

No. 06-5324  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**MAISOON MOHAMMED,**  
Next Friend of  
**MOHAMMAD MUNAF,**  
Petitioners-Appellants,

v.

**FRANCIS J. HARVEY, et. al.,**  
Respondents-Appellees.

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**APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  
[Not Yet Scheduled for Oral Argument]**

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## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for Petitioners-Appellants certify as follows:

A. Parties, Intervenors, and *Amici Curiae*.


The named Petitioners-Appellants are Maisoon Mohammed, acting as next friend of Mohammad Munaf. The named Respondents-Appellees are Francis J. Harvey, the Secretary of the Army; Major General John D. Gardner, Deputy Commanding General (Detainee Operations); and Lt. Col. Quentin K. Crank. There are no intervenors or *amici*.

B. Rulings Under Review

The ruling under review is the Oct. 19, 2006 order of the District Court for the District of Columbia (Lamberth, J.) in Civil Action No. 06-5324, dismissing Mr. Munaf's petition for habeas corpus for lack of subject matter jurisdiction and denying his motion for a temporary restraining order as moot. Joint Appendix ("J.A.") 57. The memorandum opinion (J.A. 58) is reported at \_\_\_ F. Supp. 2d \_\_\_, 2006 WL 2971926 (D.D.C. Oct. 19, 2006)

C. Related Cases

As the court below explicitly recognized, the underlying jurisdictional issue in this case is identical to the jurisdictional issue presented in *Omar v. Harvey*, Civil Action No. 05-5126, a case that was fully briefed and argued September 11, 2006, before a merits panel of this Court. A decision is pending.



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Jonathan Hafetz

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## **STATEMENT OF JURISDICTION**

This Court has jurisdiction under 28 U.S.C. § 1291. The United States District Court for the District of Columbia erroneously declined to exercise jurisdiction pursuant to 28 U.S.C. §§ 2241(a), (c)(1), (c)(3), 2242, and 2243.

## **STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

Did the District Court err in holding that it had no power to consider a writ of habeas corpus filed on behalf of a U.S. citizen imprisoned by U.S. soldiers at a U.S. prison because the U.S. custodians claim they act at the behest of a multinational entity and not the United States.

## **STATEMENT OF THE CASE**

Through his sister as next friend, Mohammed Munaf filed this habeas action August 18, 2006, in the United States District Court for the District of Columbia. An American citizen, Mr. Munaf has been confined in U.S. military custody at a U.S. prison in Iraq since June 2005. *See* J.A. 8. Fifteen months after his imprisonment began, and three weeks after Mr. Munaf filed this action, counsel for Respondents advised undersigned counsel that Mr. Munaf would soon be tried for an unspecified civilian crime by an Iraqi court and would be transferred to Iraqi custody if convicted. Because Mr. Munaf, a Sunni Muslim, faces a real and substantial risk of torture if he were delivered to the Iraqi Government, counsel

moved for a temporary restraining order to maintain the *status quo* and prevent the transfer. *Mohammed v. Harvey*, No. 06-cv-01455-RCL, Petitioners' Motion for Temporary Restraining Order [dkt #7] (September 8, 2006).

Respondents opposed the motion. *Id.*, Respondents' Memorandum in Opposition to Motion for Temporary Restraining Order [dkt #9] (September 16, 2006). While the application for the TRO was pending, an Iraqi court convicted Mr. Munaf and sentenced him to die. Mr. Munaf promptly notified the District Court of this development. *Id.*, Petitioners' Supplemental Motion for Temporary Restraining Order [dkt #12] (October 13, 2006). Nonetheless, on October 19, 2006, the lower court dismissed the case for want of jurisdiction and denied the application for a TRO as moot. J.A. 57 (published at *Mohammed v. Harvey*, \_\_\_ F. Supp. 2d \_\_\_, 2006 WL 2971926 (D.D.C. Oct. 19, 2006)).

Mr. Munaf filed an immediate notice of appeal, J.A. 83, and asked this Court to stay his transfer. On October 27, 2006, a divided panel denied the motion over a written dissent, but granted a stay until November 6<sup>th</sup> to enable him to seek a further stay from the United States Supreme Court. *Mohammed v. Harvey*, No. 06-5324 (D.C. Cir. Nov. 6, 2006); *id.* (Tatel, J. dissenting). On that date, petitioner filed simultaneous stay motions in the Supreme Court and in this Court en banc. On November 10, 2006, the panel issued an order extending its stay pending action of the en banc Court and on November 13, the Supreme Court denied the motion

that was still pending before it. *Mohammed v. Harvey*, No. 06-5324 (D.C. Cir. 2006); *Mohammed v. Harvey*, No. 06-A471, 2006 WL 3262398 (November 13, 2006). On November 16, the parties filed a consent motion for an expedited briefing schedule of this appeal, which the Court granted December 1, 2006.

### STATEMENT OF FACTS

Mohammad Munaf was born in Baghdad, Iraq, and emigrated to the United States in 1990, accompanied by his wife. J.A. 7. In 2000, after ten years in the U.S., Mr. Munaf was naturalized as an American citizen. *Id.* at 11. Mr. Munaf and his wife have three young children; all are U.S. citizens. *Id.* at 12. In 2001, Mr. Munaf moved with his family to Bucharest, Romania. *Id.*

In March 2005, the family was still living together in Bucharest. Three Romanian journalists, Ovidiu Ohanesian, Marie Jeanne Ion, and Sorin Miscoci, invited Mr. Munaf to travel to Iraq with them as their translator and guide. *Id.* The journalists hired Mr. Munaf because of his ability to speak and read the Iraqi dialect of Arabic. The four travelers arrived in Baghdad, Iraq on or about March 15, 2005. *Id.*

Mr. Munaf and his companions then traveled to an area southwest of Baghdad. On or about March 28, 2005, unknown armed forces kidnapped the four travelers. *Id.* An Iraqi group identifying itself as the “Muadh Ibn Jabal Brigade” publicly claimed responsibility for the kidnapping. The group demanded that

Romania withdraw its troops from Iraq and sought millions of dollars in ransom. On or about May 22, 2005, after approximately fifty-five days in captivity at the hands of the kidnappers, the four companions were released. *Id.*

Upon their release, they were taken to the Romanian Embassy in Baghdad, Iraq. Immediately thereafter, U.S. military officers took custody of Mr. Munaf. *Id.* They transported him to Camp Cropper, a U.S. prison compound located near the Baghdad International Airport, where he has remained. *Id.* at 8. There is no dispute that Mr. Munaf is currently “being detained in Iraq . . . by U.S. forces,” Resp’ts’ Opp. to Pet’rs’ Mot. TRO at 17, who categorize him as “a security internee.” J.A. 22.

Mr. Munaf has committed no crime or violent act against the U.S. or its allies, nor has he supported forces hostile to American interests. J.A. 13. He has never been a member of or associated with al Qaeda or any other terrorist group. He has not supported any insurgent group or militia. *Id.* Mr. Munaf’s custodians, like all U.S. soldiers in Iraq, answer only to a U.S. chain of command and are “subject to the authority, direction and control of the Commander, U.S. Central Command[,]” General John Abizaid. *Advance Questions for General George W. Casey, Jr., U.S. Army Nominee for Commander, Multi-National Force-Iraq*, 108th Cong. 3 (2004). They do not answer to any component of the United Nations or to any entity other than the United States. *Nomination of General George W. Casey,*

*Jr., USA, for Reappointment to the Grade of General and to be Commander, Multinational Force-Iraq: Hearing Before the S. Comm. On Armed Svcs., 108th Cong. (June 24, 2004) (Statement of Gen. George W. Casey, Jr.).*

In August 2006, after being in the custody of U.S. officers for more than fourteen months, Mr. Munaf petitioned for a writ of habeas corpus in the United States District Court for the District of Columbia. Through his sister as next friend, he alleged that he had committed no crime and was detained by the executive without lawful process. J.A. 7, 85-86.

Two months later, on October 12, 2006, U.S. military officers presented Mr. Munaf before the Central Criminal Court of Iraq (“CCCI”) to face charges for his alleged role in the kidnapping of his three Romanian companions. Resp. Pet’rs’ Emergency Supplement Mot. TRO at 1, *Mohammed v. Harvey*, No. 06-1455 (D.D.C. Oct. 16, 2006). In order for an Iraqi criminal prosecution to proceed, Iraqi law requires that the aggrieved party issue a formal complaint against the accused. Resp. to Pet’rs’ Emergency Supplement Mot. TRO, Ex. 1 (Pirone Decl. ¶ 7), *Mohammed v. Harvey*, No. 06-1455 (D.D.C. Oct. 16, 2006) (J.A. 50). Because Mr. Munaf was charged in connection with the kidnapping of Romanian citizens, the CCCI could not prosecute him without a formal complaint by the Romanian government.

At the October 12, 2006 proceeding, Lieutenant Robert M. Pirone of the U.S. Coast Guard appeared in the CCCI, purportedly on behalf of the Romanian Government, to make a formal complaint against Mr. Munaf. Resp. to Petrs.’ Emergency Supplement to Mot. TRO at 2. Lieutenant Pirone stated that the Romanian Embassy had authorized him to appear on its behalf. *Id.* He claimed this authorization was documented in a signed and stamped letter submitted in advance to the Iraqi court. *Id.* No such letter was produced in court, however, and neither Mr. Munaf nor his counsel have seen it. On the basis of Lt. Pirone’s complaint, Mr. Munaf was convicted and sentenced to death. *Id.* at 3. Mr. Munaf promptly alerted the District Court to these developments. The Government of Romania, meanwhile, has officially denied that it deputized Lt. Pirone to speak on its behalf. J.A. 85.

Mr. Munaf has filed an appeal before the Iraqi Court of Cassation. The United States has represented that Mr. Munaf will remain in the physical custody of U.S. officers at the U.S. facility of Camp Cropper while his appeal is pending. Opp’n to Pet’r’s Emergency Mot. Injunctive Relief at 7, *Mohammed v. Harvey*, No. 06-1455 (D.D.C. Oct. 16, 2006). It is not known, however, how long the appeal will take. If his appeal is unsuccessful, U.S. officers will deliver Mr. Munaf into the custody of the Iraqi government to be executed. *See id.*

One week after the CCCI sentenced Mr. Munaf to death, the district court dismissed his habeas petition for lack of jurisdiction. *Mohammed v. Harvey*, No. 06-1455, 2006 U.S. Dist. LEXIS 75717, \*44 (D.D.C. Oct. 19, 2006) (JA 57). Mr. Munaf appeals that decision.

### SUMMARY OF ARGUMENT

Mohammed Munaf is a U.S. citizen in the actual and physical custody of U.S. soldiers at a U.S. prison in Iraq. His ultimate custodians are U.S. officials within the territorial jurisdiction of the District Court. It is not contested that both his ultimate custodian—Respondent Francis J. Harvey—and his immediate custodian—Respondent Lt. Col. Quentin K. Crank—answer solely to the Constitution and laws of the United States.

These facts establish the district court's jurisdiction over Mr. Munaf's habeas petition. More than five decades ago, the Supreme Court held that U.S. citizens in the physical custody of U.S. jailers overseas who answer to U.S. officials at home may invoke the Habeas Corpus Statute to demand that the Executive defend their detention through a lawful judicial process. *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Madsen v. Kinsella*, 343 U.S. 341 (1952); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). With the exception of the District Court below, no court has ever held otherwise.

The lower court reasoned that it had no jurisdiction because Mr. Munaf was in the custody not of the United States but rather of an entity called “Multinational Force–Iraq,” created by international agreements between the United States and others. This proposition entails the startling consequence that by entering into an agreement with foreign countries, the Executive Branch may shed the duties imposed upon it by the Constitution. In support, the court below relied almost exclusively on a single case, *Hirota v. MacArthur*, 338 U.S. 197 (1948).

The District Court’s reliance on *Hirota v. MacArthur*, however, was wholly misplaced. In the three-paragraph *Hirota per curiam*, the Supreme Court refused to entertain litigation by a former Japanese prime minister who sought leave to file a habeas petition *directly* in the Supreme Court, challenging his conviction by an international tribunal sitting after World War II. *Hirota* involved different facts, a different procedural posture, and critically different precedent; it differs from this case in three fundamental respects, and therefore cannot control.

First, *Hirota* was an enemy alien who could not claim the benefits and privileges of citizenship. Citizenship, as the Supreme Court has made clear, is “a head of jurisdiction and a ground of protection.” *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950).

Second, *Hirota* sought federal-court review at a time when statutory habeas jurisdiction in the district court required that a prisoner be present within that

court's territorial jurisdiction to invoke its authority. This forced Hirota to proceed directly in the Supreme Court. But the Supreme Court had neither appellate nor original jurisdiction, and declined his application. Today, however, jurisdiction under the habeas statute requires only that an *ultimate* custodian be within the reach of the court. Munaf's ultimate custodians are indisputably within the territorial jurisdiction of the District Court. Habeas jurisdiction in the District Court therefore obtains.

Third, Hirota challenged the lawfulness and legitimacy of the international military tribunal that tried and convicted him of war crimes. His habeas petition was in the nature of a collateral attack on a conviction by a foreign military tribunal. Mr. Munaf, by contrast, does not challenge any Iraqi proceeding or multilateral decision-making: He challenges the unvarnished fact of his detention and handling by officials who wear the uniforms of the United States and answer solely to other United States officials in the chain of command—and thus to the Constitution. He was in American custody long before the Iraqi proceedings began. Even if the Iraqi charges were dismissed tomorrow the United States does not suggest he would be released. The United States holds Mr. Munaf on its own authority. It is this U.S. detention that Mr. Munaf challenges in his habeas action.

All of the foregoing is plain on the undisputed facts. Even if it were not, the District Court erred in dismissing the petition. That Court certainly had

jurisdiction to determine its own jurisdiction and a duty not to dismiss the petition until it had decided any unresolved factual issues regarding the nature and extent of United States control over Mr. Munaf's custody.

## STANDARD OF REVIEW

The District Court dismissed Mr. Munaf's petition for want of jurisdiction. Dismissal for lack of jurisdiction is proper only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Sinclair v. Kleindienst*, 711 F.2d 291, 293 (D.C. Cir. 1983) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *Kowal v. MCI Commc 'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994) (allegations of non-moving party are "construed liberally").

## ARGUMENT

### I. THE DISTRICT COURT HAD JURISDICTION

#### A. An American Citizen May Not Be Denied Access to the Courts of His Country to Make the Claim That His Government Has Imprisoned Him Illegally.

For the first time in our Nation's history, the Executive Branch advances the perilous contention that, even though Congress has not suspended the Writ of Habeas Corpus, the United States military may nonetheless detain a United States citizen in an American prison indefinitely, with no obligation to demonstrate the

legal or factual basis for his imprisonment. In this brave new world, the United States' military no longer traces its authority to the Constitution and laws of the United States. Instead, the military owes its allegiance to an international agreement, the Multinational Force-Iraq, which, if Respondents are correct, stands above the Constitution and laws of the land, and divests the federal courts of all power to inquire into the legality of Mr. Munaf's detention and threatened transfer to foreign custody.

Indeed, Respondents' claims are broader still. Respondents' contention – that U.S. participation in the MNF-I strips the federal courts of all authority – does not hinge on Mr. Munaf's presence in Iraq; the argument turns on our membership in an international agreement, not the locus of our government's actions. Respondents' claim would be no different if the U.S. military were holding Mr. Munaf at a U.S. military prison in Kuwait, or Guantánamo Bay. Or a military brig in Norfolk, Virginia.

Fortunately, Respondents are mistaken. Our law is perfectly clear: An American citizen cannot be imprisoned at the hands of his countrymen without due process of law. No less clear is that international entanglements do not, and cannot, enfeeble the protections owed to an American citizen by his government under the Constitution. This country's participation in the MNF-I, therefore, does not and cannot alter the fundamental legal obligation of U.S. officials to account

for Mr. Munaf’s detention. Under the Habeas Corpus Act, which sets forth the process by which Mr. Munaf may vindicate his constitutional rights, Mr. Munaf is entitled to judicial inquiry into the factual and legal basis on which his country is imprisoning him and threatening to transfer him to another sovereign for execution.

**1. The Habeas Statute Provided the District Court with Jurisdiction.**

The federal habeas statute authorizes district courts to issue the habeas writ to any person held “in violation of the Constitution or laws or treaties of the United States,” 28 U.S.C. § 2241 (c)(3), or “in custody under or by color of the authority of the United States.” *Id.* § 2241(c)(1). Section 2241(a) of the statute empowers courts to act “within their respective jurisdictions,” which requires only “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). “[B]ecause the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody, a district court acts ‘within [its] respective jurisdiction’ within the meaning of § 2241 as long as the custodian can be reached by service of process.” *Rasul v. Bush*, 542 U.S. 466, 478-79 (2004) (internal quotations omitted).

Clear commands are the easiest to follow, and this unambiguous statutory language has produced a straightforward doctrine: U.S. citizens in the custody of

U.S. jailers, even when imprisoned overseas, may test the lawfulness of their detention in federal court to ensure its compliance with the Constitution and laws of the United States.

Tellingly, this doctrine developed when, as now, war-related exigencies tempted the Executive Branch to test the bounds of habeas. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), a case involving German war prisoners detained overseas, the Solicitor General urged the Supreme Court to hold that the courthouse doors were closed to citizens as well as aliens imprisoned abroad. The Court pointedly declined the invitation, describing citizenship as both “a head of jurisdiction and a ground of protection [that] 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; *see also* Brief of Petitioner at 14-15, *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (No. 306).

Two years later, in *Madsen v. Kinsella*, 343 U.S. 341 (1952), the Court exercised habeas jurisdiction over a petition filed by an American citizen convicted and sentenced by a U.S.-led occupation court sitting in Germany.<sup>1</sup> The next year,

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<sup>1</sup> The district court sought to distinguish *Madsen* by suggesting the international court there had been “established unilaterally by the United States.” *Mohammed v. Harvey*, \_\_\_ F. Supp. 2d \_\_\_, 2006 U.S. Dist. LEXIS 75717, \*26 (D.D.C., Oct. 19, 2006) (J.A. 72). This is incorrect. U.S. General Dwight D. Eisenhower, Supreme Commander of the Allied Expeditionary Force, invoked international *Allied*

the Court considered the habeas applications of American servicemen court-martialed in Guam. *Burns v. Wilson*, 346 U.S. 137 (1953). By this stage in the development of the doctrine, the Court had honed in on a narrow inquiry: “not whether the District Court has any power at all to consider petitioners’ applications; rather our concern is with the manner in which the Court should proceed to exercise its power.” *Id.* at 139. Such power indisputably existed so long as an ultimate custodian of a petitioner was within the district court’s territorial jurisdiction.

Two years after *Burns*, in *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), the Court considered the habeas petition of a citizen detained by U.S. authorities in Korea for crimes allegedly committed there. *Id.* As in Iraq, the U.S. asserted that its military operations in Korea were authorized by U.N. Resolution, which created a multinational force with a prominent U.S. role. *See* Max Hilaire, *United Nations Law and the Security Council* 9, 186 (2005) (describing authorization under U.N. Resolution 84); U.N. Resolution 84 (July 7, 1950). If the Respondents today were correct, the fact of that multinational authorization for

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authority to establish the tribunal that tried Madsen. Eli Nobleman, *American Military Government Courts in Germany: Their Role in the Organization of the German People*, 44-45 (1950) (citing Combined Directive for Military Government in Germany Prior to Defeat or Surrender, April 28, 1944); *see also Madsen*, 343 U.S. at 362-371 (Appendix to Opinion of the Court, describing the chronology of establishment of the U.S. occupation courts in Germany).

Korean operations would alone have removed all jurisdiction. Nonetheless, the Court held that the district court properly exercised jurisdiction over Toth's ultimate custodians and properly granted the Writ. *Toth*, 350 U.S. at 23.

By 1973, the doctrine had developed with sufficient clarity that the Court could proclaim the following rule with confidence: "Where American citizens confined overseas (and thus outside the territory of any district court) have sought relief in habeas corpus . . . , the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim." *Braden*, 410 U.S. at 498 (internal citations omitted). At least for U.S. citizens held abroad, the only question relevant to jurisdiction is whether an *ultimate* custodian is in the territorial jurisdiction of the district court. *Id.* at 495; *accord Rasul*, 542 U.S. at 481 (federal court would have jurisdiction over habeas petition brought by American citizen held by the U.S. military at a base outside the U.S.).

The most recent link in this unbroken chain is *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Yaser Hamdi was a U.S. citizen captured overseas by members of a multinational military force in a multinational military operation. 542 U.S. at 510 (plurality opinion) (noting that Hamdi was captured by allied, not American, forces).<sup>2</sup> Hamdi was turned over to the physical custody of the U.S. military,

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<sup>2</sup> The U.N. Resolutions that authorized multinational operations in Afghanistan mirror the Resolutions that established the multinational force in Iraq. *Compare* U.N. Resolution 1386 ¶ 1 (Dec. 20, 2001) (authorizing an "International Security

which held and interrogated him first in Afghanistan, then at the Naval Base at Guantánamo Bay, and ultimately in Virginia and South Carolina. *Id.* Not a single Justice suggested even the possibility of a want of jurisdiction—a matter that the Court necessarily considers of its own accord, regardless of what position the parties might take. *Id.* at 539 (plurality opinion); *id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 554 (Scalia, J., dissenting); *id.* at 585 (Thomas, J., dissenting).

Jurisdiction did not derive solely from Hamdi’s presence within the United States. Rather, it was a necessary consequence of his status as a U.S. citizen. Justice O’Connor emphasized that Hamdi enjoyed “the most elemental of liberty interests – the interest in being free from physical detention by one’s own government” – and was entitled to use the habeas statute to vindicate that interest, without regard to where the military chose to detain him. *Id.* at 529 (plurality opinion)<sup>3</sup>; *see also Reid v. Covert*, 357 U.S. 1, 6 (1957) (“When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights

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Assistance Force” to maintain security in Afghanistan) *with* U.N. Resolution 1511 ¶ 13 (Oct. 16, 2003) (authorizing a “multinational force” to maintain security in Iraq); U.N. Resolution 1546 ¶ 10 (June 8, 2004) (authorizing the “multinational force” to take all necessary steps to maintain and stabilize Iraq).

<sup>3</sup> The Court also cautioned that granting access to U.S. courts for citizens held within the country but denying it to citizens held overseas would create a “perverse incentive” for the military to “simply keep citizen-detainees abroad.” *Hamdi*, 542 U.S. at 524 (plurality opinion).

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.”).

Like Hamdi, Mr. Munaf is a U.S. citizen captured abroad in the context of a multinational military operation. Like Hamdi, Mr. Munaf was not captured in the course of battle, but was handed over to U.S. custody by an ally. J.A. 12. And, like Hamdi, Mr. Munaf is in the present and actual custody of U.S. officers. Resp. to Pet’rs’ Emergency Supplement Mot. TRO at 17, *Mohammed v. Harvey*, No. 06-1455 (D.D.C. Oct. 16, 2006) (Mr. Munaf “is being detained in Iraq . . . by United States forces”). Quite literally, U.S. military officers indisputably hold the key to his cell. U.S. officials alone have the authority to release him, should a U.S. court order it done. *Braden, supra*. Jurisdiction under the habeas statute requires nothing more.

## **2. Respondents’ Participation in Multinational Operations Does Not Alter Their Duty To Obey U.S. Law.**

Respondents do not seriously challenge the right of a U.S. citizen detained by the U.S. overseas to invoke the habeas jurisdiction of a federal court. Nor could they. Instead, they argue that the federal courts lack jurisdiction over Mr. Munaf’s petition because his American custodians purport to act “pursuant to their participation in MNF-I and under the authority of United Nations resolutions.” Resp. to Pet’rs’ Emergency Supplement Mot. TRO at 17, *Mohammed v. Harvey*,

No. 06-1455 (D.D.C. Oct. 16, 2006). If by this Respondents mean to imply that Mr. Munaf's custodians answer solely to the United Nations, and not to U.S. law, or that Mr. Munaf is not held "under of by color of the authority of the United States," 28 U.S.C. § 2241(c)(1), Respondents are mistaken as a matter of both fact and law.

The MNF-I is, and has always been, under the sole command of U.S. General George W. Casey, Jr. General Casey has repeatedly affirmed that his actions are "subject to the authority, direction and control of the Commander, U.S. Central Command," *Advance Questions for General George W. Casey, Jr., U.S. Army Nominee for Commander, Multi-National Force-Iraq*, 108th Cong. 3 (2004) (available at [http://www.senate.gov/~armed\\_services/statemnt/2004/June/Casey.pdf](http://www.senate.gov/~armed_services/statemnt/2004/June/Casey.pdf)). In testimony to the United States Senate Armed Services Committee, General Casey was asked if there would be any diminution in the authority of the U.S. Central Command as a result of the international nature of MNF-I. General Casey insisted there was "none at all[.]" *Nomination of General George W. Casey, Jr., USA, for Reappointment to the Grade of General and to be Commander, Multinational Force-Iraq: Hearing Before the S. Comm. On Armed Svcs.*, 108th Cong. (June 24, 2004) (Statement of Gen. George W. Casey, Jr.) (available from Lexis News-All [Hereinafter "Casey Hearing Testimony"]). As U.S. Commander of MNF-I, he has

“no reporting chain that goes back to the United Nations.” On the contrary, his “chain of command is through the secretary of defense and the president.” *Id.*<sup>4</sup>

General Casey also told the Senate Armed Services Committee numerous times that MNF-I “is a subordinate command to CENTCOM[.]” Casey Hearing Testimony at 2; *see also* Statement of Lt. Gen. Walter L. Sharp, Director, Strategic Plans and Policy, The Joint Staff, *The Imminent Transfer of Sovereignty of Iraq: Testimony Before the H. International Relations Comm.*, 108th Cong. (May 13, 2004) (*available from* Lexis News-All) (MNF-I “is subordinate to General Abizaid as Commander, U.S. Central Command.”).

Respondents’ arguments rest on Resolutions of the U.N. Security Council. U.N. Security Council Resolutions 1511 and 1546 establish the Multi-National Force (MNF-I) in Iraq, and authorize it to maintain security and stability. Resp’ts.’ Opp. to Petrs.’ Mot. TRO at 4. According to Respondents, MNF-I derives its authority entirely from the United Nations and is legally distinct from the United States. *Id.* But these Resolutions do not even purport to diminish the obligations of an American soldier to comply with the Constitution and laws of the United States. Nor could they displace the U.S. chain of command.

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<sup>4</sup> The U.S. Central Command not only directs the conduct of every U.S. soldier serving in Iraq – including Mr. Munaf’s custodians – but also that of every other military commander in MNF-I, regardless of nationality. *See, e.g.*, Casey Hearing Testimony (multinational divisions report to a U.S. Lieutenant General, who reports to General Casey, who reports to General Abizaid).

To the contrary, General Casey has characterized the U.N. not as *superior* to U.S. authority, but as being in “a partnership pursuing the common goal of building a democratic Iraq.” Casey Hearing Testimony at 7. This characterization was confirmed by then-Secretary of State Colin Powell’s statement that United Nations Resolution 1511 simply “gives a chapeau to the multinational force, as it will now be called.” Colin Powell, U.S. Sec’y of State, Media Availability Following Passage of Resolution 1511 (Oct. 16, 2003) (*available at* <http://www.state.gov/secretary/former/powell/remarks/2003/25250.htm>) (last visited Nov. 28, 2006); *cf.* Hilaire, *supra*, 243 (2005) (“Resolution 1511 . . . does not change the situation on the ground in Iraq . . . [and it] made no major changes in the role of the United Nations.”).

Much the same is true of U.N. Resolution 1546, on which Respondents rely to support the proposition that U.S. officers are beyond the jurisdiction of the federal courts. *See* Resp’ts.’ Opp. to Petrs.’ Mot. TRO at 4. Resolution 1546 only grants authority to MNF-I “*in accordance with the letters annexed to [it.]*” *Id.* (quoting U.N. Resolution 1546 ¶ 10 (June 8, 2004)) (emphasis added). One of the annexed letters, from then-acting Secretary of State Colin Powell, provides that “the MNF must continue to function under a framework that affords the force and its personnel the status that they need to accomplish their mission, *and in which the contributing states have responsibility for exercising jurisdiction over their*

*personnel[.]”* J.A. 37 (U.N. Resolution 1546, annexed letter from U.S. Sec’y of State Colin Powell (June 5, 2004) (emphasis added)).<sup>5</sup>

Indeed, Senator Carl Levin, ranking member of the Senate Armed Services Committee, specifically referred General Casey to the letters annexed to Resolution 1546 and asked him, “Will U.S. forces at any level be under the command of any commander but a U.S. commander?” General Casey responded, unequivocally: “No, Senator, they will not.” Casey Hearing Testimony. This interchange reflects the unchallenged consensus that command of U.S. troops cannot be delegated beyond the boundaries of the U.S. Constitution.<sup>6</sup>

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<sup>5</sup> Consistent with the directive that U.S. soldiers in MNF-I are answerable only to U.S. authority, the prosecution of U.S. soldiers for misdeeds committed in Iraq have taken place in solely U.S. courts: There are no MNF-I courts for criminal prosecutions (or claims to liberty such as Mr. Munaf’s). James P. Barker, Paul E. Cortez, Jessie V. Spielman, Brian L. Howard, and Steven D. Green, for instance, have been charged in U.S. tribunals under U.S. law for their alleged roles in the rape of an Iraqi girl and murder of her family, which occurred while they were serving in Iraq as soldiers in the U.S. Army and members of MNF-I. *See* Maj. Gen. William B. Caldwell IV, Spokesman, MNF-I, “Operations Update” (July 10, 2006) (transcript available at [http://www.mnf-iraq.com/index.php?option=com\\_content&task=view&id=705&Itemid=30](http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=705&Itemid=30)).

Green, who was discharged from the Army before he was indicted, faces charges in the U.S. District Court for the Western District of Kentucky. *See* Associated Press, *supra*; *see also* Criminal Complaint, *U.S. v. Green*, 06-CR-0019 (W.D. Ky., June 30, 2006) (available at <http://www.kywd.uscourts.gov/3-06-00230/pdf/entry1MainDocument.pdf>) (last visited Nov. 27, 2006).

<sup>6</sup> Respondents also rely on Security Council Resolution 1637. J.A. 38-43. By its terms, this Resolution merely “reaffirms the authorization for the Multinational Force as set forth in Resolution 1546.” This reaffirmation incorporates the letters originally attached to 1546 as indicated by Secretary of State Condoleeza Rice in

The remarks by General Casey and Secretary Powell merely confirm what has always been the unwavering command of the Constitution. In *Reid v. Covert*, for instance, 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 Covert before a military tribunal. *Reid*, 357 U.S. at 15-16.<sup>7</sup> Covert complained that the tribunal had not provided for trial by jury, in violation of the Sixth Amendment. Defending the conviction, the Government argued that the executive agreement prevailed over the Constitution. *Id.* at 16.

The Court emphatically disagreed: “The 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; *see also Missouri v. Holland*, 252 U.S. 416, 432-34 (1929) (treaty cannot authorize the national government to do that which the Constitution disallows); *Wong Kim Ark v. U.S.*, 169 U.S. 649 (1898) (invalidating treaty provision as

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her letter attached to Resolution 1637. Secretary Rice wrote that the MNF is “acting under the authorities set forth in Resolution 1546 (2004), including the tasks and arrangements set out in the letters annexed thereto.”

<sup>7</sup> *See* Executive Agreement of July 27, 1942, 57 Stat. 1193 (cited in *Reid v. Covert*, 357 U.S. 1, 16, n. 29 (1957)).

unconstitutional); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (treaty power “cannot authorize what the Constitution forbids.”).

By arguing that American forces hold Mr. Munaf “not *qua* the United States but as part of their role in MNF-I,” (J.A. 65), the Executive Branch invokes a U.N. Resolution to shield itself from its duty to account to the federal courts for the deprivation of citizen’s liberty. This it may not do. Habeas avails regardless of the insignia U.S. soldiers affix to their helmets.

### **3. The Court Should Reject An Interpretation of the Habeas Statute That Endorses Indefinite Detention of a U.S. Citizen Without Judicial Review.**

Respondents’ reading of the habeas corpus statute would lead to the unconstitutional result of depriving Mr. Munaf of any judicial review of his imprisonment by the executive. As a U.S. citizen, Mr. Munaf cannot be deprived of his life or liberty by federal officials without due process of law. *See* U.S. Const. Amend. V. The statutory mechanism for him to vindicate that right is the writ of habeas corpus. *Hamdi*, 542 U.S. at 537 (“Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process.”).

Yet if Respondents are correct, Mr. Munaf may be held indefinitely by his countrymen, without legal process. He may be deprived of “the most elemental of liberty interests – the interest in being free from physical detention by one’s own government.” *Hamdi*, 542 U.S. at 529. If Respondents are correct, the writ has

been suspended without Congressional action, and with no evidence that Congress intended such a result. *But see United States v. X-Citement Video*, 513 U.S. 64, 69 (1994) (courts reading statutes presume that Congress did not intend arguably unconstitutional results). If Respondents are correct, Mr. Munaf has forever lost all means by which he may challenge the lawfulness of his detention by the Executive Branch. Indeed, if Respondents are correct, the Habeas Corpus Statute fails to do precisely that for which it was enacted. *See Ex Parte Bollman*, 8 U.S. [4 Cranch] 75, 95 (1807) (Marshall, C.J.) (in drafting original § 2241, First Congress “felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity.”).

The Court should reject a reading of the habeas statute that produces this result. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 298-303 (2001) (interpreting the habeas statute to avoid constitutional questions arising from indefinite detention of aliens without judicial review); *see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (avoiding statutory interpretations that raise serious constitutional problems is a cardinal rule of statutory construction).

Indeed, as the District Court noted, “*Eisentrager* and *Rasul* strongly suggest that there are constitutional aspects to the right to habeas corpus, whether or not they are embodied in the jurisdictional statute.” J.A. 78. It nonetheless failed to

read that statute in such a way as to obviate the constitutional concern. Even if the meaning of the statute had been cloudy – and this one has been clear for more than two hundred years – its duty was to avoid, rather than invite, constitutional dilemmas. *See United States ex rel. Attorney General v. Delaware & Hudson Corp.*, 213 U.S. 366, 408 (1909) (“[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”). The District Court thus erred when it failed to exercise its habeas jurisdiction here.

## **II. HIROTA DOES NOT SUPPORT THE RESULT BELOW.**

In support of the ominous proposition that the Executive Branch may evade accountability by donning a multinational cap, Respondents rely almost exclusively on *Hirota v. MacArthur*, 338 U.S. 197 (1948). That reliance, however, is misplaced since *Hirota* is distinguishable in three fundamental respects.

*First*, Japanese Foreign Minister and Prime Minister Koki Hirota was an admitted enemy alien. Unlike Mr. Munaf, he could not claim citizenship as a “head of jurisdiction and ground of protection.” *Eisentrager*, 339 U.S. at 769. *Second*, Hirota, unlike Mr. Munaf, litigated at a moment when habeas jurisdiction in the district courts rested on the prisoner’s presence within the court’s territorial jurisdiction. This forced Hirota to proceed directly in the Supreme Court. But

litigation cannot commence before the High Court unless it falls within the Court's appellate or original jurisdiction. Hirota's petition fell into neither, and the Court had no choice but to refuse his application.

*Third and finally*, Hirota, unlike Mr. Munaf, challenged the lawfulness and judgment of an international military tribunal staffed by foreign judges that tried and convicted him of war crimes; his habeas petition was an improper attempt to mount a collateral attack on a foreign military tribunal. Mr. Munaf makes no such attack. Instead, he challenges the legal and factual basis of his detention and threatened transfer by American officers. These challenges lie squarely in the historic heartland of habeas.

**A. Hirota, Unlike Mr. Munaf, Was an Enemy Alien and War Criminal Who Did Not Enjoy The Privilege of Litigation In This Country.**

First, and most important, Koki Hirota was an alien. Indeed, he was an enemy alien: A former Foreign Minister and Prime Minister of Japan who swore allegiance to the Imperial Emperor, and who had held his posts through the barbarities of the Rape of Nanking. For his role in these atrocities, Hirota was convicted as a war criminal after a trial before a panel of international judges, a trial that lasted almost *two years*. *Petition for Writ of Habeas Corpus at 22, Hirota v. MacArthur*, No. 239 (Nov. 1948).

Mr. Munaf, by contrast, is a citizen of this country. And “[citizenship], like freedom of speech, press, and religion, occupies a preferred position in our written

Constitution, because it is a grant absolute in terms. The power of Congress to withhold it, modify it, or cancel it does not exist.” *Perez v. Brownell*, 356 U.S. 44, 84 (1958).<sup>8</sup> Mr. Munaf is entitled to the protections of the Constitution wherever he goes, in the United States or abroad. *Reid*, 357 U.S. at 5-6. Whatever may be said of the decision by the Supreme Court to deny Hirota a forum for his challenge, it blinks reality to equate his status with that of Mr. Munaf.

**B. Because of *Ahrens v. Clark*, Hirota Filed Directly In The Supreme Court, Which Did Not Have Jurisdiction.**

More than anything else, the Supreme Court decision in *Hirota* is a product of its distinctive time. Five months before Hirota sought an original writ, the Supreme Court held in *Ahrens v. Clark* that federal district courts had no statutory authority to issue the writ for 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* in the Supreme Court. See Brief of Petitioner-Appellant at 2, *Hirota v. MacArthur*, No. 239 (Dec. 1948) (“Had it not been for the decision in *Ahrens v. Clark* ... the petitioner might have filed a petition for Writ of

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<sup>8</sup> Respondents identify Mr. Munaf as an Iraqi-American, as though it were somehow significant that he was not born in this country. “Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency,” *Luria v. United States*, 231 U.S. 9, 22 (1913), and the Supreme Court has long understood the importance to the country of a rigorous insistence on this principle. See, e.g., *Baumgartner v. U.S.*, 322 U.S. 665 (1944) (unanimous). Respondents’ effort to dilute the protection of citizenship by insidious aspersion ought to be rejected out of hand.

Habeas Corpus in the District Court....”). Counsel for Hirota repeated this position at oral argument. *See, e.g.*, Transcript of Record at 14, *Hirota v. MacArthur*, 338 U.S. 197 (1948) (No. 239) (“there is no other court to which we can go”); *id.* at 19 (under *Ahrens*, “there is no jurisdiction in any district court of the United States”).

Under Article III, however, the Supreme 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, 374-75 (1879) (Court can only issue habeas writs in its original jurisdiction “in cases affecting ambassadors, public ministers, and consuls, and other cases in which a State is a party.”); *see also Marbury v. Madison*, 5 U.S. [1 Cranch] 137, 174-76 (1803) (Article III original jurisdiction is exclusive and limited to cases enumerated in the Constitution). The *Hirota* Court clearly lacked original jurisdiction.<sup>9</sup>

Yet as the petitioners conceded, the result of *Ahrens* was that the *Hirota* Court also lacked appellate jurisdiction. Under the Regulations and Exceptions Clause (U.S. Const. Art. III, Sec. 2, cl. 2), the Court’s appellate jurisdiction is

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<sup>9</sup> So far as counsel can ascertain, no writ of habeas corpus in aid of the Supreme Court’s original jurisdiction has ever been granted. Dallin Oaks, *The “Original” Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Ct. Rev. 153, 156-63.

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. Compare *Ex parte Vallandigham*, 68 U.S. 243, 253 (1863) (no Supreme Court review of decision of military tribunal where no statute granted it the power) with *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) (Stevens, J., concurring).

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. 338 U.S. at 198.

The *holding* in *Hirota* regarding the scope of the Supreme Court's two species of habeas jurisdiction under Article III remains sound and binding constitutional law. In cases after *Hirota*, the Supreme Court repeatedly denied leave to file petitions like the one filed by Hirota because the Court lacked original jurisdiction. See, e.g., *Ex parte Betz*, 329 U.S. 672, 672 (1946) (denying original habeas writ "for want of original jurisdiction"); *Everett ex rel Bersin v. Truman*, 334 U.S. 824 (1948) (same); *In re Dammann*, 336 U.S. 922, 923 (U.S. 1949) (same); Richard H. Fallon, Jr. et al., *The Federal Courts and the Federal System* 316 (5th ed. 2003) (collecting cases); James Pfander, *The Limits of Habeas*

*Jurisdiction and the Global War on Terror*, 91 Cornell L. Rev. 497, 517, nn. 131-32 (2004) (same).

But *Hirota* also contained *dicta* to the effect that no lower court had jurisdiction. This *dicta* has not survived. In *Hirota* itself, the *dicta* did not command a unanimous court. Justice Douglas, in a later-filed concurrence, agreed with the Court's holding that there was neither original jurisdiction nor a "court of the United States to which the potential appellate jurisdiction of [the Supreme] Court extends." *Hirota*, 338 U.S. at 199 (Douglas, J., concurring). Justice Douglas maintained, however, that *Ahrens* did not preclude *Hirota* from re-filing in the District Court for the District of Columbia. *Id.* at 199-201.<sup>10</sup> It was one thing to say the Supreme Court lacked "authority to review the judgment of an international tribunal," according to Justice Douglas, but quite another to hint, even obliquely, that "the [habeas] inquiry [could] be thwarted merely because the jailer acts not only for the United States but for other nations as well." *Id.* at 204; *see also In re Bush*, 336 U.S. 971 (1949) (unanimously denying leave to file an original habeas

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<sup>10</sup> By then, the point was moot. *Hirota* had been executed some six months before the Douglas concurrence issued. Saburo Shiroyama, *WAR CRIMINAL: THE LIFE AND DEATH OF HIROTA KOKI* 298 (John Bester, trans. 1977).

petition in the Supreme Court “without prejudice to the right to apply to any appropriate court that may have jurisdiction”).<sup>11</sup>

Justice Douglas’s view – that *Ahrens* merely allocates jurisdiction when a U.S. citizen is detained in *some* federal court’s territorial jurisdiction – eventually prevailed, at least for U.S. citizens. *See, e.g., Rumsfeld v. Padilla*, 542 U.S. 426, 435 nn. 8-9 (2004); *Braden, supra*; *Rasul*, 542 U.S. at 478-79 (Justice Douglas’ concurrence in *Hirota* correctly anticipated demise of *Ahrens*). As noted, two years after *Hirota*, in *Johnson v. Eisentrager*, the Supreme Court began to map the legal landscape when the military holds a U.S. citizen overseas. In *Eisentrager*, the Solicitor General argued that federal courts lacked habeas jurisdiction over a citizens’ challenge to overseas detention. Brief of Petitioner at 14-15, *Johnson v. Eisentrager*, (No. 306) (1950). The Court rejected this argument. 339 U.S. at 767. And as we have demonstrated above, the availability of habeas review in the district court when U.S. officials have custody of a U.S. citizen overseas is now beyond cavil, and this Court should reject the Government’s effort to carve anew the exception it failed to secure in *Eisentrager*.

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<sup>11</sup> Anticipating *In re Bush*, Justice Douglas suggested there would have been jurisdiction in the district courts. “If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least the Constitution follows the flag. It is no defense for him to say that he acts for the Allied Powers. He is an American citizen who is performing functions for our government. It is our Constitution which he supports and defends.” *Hirota*, 338 U.S. at 204 (Douglas, J., concurring).

In sum, *Hirota*'s procedural posture renders it irrelevant to any discussion about the reach of *district court* habeas jurisdiction. *Hirota* involved habeas petitions filed *directly* in the Supreme Court. Article III gives the Court limited original jurisdiction and such appellate jurisdiction as Congress grants. But the *Hirota* petitions were not within the Court's subject matter jurisdiction, either original or appellate, and so the Court lacked power to grant the writs. *Hirota*, therefore, has no bearing on the power of the District Court to adjudicate challenges to the executive detention of American citizens overseas.

**C. Hirota, Unlike Mr. Munaf, Sought Habeas To Mount a Collateral Challenge To The Judgment and Legitimacy of a Foreign Tribunal.**

Finally, Hirota, unlike Mr. Munaf, challenged the lawfulness, legitimacy, and procedural operation of the international military commission that tried and convicted him of war crimes. In his habeas petition, Hirota leveled three principal complaints. First, he argued at great length that General MacArthur exceeded his constitutional authority by creating an international military tribunal. General MacArthur, he contended, "had no authority at any time from Congress or the President" to create an international commission. As an American officer, his power was confined to creating an American commission. Second, Hirota argued that the acts for which he had been convicted, which pre-dated the war, were "beyond the scope and purview of the Japanese instrument of surrender." As a consequence, his conviction was "null and void in its entirety." Petition for Writ

of Habeas Corpus at 34, *Hirota v. MacArthur*, No. 239 (Nov. 1948). And third, Hirota raised a multitude of challenges to the particular operation of his trial. Among other deficiencies, the commission repeatedly deprived him of his right to cross-examine witnesses, routinely misapplied the rules of evidence, and allowed him to be convicted in violation of the constitutional provisions prohibiting bills of attainder and ex post facto laws. Brief of Petitioner-Appellant at 18-22, *Hirota v. MacArthur*, No. 239 (Dec. 1948).

In short, Hirota's habeas petition was in the nature of a collateral attack on the foreign military tribunal that tried, convicted, and sentenced him to die. But the Supreme Court has long limited the scope of habeas review when a coequal and lawfully created tribunal has provided the prisoner with a full and fair opportunity to challenge the legality of his detention. *See, e.g., Stone v. Powell*, 428 U.S. 465, 494-95 (1976) (federal court has jurisdiction under habeas statute, but will restrain exercise of judicial power for Fourth Amendment claims fully and fairly adjudicated in state court); *Frank v. Mangum*, 237 U.S. 309, 329, 334-36 (1915); *Ex parte Royall*, 117 U.S. 241, 252 (1886) (to avoid interference with the "courts of co-ordinate jurisdiction, administered under a single system," and in the absence of any indication that the state court had abused its authority, Court declines to exercise its undisputed power under the habeas statute); *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 207-09 (1830); *see also Withrow v. Williams*, 507

U.S. 680, 716 (1993) (Scalia, J., dissenting on other grounds)(“the most powerful equitable consideration” in deciding whether to restrain the exercise of habeas is whether petitioner “has already had full and fair opportunity to litigate [his] claim.”).

Mr. Munaf, by contrast, does not challenge the Iraqi proceeding in this action. Mr. Munaf’s detention in American custody began May 23, 2005 – long before the start of any Iraqi case. Even if the Iraqi charges were dismissed, or if the appeal ended in his favor, the United States has never suggested it would release Mr. Munaf. As the history of its actions shows, the United States holds Mr. Munaf on its own authority, and for its own purposes – purposes that have never been the subject of scrutiny by a federal court. It is this detention that Mr. Munaf challenges in habeas.<sup>12</sup>

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<sup>12</sup> In another case involving an enemy alien petitioner making a collateral challenge to an overseas military criminal tribunal, this Court held that a judgment of a military commission whose “power and jurisdiction arose out of the joint sovereignty of the Four victorious Powers [of World War II]” could not be reviewed in habeas. *Ex Parte Flick*, 174 F.2d 983, 985 (D.C. Cir. 1949). *Flick*, therefore, provides no more support for the Government’s position than *Hirota*: *Flick*, like *Hirota* and unlike Mr. Munaf, was an enemy alien who challenged the judgment of a foreign tribunal, and who litigated under the disability imposed by *Ahrens*. In any event, subsequently decided cases such as *Madsen*, *Toth*, and *Hamdi* give the lie to the notion that all cases arising from overseas multinational military operations are immune from scrutiny.

### III. AT MINIMUM, REMAND IS REQUIRED FOR DETERMINATION OF RELEVANT JURISDICTIONAL FACTS.

The existing record, including the Congressional testimony of the executive's highest military and civilian officers, compels the conclusion that the District Court had jurisdiction over Mr. Munaf's habeas petition. But if the material facts were disputed, Mr. Munaf was entitled to have the District Court exercise its undoubted power to determine its own jurisdiction before summarily dismissing his petition.<sup>13</sup> See, e.g., *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *Herbert v. Nat'l Acad. of Sci.*, 974 F. 2d 192, 197 (D.C. Cir. 1992); *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 41 (D.D.C. 2005) (ordering discovery to resolve disputed jurisdictional facts regarding actual

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<sup>13</sup> Once more, the District Court took the opposite of the correct approach, dismissing the petition because, "There is evidence that this force is a true coalition ... and petitioner has not demonstrated that it is a mere sham by which the United States seeks to avoid constitutional accountability." J.A. 23. *But see Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (summary jurisdictional dismissal only proper if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). Because the lower court improperly dismissed for want of jurisdiction, the merits of Mr. Munaf's petition are not before the Court. On remand, the lower court will have to determine the factual and legal validity both of the American government's determination to imprison him and of his threatened transfer to Iraqi custody. It will do so using the traditional procedural tools of habeas. See 28 U.S.C. § 2243.

custodians of U.S. citizen detained in Saudi Arabia).<sup>14</sup> At a minimum, therefore, and to the extent Respondents challenge the factual assertions made by their officers, the Court should remand for resolution of the relevant jurisdictional facts.

### CONCLUSION

For the foregoing reasons, the judgment of the lower court should be reversed, and the cause remanded for resolution of the merits of Mr. Munaf's petition.

Respectfully submitted,



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<sup>14</sup> The relevance of such facts in determining whether the Constitution has been violated by the actions of American officials abroad is well-recognized. *See, e.g. Barr v. U.S. Department of Justice*, 819 F.2d 25, 27-29 (2d Cir. 1987).

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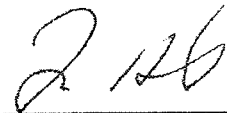
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Dated: December 8, 2006

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