
الله
رسول
محمد
دولة الإسلام في العراق والشام

1	الإسم واللقب	[redacted]
2	الكنية	[redacted]
3	إسم الأم	[redacted]
4	فصيلة الدم	O+
5	تاريخ الولادة و الجنسية	[redacted]
6	الحالة الإجتماعية	أعزب ( ) متزوج (*) عدد الأطفال (1)
7	العنوان و مكان الإقامة	بلاد الحرمين [redacted]
8	التحصيل الدراسي	جامعي – الكهرباء
9	المستوى الشرعي	طالب علم ( ) متوسط ( ) بسيط ( )
10	ماهي مهنتك قبل المجيئ ؟	تجاره
11	البلدان التي سافرت إليها وكم لبثت بها؟	امريكا [redacted]
12	المنفذ الذي دخلت منه ؟ والواسطة ؟	جرابلس [redacted]
13	هل لديك تزكية ومن من ؟	[redacted]
14	تاريخ الدخول ؟	1435/[redacted]
15	هل سبق لك الجهاد ؟ وأين ؟	لا
16	مقاتل أم إستشهادي أم إنغماسي ؟	مقاتل
17	الإختصاص ؟	مقاتل ( ) شرعي ( ) أمني ( ) إداري ( )
18	مكان العمل الحالي	
19	الأمانات التي تركتها ؟	جواز – هاتف – كمره
20	مستوى السمع والطاعة ؟	
21	العنوان الذي نتواصل معه ؟	[redacted]
22	تاريخ القتل و المكان	
23	ملاحظات	

EXHIBIT
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PENGAD 800-631-6989

مسؤول الحدود

الدولة الإسلامية في العراق والشام _ سري _

بسم الله الرحمن الرحيم
الدولة الإسلامية في العراق والشام الإدارة العامة للحدود
بيانات المجاهدين

1	الإسم واللقب	عبدالرحمن احمد الشيخ
2	الكنية	ابو حنيفه الجزراوي
3	إسم الأم	حنيفه
4	فصيلة الدم	O+
5	تاريخ الولادة و الجنسية	1400/9/2هـ - جزيري مواليد امريكا
6	الحالة الإجتماعية	أعزب) (متزوج) * (عدد الأطفال) 1(
7	العنوان و مكان الإقامة	بلاد الحرمين – الخبر – حي الهدا
8	التحصيل الدراسي	جامعي – الكهرباء
9	المستوى الشرعي	طالب علم) (متوسط) (بسيط) (
10	ماهي مهنتك قبل المجيئ ؟	تجاره
11	البلدان التي سافرت إليها وكم لبثت بها؟	معظم دول شرق اسيا – امريكا
12	المنفذ الذي دخلت منه ؟ والواسطة ؟	جرابلس – ابو محمد الشمالي
13	هل لديك تزكية ومن من ؟	ابو علي الجزراوي
14	تاريخ الدخول ؟	1435/9/17هـ
15	هل سبق لك الجهاد ؟ وأين ؟	لا
16	مقاتل أم إستشهادي أم إنغماسي ؟	مقاتل
17	الإختصاص ؟	مقاتل) (شرعي) (أمني) (إداري) (
18	مكان العمل الحالي	
19	الأمانات التي تركتها ؟	جواز – هاتف – كمره
20	مستوى السمع والطاعة ؟	
21	العنوان الذي نتواصل معه ؟	00966503490940
22	تاريخ القتل و المكان	
23	ملاحظات	

الدولة الإسلامية في العراق والشام _ سري _

مسؤول الحدود