Nos. 07-394 and 06-1666

# In The Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, et al.,

*Petitioners,*

v.

SANDRA K. OMAR AND AHMED S. OMAR, as next friends of Shawqi Ahmad Omar,

*Respondents.*

MOHAMMAD MUNAF, et al.,

*Petitioners,*

v.

PETE GEREN, SECRETARY OF THE ARMY, et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF FOR THE HABEAS PETITIONERS

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## QUESTIONS PRESENTED

I.

When an American citizen is detained abroad under the plenary authority and control of the U.S. military, is the otherwise-available jurisdiction of a federal court to entertain his petition for writ of habeas corpus ousted by the claim that the U.S. military acts pursuant to "international authority"?

II.

If habeas jurisdiction is not defeated, is it an abuse of discretion for the district court to freeze the status quo while adjudicating the merits of the citizen's challenge to his detention and threatened transfer to the custody of a foreign government?

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## BRIEF FOR THE HABEAS PETITIONERS

### OPINIONS BELOW

The opinion of the court of appeals in No. 07-394 is reported at 479 F.3d 1. The opinion of the district court in that case is reported at 416 F. Supp. 2d 19. The opinion of the court of appeals in No. 06-1666 is reported at 482 F.3d 582, and the opinion of the district court in that case is reported at 456 F. Supp. 2d 115.

### JURISDICTION

In No. 07-394, the court of appeals entered judgment February 9, 2007, and denied rehearing May 24, 2007, 07-394 Pet. App. 61a-62a. The Chief Justice extended the time within which to file a petition for writ of certiorari to September 21, 2007. The federal parties filed a petition on that date. In No. 06-1666, the court of appeals entered judgment April 6, 2007, 06-1666, Pet. 1a-9a, and Munaf filed a petition for writ of certiorari June 13, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process and Suspension Clauses of the United States Constitution, as well as the federal habeas statute, relevant portions of which are reprinted in the petition for certiorari in No. 06-1666, Pet. 1-2.

## STATEMENT OF THE CASE

### Shawqi Omar

On October 29, 2004, U.S. soldiers arrested Shawqi Omar, an American citizen, at his home in Baghdad. Joint Appendix ("JA") 111. Believing he had some connection to insurgent activity, they beat him severely in the presence of his young son. *Id.* Photos of Omar's injuries, taken by the U.S. military shortly after the beating, are filed with the district court. Pet'rs' Mot. for Preservation Order, *Omar v. Harvey*, 416 F. Supp. 2d 19 (D.D.C. Feb. 14, 2008)(No. 05-2374). Since that day, Omar has been in U.S. military custody in Iraq, shuttled by his American captors between various U.S. military prisons, including Camp Bucca and the Abu Ghraib prison. JA 111-113. More than three years later, he remains in the custody of American soldiers at Camp Cropper, near Baghdad International Airport.[1]

Omar has done no wrong. He is neither insurgent, nor "enemy combatant," nor terrorist. He is a husband, father, and businessman. Now 46, Omar first came to the United States as a seventeen-year-old student. JA 110-111. In 1983, he married Sandra Kay Sulzle ("Ms. Omar"), in Mobridge, South Dakota, and three years later became an American citizen. JA

[1] Because the government seeks dismissal on jurisdictional grounds, the Court accepts the allegations in the petitions as true. *See Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264 (1991).

108-109, 111. The Omars eventually moved to Minnesota, where Omar served in the Minnesota National Guard. He and his wife have six children, all U.S. citizens. JA 111. After Saddam Hussein's fall, Omar, who was born in Kuwait and speaks Arabic fluently, traveled to Iraq in the hope of securing work in the reconstruction. JA 111. From the moment of his arrest, he has maintained his innocence. JA 114-115.

After his arrest, Omar was held *incommunicado* for several months. In late 2004, his wife contacted the American Embassy in Baghdad to learn her husband's whereabouts and welfare. JA 112. On December 22, Marie Damour, United States Consul in Baghdad, told Ms. Omar that her husband was being held "under United States military care, custody, and control." *Id.* Ms. Damour tried to meet with Omar, but the United States military refused to allow it. JA 112-113. In April 2005, Ms. Damour told Ms. Omar that her efforts "have been stymied at every turn" by the military. JA 113. As for Omar, the military repeatedly refused him access to counsel, and denied him legal process. JA 113, 129-131.

In December 2005, Ms. Omar and her adult son filed this habeas petition, JA 88, alleging that Omar's detention violated, *inter alia*, the Due Process Clause. JA 106-107. They named as respondents Omar's immediate custodian – the U.S. officer in command of the U.S. prison where Omar was held – as well as his ultimate custodian – the Secretary of the Army. JA 110.

Petitioners sought either Omar's release from unlawful detention, or an order requiring Respondents "to show just cause for his continued detention," JA 123, and prayed that Respondents not "transfe[r] Mr. Omar to the authority of any other government, sovereign, country, or agency *until this Court has an opportunity to consider and decide the merits of this Petition.*" *Id*. (emphasis added). They did not seek, and have never sought, to interfere with any Iraqi proceeding.[2]

On January 20, 2006, the district court issued a show cause order. JA 90. On January 27, Omar's lawyers learned that Omar would be presented before an Iraqi court February 3, 2006. Counsel immediately contacted counsel for the federal officials and asked to participate in this proceeding. On February 2, the government advised that while "a determination" had been made "to refer [Omar's] case to the Central Criminal Court of Iraq," no date had yet been set for whatever hearing might take place. JA 143. The government refused to provide Omar's lawyers with

[2] Petitioners also asked that Omar be allowed to meet with counsel. JA 122. In September 2007, spurred by the District Court's order, the government finally agreed to provide counsel with safe transport into Iraq. Counsel met with Omar and Munaf at Camp Cropper in January 2008. *See* Order Denying Without Prejudice Pet'rs' Emerg. Mot. for Access and Granting Pet'rs' Emerg. Mot. for Medical Records and Photographs, *Omar v. Harvey*, 416 F. Supp. 2d 19 (D.D.C. Sept. 28, 2006)(No. 05-2374); Resp'ts' Resp. to Order to Show Cause, *Omar*, 416 F. Supp. 2d 19 (D.D.C. Oct. 8, 2007)(No. 05-2374).

notice of this hearing, "whenever scheduled," or any assurance that Omar would remain in U.S. custody once it began. *Id*.

Later that same evening, counsel for Omar moved *ex parte* for a temporary restraining order ("TRO") to prevent Omar's transfer to Iraqi custody "*until this Court has an opportunity to consider and decide the merits of this Petition.*" JA 25, *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir. 2007)("*Omar* DC Cir. JA"). Again, counsel sought only "to preserve the *status quo* – namely, Omar in the custody and control of the United States." *Omar* DC Cir. JA 30.

Omar argued that allowing the United States to transfer him to Iraqi custody "would render meaningless [his] constitutional right to challenge the constitutionality and legality of his confinement by U.S. authorities." *Id.* at 32. He also described the "strong likelihood" of torture if he were handed over to the Iraqi Government, *id.* at 34-35, pointing out that senior American officials in Iraq had publicly warned that prisoners – especially Sunni Muslims like Omar – faced a risk of torture at Iraqi hands, *id.* at 35.

On February 3, 2006, the district court granted a TRO "to maintain the status quo . . . for the next ten days." JA 126. The court directed the parties to file supplemental briefs addressing, *inter alia*, "the constitutional implications arising out of judicial versus executive branch authority on the matter." *Id*.

During the ten-day period, Omar was not to "be removed from United States custody." *Id.*[3]

In the briefing requested by the court, Omar provided detailed expert declarations – partially based on U.S. government reports – describing how Iraqi officials "regularly and systematically engage in acts of torture," including the "use of electric shocks . . . strangulation, breaking of limbs, sexual abuse, using cigarettes to burn body parts, use of electric drills on arms and legs, and suffocation." JA 151, 153; *see also Omar* DC Cir. JA 70.[4] The government did not rebut these declarations then and has not done so since.

On February 13, 2006, the district court issued a preliminary injunction, temporarily barring the government from transferring Omar to Iraqi custody. *Omar v. Harvey*, 416 F. Supp. 2d 19 (D.D.C. 2006). The court applied the familiar four-factor test: (1) "substantial likelihood of success on the merits"; (2) "irreparable injury if the injunction is not granted"; (3) no "substantia[l]" injury to "other interested parties"; and (4) furtherance of "the public interest." *Id.* at 22 (citation and quotations omitted). Omar met the first factor because the petition raised "substantial, difficult

[3] Three days later, the court filed a Memorandum Opinion explaining its decision. JA 155-159.

[4] The risk of torture faced by Sunni Muslims in Iraqi custody is described in greater detail in the Brief *Amicus Curiae* of Non-Governmental Organizations.

and doubtful questions" of law meriting careful adjudication. *Id.* (citation and quotations omitted). Assessing the risk of torture, the court concluded the likelihood of irreparable injury to Omar was "high," *id.* at 23, and expressed "concern that any physical transfer of the petitioner may prematurely moot the case or undo [the] court's jurisdiction," *id.* at 28 (citing 28 U.S.C. § 1651).

The court also concluded "that the threat of tangible harm to the petitioner resulting from the court's failure to act outweighs any potential harm to the Executive's exercise of its war powers," and that "it is in the public's interest to have a judiciary that does not shirk its obligations." *Id.* at 29. Accordingly, and to preserve the status quo, the court ordered that "respondents . . . shall not remove the petitioner from United States or MNF-I custody, or take any other action inconsistent with this court's memorandum opinion." 07-394, Pet. 59a.[5] The court did not interfere with any Iraqi proceeding.

The government appealed, and the court of appeals affirmed. *Omar v. Harvey*, 479 F.3d 1 (D.C.

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[5] In the district court, the government argued the U.S. military detained Mr. Omar "as part of the MNF-I and not qua the United States." Resp'ts' Opp. to Petr's *Ex Parte* Mot. for a TRO 13, *Omar v. Harvey*, 416 F. Supp. 2d 19 (D.D.C. Feb. 7, 2006)(No. 05-2374). To eliminate any ambiguity about its ruling, the court's preliminary injunction restrained the respondent U.S. officials from transferring Omar "from United States or MNF-I custody."

Cir. 2007). The court unanimously agreed "the district court has jurisdiction to entertain Omar's habeas petition." *Id.* at 9; *accord id.* at 15 (Brown J., concurring in part and dissenting in part). It rejected the government's argument that *Hirota v. MacArthur*, 338 U.S. 197 (1948)(per curiam), foreclosed judicial inquiry, since *Hirota* turned on four "circumstances": "detention overseas," "the existence of a multinational force," "foreign citizenship," and a "criminal conviction." *Id.* at 7. Absent the latter two, *Hirota* did not apply. *Id.*[6]

A majority of the Court of Appeals also upheld the preliminary injunction prohibiting a transfer that might "defeat the district court's habeas jurisdiction." *Id.* at 12, 14. The majority rejected the government's "primary challenge" to the preliminary injunction – *viz*., that transfer was properly categorized as "a subset of release." *Id.* at 12. The court noted the "obvious and quite significant difference between transferring Omar to Iraqi authorities and releasing him to walk free from his current detention." *Id.*

The court also rejected Judge Brown's argument in dissent that no preliminary injunction could issue because, even if Omar prevailed, "Iraqi authorities

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[6] The Court of Appeals also found Mr. Omar's challenge to his threatened transfer justiciable. 479 F.3d at 10. Because the parties had neither briefed nor argued the underlying *merits* question of whether statutory or treaty authority for such a transfer existed, the Court of Appeals held that the issue should be addressed in the first instance by the District Court. *Id*.

might arrest Omar the moment U.S. forces release him." *Id*. at 12-13. The majority noted that Judge Brown's objection rested not on the *preliminary* injunction actually under review, but on "speculation" about the contours of a hypothetical *permanent* injunction that might never issue. "[A] preliminary injunction protecting Omar from the *certainty* of transfer," and also of torture, therefore was proper. *Id.* at 13 (emphasis in original).

For similar reasons, the majority rejected as "speculative" Judge Brown's argument (not raised by the government) that final relief would necessarily go beyond release. "Speculating about the conditions under which the military might release Omar or the lawfulness of those conditions is thus not only premature – *the matter may never arise* – but irrelevant" because "the petition does not seek 'release-plus' . . . [it] seeks [only Omar's] release from military custody." *Id.* at 13-14 (emphasis added). Nothing in the injunction, the majority held, "bar[s] a bona fide release of Omar." *Id.* at 12.

The government moved for rehearing *en banc*, which was denied May 24, 2007, with two dissents. 07-394 Pet. 63a-64a.

**Mohammad Munaf**

Mohammad Munaf emigrated from Baghdad in 1980, leaving behind his parents and six siblings to settle in Romania. He lived there for ten years, where he met his future wife Georgette. JA 32. The two were

married in 1989 and moved to New York the following year. Over the next 15 years, Munaf was a businessman. Between 1996 and 2001, he and his family maintained residences in New York and Bucharest. In 2000, Munaf became a U.S. citizen. *Id.* Today, the Munafs have three young children, all U.S. citizens.

In March 2005, three Romanian journalists asked Munaf to travel with them to Iraq as a paid translator. JA 32-33. The four arrived in Iraq in mid-March 2005. In late March, they were kidnapped by an Iraqi group identifying itself as the "Muadh Ibn Jabal Brigade." The group demanded a ransom for their captives' safe release and Romania's immediate withdrawal from Iraq.[7] On May 22, 2005, after nearly two months in captivity, Munaf and the three journalists were freed. JA 33. They were taken to the Romanian Embassy in Baghdad. Munaf, however, asked to be taken to the U.S. Embassy in the Green Zone. Exhibit 1 at ¶ 13, Pet. for Writ of Habeas Corpus, *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. Aug. 15, 2006)(No. 06-5324). There, he was arrested by U.S. officers and transported to Camp Cropper, where the U.S. military continues to hold him. JA 33.

Yet Munaf is not an insurgent, an "enemy combatant," or a member of any terrorist or militia group,

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[7] The kidnappers released a video of their prisoners as they were held by two masked men with semiautomatic rifles. CNN later broadcast a still from the video. *See* http://www.cnn.com/interactive/world/0504/gallery.iraq.hostages/frameset.exclude.html. Munaf is the small man squatting on the far right.

JA 33, and the military does not contend otherwise. Rather, it has labeled Munaf a "security internee," a term that remains vague on this record. On August 18, 2006, – after almost fifteen months in U.S. custody – Munaf, through his sister as next friend, brought this habeas petition. He alleged that his detention violated, *inter alia*, the Due Process Clause. JA 28-30, 36-41.

Three weeks later, counsel for the government advised Munaf's counsel that Munaf would be tried for an unspecified civilian crime by an Iraqi court and, if convicted, transferred to Iraqi custody. Like Omar, Munaf is a Sunni Muslim who faces a grave risk of torture if transferred. Moreover, counsel feared that Munaf's transfer to Iraqi authorities "would abuse the process now put in place for the purpose of adjudicating matters on their merits." Pet'rs' Mem. in Supp. of TRO at 13, *Mohammed v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. Sept. 8, 2006)(No. 06-1455) (internal quotations omitted). Counsel accordingly moved for a temporary restraining order freezing the status quo and preventing any transfer "*until this Court has had the opportunity to decide the merits of Mr. Munaf's Petition for Writ of Habeas Corpus.*" Pet'rs' Mot. for TRO, *Mohammed v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. Sept. 8, 2006)(06-1455)(emphasis added). Like Omar, Munaf did not seek to interfere with any Iraqi proceeding.

By this time, the district court in *Omar* already had held that the absence of a foreign conviction was one factor distinguishing *Omar* from *Hirota*. *Omar*,

416 F. Supp. at 26 n.11. Thereafter, U.S. military officers presented Munaf before the Central Criminal Court of Iraq ("CCCI") to face charges related to his alleged role in the kidnapping. *Id.*; Resp. to Pet'rs' Supp. Mot. for TRO at 1, *Mohammed v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. Oct. 16, 2006)(No. 06-1455).

Iraqi law requires that an aggrieved party issue a formal complaint before a prosecution can go forward. JA 52-53, *Munaf v. Geren*, 482 F.3d 582 (D.C. Cir. 2007)(No. 06-5324)("*Munaf* DC Cir. JA"). Because Munaf was charged with kidnapping Romanian citizens, the CCCI could not begin a prosecution without a complaint from the Romanian government. *Id*. At an October 12 proceeding, Lieutenant Robert Pirone of the United States Coast Guard appeared in the CCCI to make a formal complaint against Munaf. Lieutenant Pirone said the Romanian Embassy had authorized him to appear on its behalf. *Id*. at 52. Pirone later claimed this authorization was documented in a letter submitted in advance to the Iraqi court. *Id*.

No such letter was produced. *Id.* at 48. It is not part of the record in any court. Neither Munaf nor his counsel has seen it, nor have they been able to inquire into the circumstances under which it was purportedly obtained. The Government of Romania has repeatedly denied it authorized Lieutenant Pirone to speak on its behalf. *Id.* at 86; *see also* U.N. HRC, Communication No. 1539/2006, *Munaf v. Romania* (CCPR), Submissions of Romanian Gov't on Admissibility, ¶ 21 (Mar. 5, 2007)("Romanian representatives from the Embassy

in Iraq had no knowledge either of the trial, nor of the alleged authorization allegedly given by the Romanian authorities to U.S. officer Robert Pirone.").[8]

The Iraqi trial court convicted Munaf and sentenced him to death. JA 49. Munaf's appeal to the Court of Cassation is pending.

Munaf notified the District Court of his conviction and death sentence. Pet'rs' Supp. Mot. for TRO at 1, *Mohammed v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. Oct. 13, 2006)(06-1455). Nonetheless, on October 19, 2006, the District Court dismissed the case for want of subject matter jurisdiction and denied the TRO application as moot. *Mohammed v. Harvey,* 456 F. Supp. 2d 115 (D.D.C. 2006). Munaf appealed, and a divided panel of the D.C. Circuit affirmed, concluding that its hands were tied by the *per curiam* opinion in *Hirota v. MacArthur*, 338 U.S. 197 (1948). *Munaf v. Geren*, 482 F.3d 582, 584-585 (D.C. Cir. 2007).

Speaking for the majority, Judge Sentelle questioned "the logic of *Hirota*," "particularly as applied to U.S. citizens," and "acknowledged" that this Court's recent decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507

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[8] Mr. Munaf has filed a complaint against Romania in the United Nations Human Rights Committee, alleging, *inter alia*, that Romania did not act to protect Mr. Munaf from a death sentence. In its response, Romania has insisted Pirone had no authority to act for the Romanian Government. The documents are available at http://www.brennancenter.org/dynamic/subpages/download_file_49032.pdf and http://www.brennancenter.org/dynamic/subpages/download_file_49034.pdf.

(2004), and *Rasul v. Bush*, 542 U.S. 466 (2004), cast doubt on "*Hirota*'s continuing vitality." 06-1666, Pet. 5a-6a. Concurring in the judgment, Judge Randolph rejected the government's jurisdictional argument, agreeing with Munaf that citizenship and detention by U.S. forces were "critical" distinctions between this case and *Hirota*. 06-1666, Pet. 7a (Randolph, J., concurring in the judgment); *see also id*. at 8 (extending *Hirota* in this case "would contradict . . . the majority and dissenting opinions in *Rasul*"). Judge Randolph, however, would have denied relief on the merits based on grounds neither party had briefed. *Id*. at 7-9.

On May 9, the court below granted Munaf's motion to stay its mandate pending the filing and ultimate disposition of this petition. Order Granting Mot. to Stay the Mandate, *Munaf v. Geren*, 482 F.3d 582 (D.C. Cir. May 9, 2007)(No. 06-5324); JA 12. The effect of that order was to continue the Court of Appeals' interim injunction of December 15, 2006, which restrained Munaf's transfer to Iraqi custody *pendente lite*. Order Granting Mot., *Munaf*, 482 F.3d 582 (D.C. Cir. Dec. 15, 2006)(No. 06-5324)(en banc); JA 9.

## SUMMARY OF ARGUMENT

U.S. citizens imprisoned by U.S. officers at a U.S. prison in Iraq may invoke the habeas statute to challenge their detention and threatened transfer to Iraqi custody. The district courts therefore have jurisdiction, and the *Omar* court that so held did not abuse its discretion in freezing the status quo to allow

measured consideration of Omar's constitutional and statutory claims.

The Executive challenges both jurisdiction and the power to preserve it. Its arguments are two attempts aimed at one result – a "blank check" over "the rights of the Nation's citizens." The Court recently refused this demand, and should again. *Hamdi*, 542 U.S. at 536 (plurality op.); *see also id.* at 553 (Souter, J., concurring); *id*. at 554 (Scalia, J., dissenting on other grounds). For to accept either of the government's arguments here would render *Hamdi* a dead letter.

I. The habeas statute grants federal courts jurisdiction to hear petitions from citizens "held under or by color of the authority of the United States" or imprisoned "in violation of the Constitution or the laws or treaties of the United States." 28 U.S.C. § 2241(c)(1), (c)(3). The petitions filed in the District Court on behalf of Omar and Munaf fit comfortably within both provisions.

Omar and Munaf are detained by U.S. soldiers. Their immediate custodian is a Lieutenant Colonel in the U.S. Army. Every officer in the chain of command is a soldier in the U.S. Army. Their ultimate custodian, the Secretary of the Army, is present within the district court's territorial jurisdiction. The U.S. military – not the U.N., not any coalition partner, and not Iraq – has plenary and exclusive authority over their custody. They are, therefore, "held under or by color of the authority of the United States." And their claim

that although innocent, they have been detained without judicial process, "unquestionably describe[s] custody in violation of the Constitution or laws or treaties of the United States." *Rasul*, 542 U.S. at 483 n.15.

The government nevertheless contends that American participation in military operations authorized by the U.N. Security Council vests the Executive with the power to hold citizens without judicial review. Its position contradicts the plain meaning of the habeas statute and raises "serious constitutional questions." *INS v. St. Cyr*, 533 U.S. 289, 314 (2001). Only Congress has the power to limit a citizen's constitutional right to challenge Executive detention. And the Executive cannot by international agreement achieve what the Constitution forbids. *See Reid v. Covert*, 354 U.S. 1, 5-6 (1957)(plurality op.). The government's argument also brooks no geographic limit: Invoking "international authority," Executive officials could seize and detain citizens in the United States without judicial review. This is plainly not the law.

The government relies wholly on the nine-sentence *per curiam* in *Hirota*. But *Hirota* involved habeas applications filed in this Court by enemy aliens who raised collateral challenges to "the judgments and sentences" of a foreign tribunal. The case is irrelevant to applications filed in the district court by U.S. citizens making a direct challenge to U.S. detention by U.S. soldiers at a U.S. prison. Omar and Munaf do not seek to "overrule" *Hirota*; it is the

government that seeks to extend *Hirota* beyond its original sphere.

The Executive supports this attempt to oust the federal courts of jurisdiction by speculating about intergovernmental friction. But international law sets a clear rule – hinged on "effective control" – distributing jurisdiction when several nations act in coordination. Applying that rule, and rejecting arguments such as the ones made by the government here, the British House of Lords recently affirmed jurisdiction over British officers within the Multi-National Force-Iraq ("MNF-I") who were detaining a British citizen. *R. (on the application of Al-Jedda) v. Sec'y of State for Def.*, [2007] U.K.H.L. 58. Compliance with the rule of law will thus not embarrass the United States or place it at odds with the United Nations.

II. Having jurisdiction, the District Court did not abuse its discretion by issuing a standstill injunction. The government's claim that it has unlimited power to transfer would leave jurisdiction an empty vessel. For if a federal court lacks power to enter such routine interim relief, habeas jurisdiction is hollow and Due Process a nullity.

The District Court has the power and duty to adjudicate two claims on remand: a challenge to indefinite detention by U.S. officers, in violation of the Due Process Clause, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); and a challenge to transfer to foreign custody and the consequent high risk of torture, in violation of the Due Process Clause and Section 2242(a) of the Foreign Affairs Restructuring and Reform Act ("the

FARR Act"). Pub. L. No. 105-277, div. G, 112 Stat. 2681-822 (1998). Federal officials lack authority to detain Omar and Munaf, innocent American citizens. They also lack authority under the applicable treaty to transfer U.S. citizens to Iraqi custody. Further, any transfer would be unlawful given the unrebutted evidence of likely torture. At this threshold stage, a preliminary injunction to permit litigation of these matters was entirely proper.

The government nonetheless argues it is entitled to judgment as a matter of law, relying principally on *Wilson v. Girard*, 354 U.S. 524 (1957), and the rule of non-inquiry. But *Wilson* confirms federal court jurisdiction to inquire into the statutory authority for an extraterritorial transfer, and the common-law rule of non-inquiry does not apply because Congress has directed courts to inquire into likely torture.

Finally, the government attacks the *preliminary* injunction with alarming speculation about the contours of a possible *final* injunction. But the dire consequences predicted by the government simply do not arise from an injunction that merely freezes the status quo. Petitioners may or may not prevail on all or some of their claims. Depending on the circumstances at that time, the courts below will fashion relief. Their work will then be amenable to review here.

The Court should remand these cases to the District Court for the "prudent and incremental"

adjudication of habeas petitioners' claims. *Hamdi*, 542 U.S. at 539 (plurality op.).

## ARGUMENT

As it has during prior periods of public anxiety, the Executive Branch once again demands the power to detain its citizens unrestrained by judicial review. In *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), for example, the government argued that martial law in Hawaii "was not subject to any judicial control whatever," and issued orders that "prohibited even [the] accepting of a petition for writ of habeas corpus by a judge or judicial employee or the filing of such a petition by a prisoner or his attorney." *Id.* at 309. In *Hamdi v. Rumsfeld*, the government argued that the Executive could designate a citizen an enemy combatant, and hold him without judicial scrutiny because the designation was "a quintessentially military judgment, representing a core exercise of the Commander-in-Chief authority." Brief for United States at 25, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)(No. 03-6696). The Court has generally resisted such extravagant demands. Those few occasions when it has succumbed have not been the Court's "finest hour." *Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting)(citing *Ex parte Quirin*, 317 U.S. 1 (1942)).

Today, the government argues that a U.N. Security Council Resolution transforms the United States into "the agent" of the United Nations and permits the military to detain American citizens without

judicial review. G. Br. 17-36. Alternatively, the government argues that any role the Judiciary might play is meaningless because the Executive has unlimited power to transfer citizens to other sovereigns. Both arguments should find no favor with the Court.

## I. The Lower Courts Have Jurisdiction.

Omar and Munaf are U.S. citizens who have been detained for years by U.S. officers at a U.S. prison. Their immediate custodian is a Lieutenant Colonel in the U.S. Army. Every officer up and down the chain of command is a soldier in the U.S. Army. And their ultimate custodian, the Secretary of the Army, is present within the District Court's territorial jurisdiction. Having done no wrong, they seek only what is guaranteed to all American citizens by the Suspension Clause, the Due Process Clause, and the habeas statute: the opportunity to test the lawfulness of their continued confinement in federal court.

Yet the government maintains the courts of their country are closed to them because the Executive has elected to become part of the "Multi-National Force-Iraq." This, the Executive claims, places federal officials beyond the reach of American courts, and the Constitution beyond the grasp of American citizens. The government is profoundly mistaken.

### A. The Habeas Statute Grants the District Courts Jurisdiction.

The modern habeas statute is a jurisdictional grant of extraordinary breadth. One section gives district courts jurisdiction over prisoners held "under or by color of the authority of the United States." 28 U.S.C. § 2241(c)(1). Another empowers the court to order relief whenever a prisoner is detained "in violation of the Constitution or laws or treaties of the United States." *Id.* at § 2241(c)(3). Taken together, "[i]t is impossible to widen this jurisdiction." *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 326 (1868). Omar and Munaf satisfy both provisions, and their allegations "fit[ ] comfortably within the terms of the modern habeas statute." *Omar*, 479 F.3d at 9.

First, Omar and Munaf are detained "under or by color of the authority of the United States." *Id.* (quoting § 2241(c)(1)). They are held by U.S. soldiers, and their ultimate custodian – the person who decides whether they remain imprisoned – is the Secretary of the Army, a federal official within the jurisdiction of the District Court who must answer to a federal court's command.[9]

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[9] The habeas statute instructs courts to act within their respective jurisdictions, i.e., "that the court issuing the writ have jurisdiction over the *custodian*." *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973)(emphasis added); *accord Rasul v. Bush*, 542 U.S. 466, 478-479 (2004).

Second, Omar and Munaf allege they have done no wrong but are imprisoned by federal officials without legal process. This "unquestionably describe[s] 'custody in violation of the Constitution or laws or treaties of the United States.'" *Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004)(quoting § 2241(c)(3)); *Hamdi*, 542 U.S. at 529 (indefinite detention violates "the most elemental of liberty interests – the interest in being free from physical detention by one's own government"). Jurisdiction under the statute requires "nothing more." *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973); *Rasul*, 542 U.S. at 482-84.

The government strains to avoid this clear statutory command by arguing that Omar and Munaf are held under MNF-I "authority," not "under or by color of the authority of the United States." G. Br. 17-18. But this contention is belied by the record.

The government concedes, as it must, that the entire MNF-I serves under the "unified command" of the U.S. military. *See* S. C. Res. 1546, ¶ 10, at 4, U.N. Doc. S/RES/1546 (June 8, 2004); G. Br. 2. In this context, "[c]ommand constitutes the authority to issue orders covering every aspect of military operations and administration."[10] The government also

[10] Statement by the Press Secretary Regarding Presidential Decision Directive-25 (May 6, 1994), http://www.fas.org/irp/offdocs/pdd25.htm (last visited Feb. 18, 2008). This Decision Directive, issued by President Clinton May 3, 1994, describes in detail the role of U.S. forces in UN-authorized military operations.

(Continued on following page)

concedes that the immediate and ultimate custodians in this litigation, as well as every person responsible for the detention of Omar and Munaf, are American officers who answer only to the U.S. Constitution. As General George Casey, the former Commander of the MNF-I, explained to the Senate Armed Services Committee, U.S. soldiers participating in the MNF-I have "no reporting chain that goes back to the United Nations." *See Nomination of General George W. Casey, Jr., USA: Hearing Before the S. Comm. On Armed Svcs.*, 108th Cong. (June 24, 2004)(Statement of Gen. Casey); G. Br. 2. Indeed, when asked by the Committee whether the international character of the MNF-I would lead to any loss of U.S. authority, General Casey assured the Committee there would be "none at all[.]" *Id.*[11]

The United States military thus has plenary and absolute control over Omar and Munaf. Indeed, on

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While the Directive has never formally been made public, the account released by the White House vowed that "[t]he President retains and will never relinquish command authority over U.S. forces. . . . Command constitutes the authority to issue orders covering every aspect of military operations and administration. The sole source of legitimacy for U.S. commanders originates from the U.S. Constitution, federal law and the Uniform Code of Military Justice. . . ." *Id*.

[11] *See also Advance Questions for General George W. Casey, Jr., U.S. Army Nominee for Commander, Multi-National Force-Iraq*, 108th Cong. 3 (2004)(U.S. soldiers in MNF-I are "subject to the authority, direction and control of the Commander, U.S. Central Command"), http://www.senate.gov/~armed_services/statemnt/2004/June/Casey.pdf (last visited Feb. 18, 2008).

this record, it is impossible to identify any sense in which "the authority of the United States" is *lacking*. 28 U.S.C. § 2241(c)(1).[12] Nothing in this record suggests, for example, that the U.S. officials who detain Omar and Munaf would have to ask permission from other member States before releasing them. Nor does the government claim that there is any other State, including Iraq, which could release them if the United States objected.[13]

This unilateral authority accounts for the government's concessions before the Court of Appeals in *Omar*, where it agreed not only that the prisoners were "in the authority and control of the United States," and "'subject to' no independent MNF-I authority," but that the degree of control exercised by the United States empowered it to *refuse* Iraq's demand for custody. *See Omar v. Harvey*, 479 F.3d 1, 9 (D.C. Cir. 2007)(citations omitted); Tr. of Oral

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[12] Conceivably, there may be cases in which U.S. involvement in a prisoner's detention is so *de minimis* that U.S. officers would lack the authority to compel his release and his ultimate custodians would not be within the territorial jurisdiction of a district court. If the government were to assert such a defense in a particular case, the Court should examine it in the same pragmatic light as we urge it in this case. *See also supra*, 22-23 n.10.

[13] Hence, the government has never suggested it could not comply with the preliminary injunction entered by the District Court in *Omar*, or with the stay entered by the Circuit Court in *Munaf*. Nor has it asserted it would decline to obey a federal court order. At the end of the day, U.S. government officials alone will decide whether to release Omar and Munaf.

Argument at 11-12, 25-26, *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir. 2007)(No. 06-5126); *see also* G. Br. 39-40 n.10 (federal officials make a discretionary decision before any transfer to Iraqi custody). If the United States *does not* have "authority and control" over the prisoners, then no one does and they languish in a legal black hole.[14]

Conceding its unlimited authority to detain or release, the government nonetheless asks the Court to accept the formalistic fiction of MNF-I "authority." But habeas corpus is celebrated as the Great Writ precisely because it is *not* a "formalistic remedy." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). The great genius of the writ is its time-tested "ability to cut through barriers of form," *Harris v. Nelson*, 394 U.S. 286, 291 (1969), in order that the Executive not

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[14] The government concedes these facts, but argues the same could have been said of General Douglas MacArthur, the ultimate custodian in *Hirota v. MacArthur*. We discuss *Hirota* at length below. *See infra*, 35-44. Here it is sufficient to note that the government is simply wrong about *Hirota*. In *Hirota*, Solicitor General Philip Perlman argued "that in case of conflict it would be General MacArthur's duty, so long as he is the Supreme Commander, to obey the directives of the Far Eastern Commission and not our War Department." Tr. of Record at 42, *Hirota v. MacArthur*, 338 U.S. 197 (1948)(No. 239). The Solicitor General asserted that MacArthur *was not* "acting under the Constitution and laws of this country," that "no process that could be issued from this court . . . would have any effect on his action," and that General MacArthur *did not* serve "under the Joint Chiefs of Staff." *Id*. at 50-51. The government has never made such an argument here.

be allowed to imprison a citizen without judicial review.

To that end, the Court has consistently read the statute functionally. *See*, *e.g.*, *In re Kaine*, 55 U.S. (10 How.) 103, 109-111 (1852)(U.S. commissioner who arrested Irish national at the request of the British government was acting under authority of the United States although he did not consult with the United States government, which played no role in his actions); *see also United States v. Jung Ah Lung*, 124 U.S. 621, 626 (1888)(Chinese national detained by steamship master at the direction of San Francisco customs authorities was in custody "under or by color of the authority of the United States"). The Court should do so again here.[15]

[15] This reading of the habeas statute is also consistent with international law, which makes the U.S. legally responsible for the prisoners because it maintains "effective control" over their custody. *See* Int'l Law Comm'n, *Responsibility of International Organizations: Titles and Texts of the Draft Articles 4, 5, 6, and 7 Adopted by the Drafting Committee*, art. 5, U.N. Doc. A/CN.4/L.648 (May 27, 2004); *see also Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)("[A]n act of Congress ought never to be construed to violate the law of nations in any other possible construction remains."). Applying this standard, U.N. bodies disclaim responsibility for the conduct of troops acting pursuant to Security Council authorization when those troops remain under the "operational command and control" or "effective command and control" of participating governments. U.N. Doc. A/CN.4/556 (May 12, 2005).

### B. The Court Should Not Construe the Habeas Statute to Allow the Executive to Suspend the Writ and Imprison Citizens Without Due Process Merely by Participating in U.N. Military Operations.

The government recognizes that, but for its claim of multinational authority, the district court would have jurisdiction. Tr. of Oral Argument at 24, *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir. 2007)(No. 06-5126). According to the government, therefore, jurisdiction is ousted solely by the Executive's "agree[ment] to participate in the MNF-I . . . in conjunction with U.N. Resolution 1546." G. Br. 24. The Executive thus identifies its own action – absent any congressional involvement – as sufficient to eliminate jurisdiction. The Court should avoid the "serious constitutional questions" created by this claim, which allows the Executive Branch to suspend the Writ by its unilateral decision to participate in multinational military operations. *INS v. St. Cyr*, 533 U.S. 289, 314 (2001); *see also Zadvydas v. Davis*, 533 U.S. 678, 692 (2001).[16]

It has long been understood that the Executive acting alone has no power to suspend the writ: "If at

[16] Under the government's theory, a person seized before the U.S. agreed to participate in the MNF on May 22, 2003, could invoke habeas jurisdiction, but would forfeit jurisdiction as soon as the agreement were entered, G. Br. 24, and apparently would regain it if the agreement lapsed, *id.* at 22 n.5. Thus, by adjusting arrangements with foreign governments, the Executive can choose whether to allow habeas review.

any time the public safety should require the suspension [of habeas], *it is for the legislature to say so*." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (emphasis added); *accord Hamdi*, 542 U.S. at 536-37 (plurality op.); *id.* at 545 (op. of Souter, J.); *id.* at 562 (Scalia, J., dissenting).

It is equally clear that Munaf and Omar – U.S. citizens held by federal officials – are entitled to the protections of the Due Process Clause. "When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." *Reid v. Covert*, 354 U.S. 1, 6 (1957)(plurality op.); *Hamdi*, 542 U.S. at 534 n.2 (plurality op.)(citizen detained by military during war is "constitutionally entitled" to due process); *accord Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).

The Due Process and Suspension Clauses converge in habeas; only through habeas can citizens detained by the Executive vindicate these entitlements. *Hamdi*, 542 U.S. at 555-556 (Scalia, J., dissenting) ("[H]abeas corpus [is] the instrument by which due process could be insisted upon by a citizen illegally imprisoned."). Here, Congress took no step to suspend the writ. The government's interpretation of the habeas statute would therefore mean that the Executive Branch could suspend the Writ of its own will and imprison a citizen without judicial review or due process. This it cannot do.

The Executive cannot entreat with a foreign sovereign to do what the Constitution forbids. In *Reid v. Covert*, the government argued that an executive agreement between the United States and Great Britain vested military courts with "exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents." Pursuant to this agreement, the United States tried and convicted two American citizens before military tribunals. 354 U.S. at 4, 15 (plurality op.).[17]

The Court disagreed, underscoring the long-settled rule that "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. . . . [N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Id.* at 5-6, 16; *accord Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *United States v. Wong Kim Ark*, 169 U.S. 649, 704 (1898)(invalidating treaty as inconsistent with Fourteenth Amendment).

That the government's interpretation of the habeas statute raises such grave constitutional concerns is reason enough to reject it. *St. Cyr*, 533 U.S. at 298-303. Constitutional avoidance is especially

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[17] *See* Executive Agreement of July 27, 1942, 57 Stat. 1193 (cited in *Reid v. Covert*, 354 U.S. 1, 15, n.29 (1957)). *Reid* was consolidated with *Kinsella v. Krueger*, 351 U.S. 470 (1956), involving another citizen who, like Reid, killed her husband, a U.S. serviceman.

appropriate here because the government's position cannot be confined to detentions abroad. If "international authority" alters the statutory command, as the government maintains, then it makes no difference where the prisoners are held.[18] So long as the United States, in its capacity as unified commander of the MNF, denominates the jailer as part of the MNF-I, jurisdiction would be ousted, even if the prisoner were held in Charleston, South Carolina.

### C. The Court Has Repeatedly Entertained Habeas Challenges From Citizens Detained by the U.S. Military Pursuant to International Authorization.

The Executive's claim, moreover, is inconsistent with prior decisions of the Court that have often entertained habeas applications from citizens detained by the military pursuant to "international authority." *Madsen v. Kinsella*, 343 U.S. 341 (1952), for instance, involved an American citizen convicted and sentenced by an occupation court in Germany. This court was the creature of a multinational "Occupation Statute," drafted jointly by France, England, and the United States, which divided post-war Germany into three zones and authorized detention and trial of civilians by the Allies. *Id.* at 345 n.7, 367-370

[18] Nor is there any reason why the government's argument would not equally extend to bilateral agreements with Iraq or another State, which would similarly create a "multinational force under international authority." G. Br. 21.

(referencing Allied High Commission, Law No. 2, Art. 1, 14 Fed. Reg. 7457 and Allied High Commission, Law No. 13, Art. 1, 15 Fed. Reg. 1056-1057); *see also* Brief for Resp't at 7 & n.4, *Madsen v. Kinsella*, 343 U.S. 341 (1952)(No. 411): *see also* Brief *Amicus Curiae* of National Institute of Military Justice (military command cannot be delegated to U.N., and was not delegated in Iraq).[19]

Likewise, in *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), the Court considered a habeas application brought by a citizen detained by the U.S. military in Korea. U.S. military operations in Korea, as in Iraq, were authorized by a U.N. Security Council Resolution. *See* S.C. Res. 84, U.N. Doc. S/RES/84 (July 7, 1950). As in Iraq, this Resolution envisaged a multinational force under the unified command of the

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[19] The "Occupation Statute" replaced a similar Allied agreement establishing military courts in post-war Germany. *Madsen*, 343 U.S. at 362-369 (appendix). In *Flick v. Johnson*, 174 F.2d 983 (D.C. Cir.), *cert. denied*, 338 U.S. 879 (1949), the circuit court had held that a tribunal convened under the earlier Allied authority was international in nature, and thus not a court of the United States. *Id.* at 985. Yet when this Court addressed the successor courts in *Madsen*, it never questioned that it had habeas jurisdiction over Madsen's petition.

The district court in *Munaf* tried to distinguish *Madsen* by suggesting the international court there had been "established unilaterally by the United States." *Mohammed v. Harvey*, 456 F. Supp. 2d 115, 125 (D.D.C. 2006). As noted above, and as stated in *Flick*, this is incorrect. The court that tried, convicted, and sentenced Madsen existed only because the "Occupation Statute" authorized its creation, and that statute was entirely international.

United States. *Id.* at ¶¶ 3-4. If the government were correct, this Resolution would have stripped the courts of habeas jurisdiction. Yet the Court held that the district court had jurisdiction over Toth's ultimate custodians such that habeas relief would be proper. *Toth*, 350 U.S. at 23; *accord Smallwood v. Clifford*, 286 F. Supp. 97 (D.D.C. 1968)(considering habeas application from citizen held by United States military in Korea pending Korean prosecution).[20]

Even the case upon which the government places greatest reliance in its challenge to the preliminary injunction, *Wilson v. Girard*, 354 U.S. 524 (1957) (per curiam), supports jurisdiction. In *Wilson*, the petitioner, an American soldier detained in Japan, faced prosecution in Japanese courts for a violation of Japanese law under a bilateral treaty and executive agreement. *Id.* at 526-527. If the government's reading of the habeas statute were correct, the *Wilson* Court should have simply dismissed for want of jurisdiction. Yet neither this Court nor the lower courts questioned their power to hear Girard's habeas petition. *Id.*; *see infra*, 53-57.

It is no answer to point out that some of the prisoners in these cases were transferred to the United States in the course of the litigation. In other

[20] Similarly, *Reid v. Covert* arose in the context of U.S. military operations in Britain authorized by a bilateral Executive Agreement, the terms of which gave the United States the power to detain prisoners. 354 U.S. at 15-16 n.29 (plurality op.). Yet the Court granted relief under the habeas statute. *Id.* at 41.

cases the prisoners were detained overseas throughout the case, with no change in the jurisdictional calculus.[21] And as the Court in *Hamdi* recognized, grafting a territorial exception onto the habeas statute would create a "perverse incentive" to "keep citizen-detainees abroad." 542 U.S. at 524 (plurality op.). It would reward the government for abandoning what former Solicitor General Perlman called its "practice" of returning citizens to this country where they can file a "normal habeas." Perlman, *Habeas Corpus and Extraterritoriality*, 36 A.B.A. J. 187, 190 (1950).

In any event, as the government pointed out in *Hamdi*, the location of detention has nothing to do with its legality: "Once the military makes a determination that an individual is an enemy combatant who should be detained in connection with the conflict, the *place* where the combatant is detained in no way affects the legality of that determination." Brief for United States at 20, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)(No. 03-6696)(emphasis in original); *see also id*. at 31 (lawfulness of Hamdi's detention unaltered

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[21] *See*, *e.g.*, *Burns v. Wilson*, 346 U.S. 137, 139 (1953) (plurality op.)(for prisoners detained overseas, question was "not whether the District Court has any power at all to consider petitioners' [habeas] applications; rather our concern is with the manner in which the Court should proceed to exercise its power"); *Braden*, 410 U.S. at 498 ("Where American citizens confined overseas . . . have sought relief in habeas corpus . . . , the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim.") (internal citations omitted).

"when, consistent with the intent of the Geneva Convention, he is removed from Afghanistan to a safer location").

Thus, the Court has routinely reviewed habeas applications from citizens detained by the military pursuant to "international authority." And as this doctrine has deepened, Congress has shown no inclination to alter these results. The evidence of intent, however, is supported by more than mere congressional inaction. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983). In 2006, Congress amended the habeas statute to exclude alien enemy combatants detained overseas. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-2636 (amending 28 U.S.C. § 2241(e)(1)). But Congress deliberately left a citizen's right to challenge his detention in habeas completely undisturbed.[22]

[22] The different treatment for citizens was deliberate. *See* 152 Cong. Rec. S10,243-01, S10,267 (daily ed. Sept. 27, 2006) (Remarks of Sen. Jon Kyl)(R-AZ)("This legislation has nothing to do with citizens. . . . *And, of course, the writ of habeas corpus applies to U.S. citizens*." (emphasis added)); 152 Cong. Rec. H7,925-02, H7,946 (daily ed. Sept. 29, 2006)(Remarks of Rep. Dan Lungren)(R-CA) ("[*U*]*nder the expressed terms of the bill, an American citizen will have the unencumbered ability to challenge his or her detention as they have under the Constitution*." (emphasis added)).

### D. *Hirota v. MacArthur*, a Collateral Challenge to a Foreign Tribunal Filed by Enemy Aliens in This Court, Has No Relevance to This Litigation, a Direct Challenge to U.S. Detention Filed by U.S. Citizens in the District Court.

The government makes no serious attempt to overcome these impediments to its position. Instead, it leans heavily on the *per curiam* in *Hirota*, where the Court refused to entertain litigation brought by convicted Japanese war criminals who challenged the judgments and sentences of the International Military Tribunal for the Far East ("IMTFE"). But *Hirota* is distinguishable in three fundamental respects. To recognize this is not to "overrule" *Hirota*, as the government insists, but merely to confine it to its proper sphere.

#### 1. The *Hirota* Petitioners, Unlike Omar and Munaf, Filed Directly in This Court, Though They Were Not Within the Court's Original or Appellate Jurisdiction.

Five months before Hirota sought an original writ, the Court held in *Ahrens v. Clark* that federal district courts lacked statutory authority to issue the writ to those imprisoned outside their territorial jurisdiction. 335 U.S. 188, 192 (1948). After *Ahrens*, Hirota and his co-petitioners believed they needed to proceed *directly* here. Brief of Pet'r at 2, *Hirota v. MacArthur*, 338 U.S. 197 (1948)(No. 239) ("Had it not been for

the decision in *Ahrens v. Clark* . . . the petitioner might have filed a petition for Writ of Habeas Corpus in the District Court. . . .”). Counsel repeated this position at oral argument. Tr. of Record at 19, *Hirota*, 338 U.S. 197 (No. 239).

Under Article III, however, this Court has only two species of jurisdiction: original and appellate. U.S. Const. art. III, § 2, cl. 2. “Original” subject matter jurisdiction in the Supreme Court is limited to “cases affecting ambassadors, public ministers, and consuls, and other cases in which a State is a party.” *Id.*; *Ex parte Siebold*, 100 U.S. 371, 374-375 (1879); *accord Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-176 (1803). The Court in *Hirota* clearly lacked original jurisdiction.

Yet the Court also had no appellate jurisdiction. Under the Regulations and Exceptions Clause, U.S. Const. art. III, § 2, cl. 2, the Court’s appellate jurisdiction is dependent upon statute, and the Court may issue a writ of habeas corpus only where it has the statutory power to review the decision of some lower tribunal. *See Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807)(Marshall, C.J.)(exercising statutory authorization to issue writ of habeas corpus in aid of Court’s appellate jurisdiction over lower federal court); *see also Felker v. Turpin*, 518 U.S. 651, 667 n.1 (1996)(Souter, J., concurring). Plainly, Congress had given the Court no power to review the “judgments and sentences” of the IMTFE.

Lacking either appellate or original jurisdiction, the Court had no choice but to rule as it did, denying Hirota and his co-petitioners leave to file, and leaving them no federal forum. *Hirota*, 338 U.S. at 198. But the *Ahrens* rule has not survived. Today the district court has jurisdiction over a citizen detained abroad so long as an ultimate custodian is subject to the court's command. *See*, *e.g.*, *Rumsfeld v. Padilla*, 542 U.S. 426, 435-436 nn.8-9 (2004); *Braden*, 410 U.S. at 498. Here, the ultimate custodian is concededly the Secretary of the Army, located in the District of Columbia, where Omar and Munaf began this litigation.[23]

### 2. The Petitioners in *Hirota*, Unlike Omar and Munaf, Sought Collateral Review of the "Judgment and Sentences" of a Foreign Tribunal.

Even if the petitioners in *Hirota* had been within the Court's Article III jurisdiction, their suit would still have failed since they challenged the creation, composition, and workings of the IMTFE. Omar and

[23] In the courts below, the government responded that *Hirota* makes no specific mention of original or appellate jurisdiction. In subsequent cases, however, the Court denied leave to file petitions like the one filed by Hirota explicitly because the Court lacked original jurisdiction. *See, e.g.*, *Ex parte Betz*, 329 U.S. 672, 672 (1946)(denying leave to file original habeas application "for want of original jurisdiction"); *Everett v. Truman*, 334 U.S. 824 (1948)(same); *In re Dammann*, 336 U.S. 922, 923 (1949)(same); Fallon, et al., *The Federal Courts and the Federal System* 316 (5th ed. 2003)(collecting cases).

Munaf, by contrast, challenge the legality of detention at the hands of their own government. Their petitions, unlike the petitions in *Hirota*, fall into the "historical" heartland of habeas "as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301.

As the Court in *Hirota* properly perceived, the IMTFE was "not a tribunal of the United States." It was the product of lengthy diplomatic negotiations beginning with the Potsdam Agreement of July 26, 1945, continuing during the Moscow Conference of late December 1945, and culminating in the creation of the Far Eastern Commission, a group that included representatives from eleven nations and that authorized the establishment of the IMTFE in April 1946. *See* Documentary App. at 1-3, 14-22, 31-46, *Hirota v. MacArthur*, 338 U.S. 197 (1948)(Nos. 239, 240, 248).

In their petition, Hirota and his fellow petitioners leveled three charges against the IMTFE: that General MacArthur exceeded his constitutional authority when he created the tribunal; that the predicate acts for conviction were "beyond the scope and purview of the Japanese instrument of surrender"; and that the commission deprived them of the rights essential to a fair trial. *See* Pet'n for Writ of Habeas Corpus at 29, 30, 34, *Hirota v. MacArthur*, 338 U.S. 197 (1948)(No. 239); Brief of Pet'r at 18-22, *Hirota*, 338 U.S. 197 (No. 239)(alleging various procedural errors during the IMTFE proceedings).

In short, they asked the Court to scrutinize the legitimacy and operation of a foreign court. But it is axiomatic that an American court does not provide collateral review of proceedings in a foreign tribunal. *Cf. Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004). The American judiciary, therefore, simply had "no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners." *Hirota*, 338 U.S. at 198.[24]

Omar and Munaf, by contrast, make no challenge to any Iraqi or foreign tribunal. As the Court of Appeals in *Omar* understood, they "seek[ ] not to collaterally attack a final international conviction, but only to test the lawfulness of [their] extrajudicial detention in Iraq, where [they have] remained in the control of U.S. forces for over two years without legal process." *Omar*, 479 F.3d at 8. And to the extent

[24] The government points out that the petitioners in *Hirota* were in the custody of General Douglas MacArthur, who, it is said, was "under the direct command and control of the United States." G. Br. 19-20. As noted earlier, however, the Solicitor General in *Hirota* argued precisely the opposite, insisting that no officer in the country, including General MacArthur, could order "the release of the prisoners." Tr. of Record at 50, *Hirota v. MacArthur*, 338 U.S. 197 (1948)(No. 239); *see supra*, 25 n.14. Even if the government's revisionist view of history were correct, it would not alter the result. MacArthur's status as a U.S. soldier did nothing to bring the case within the Court's original or appellate jurisdiction; could not transform the petitioners' allegations into something other than an attack on the "judgments and sentences" of a foreign tribunal; and did not convert the petitioners from enemy aliens to American citizens.

federal officials seek to transfer them to Iraqi custody, they challenge the lawfulness of their own government's decisions, not Iraqi action. *Hirota*, therefore, simply does not apply.[25]

Recognizing that Munaf and Omar do not challenge a foreign judgment, the government makes an unconvincing eleventh-hour attempt to liken the three-person screening panels that apparently labeled them "security internees" and, in Omar's case, also an "enemy combatant," to the nearly two-year trial conducted by the IMTFE and at issue in *Hirota*. The Court should reject this argument.

Omar and Munaf challenge their detention by U.S. officers, not the result of some extra-record screening process. The government pointedly does not suggest the proceedings of the screening panels, which took place without counsel, satisfied the Due

[25] Nor does the *Hirota* bar to collateral challenges impede Munaf's inquiry into the key role that Lieutenant Pirone played in initiating the Iraqi proceedings against him. The government concedes that Pirone did so but says it was at Romania's behest. G. Br. 10 n.3. Romania, however, has formally, publicly, and repeatedly disavowed any such delegation of authority. *See supra*, 12-13 & n.8. Without questioning the Iraqi process, Munaf assuredly is entitled to question whether a U.S. official used false pretenses to secure the foreign prosecution that Respondents now proffer in their defense. *Cf. In re Burt*, 737 F.2d 1477, 1484 (7th Cir. 1984)("[The government] must, in carrying out its treaty obligations, conform its conduct to the requirements of the Constitution. . . .").

Process Clause. If the government makes such an argument on remand, Munaf and Omar will respond as needed, and the lower court will take the measure of these proceedings against the requirements of the Fifth Amendment. *Hamdi*, 542 U.S. at 538 (plurality op.); *see* Part II, *infra*.[26]

In short, these cases are direct challenges to U.S. detention at a U.S. prison, not collateral challenges to the workings and results of a multinational tribunal.

### 3. The *Hirota* Petitioners, Unlike Omar and Munaf, Were Enemy Aliens Who Did Not Enjoy the Privilege of Litigation in American Courts.

Finally, unlike Hirota and his co-petitioners, Omar and Munaf are American citizens who enjoy a status "meant to have significance in the structure of

[26] The government claims the process employed by these panels exceeded the requirements of Article 5 of the Geneva Conventions. G. Br. 5. As the court below in *Omar* pointed out, however, "the record . . . reveals little about the panel's operation." 479 F.3d at 3. Because counsel for Omar and Munaf was finally allowed to meet with his clients in January 2008, on remand the habeas petitioners will describe how these panels actually functioned, as opposed to the fulsome description given by the government. Finally, the government calls this proceeding an "MNF-I tribunal." G. Br. 5. As with every point in its brief where it describes MNF actors, the tribunal consisted only of American soldiers. Tr. of Oral Argument at 31-32, *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir. 2007)(No. 06-5126).

our government." *Ambach v. Norwick*, 441 U.S. 68, 75 (1979). In this regard – and quite independently of other considerations – their habeas actions stand on wholly different footing from Hirota's.

The government devalues the "'priceless treasure'" of citizenship, *Fedorenko v. United States*, 449 U.S. 490, 507 (1981)(citation omitted), pointing out that *Hirota* does not specifically rely on alienage. G. Br. 31-36. But this makes far too much of far too little. The brief *per curiam* in *Hirota* does barely more than describe the petitioners – "residents and citizens of Japan." 338 U.S. at 198. *Hirota* did not address whether citizenship *alone* could provide the basis for jurisdiction when U.S. officials detain a person overseas. In his later-filed concurrence, Justice Douglas warned that the *per curiam* should not be read to stand for more than it could bear. *Id.* at 202 (Douglas, J., concurring)("If no United States court can inquire into the lawfulness of [an American citizen's] detention, the military have acquired, contrary to our traditions . . . a new and alarming hold on us.").[27] The

[27] And in fact, during the following Term, the Court heeded Justice Douglas' admonition. In 1949, several U.S. citizens imprisoned by the military in Germany sought leave to file habeas petitions directly in this Court. Because they were beyond the Court's original and appellate jurisdiction, the Court denied the motion. *In re Bush*, 336 U.S. 971, 971 (1949)(mem.). But unlike in *Hirota*, which concluded that no American court had "power or authority" over the prisoners, the Court in *Bush* denied the motions "*without prejudice to the right to apply to any appropriate court that may have jurisdiction.*" *Id*. (emphasis added). Bush promptly re-filed his petition in the District Court

(Continued on following page)

brief filed by the government in this case shows that Justice Douglas' warning was "prescient." *Omar v. Harvey*, 416 F. Supp. 2d 19, 24 n.7 (D.D.C. 2006).

In any case, whatever ambiguity lingered on this score after *Hirota* was dispelled two years later in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), where the Court rejected the Solicitor General's argument that *all* prisoners incarcerated by the military overseas – whether citizen or alien – had no right to challenge their detention in habeas. *See* Brief of Pet'r at 14-15, *Johnson v. Eisentrager*, 339 U.S. 763 (1950)(No. 306). The Court rejected this position:

> Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection.

*Eisentrager*, 339 U.S. at 769-770.[28] Since *Eisentrager*, no appellate court in the country has held that a U.S. citizen imprisoned by the military overseas was

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for the District of Columbia, which exercised jurisdiction. *In re Bush*, 84 F. Supp. 873 (D.D.C. 1949).

[28] The government suggests that the Court cannot really mean what it said in *Eisentrager* since the language, at least as the government reads it, implies that U.S. citizens could challenge detention by a foreign government. G. Br. 32. But *Eisentrager* said no such thing, and obviously did not mean to alter the requirement that the custodian be subject to the Court's command.

beyond the habeas jurisdiction of the federal courts – until the decision below in *Munaf*.[29]

### E. Complying With the Rule of Law Will Not Embarrass the United States.

Finally, the government argues that allowing American citizens to challenge their detention at the hands of American soldiers at an American prison would somehow embarrass America before her allies. G. Br. 26. This is a variant of the argument pressed below that the habeas applications should be dismissed because determining the lawfulness of a citizen's detention is a "political question."[30] Repackaging this argument makes it no more convincing.

The government attempts to oust jurisdiction with the specter that "courts of other nations" might also exercise jurisdiction with conflicting results. G. Br. 26. But as we have noted, international law already provides a clear rule for distributing jurisdiction when nations act in coordination. *See* Int'l Law

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[29] And even then, only reluctantly. *See Munaf v. Geren*, 482 F.3d 582, 584 (D.C. Cir. 2007)("[W]e do not mean to suggest that we find the logic of *Hirota* especially clear or compelling, particularly as applied to American citizens.").

[30] The government's arguments about foreign affairs, military discretion, and the absence of manageable standards echo the political question arguments pressed and rejected in *Hamdi*. 542 U.S. at 535 (plurality op.)(rejecting "assertion that separation of powers principles mandate a heavily circumscribed role for the courts").

Comm'n, *Responsibility of International Organizations: Titles and Texts of the Draft Articles 4, 5, 6, and 7 Adopted by the Drafting Committee*, art. 5, U.N. Doc. A/CN.4/L.648 (May 27, 2004). The "effective control" rule is not only congruent with the bounds of habeas jurisdiction, *see supra*, 21-26, it also guards against conflicts of jurisdiction and prevents "black holes" that are anathema to international law. Applying this rule, the British House of Lords recently held that the U.K., not the U.N., was responsible for adjudicating the propriety of the detention of a British citizen by British MNF-I forces in Iraq. *R. (on the application of Al-Jedda) v. Sec'y of State for Def.*, [2007] U.K.H.L. 58. No international outcry accompanied this decision.

In any event, the fear that an over-strong attachment to the rule of law will embarrass the United States cannot be a basis to deprive citizens of their liberty. This amounts to the contention that while the Commander in Chief cannot suspend the Writ, the Security Council can. The Constitution admits of no such construction.

## II. The District Court Did Not Abuse Its Discretion by Entering a Narrowly Tailored Standstill Junction.

The government argues next that no preliminary injunction, however narrow, could be entered in this case. G. Br. 38-51. But because the District Court has

jurisdiction, it also has the power to preserve it by freezing the status quo. *See* Fed. R. Civ. Pro. 65; *see also* 28 U.S.C. § 1651(a); *FTC v. Dean Foods Co.*, 384 U.S. 597, 603-604 (1966). Heated rhetoric about sheltering "alleged criminals" or hindering Iraqi courts not only mischaracterizes the narrow, *preliminary* order here, but also pointedly fails to address the constitutional challenges Omar and Munaf lodge against their detention and threatened transfer. G. Br. 40, 48-49.[31]

Omar and Munaf raise two claims that must be adjudicated on remand. The government cannot eliminate the district court's power to decide these claims – and ascertain the truth of the government's allegations – merely by declaring an intent to transfer.

*First*, Omar and Munaf challenge the lawfulness of their detention under the Due Process Clause. *See Hamdi*, 542 U.S. at 529 (plurality op.)(freedom from "physical detention by one's own government" is "the most elemental of liberty interests"); *id.* at 554-555 (Scalia, J., dissenting). They claim they are innocent

[31] The government's argument regarding the injunction is *de facto* an effort to dismiss. *Cf. McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 867 n.15 (2005). The Court hence "accept[s] as true all material allegations [of the habeas petitioners]," *Nat'l Wildlife Fed'n v. Buford*, 835 F.2d 305, 312 (D.C. Cir. 1987), and "review[s] the District Court's legal rulings *de novo* and its ultimate decision to issue the preliminary injunction for abuse of discretion," *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006).

civilians who have been held for years in U.S. custody. But even the government does not assert the power to detain innocent civilians. *See Hamdi*, 542 U.S. at 534 (plurality op.)(habeas "ensur[es] that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error"). On remand, therefore, the District Court must hold *Hamdi* hearings to test the government's factual allegations. Hence, the government's suggestion that the standstill injunction "shelter[s] alleged criminals" seeks to displace the factfinding function of orderly district-court litigation with untested assertions in an appellate brief. Only the preliminary injunction, and the hearing it allows, will yield the truth behind the allegations against Omar and Munaf.[32]

*Second,* Omar and Munaf challenge the lawfulness of their detention for transfer to Iraqi authorities. Their challenge contains two strands: they challenge the government's legal authority to effect a transfer to Iraqi custody; and they claim that their transfer to likely torture would violate both statutory

[32] On remand, the government may seek to rely on the determinations by the three-member screening panels as a "sufficient basis" for detention. G. Br. 21. But Omar and Munaf are entitled to challenge the process used to designate them for detention and transfer under the Due Process Clause. *Hamdi*, 542 U.S. at 538 (plurality op.)(courts must ensure "minimum requirements of due process are achieved"). These "tribunals," moreover, have not been subject to factual development, only naked government assertion. *Accord Omar*, 479 F.3d at 3; *supra*, 41 n.26.

and constitutional law. Preserving the status quo to allow adjudication of these complex factual and legal questions was surely no abuse of discretion.

The Due Process Clause protects citizens against transfer to foreign sovereigns absent statutory or treaty authority. In *Valentine v. United States ex rel. Neidecker*, the Court held that "[t]here is no executive discretion to surrender [a citizen] to a foreign government, unless that discretion is granted by law." 299 U.S. 5, 9 (1936); *accord* G. Br. 40-41. This holding takes root in "the liberty of the individual" sheltered by Due Process. *Valentine*, 299 U.S. at 9; *In re Kaine*, 55 U.S. (14 How.) 103, 113 (1852)(Catron, J.)("Public opinion had settled down to a firm resolve . . . that so dangerous an engine of oppression as secret proceeding before the executive, . . . and then, an extradition without an unbiased hearing before an independent judiciary, were highly dangerous to liberty, and ought never to be allowed in this country."). In addition, under settled law, the Due Process Clause applies overseas. *Reid*, 354 U.S. at 6.[33] Freedom from unlawful transfer is thus protected *wherever* the government seizes a citizen. On remand, therefore, the

[33] Even before *Reid*, habeas availed when the government seized a petitioner and sought to send him to another country from the high seas. *See Chin Yow v. United States*, 208 U.S. 8, 12-13 (1908)("If we regard the petitioner . . . as if he had been stopped and kept at the limit of our jurisdiction . . . still it would be difficult to say that he was not imprisoned . . . when to turn him back meant that he must get into a vessel against his wish and be carried to China."); *United States v. Jung Ah Lung*, 124 U.S. 621, 626 (1888)(same).

government must identify a treaty or statute that permits it to transfer the habeas petitioners to Iraqi custody.

But no such authority exists. To the contrary, the 1936 extradition treaty between Iraq and the U.S. affirmatively bars the government from transferring Omar and Munaf. *See* Extradition Treaty, U.S.-Iraq, *signed* June 7, 1934, 49 Stat. 3380 ("Iraq-U.S. Treaty"). Article VIII of the Treaty, by its terms, prohibits a citizen's transfer. 49 Stat. at 3383; *see Valentine*, 299 U.S. at 15-16 (interpreting, contemporaneous to the Iraq-U.S. Treaty, identical language in extradition treaty with France to bar extradition of citizens). And under Article XI, the Treaty applies in "all territory wherever situated, belonging to either of the High Contracting Parties *or in the occupancy and under the control of either of them, during such occupancy or control*." 49 Stat. at 3383 (emphasis added). Since the United States concededly occupies and controls the territory where Omar and Munaf are held, the treaty provides the governing rule of decision.[34] The government thus cannot demonstrate the

[34] Federal officials control Camp Cropper to the exclusion of Iraq. As the government concedes, Iraqi authorities may not enter and seize detainees from Camp Cropper without U.S. permission. Tr. of Oral Argument at 25-26, *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir. 2007)(No. 06-5126). In addition, federal officials must decide independently whether they will transfer a detainee to Iraqi custody. G. Br. 39, n.10. Furthermore, the Security Council resolutions recognize that the United States is an occupying power, a status that continues until its effective control ends. S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22,

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legal predicate for a transfer, which compels the conclusion that no transfer of a U.S. citizen to Iraqi custody is permitted. *See also* Brief of *Amici Curiae* of M. Cherif Bassiouni et al.[35]

Nor can the Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 ("Iraq AUMF"), fill the gap. Extradition treaties are not superseded or nullified by the law of war. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 45 ¶ 5, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 3546, 75 U.N.T.S. 287, 316 (while some transfers are allowed, "extradition treaties concluded before the outbreak of hostilities" still provide a basis

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2003)(U.S. and U.K. undertake "the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers . . . "); Benvenisti, *The International Law of Occupation* xiv-xv (rev. ed. 2004)(noting continuing application of occupation laws).

[35] The government claims that extradition is by definition a domestic procedure. This is not so. Historically, extradition was defined without reference to the locus of seizure. *See, e.g.,* 1 Moore, *A Treatise on Extradition and Interstate Rendition* 4 (1891)("[E]xtradition may be defined as the delivery by a state of a person accused or convicted of a crime, to another state within whose territorial jurisdiction, actual or constructive, it was committed."); Spear, *The Law of Extradition, International and Inter-State* 70 (3d ed. 1885)(extradition is "the surrender by one sovereign State to another, on its demand, of persons charged with the commission of crime within its jurisdiction" (internal citation omitted)); *see also Sayne v. Shipley*, 418 F.2d 679, 682-84 (5th Cir. 1969)(describing extradition framework for Panama Canal Zone).

for enforcing "offences against ordinary criminal law"). And while the Iraq AUMF may permit battlefield captures and detention, it does not extend to detention or transfer to another sovereign for regular *criminal* prosecution. *See* Pejic, *Procedural principles and safeguards for internment/administrative detention in armed conflicts and other situations of violence*, 87 Int'l Rev. Red Cross 375, 381 & n.21 (2005)(noting that "internment/administrative detention" is "strictly separate" from "penal repression"); *see also Hamdi*, 542 U.S. at 518-519 (plurality op.)(looking to law-of-war sources to ascertain AUMF's scope).[36]

Moreover – and even if the government has statutory or treaty authority to transfer Omar or Munaf – federal officials nonetheless cannot transfer *any* U.S. citizen to likely torture. Omar and Munaf have rights under both the substantive component of the Due Process Clause and the FARR Act against transfers to likely torture. Section 2242(a) of the act provides that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the

[36] Further, the government concedes it may transfer solely "individuals determined to be security internees" to Iraqi authorities. G. Br. 45. Thus, even if the AUMF provided legal authority for transfer, the District Court would still have to ascertain whether Omar or Munaf *in fact* qualify as "security internees" before a hand-over. Moreover, since the category of "security internee," like "[t]he legal category of enemy combatant[,] has not been elaborated upon in great detail," remand is necessary to ascertain the "permissible bounds of the category." *Hamdi*, 542 U.S. at 523 n.1 (plurality op.).

involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger . . . *regardless of whether the person is physically present in the United States*." Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-822 (emphasis added). The FARR Act, which covers Omar and Munaf, is routinely enforced in federal court.[37]

The record here contains unrebutted evidence that Omar and Munaf would be tortured in Iraqi custody. JA 151-153; *Omar*, 416 F. Supp. 2d at 23. Disregarding that proof, the government blithely asks the Court to accept on faith that it would not transfer a citizen to torture. G. Br. 47. Due process, however, contemplates *judicial* process, to which Omar and Munaf are entitled upon remand.[38]

In sum, the government cannot render habeas jurisdiction an empty vessel merely by proclaiming its intention to transfer a citizen overseas to foreign custody. For if the district court cannot issue a stand-still order, habeas jurisdiction is meaningless, and the government would achieve indirectly what it cannot directly: a "blank check . . . when it comes to the

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[37] *See, e.g., Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005); *Cadet v. Bulger*, 377 F.3d 1173 (11th Cir. 2004); *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003).

[38] *See Khouzam v. Hogan*, ___ F. Supp. 2d ___, No. 3:07-cv-0992-TIV, slip op. at 43-46 (M.D. Pa. Jan. 10, 2008)(contrary to government's suggestion, "consultation among members of the Executive Branch [about the risk of torture] . . . does not satisfy the constraint of the Fifth Amendment").

rights of the Nation's citizens." *Hamdi*, 542 U.S. at 536. This Court should remand for the "prudent and incremental" process required to adjudicate these claims. *Id.* at 539 (plurality op.); *see also Ashcroft v. ACLU*, 542 U.S. 656, 664-665 (2004)("If the underlying constitutional question is close . . . we should uphold the injunction and remand for trial on the merits.").

## III. The Court Should Reject the Government's Effort to Short-Circuit Judicial Review.

In the teeth of this authority, the government claims that *Wilson v. Girard*, 354 U.S. 524 (1957)(per curiam), the rule of non-inquiry, and speculation about final relief prevent *any* judicial inquiry into the legality of transfer to Iraqi custody. But *Wilson* supports the preliminary injunction, the rule of non-inquiry is not relevant, and errant speculation about final relief cannot be leveraged to close the courthouse door.

### A. *Wilson* Supports Issuance of a Stand-still Injunction.

In *Wilson*, an American serviceman stationed in Japan sought to bar his transfer to Japanese authorities. 354 U.S. at 525. The district court granted declaratory relief and an injunction against transfer. 152 F. Supp. 21, 27 (D.D.C. 1957). This Court granted both sides' petitions for certiorari. In this Court, Girard lodged two main arguments: that the U.S.-Japan

agreement enabling transfer was void because it lacked Senate authorization, Brief for Appellee 15-24, *Wilson v. Girard*, 354 U.S. 524 (1957)(No. 1103); and that "[u]nder International Law . . . visiting troops in a friendly sovereign's territory are immune from . . . criminal jurisdiction." *Id.* at 24 (citing *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812)).

The Court rejected both arguments. It first highlighted the "Security Treaty" and the "Administrative Agreement covering . . . jurisdiction of the United States over offenses committed in Japan by members of the United States armed forces." *Wilson*, 354 U.S. at 526-527. The Court expressly noted that the Agreement "was considered by the Senate before consent was given to the Treaty," and held: "[W]e are satisfied that the approval of Article III of the Security Treaty authorized the making of the Administrative Agreement and the subsequent Protocol . . . governing jurisdiction to try criminal offenses." *Id.* at 528-529. Only then did the Court reject Girard's second argument, citing the passage in *Schooner Exchange* acknowledging a sovereign's prescriptive jurisdiction within its own territory.

*Wilson*, therefore, does not grant the government unfettered authority to seize and transfer citizens overseas to foreign custody. To the contrary, *Wilson* confirms the extraterritorial reach of the *Valentine* Due Process rule – *viz.,* that the government may not transfer a citizen without legal authority. *Accord Omar*, 479 F.3d at 10. Only after the Court "satisfied"

itself that such authority existed did it cite *Schooner Exchange* to reject Girard's second argument that visiting troops have immunity under *international* law. *Wilson*, 354 U.S. at 528-529. And, most importantly, the Court did not remotely suggest that it was an abuse of discretion for the District Court in *Wilson* to freeze the status quo while it resolved these complicated issues.

The government's reading of *Wilson* also contradicts *Schooner Exchange*'s holding that "public ships of foreign friendly powers" are immune from attachment in federal court within the United States. 11 U.S. at 141. For if the government were correct about the preclusive effect of Iraqi territorial jurisdiction here, *Schooner Exchange*'s rejection of plenary U.S. jurisdiction in U.S. territory was correspondingly incorrect.[39]

[39] Nations always may exercise jurisdiction over their citizens abroad. *See The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824)("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens."); 10 Annals of Congress 597 (1800)(Rep. John Marshall)("[T]he jurisdiction of a nation extends to the whole of its territory, and to its own citizens in every part of the world.").

Further, the government's readings of *Wilson* and *Schooner Exchange* implausibly treat Iraq's presumptive right to exercise prescriptive jurisdiction as nullifying an American citizen's right to Due Process.[40] Indeed, if the government were right, Iraq's plenary authority to prosecute crimes in its own territory would obviate the need for extradition hearings for suspects domestically.

But the government's reasoning improperly transforms *Schooner Exchange*'s reliance on a default rule of international law into a first principle of constitutional law. Justice Marshall expressly rested his holding on "general principles" of international law, i.e., on grounds that cannot justify derogation from constitutional rights. 11 U.S. at 135-136; *accord* Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 Sup. Ct. Rev. 179, 187. "[A] court may properly look to international law norms only where there is 'no controlling executive or legislative act.'" Brief for United States at 35, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)(No. 03-339) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)). If international law cannot trump a statute or executive order, *a fortiori* it cannot displace Due Process. That Iraq has authority to prosecute offenses does not mean the U.S. has power to dispense with its citizens' Due Process rights.

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[40] As noted, the United States maintains discretion to decline to hand over detainees to Iraqi authority. *See* G. Br. 39 n.10.

Unsurprisingly, therefore, lower courts since *Wilson* have consistently scrutinized the legal basis for U.S. citizens' overseas transfer. *See*, *e.g.*, *Williams v. Rogers*, 449 F.2d 513, 520-521 (8th Cir. 1971); *Stone v. Robinson*, 431 F.2d 548, 552-553 (3d Cir. 1970); *Smallwood v. Clifford*, 286 F. Supp. 97, 101 (D.D.C. 1968); *May v. Wilson*, 153 F. Supp. 688, 689-690 (D.D.C. 1956)(finding treaty authorizing transfer). Remand for a hearing on the merits is thus in harmony with federal-court practice.

In sum, a citizen does not forfeit Due Process "just because he happens to be in another land." *Reid*, 354 U.S. at 6 (plurality op.). And *Wilson* does not allow the government to deprive citizens of that liberty merely by expressing its intent to transfer them to another sovereign.

### B. The Rule of Non-Inquiry Does Not Preclude Judicial Inquiry Into Habeas Petitioners' Likely Torture After Transfer.

The government also invokes the common-law "rule of non-inquiry" to suggest that courts have no role when it comes to the likely torture of a U.S. citizen. *See* G. Br. 46-47. But the rule of non-inquiry is inapplicable here. In the FARR Act, Congress displaced that common-law rule with a judicially enforceable prohibition on transfers to likely torture. *See Mironescu v. Costner*, 480 F.3d 664, 671 (4th Cir. 2007) (noting that "prior to the CAT and the FARR Act . . . individuals being extradited [were] not constitutionally

entitled to any particular treatment. . . . However, the FARR Act has now given petitioners the foothold that was lacking").[41] When Congress commands inquiry into another legal system before a transfer, a federal common-law rule such as the rule of non-inquiry must give way. *See*, *e.g.*, *In re Artt*, 158 F.3d 462, 474-475 (9th Cir. 1998)(Article 3 of the 1985 U.S.-U.K. extradition treaty mandates inquiry into British judicial system). Courts, moreover, are well-equipped to answer "straightforward question[s] of whether a fugitive would likely face torture [since] . . . American courts routinely answer similar questions, including in asylum proceedings." *Mironescu*, 480 F.3d at 672.

Further, courts have recognized that the rule of non-inquiry does not apply to torture. *See*, *e.g.*, *Rosado v. Civiletti*, 621 F.2d 1179, 1195 (2d Cir. 1980); *accord United States v. Kin Hong*, 110 F.3d 103, 112 (1st Cir. 1997); *In re Burt*, 737 F.2d 1477, 1487 (7th Cir. 1984); *Prushinowski v. Samples*, 734 F.2d 1016, 1019 (4th Cir. 1984). Torture differs from the run-of-the-mill procedural variations between criminal justice systems, as the government implicitly concedes, G. Br. 47, because it eviscerates even the possibility of basic fairness.

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[41] With one exception, the authorities cited by the government predate the FARR Act. In the exception, *Prasoprat v. Benov*, the petitioner did not allege torture, and the Court warned: "the rule of non-inquiry does not prevent an extraditee who fears torture upon surrender to the requesting government from petitioning for habeas corpus review." 421 F.3d 1009, 1016 n.5 (9th Cir. 2005), *cert. denied*, 546 U.S. 1171 (2006).

### C. The *Omar* Preliminary Injunction is Properly Tailored.

In a last-ditch effort to stave off judicial review, the government makes apocalyptic predictions about the consequences of a *final* injunction. Its arguments are speculative and unsupported. They were not articulated below. And they incorrectly treat the *preliminary* injunction here as if it were final.

Omar sought a standstill instruction only *after* the government stated it would transfer him to the CCCI without notice to the Court or opposing counsel. JA 132-135. (Munaf's case later demonstrated this to be no idle threat. JA 53-55). The injunction sought only to maintain the status quo. After ordering briefing on separation-of-powers concerns, Judge Urbina issued a narrowly crafted order. *See* 07-394, Pet. App. 59a.

The government suggests that the injunction blocks a true release. G. Br. 37-38. But Omar and Munaf do not seek to delay genuine release. They seek their liberty.[42] Transfer to Iraqi authorities for further detention, torture, or death, however, is hardly liberty.

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[42] In her partial dissent, Judge Brown acknowledged: "It may be true that [Omar] is likely to succeed on the merits *if all he seeks from his habeas petition is release with no additional protections,* but then the United States would be free to notify Iraqi officials of the time and place of his release. . . ." *Omar*, 479 F.3d at 18 (emphasis in original). Of course, release is all that is presently at issue.

The government also suggests that the injunction "prevent[s] the Iraqi courts from adjudicating." G. Br. 49. This too is mistaken. The preliminary injunction does not affect the Iraqi courts or constrain Iraqi officials. *See* 07-394, Pet. App. 59a (directing injunction against respondents and their agents, not Iraq's courts); *accord Omar*, 479 F.3d at 14 ("U.S. courts . . . have no authority to constrain the actions of Iraqi authorities. . . ."). The CCCI has authority to continue both investigative and trial phrases in a defendant's absence. *See* Frank, *Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq*, 18 Fla. J. Int'l L. 1, 55 & n.226 (2006). And in Munaf's case, the CCCI continues to act regardless of the stay currently in effect.

In fact, the government's argument depends on the far more extreme proposition that whenever the Executive is aiding foreign criminal proceedings, judicial superintendence of a transfer is ousted. This argument allows no logical distinction between domestic and extraterritorial transfers. For *any* habeas challenge to an extradition hinders and delays the handovers of even convicted persons to foreign custody. *See*, *e.g.*, *Pettit v. Walshe*, 194 U.S. 205, 214, 220 (1904)(declining to transfer convicted fugitive). In this case, however, the "petition[s] merely cal[l] on the district court to determine whether [federal] officials are complying with American law." *Omar*, 479 F.3d at 14.

Finally, the government's overheated speculation about potential *final* relief falls far wide of the mark.

G. Br. 48-51. The question of final remedy arises only if the district court finds no lawful basis for detention and transfer. While the nature of any final relief is unripe, it clearly need not include a bar on "information-sharing" – an item floated first by the *Omar* dissent, not the government. In any event, the contours of an appropriate remedy depend on facts now unknown.

The government may decide, for instance, as it has already warned, to continue holding Omar or Munaf as "enemy combatants." G. Br. 22 n.5. Or it might charge them criminally. *See*, *e.g.*, *Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006)(Kennedy, J., concurring in the denial of certiorari); *accord United States v. Abu Ali*, 395 F. Supp. 2d 338 (E.D. Va. 2005). And if habeas petitioners prove that any transfer would *in fact* result in torture, the government agrees it would not attempt a transfer. G. Br. 47. In sum, the government's premature claims about the infirmities of a hypothetical final injunction provide no sound basis to overturn a narrowly crafted preliminary injunction preserving the status quo and allowing merits adjudication.

In the end, the government's demand for an urgent new exception to orderly judicial review sheds more heat than light. In *Hamdi*, the Court foresaw an orderly, incremental process of litigation to adjudicate citizens' challenges to military detentions purportedly justified by national security. *See* 542 U.S. at 539-540 (plurality op.). Omar and Munaf have been in U.S.

military custody for years, and it is past time for that process to unfold.

## CONCLUSION

The Court should affirm the Court of Appeals in *Omar*, reverse in *Munaf*, and remand both cases to the District Court for further proceedings.

Respectfully submitted,

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