



# Military Enjoined from Transferring American ISIS Suspect to Foreign Country – at Least for Now

**Jennifer K. Elsea**  
Legislative Attorney

June 20, 2018

In *Doe v. Mattis*, a case with potential ramifications regarding the authority to conduct military operations against the Islamic State of Iraq and the Levant (ISIS), the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) upheld 2-1 the district court’s [injunctions](#) temporarily protecting “John Doe” from forcible transfer to another country from Iraq, where he is currently being held by the U.S. military as a suspected ISIS combatant. Doe, a dual U.S.-Saudi national who surrendered to Syrian Democratic Forces and was subsequently transferred to U.S. custody, seeks to end his detention through a petition for a writ of habeas corpus in the federal district court for the District of Columbia. The Department of Defense (DOD) seeks to transfer him involuntarily to the custody of one of two countries (the names of which remain classified). Doe asked the district court to prevent his transfer during the pendency of his litigation, but DOD claimed the authority to transfer him as soon as diplomatic arrangements could be made. The district court judge issued two orders, one [requiring](#) DOD to provide 72 hours’ notice to the court prior to Doe’s transfer to another country and a second enjoining the government from transferring Doe, once the government gave notice to the court of its intent to transfer him. DOD appealed both orders.

Doe’s habeas petition, filed on his behalf by the American Civil Liberties Union, contends that his detention is unlawful because the military’s legal authority to detain enemy combatants does not encompass ISIS within any authorization for use of military force. Additionally, he claims he is not an ISIS combatant. The instant dispute concerns whether Doe has the right to litigate his habeas claim to the merits or whether the government can essentially moot his claim for relief by transferring him to another country with an interest in holding or prosecuting him.

The appellate court [described](#) the D.C. Circuit’s test for a preliminary injunction as a balancing of four factors:

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

LSB10152

- (i) whether the party seeking the injunction is likely to succeed on the merits of the action;
- (ii) whether the party is likely to suffer irreparable harm without an injunction;
- (iii) whether the balance of equities tips in the party's favor; and,
- (iv) whether an injunction would serve the public interest.

Assessing the first factor, the D.C. Circuit [framed](#) the question as one of whether the forcible transfer of Doe to a foreign country would be unlawful under the circumstances, and agreed with him that such a transfer would be unlawful. The government proffered two rationales for permitting the transfer without court intervention. The first pointed out that there is no bar to transferring a U.S. citizen who is in U.S. custody in a foreign country to that country's government if the citizen is alleged to have committed a crime there. The court found that rationale unpersuasive on the grounds that Doe is not alleged to have committed any crime in Iraq. The court declined to extend the government's cited case law (primarily the Supreme Court's 2008 opinion in *Munaf v. Geren*) to cover the involuntary transfer of a U.S. citizen to a third country. To effect that sort of transfer, the court [held](#), the government must both (i) demonstrate that a treaty or statute authorizes the transfer, and (ii) give the citizen an opportunity to challenge the factual basis for the transfer.

The court [quoted](#) the Supreme Court's holding in *Munaf*, "[t]hose who commit crimes within a sovereign's territory may be transferred to that sovereign's government for prosecution' even if the 'crime at issue' is an inherently non-war offense like 'embezzlement.'" But the court deemed the sovereignty rationale for permitting an in-country transfer inapplicable to the present circumstances. The majority [rejected](#) the government's interpretation that the Executive has the authority to forcibly transfer U.S. citizens to any foreign country with potential jurisdiction whenever they leave the United States.

The government's second rationale claimed that the Executive has wartime powers to transfer enemy combatants into the custody of an ally under the law of war. While the appellate court did not disagree with that assertion, it disagreed with the contention that U.S. citizenship of the combatant is immaterial. Rather, the majority [held](#), that wartime authority could potentially support Doe's transfer only if the government:

- (i) demonstrates that it is legally authorized to use military force against [ISIS], and
- (ii) affords Doe an adequate opportunity to challenge the Executive's factual determination that he is an [ISIS] combatant.

The majority arrived at this interpretation primarily by analyzing the Supreme Court's 2004 opinion in *Hamdi v. Rumsfeld* (plurality opinion, described more fully in [this CRS report](#)). The court [echoed](#) the *Hamdi* Court's holding that there is generally no bar against detaining a U.S. citizen as an enemy combatant under the law of war, but that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Noting that detention and transfer are not the same thing, the court [determined](#) the pertinent questions to be:

First, is the Executive's transfer authority (this case) on par with its detention authority (*Hamdi*) as a fundamental incident of waging war? Second, if so, is the Executive's exercise of transfer authority against a U.S. citizen subject to the same conditions attending the exercise of detention authority against a U.S. citizen?

The majority held that detention and transfer powers rise or fall together, [relying](#) in part on Congress's affirmation of the detention authority conferred by the Authorization for Use of Military Force ([AUMF](#)) when it passed the National Defense Authorization Act for FY 2012 (2012 NDAA). In [section 1021](#) of the 2012 NDAA, Congress listed transfer, along with detention, among permissible options pertaining to the disposition of enemy combatants. Consequently, the court reasoned, detainee transfers to foreign countries must be considered a fundamental incident of waging war.

The majority likewise assessed the second question to be answerable in the affirmative. **Emphasizing** the potentially irrevocable nature of Doe’s forcible transfer to a foreign country, the court attached importance to the fact that such transfer would void his quest for habeas relief, “perhaps in perpetuity.” The court rejected the government’s assertion that the court should instead assess the potential transferee’s liberty interests without factoring in his potential continued detention in the receiving country. Given the fundamental nature of the liberty interest involved, the court saw no reason to presume that the *Hamdi* requirement for limited due process would not apply. Finally, the court **noted** its prior decisions have found an equivalency between detention and forcible transfer abroad, and rejected the government’s interpretation of the circuit’s prior decisions as applying only to citizens detained in the United States. The court **remarked**:

[I]f the transfer of a citizen could be accomplished without affording her those [*Hamdi*] protections, a risk of error thought unacceptable for continued detention would be present for an irrevocable transfer to another country. An “errant tourist” might then be protected against detention but unable to avoid an irrevocable transfer to another country’s custody.

For similar reasons, the court **concluded** that Doe had satisfied the “irreparable injury” prong – the second factor– necessary to obtain the preliminary injunction he sought. The court rejected the government’s contention that, because Doe’s transfer to a foreign country would release him from U.S. detention, he would achieve the relief he desired and could not thereby suffer irreparable harm. The majority also **found** it irrelevant that Doe’s release in Iraq could expose him to arrest there.

With respect to the final two factors—weighing the equities and public interest at stake—the court found these also tip in Doe’s favor. The court **recognized** the manifest weightiness of these interests on both sides:

The government seeks to avoid undue interference with its military judgments in connection with ongoing hostilities and with its conduct of foreign relations with a coalition partner in that campaign. Doe, meanwhile, seeks to vindicate his rights as an American citizen to avoid a forcible and irrevocable transfer to (potentially indefinite) custody at the hands of a foreign sovereign.

Here, the majority noted the similar equities and interests that existed in the *Hamdi* case and suggested a similar result was appropriate.

In dissent, one judge of the panel disagreed with the majority’s reading of *Hamdi* and would have cabined its holding to continued detention only, viewing it as inapplicable to a decision to transfer a citizen-detainee to a foreign government. Moreover, she warned that the majority’s analysis amounted to the “**judicial equivalent of mission creep**,” explaining that it permits a habeas court to “review not only a decision to ‘continue’ Executive Branch custody of a citizen captured abroad on an active battlefield,...but also—extraordinarily—a decision to discontinue it.” In her view, courts should exercise a minimal role in reviewing the executive branch’s authority in matters of war and diplomacy.

The injunctions the court upheld do not permanently enjoin the government from transferring Doe to a foreign country; they merely require advance notice to the district court in order to give Doe the opportunity to protest. However, if Doe seeks to make these injunctions permanent during the pendency of his habeas claim, the D.C. Circuit’s analysis of the four-pronged test suggests Doe likely has a good chance of success (the **same factors apply for a preliminary or permanent injunction**, except “actual success” on the merits – rather than likelihood – must be shown). Such a possible injunction could potentially give the judicial system its first opportunity to test the Executive’s legal authority for detaining ISIS suspects as enemy combatants or even for conducting operations against ISIS under the current claimed authority. On the other hand, the military may be seeking to avoid further litigation of the merits by **proposing** to return Doe to Syria against his will and release him there.