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

MOHAMMAD MUNAF, ET AL., PETITIONERS

v.

PETE GEREN, SECRETARY OF THE ARMY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PARTIES

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It is undisputed that the habeas petitioners (Omar and Munaf) voluntarily traveled to Iraq, allegedly engaged in criminal conduct in Iraq, and remain in Iraq. Under settled international legal principles recognized long ago by Chief Justice Marshall and invoked by this Court on numerous occasions since, the Iraqi authorities have sovereign jurisdiction to try and punish them. *The Schooner Exch.* v. *McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812). Neither the habeas petitioners nor their amici have provided any basis for this Court to interfere with the exercise of that core component of Iraq's national sovereignty and, in effect, to use the writ of habeas corpus as a means of forcing the Multinational

Force-Iraq (MNF-I) to harbor Omar and Munaf as fugitives from Iraqi justice.

And there is no reason for the Court to take that unprecedented and internationally disruptive step in these cases. As a threshold matter, the United States courts lack habeas jurisdiction because Omar and Munaf are being held by MNF-I under and by color of international authority, and not solely United States authority. That is sufficient to dispose of these cases. See *Hirota* v. *MacArthur*, 338 U.S. 197 (1948) (per curiam). But even if jurisdiction exists to review the habeas petitioners' current detention by *MNF-I*, such jurisdiction cannot be exercised in a manner that would frustrate, much less override, *Iraq's* sovereign right to bring Omar and Munaf to justice for crimes committed in Iraq. At a minimum, therefore, the *Omar* injunction must be vacated.

I. THE HABEAS PETITIONERS FAIL TO ACCOUNT FOR THE INTERNATIONAL DIMENSIONS OF THESE CASES

The habeas petitioners (Br. 17, 34) and their amici attempt to trivialize the international dimensions of these cases by claiming that they seek "routine" habeas review and relief and by repeatedly mischaracterizing MNF-I's uniquely international composition and mission and falsely portraying (Br. 25) MNF-I itself as a "fiction." Whether viewed from the standpoint of the existence of habeas jurisdiction or the authority of the United States courts, the unprecedented result sought by Omar and Munaf would profoundly disrupt international law principles and arrangements.

The background rule against which these cases arise is that foreign countries have sovereign jurisdiction over persons and criminal offenses within their borders. *E.g.*, *Wilson* v. *Girard*, 354 U.S. 524, 529 (1957); see Restate-

ment (Third) of the Foreign Relations Law of the United States §§ 206(a), 421(2)(a) (1986) (Restatement). Thus, this Court long ago held that "citizenship does not give [Americans] an immunity to commit crimes in other countries," nor does it excuse them from having to answer for crimes committed in Iraq according to the "modes of trial and to such punishment as the laws of that country may prescribe for its own people." *Neely* v. *Henkel*, 180 U.S. 109, 123 (1901). The habeas petitioners do not even cite *Neely*, much less attempt to account for it. It is settled law, however, that "a foreign nation has plenary criminal jurisdiction, of course, over all Americans * * * who commit offenses against its laws within its territory." *Reid* v. *Covert*, 354 U.S. 1, 15 n.29 (1957) (plurality opinion).

The habeas petitioners likewise seek to trivialize the international arrangements under which United States forces are present in Iraq. The United States forces are part of a multinational force that is operating in Iraq at the explicit request of the Iraqi government (07-394 Pet. App. 70a, 82a, 91a, 96a) and under U.N. Security Council resolutions authorizing it "to take all necessary measures to contribute to the maintenance of security and stability in Iraq." *Id.* at 74a; see Gov't Br. 2-3. MNF-I itself is not a "fiction" (Br. 25); it is a distinct legal entity with a uniquely international mission. In carrying out its U.N. mandate, MNF-I holds individuals suspected of criminal activity in Iraq pending investigation and prosecution in Iraqi courts under Iraqi law. J.A. 48. Those proceedings enhance both the security and stability of Iraq. And since 2003, MNF-I has transferred some 2000 detainees to the Government of Iraq.

The habeas petitioners are held pursuant to MNF-I's U.N. mandate, and at the request of the Government of

Iraq. MNF-I tribunals have determined that their detentions are necessary in enforcing MNF-I's U.N. mandate to promote security and stability in Iraq. Gov't Br. 5-6 & n.2, 9-10. In addition, Munaf is currently held by order of the Iraqi courts. Although the Iraqi Court of Cassation vacated Munaf's Iraqi conviction last month, it specifically directed that Munaf "remain in custody pending the outcome" of further Iraqi proceedings. *In re Hikmat*, No. 19/Pub. Comm'n/2007, at 4 (Fed. Cass. Ct. Feb. 19, 2008) (Iraq).

Exercising habeas jurisdiction—and certainly granting the requested injunctive relief—not only would directly interfere with Iraq's sovereignty and undermine the U.N.'s efforts to promote the security of Iraq and rebuild its vital governmental institutions, but contravene this Court's precedents, Congress's actions, and the Nation's international commitments.

II. THE UNITED STATES COURTS LACK JURISDICTION OVER THESE HABEAS ACTIONS

As the government has explained, the United States courts lack jurisdiction over these habeas actions under *Hirota*, because Omar and Munaf are being held pursuant to international authority—*viz.*, the terms of U.N. resolutions, the determinations of MNF-I tribunals enforcing those U.N. directives, and the authority of the Government of Iraq. See Gov't Br. 17-28. None of the considerations relied upon by the habeas petitioners warrants any different conclusion.

A. The "Foreign Conviction" Rule Has No Currency

Although the *Omar* court held that *Hirota*'s jurisdictional holding is limited to individuals who have been convicted by a foreign or international tribunal, the habeas petitioners do not defend that illogical holding. See

Gov't Br. 28-31. And recent events underscore the problems with such a rule. Last month, the Iraqi Court of Cassation overturned Munaf's conviction and sentence and remanded his case to the Central Criminal Court of Iraq (CCCI) for another investigative hearing and prosecution. See p. 4, *supra*. Under the decision below, the United States courts had jurisdiction when Munaf filed his habeas petition, lost that jurisdiction when the CCCI entered Munaf's conviction, and regained jurisdiction when the Court of Cassation vacated the conviction (even though that court expressly directed that Munaf remain in custody). Moreover, under the *Omar* decision, with jurisdiction, the United States courts could now issue an injunction effectively precluding the Iraqi courts from going forward with the remand proceedings ordered by the Court of Cassation. Neither party here advocates that untenable result and a correct reading of *Hirota* avoids it.

B. *Hirota*'s Jurisdictional Rule Governs These Cases

While the habeas petitioners say (Br. 16-17) that they fully embrace this Court's decision in *Hirota*—and pointedly do not ask that it be overruled, Br. 16, 35—they advance a series of arguments that simply cannot be squared with *Hirota*. Though that decision is indeed short, there is no word count threshold for a decision of this Court to have stare decisis effect.

1. The habeas petitioners' efforts to distinguish and limit Hirota *are unavailing*

a. The habeas petitioners' principal argument (Br. 15-16, 20, 21, 22-24) is that there must be jurisdiction because they are in the immediate custody of United States soldiers who ultimately answer in the chain of command to the United States Army and its Comman-

der in Chief. That principle would have generated jurisdiction in *Hirota*. Gov't Br. 18-19. The petitioners in *Hirota* were held in the immediate custody of "the United States Eighth Army, who held them pursuant to the orders of [General] MacArthur." *Hirota*, 338 U.S. at 199 (Douglas, J., concurring). Moreover, at all times "the chain of command from the United States to the Supreme Commander [was] unbroken." *Id.* at 207.

The habeas petitioners argue (Br. 25 n.14, 39 n.24) that the United States forces that participated in the multinational force in *Hirota* were ultimately bound by the Far Eastern Commission, which comprised representatives of the Allied Powers. That commission had authority to formulate policy directives, just as the U.N. Security Council formulated the resolutions under which MNF-I operates. See Agreement of Foreign Ministers at Moscow on Establishing Far Eastern Commission and Allied Council for Japan, Art. II.A (Dec. 27, 1945) (Moscow Agreement) (*reprinted in* Gov't Documentary App. 15, *Hirota*, *supra*). But the commission's policy directives were forwarded to General MacArthur only through the United States chain of command. *Id.*, Art. II.C. And, as Justice Douglas explained, "the Commission [was] enjoined to respect 'the chain of command from the United States Government to the Supreme Commander.'" *Hirota*, 338 U.S. at 206 (quoting Moscow Agreement Art. II.C).[1]

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[1] The habeas petitioners (Br. 25 n.14) quote Solicitor General Perlman's response to a hypothetical question concerning whether orders to General MacArthur from the Far Eastern Commission would supersede contrary orders from the United States War Department. See 12/16-17/1948 *Hirota* Tr. 41-42. The Solicitor General also explained, however, that he did not know how that hypothetical circumstance could

It is true that, if the commission had issued a policy directive revoking the Supreme Commander's authority to maintain and oversee the international military tribunal, General MacArthur presumably would have lost that source of international authority for the *Hirota* detentions. But the same is true here. The U.N. resolutions governing MNF-I are scheduled to expire at the end of this year. If they are not re-authorized by the U.N., the international authority pursuant to which the habeas petitioners are held, not to mention MNF-I itself, will lapse. But regardless of the ultimate *duration* of the international authority, it now exists in these cases, just as it existed in 1948 in *Hirota*, and it supplies the authority under which Omar and Munaf are held.

Moreover, as Justice Douglas explained, General MacArthur "was recognized as 'the sole executive authority for the Allied Powers in Japan.'" *Hirota*, 338 U.S. at 206 (citation omitted). General MacArthur both established the international tribunal that sentenced the *Hirota* petitioners and exercised final authority to review its convictions and sentences. See Gov't Br. 18-19; Charter of the International Military Tribunal for the Far East, Preamble & Art. 17 (Jan. 19, 1946) (*reprinted in* Gov't Documentary App. 22, 30-31, *Hirota*, *supra*). Nonetheless, this Court held that the United States courts lacked habeas jurisdiction over the detentions at issue in *Hirota* because the United States military was acting pursuant to international authority—just as the United States forces are doing here.

Relying primarily on non-record materials, the habeas petitioners suggest (Br. 22-24 & nn.10 & 11) that

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arise, because General MacArthur received orders only through his United States chain of command. *Id.* at 41.

MNF-I has no international character. That is incorrect. 06-1666 Pet. App. 32. MNF-I was established by U.N. resolution and will expire with that resolution, Gov't Br. 3 n.1; it comprises representatives from 26 nations (the second-in-command is a British officer and nearly one-third of headquarters General Officer positions are filled by officers from other nations); it has its own command structure and insignia; it operates almost exclusively in Iraq; it works in "close coordination and cooperation" with the Government of Iraq, 07-394 Pet. App. 83a-84a, 86a; and it receives periodic inquiries from the U.N. and must submit quarterly reports to the U.N, which is "to remain actively seized of th[is] matter," *id.* at 80a. See *id.* at 100a-101a.

The habeas petitioners and their amici assert that United States soldiers participating in MNF-I answer to no one but United States officers. That is also incorrect. Because officers of many different ranks and nationalities serve in MNF-I, United States personnel do at times report to, and take orders from, officers from other nations. See Joint Publication 3-0, Joint Operations xiii, II-5 (Feb. 13, 2008) <http://www.dtic.mil/doctrine/jel/new_pubs/jp3_0.pdf> (providing that United States personnel may serve under operational control of foreign commanders). Similarly, *all* MNF-I forces, including forces from the United States and other nations, are subject to MNF-I's unified chain of command. *Nominations: Hearings Before the Senate Comm. on Armed Servs.*, 108th Cong., 2d Sess. 133-134 (2004) (Nomination of Gen. George W. Casey, Jr.).[2]

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[2] Nor is MNF-I Task Force 134—which is responsible for detentions—exclusively American, as amici suggest (NIMJ Amicus Br. 10). Rather, Bulgarian soldiers are serving within that task force.

Accordingly, while the United States unquestionably plays the leading role in MNF-I (just as it did in the international force in *Hirota*), MNF-I is a distinct multinational force operating pursuant to international authority. And, as was true in *Hirota*, the detentions at issue are a direct extension of that authority.[3]

b. Omar and Munaf argue (Br. 21-22) that they are held "under or by color of the authority of the United States," 28 U.S.C. 2241(c), because they are in the immediate custody of United States soldiers and allege violations of United States law. That contention cannot be reconciled with *Hirota*. As the government has explained (Br. 20-21), the *Hirota* petitioners were held in the immediate custody of United States soldiers, made the same basic argument, and even quoted the same

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[3] The habeas petitioners point (Br. 17, 45) to the House of Lords decision in *R (on the application of Al-Jedda)* v. *Secretary of State for Defence*, [2007] UKHL 58, which held in part that the detention of a British citizen by British forces acting as part of MNF-I was not "attributable" to the U.N. That ruling, however, was divided. See *id.* ¶¶ 3, 26 (Lord Bingham's majority opinion); *id.* ¶¶ 88-111 (Lord Rodger's dissenting opinion). Indeed, one Lord thought the "attribution" issue so close that he simply reserved judgment on it. *Id.* ¶ 155 Post Script (Lord Brown). And recent precedent of the European Court of Human Rights involving the U.N.-authorized multinational force in Kosovo reached the opposite conclusion. *Id.* ¶¶ 54-62, 87-91 (Lord Rodger) (discussing *Behrami* v. *France*, *Saramati* v. *France* (Application Nos. 71412/01 and 78166/01 (unreported), 2 May 2007)). Moreover, because the Lords' resolution of this issue was not based on United States concepts of jurisdiction, nothing in *Al Jedda* alters *Hirota*'s jurisdictional rule or calls into question its proper application to these cases. And, in the end, *Al Jedda* is most noteworthy insofar as the Lords unanimously dismissed Al-Jedda's challenge because they concluded that the British forces were not only authorized under the U.N. resolutions at issue here to detain Al-Jedda, but actually *obligated* to do so under MNF-I's U.N. mandate. *E.g.*, *id.* ¶¶ 39, 118, 135.

statutory text in doing so. The habeas statute has not changed in any pertinent respect since *Hirota*, and there is no basis for this Court's interpretation of that statute to change. See, *e.g.*, *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989) (stare decisis applies with greatest force in statutory cases).

The habeas petitioners' Suspension Clause argument is equally unavailing. Here as in *Hirota*, there is no habeas jurisdiction because the habeas petitioners are held under international authority, not under or by color of the authority of the United States. Because habeas jurisdiction does not reach that circumstance (a point settled for at least the last 60 years), it has not been suspended. And even earlier, this Court held that the Suspension Clause (U.S. Const. Art. I, § 9, Cl. 2) does not protect Americans in these circumstances because that Clause has "no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." *Neely*, 180 U.S. at 122.

c. The habeas petitioners (Br. 35-37) attempt to recast *Hirota* as standing only for the proposition that this Court lacked original jurisdiction over the habeas petitions in that case. But the *Hirota* Court did not say a word about this Court's original jurisdiction. Quite to the contrary, *Hirota* framed its holding in terms of the power of "the courts of the United States." 338 U.S. at 198. Thus, no court has ever read *Hirota* as limited to this Court's original jurisdiction. And the District of Columbia Circuit has consistently recognized, from the year after *Hirota* was decided and ever since without exception, that "no court" has jurisdiction to review a habeas petition falling within *Hirota*'s ambit. *Flick* v.

Johnson, 174 F.2d 983, 984, cert. denied, 338 U.S. 879 (1949); see 06-1666 Pet. App. 3.[4]

d. The habeas petitioners argue (Br. 37) that *Hirota* is different because the *Hirota* petitioners "challenged the creation, composition, and workings of the" international military tribunal. But the *Hirota* petitioners advanced the same basic argument that Omar and Munaf are making here. They claimed that they were "not asking this court to review the decision of an international court," but instead were challenging only "official actions taken by General MacArthur as [a] citizen and army officer of the United States." Br. for Koki Hirota at 14, *Hirota*, *supra*; accord *Hirota* 12/16/1948 Tr. 1. In remarkably similar terms, Omar and Munaf argue (Br. 39, 40) that they "make no challenge to any Iraqi or foreign tribunal," but "challenge the lawfulness of their own government's decisions." As a jurisdictional matter, that contention works no better now than then, because it does not affect the source of authority under which the habeas petitioners are held, which was the gravamen of *Hirota*'s holding.

Moreover, the habeas petitioners' contention (Br. 4) that they "have never sought * * * to interfere with any Iraqi proceeding" is inexplicable. Omar sought and

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[4] Nor does the history of *Ahrens* v. *Clark*, 335 U.S. 188 (1948), call into question the continuing validity of *Hirota*. *Ahrens* construed the habeas statute's reference to persons "within their [the courts'] respective jurisdictions," 28 U.S.C. 2241(a), as requiring that a habeas petitioner be physically present within the district court's territorial jurisdiction. *Ahrens*, 335 U.S. at 190. This Court's subsequent retreat from that position in *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 494 (1973), see *Rasul* v. *Bush*, 542 U.S. 466, 478-479 (2004), in no way undermines the separate statutory requirement that a habeas petitioner be "in custody under or by color of the authority of the United States." 28 U.S.C. 2241(c)(1).

obtained an injunction against his presentation to the CCCI for investigation and trial. 07-394 Pet. App. 56a; see *id.* at 59a-60a. Munaf likewise sought an injunction against his transfer to Iraqi custody on the ground that he would not receive "a fair trial." 06-1455 Docket entry No. 6, at 14 (D.D.C. Sept. 8, 2006). After he was convicted by the CCCI, Munaf continued to seek an injunction on the theory that the "Iraqi court operat[ed] under glaring procedural deficiencies." *Id.* No. 12, at 1 (Oct. 13, 2006); see *id.* at 3. And in this Court, Munaf (Br. 40 n.25) again challenges the validity of the Iraqi proceedings. While the Iraqi Court of Cassation has vacated Munaf's Iraqi conviction and remanded for further proceedings, see p. 4, *supra*, that only underscores that Munaf's arguments are appropriately directed to Iraqi, not United States, courts.

The habeas' petitioners' challenge to the legality of their detention by MNF-I is also a direct assault on the determinations of the MNF-I panel that classified Munaf as a security internee and the multiple MNF-I panels and the Combined Review and Release Board (CRRB) that made similar determinations about Omar.[5]

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[5] While the habeas petitioners claim (Br. 22; see *id.* at 2, 3, 10-11) that they have done "no wrong," Munaf initially confessed to his involvement in kidnapping and appeared as a witness against his accomplices. J.A. 46-48. Likewise, MNF-I tribunals determined that both Munaf and Omar pose a security threat. J.A. 44; Gov't Br. 5-6 & n.2. Omar was captured harboring an Iraqi insurgent and four Jordanian jihadists and possessing several weapons and improvised explosive device-making materials. 07-394 Pet. App. 102a-103a. Omar has also received a hearing before the CRRB—a nine-member board composed of six representatives of the Iraqi government and three MNF-I officers—which also affirmed that he poses a security threat. In any event, Omar and Munaf will have an opportunity to argue their cases to the Iraqi courts under "fundamental standards of due process." Coalition

The government's reliance on those international proceedings is not an "eleventh-hour attempt" (Resp. Br. 40) to liken these cases to *Hirota*. To the contrary, the government has always relied on those determinations for this purpose. *E.g.*, Omar Gov't C.A. Br. 26-27; Munaf Gov't C.A. Br. 21, 28. The fact that the habeas petitioners are challenging detentions authorized by MNF-I panels acting under international authority itself brings this case comfortably within the ambit of *Hirota*. Ultimately, our courts could not grant Omar and Munaf habeas relief without countermanding the validity or exercise of that international authority.

2. **Hirota** ***does not lend itself to a citizenship exception***

Only as a final attempt to distinguish *Hirota* do the habeas petitioners point (Br. 30-34, 41-44) to their citizenship. That indeed is a factual distinction between this case and *Hirota*. But as Justice Douglas himself recognized in *Hirota*, 338 U.S. at 201-202, and as the court of appeals below concluded, *Hirota* "did not suggest any distinction between citizens and noncitizens." 06-1666 Pet. App. 4. Either a habeas petitioner is held under international authority, or he is not. Citizenship has no bearing on that determination. And neither the text of the habeas statute nor the Constitution compels a different result from *Hirota* where, as here, a citizen is being held under or by color of international authority. See Gov't Br. 31-33; *Neely*, 180 U.S. at 122.

The habeas petitioners (Br. 30-34) cite various cases in which this Court exercised jurisdiction over habeas petitions filed on behalf of United States citizens. But as the government has explained (Br. 33-35), none of those

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Provisional Authority (CPA) Order No. 13, at 1 (2004) <http://www.cpa-iraq.org/regulations/20040422_CPAORD_13_ Revised_Amended.pdf.

cases involved the detention of citizens pursuant to international authority. That includes *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004). See Gov't Br. 34-35.

In *Johnson* v. *Eisentrager*, 339 U.S. 763, 769 (1950), this Court observed that citizenship itself may be a "head of jurisdiction." This Court has never, however, held that citizenship is *always* sufficient to establish habeas jurisdiction, much less held that it confers jurisdiction where the citizen is held abroad in an active combat zone under international authority. Cf. *Hamdi*, 542 U.S. at 577 (Scalia, J., joined by Stevens, J., dissenting) ("Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different."). And it is settled that citizenship does not confer jurisdiction to challenge foreign convictions or sentences vel non. Gov't Br. 32.[6]

III. EVEN IF THERE IS HABEAS JURISDICTION, THE *OMAR* INJUNCTION CANNOT STAND

If this Court finds jurisdiction, it should nevertheless vacate the unprecedented injunction in *Omar* and hold that the United States courts lack authority either to bar Omar's release to Iraqi authorities or otherwise to interfere with Iraqi criminal proceedings against him.

A. As Omar Concedes, The *Omar* Injunction Is Overbroad

The court of appeals explicitly upheld the district court's injunction insofar as it bars the United States

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[6] In any event, if the Court believes there is jurisdiction in these cases, it should rest it on grounds strictly limited to citizens. See *Rasul*, 542 U.S. at 501 (Scalia, J., dissenting) (suggesting that "constitutional doubt" may inform construction of habeas statute as to citizens). That limitation could have vitally important operational consequences, because MNF-I is currently holding approximately 24,000 detainees in Iraq, virtually all of whom are aliens.

and MNF-I from (1) transferring Omar to Iraqi custody, see 07-394 Pet. App. 20a; (2) sharing with the Iraqi government details concerning any decision to release him, *id.* at 23a; and (3) presenting him to the Iraqi courts to answer for alleged crimes committed in Iraq, *id.* at 25a-26a. Omar now concedes (Br. 61) that any injunction "clearly need not include a bar on 'information-sharing.'" And he now suggests (Br. 61) that the Iraqi courts may initiate criminal proceedings against him, though he continues to object to his *presence* before the CCCI. Omar's failure to defend those aspects of the injunction means that it must be vacated at least in part.

Omar argues (Br. 61) that this Court should nonetheless permit the entire preliminary injunction to stand, on the theory that the government's arguments are relevant only to any final injunction the courts might issue at the completion of this litigation. As Omar has previously conceded (07-394 Br. in Opp. 32), however, the availability of preliminary injunctive relief turns in part on the plaintiff's "*likelihood* of success on the merits." See 07-394 Pet. App. 20a. Because Omar would not be entitled to the relevant relief at the conclusion of the litigation, the district court erred by awarding that relief preliminarily. *Id.* at 35a (Brown, J., dissenting in part). And because the preliminary injunction is preventing the CCCI from investigating and trying Omar *now*, it is critical that the injunction be vacated now.

B. The Courts Lack Authority To Enjoin A Transfer Here

Omar defends (Br. 46-47) the injunction against his transfer to Iraqi custody as appropriately "preserv[ing]" the district court's jurisdiction to consider his challenges to (i) his custody by MNF-I and (ii) his potential transfer to Iraqi custody. As the court of appeals recognized,

the first of those challenges provides no basis for an injunction *against* a transfer or other release from MNF-I custody; instead the termination of Omar's MNF-I custody would give him the principal relief to which he could be entitled in habeas. 07-394 Pet. App. 20a; Gov't Br. 36-37. As to the second challenge, the injunction may be sustained only if Omar has a legally enforceable right not to be transferred—within Iraq—to Iraqi authorities for criminal proceedings under Iraqi law for offenses committed in Iraq. He does not.

1. Iraq has criminal jurisdiction over persons, including United States citizens, within its borders

For two centuries, this Court has recognized that a sovereign nation has jurisdiction to punish offenses committed within its borders, unless it has waived that jurisdiction. *The Schooner Exch.*, 11 U.S. (7 Cranch) at 136. As a result, individuals "fall at once under the territorial authority of a state when they cross its frontier." 1 *Oppenheim's International Law* 384 (9th ed. 1992); see Restatement §§ 206(a), 421(2)(a). Indeed, both Omar and Munaf have conceded that, if they were not in MNF-I custody, Iraq would be free to arrest and prosecute them under Iraqi law. See Omar 9/11/2006 Tr. 48-49, 59; Munaf 10/10/2006 Tr. 15-16.

Even if the fact that Omar is held by MNF-I forces, instead of by Iraqi authorities, is sufficient to confer habeas jurisdiction for Omar to challenge his current detention by *MNF-I*, it does not entitle him to shelter from *Iraq's* justice system for criminal acts in Iraq. As this Court recognized in *Wilson*, a sovereign nation is entitled to arrest and prosecute persons within its borders, including foreigners, free from interference by other nations unless it has waived that right or the right

has otherwise been abrogated. 354 U.S. at 525-526. The Court thus reversed an injunction barring United States forces from transferring an American soldier to Japanese authorities to answer for conduct in Japan. *Id.* at 525-526. The same conclusion follows here. Indeed, because Omar traveled voluntarily to Iraq, that result follows a fortiori from *Wilson*. Gov't Br. 38-39, 42-43.

2. No affirmative statutory or treaty authorization is required to transfer Omar within Iraq

Omar principally argues (Br. 48) that the government needs statutory or treaty authorization to transfer him to Iraqi custody. That contention is wrong.

a. Omar and his amici base their argument on the rule that statutory or treaty authorization is generally needed to *extradite* a person from the United States to a foreign country. But the transfer of a person *within* a foreign country is not an extradition and it presents a situation fundamentally different from extradition. Gov't Br. 42-43; 07-394 Pet. App. 36a. In the extradition context, the United States agrees to relinquish its own jurisdiction and, by doing so, to confer personal jurisdiction on a foreign nation that the foreign sovereign would not otherwise have. In contrast, when the person is already in the foreign nation, that nation has sovereign jurisdiction over the person, *The Schooner Exch.*, 11 U.S. (7 Cranch) at 136, and the United States generally lacks authority to *interfere* with that jurisdiction.

Neither Omar nor his amici have identified any contrary authority. The cases and Attorney General opinions on which they rely *all* involve extraditions of persons "found in the United States," not, as here, the surrender of a person within a foreign country. 2 Op. Att'y Gen. 559 (1833); see, *e.g.*, *Valentine* v. *United States ex*

rel. Neidecker, 299 U.S. 5 (1936) (extradition of citizens from New York to France). And, as the federal extradition statutes reflect, Congress itself has long understood extradition to refer to "the *removal to a foreign jurisdiction* for trial of a person who has committed a crime in a foreign country or territory *and fled from justice therein to the United States*." H.R. Rep. No. 1652, 56th Cong., 1st Sess. 1 (1900) (emphases added). The current extradition statute is fully consistent with that understanding. See Gov't Br. 41-42.[7]

Omar's reliance (Br. 49-50) on the extradition treaty between the United States and Iraq is likewise misplaced. That treaty, like many others, authorizes the surrender of "any person charged or convicted of [certain crimes] committed within the jurisdiction of one of the High Contracting Parties * * * *and who shall be found within the territories of the other High Contracting Party*." Extradition Treaty, June 7, 1934, U.S.-Iraq, Art. I, 49 Stat. 3380 (emphasis added). Thus, the treaty is inapplicable where, as here, the person is found within the territory of the charging party.

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[7] The cited treatises are not to the contrary, either. See Resp. Br. 48, 50 n.35; Bassiouni Amicus Br. 18. To the extent that treatises shed light on the question here, they affirm that "[e]xtradition is the process by which persons charged with or convicted of crime against the law of a State *and found in a foreign State* are returned by the latter to the former for trial and punishment." 6 Whiteman, *Digest of International Law* 727 (1968) (emphasis added); accord 1 *Oppenheim's International Law*, *supra*, 948-949; 4 Hackworth, *Digest of International Law* 1 (1942) (Hackworth). Professor Bassiouni's own treatise explains that extradition "presupposes that the person in question is in the requested state," and *not* "within th[e requesting] state's jurisdiction." Bassiouni, *International Extradition: United States Law and Practice* 30, 313 (4th ed. 2002) (*International Extradition*).

Omar notes (Br. 49) that the treaty provides that its "stipulations * * * shall be applicable to 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.*" Extradition Treaty, Art. XI, 49 Stat. 3383 (emphasis added). Iraq, however, is no longer occupied by the United States; instead, pursuant to the U.N. resolutions, MNF-I operates in Iraq at the request of the sovereign Government of Iraq to promote the security and stability of that country. 07-394 Pet. App. 89a-91a. Indeed, the creation of MNF-I was directly tied to the *end* of the occupation or control of Iraq. *Id.* at 68a.

Nor is the facility at which Omar is detained a "territory * * * in the occupancy and under the control" of the United States. Extradition Treaty, Art. XI, 49 Stat. 3383. MNF-I controls Camp Cropper in the same sense that the United States controls its embassies and military bases throughout the world, but that does not make such facilities occupied territories. In extradition law, whether an area is occupied and controlled by the United States has long turned on whether the United States governs the *country*, not its authority over particular *facilities*. See generally 4 Hackworth 19-22. Thus, when Romania sought to extradite Munaf for trial on Romanian anti-terrorism charges stemming from the same kidnappings at issue here, Romania ultimately recognized that any extradition request would have to be made to Iraq, not the United States. Romania Ministry of Justice, Summary 5 (2007) <http://www. brennan-

center.org/dynamic/subpages/download_file_49034.pdf>; see *id.* at 3-4.[8]

Omar's reading of the treaty also would produce untenable consequences. Because Omar's position that this is an extradition does not depend on citizenship, it would evidently require the United States to follow formal extradition procedures before MNF-I transfers *anyone*—within Iraq—to Iraqi custody. MNF-I has transferred some 2000 detainees—the vast majority of whom are Iraqis—to the custody of Iraq in enforcing its U.N. mandate. If adopted, Omar's reading of the treaty would effectively preclude MNF-I from discharging an important component of its international mission.

b. Omar's position is also directly at odds with the settled practice regarding status-of-forces agreements (SOFAs). The Executive has entered into numerous such agreements that, among other things, call for the military to surrender servicemen in foreign countries for criminal prosecution in those countries without following extradition procedures. See Gov't Br. 43-44; *International Extradition* 93. And most SOFAs, unlike extradition agreements, are entered into by Executive agree-

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[8] Nor does the extradition treaty preclude extradition of United States citizens, as Omar claims (Br. 49). The treaty provides that "neither of the High Contracting Parties shall be *bound* to deliver up its citizens." Extradition Treaty, Art. VIII, 49 Stat. 3383 (emphasis added). Although this Court construed similar language in a different treaty to *bar* the extradition of citizens, see *Valentine*, 299 U.S. at 15-16, Congress abrogated that holding by authorizing the extradition of a citizen even "[i]f the applicable treaty or convention does not *obligate* the United States to extradite its citizens to a foreign country." 18 U.S.C. 3196 (emphasis added); see 136 Cong. Rec. 27,584 (1990) (explanation of the House Foreign Affairs Committee that Section 3196 was enacted to abrogate *Valentine* because it was "not feasible" to "renegotiate all the pre-*Valentine* treaties").

ment, not by treaty. Norton, *United States Obligations Under Status of Forces Agreements: A New Method of Extradition?*, 5 Ga. J. Int'l & Comp. L. 1, 20 (1975).[9]

Under Omar's theory, those agreements would be invalid, because service members could be surrendered within a foreign country only through traditional extradition procedures, and therefore only with statutory or treaty authorization. Surrenders of service members pursuant to SOFAs have consistently been upheld, however, because such agreements do not *reduce* protections for service members. Gov't Br. 43-44. As discussed, the foreign sovereign already has jurisdiction over persons within its borders. Thus, such agreements typically *increase* protections for United States service members by, for example, permitting the United States to conduct trials in some circumstances. *Ibid.*[10]

While Omar contends (Br. 57) that "lower courts since *Wilson* have consistently scrutinized the legal ba-

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[9] Omar suggests (Br. 54-55) that the SOFA at issue in *Wilson* was authorized by the Senate. But the relevant treaty simply authorized the Executive to enter into agreements "concerning '[t]he conditions which shall govern the disposition of armed forces of the United States of America in and about Japan.'" *Wilson*, 354 U.S. at 526-527 (quoting the treaty). The SOFA itself was not ratified by the Senate.

[10] Omar relies on the determination in the *Schooner Exchange* that "'public ships of foreign friendly powers' are immune from attachment in federal court within the United States." Br. 55 (quoting *Schooner Exch.*, 11 U.S. (7 Cranch) at 141). This Court has been clear, however, that a foreign country has a "sovereign right to try and punish for offenses committed within [its] borders." *Kinsella* v. *Krueger*, 351 U.S. 470, 479 (1956). Omar and Munaf are persons, not public ships. Iraq has ceded its jurisdiction over MNF-I personnel and some other categories of persons, but has not generally surrendered jurisdiction over persons like Omar and Munaf. See CPA Order No. 17, §§ 2, 4 (2004) <http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_ Coalition__Rev__with_Annex_A.pdf>.

sis for U.S. citizens' overseas transfer," those cases all involved servicemen subject to SOFAs and *upheld* the transfers at issue. Moreover, the cases cited by Omar uniformly undermine his position by explaining, for example, that SOFAs are a "cession to the United States of criminal jurisdiction" that the foreign nation would otherwise have. *United States ex rel. Stone* v. *Robinson*, 431 F.2d 548, 549 n.2 (3d Cir. 1970); see *Smallwood* v. *Clifford*, 286 F. Supp. 97, 100 (D.D.C. 1968). And whatever is true for American servicemen subject to SOFAs, it is "indubitably" true that Americans who *voluntarily* travel to foreign countries are subject to the criminal jurisdiction of those countries while present in them. *Holmes* v. *Laird*, 459 F.2d 1211, 1216 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972).

c. In any event, if a positive source of authority were required for the transfer at issue, the Authorization for Use of Military Force Against Iraq Resolution of 2002 (AUMF-Iraq), Pub. L. No. 107-243, 116 Stat. 1498, along with the U.N. resolutions, would amply provide it. The AUMF-Iraq authorizes the President, *inter alia*, "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to * * * enforce all relevant United Nations Security Council resolutions regarding Iraq." § 3(a), 116 Stat. 1501. As explained, the transfer of security internees from the MNF-I to Iraqi authorities for prosecution and punishment for crimes within Iraq falls squarely with the U.N. resolutions regarding Iraq. See Gov't Br. 2-3, 45; 07-394 Pet. App. 74a.

"[I]t is of no moment that the AUMF does not use specific language of [transfer]," because prisoner transfers within an active combat zone are a common and important incident of military operations. *Hamdi*, 542

U.S. at 519 (plurality opinion). Indeed, the AUMF-Iraq is more targeted than the authorization this Court relied on in *Hamdi*, because it specifically refers to enforcing the pertinent U.N. resolutions in Iraq. Cf. *id.* at 518-519. And construing the AUMF-Iraq as not authorizing Omar's transfer would contravene the *Charming Betsy* principle, because it would directly interfere with Iraq's sovereign right to prosecute Omar for offenses committed in Iraq. See *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).

3. Omar's torture argument is unavailing

Omar argues (Br. 51-52) that MNF-I may not transfer him to Iraqi custody because he has alleged that he may be tortured. As the government has explained (Br. 47), the United States would object to MNF-I's transfer of Omar to Iraqi custody if it thought that he would likely be tortured. Reports of torture remain a concern as to some sectors of the Iraqi government, including the military. But the State Department has determined that torture is not a systematic problem in the part of the Iraqi government that would have custody of Omar and Munaf, *i.e.*, "Justice ministry prison and detention facilities," which have "generally met internationally accepted standards for basic prisoner needs." Iraq, *Country Reports on Human Rights Practices—2006* § 1(c) (2007) <http://www.state.gov/g/drl/rls/hrrpt/2006/78853. htm>; see also Iraq, *Country Reports on Human Rights Practices—2007* § 1(c) (2008) <http://www.state.gov/g/drl/rls/hrrpt/ 2007/100596.htm>.[11]

[11] The reports cited by the amici Non-Governmental Organizations (Br. 6-7) are not to the contrary. Those reports refer to specific detention facilities controlled by Iraq's Interior and Defense Ministries, and do not allege torture by the Justice Ministry.

More to the point, even in the extradition context, courts have typically refused under the rule of non-inquiry to review torture allegations, leaving that inquiry to the Executive. Gov't Br. 45-47; *Hoxha* v. *Levi*, 465 F.3d 554, 564 n.14 (3d Cir. 2006); *Escobedo* v. *United States*, 623 F.2d 1098, 1107 (5th Cir. 1980); see also *Lopez-Smith* v. *Hood*, 121 F.3d 1322, 1325-1326 (9th Cir. 1997). The separation-of-powers concerns underlying the rule of non-inquiry are even stronger here, because Omar is already in Iraq with no legal right to evade Iraqi jurisdiction over crimes committed in Iraq.[12]

Omar argues (Br. 51-52) that the rule of non-inquiry has been overcome by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, as implemented by the Foreign Affairs Reform and Restructuring Act of 1998 (FARR Act), Pub. L. No. 105-277, 112 Stat. 2681-761. The CAT, however, provides that "[n]o State Party shall *expel, return ('refouler') or extradite* a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Art. 3 (emphasis added). That prohibition applies only with respect to persons within the United States, not to persons like

[12] The District of Columbia Circuit recently concluded that torture allegations might provide a basis for preliminarily enjoining the transfer of a Guantanamo detainee to Algeria. *Belbacha* v. *Bush*, No. 07-5258 (Mar. 14, 2007), slip op. 11. In reaching that result, the court of appeals relied in part on its (erroneous) decision in *Omar*. *Id.* at 4. *Belbacha* did not, however, determine whether (or under what circumstances) torture allegations are justiciable, and did not mention the rule of non-inquiry. In any event, Omar—who voluntarily traveled to Iraq and remains in Iraq—is in a materially different situation than a detainee who challenges his transfer from one country to another.

Omar who are already in a foreign country. See *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 183 (1993) (international convention that barred expelling or returning refugees in certain circumstances could not "reasonably be read to say anything at all about a nation's actions toward aliens outside its territory").

Moreover, the Senate conditioned its "advice and consent" to the CAT on its declaration that the convention is not self-executing, 136 Cong. Rec. 36,192 (1990), and therefore can only be enforced through implementing legislation. Omar (Br. 52) points to the FARR Act's statement of policy "not to *expel, extradite, or otherwise effect the involuntary return* of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." § 2242(a), 112 Stat. 2681-822 (emphasis added). That policy statement, however, only underscores that the CAT is limited to efforts to *return* a person to a different country. Nonetheless, as a matter of policy, the United States would oppose Omar's transfer in the face of a likelihood of torture.

To the extent that the FARR Act goes beyond policy to establish a private right of action, that private right is carefully limited to specific immigration proceedings. The Act specifies that "nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of [the policy quoted above], *except as part of the review of a final order of removal pursuant to [8 U.S.C. 1252].*" FARR Act § 2242(b) and (d), 112 Stat. 2681-822 (emphasis added). Even Omar does not contend that he is subject to a removal order under the

immigration laws, and those immigration laws plainly do not apply to someone in a foreign land.[13]

In the final analysis, it is the habeas petitioners themselves who are seeking an "extradition"—from Iraq *to* the United States—so that they do not have to answer for alleged criminal acts in Iraq. Omar and Munaf have both requested an order requiring the government to bring them to "a court of competent jurisdiction in the U.S," J.A. 40; see J.A. 123, and the unspoken premise of their insistence that they may not be transferred to Iraqi custody is that, if they can prevail on their habeas challenge to their MNF-I detention, they may use the United States courts to secure safe passage out of Iraq. There is no precedent for the use of habeas corpus in that fashion, particularly when such a court order would directly interfere with Iraq's sovereign right to try and punish Omar and Munaf for any criminal acts they committed in Iraq—where they voluntarily traveled and where they remain today.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals in No. 06-1666 should be affirmed and the judgment of the court of appeals in No. 07-394 should be reversed.

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[13] Congress recognized that the FARR Act "does not permit for judicial review * * * of most claims under the [CAT]." H.R. Rep. No. 432, 105th Cong., 2d Sess. 150 (1998). And the FARR Act and its implementing regulations make clear that there is no right to judicial review even in the *extradition* context. 22 C.F.R. 95.4; see *Mironescu* v. *Costner*, 480 F.3d 664, 674 (4th Cir. 2007), cert. dismissed, 128 S. Ct. 976 (2008). There is no basis for inferring a right to judicial review in the extraordinary situation here.

Respectfully submitted.

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