No. _____ 061666 JUN 13 2007

In The
Supreme Court of the United States

MOHAMMAD MUNAF, ET AL.,

Petitioners,

v.

PETE GEREN, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When an American citizen is detained under the exclusive control of American military authorities abroad, is the jurisdiction of a federal court to entertain his petition for a writ of habeas corpus defeated by the fact that those American military authorities purport to act as a part of a multi-national force and that they propose – with no valid legal authority – to deliver the citizen to a foreign nation for execution of a death sentence imposed by a court of that nation?

2. Does the decision of the Court of Appeals, holding that *Hirota v. MacArthur* deprives the federal courts of jurisdiction under these circumstances, extend the 1948 *per curiam* opinion in *Hirota* into conflict with this Court's post-1948 jurisprudence culminating in *Rasul v. Bush* and *Hamdi v. Rumsfeld*, and should that conflict be resolved either by restricting *Hirota* to its proper sphere or by overruling it?

3. Did the Court of Appeals err in holding that the jurisdiction of the federal courts over a habeas corpus petition filed by an American citizen detained under the exclusive control of American military authorities abroad turns on whether those authorities propose to deliver him to a foreign nation for prosecution in its courts (in which case the Court of Appeals has held that habeas jurisdiction exists) or for execution of sentence after conviction by the foreign court (in which case the Court of Appeals here holds that jurisdiction ceases to exist)? If this distinction is valid, can the military authorities defeat federal habeas corpus jurisdiction *ex post* by doing what they did in this case – arranging the conviction and sentencing of their detainee by a foreign court *after* his habeas petition has been filed?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

Mohammad Munaf, who is imprisoned at Camp Cropper, in Iraq, appeared below as the petitioner, with his sister, Maisoon Mohammed, acting as his next friend. The following people appeared below as respondents: Pete Geren, the Secretary of the Army; Major General John D. Gardner, Deputy Commanding General of Detainee Operations; and Lieutenant Colonel Quentin K. Crank, petitioner's immediate custodian.

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PETITION FOR A WRIT OF CERTIORARI

Mohammad Munaf, with his sister Maisoon Mohammed as next friend, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Munaf v. Geren*, 482 F.3d 582 (D.C. Cir. 2007), and is reprinted at Appendix A to this petition. The opinion of the United States District Court for the District of Columbia is reported as *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006), and is reprinted as Appendix B.

JURISDICTION

The Court of Appeals entered its judgment April 6, 2007, and, on May 9, granted Mr. Munaf's motion to stay the mandate pending the disposition of this petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the United States Constitution, which provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

This case also involves the Suspension Clause to the Constitution, which provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

This case also involves 28 U.S.C. § 2241, which provides in relevant part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.
>
> * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless –
>
> 1. He is in custody under or by color of the authority of the United States . . . ; or
>
> * * *
>
> 3. He is in custody in violation of the Constitution or laws or treaties of the United States. . . .

STATEMENT

This petition arises from a divided decision of the Court of Appeals for the District of Columbia Circuit dismissing the habeas corpus petition of a U.S. citizen in U.S. military custody overseas. The lower court relied on a 59-year-old *per curiam* opinion from this Court that it described as not "especially clear or compelling, particularly as applied to American citizens," a decision whose

continuing vitality has been called into question by more recent rulings here. But the Court of Appeals expressly concluded it would leave to this Court "the prerogative of overruling its own decisions." *Munaf v. Geren*, 482 F.3d 582, 585 (D.C. Cir. 2007) (App. A at 6).

A. Statement of Facts

Mohammad Munaf was born in Baghdad, Iraq, and emigrated to the United States in 1990 with his wife. J.A. 7.[1] In 2000, after ten years in the United States, Mr. Munaf naturalized to become an American citizen. *Id.* at 11. Mr. Munaf and his wife have three young children, all U.S. citizens. *Id.* at 12.

Mr. Munaf's wife is Romanian, and in 2001 he and his family moved to Bucharest. *Id.* In March 2005, three Romanian journalists invited Mr. Munaf to travel with them to Iraq as their paid translator and guide. *Id.* The four arrived in Iraq in mid-March 2005. In late March, they were kidnapped by an Iraqi group identifying itself as the "Muadh Ibn Jabal Brigade." On May 22, 2005, after nearly two months in captivity, Mr. Munaf and the three journalists were released. *Id.* Upon release, they were taken to the Romanian Embassy in Baghdad.

Immediately thereafter, U.S. military officers arrested Mr. Munaf. *Id.* They moved him to Camp Cropper, a U.S. prison near Baghdad International Airport, where he remains in the custody of U.S. personnel. *Id.* at 8; *Munaf*,

[1] "J.A." refers to the Joint Appendix filed in the Court of Appeals.

App. A. at 7 (Randolph, J., concurring in the judgment) ("[Munaf] is held by American forces overseas.").[2]

Mr. Munaf's custodians, like all U.S. soldiers in Iraq, answer *only* to a U.S. chain of command and are solely "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).[3] As the government has properly conceded, U.S. citizens imprisoned in Iraq are entirely "in the authority and control of the United States." Arg. Tr., *Omar v. Harvey*, No. 06-5126 (D.C. Cir. Sep. 11, 2006).

B. Proceedings Below

On August 18, 2006 – after almost fifteen months in U.S. custody – Mr. Munaf petitioned for a writ of habeas

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[2] In the lower courts, the government described a non-judicial proceeding that it claims took place at Camp Cropper, and that supposedly led to Mr. Munaf's classification as a "security internee." Brief for the Appellees at 5-6, *Munaf v. Harvey*, 482 F.3d 582 (D.C. Cir. 2006) (No. 06-5324). It is undisputed that Mr. Munaf did not have the benefit of counsel at this proceeding, and the government pointedly does not suggest it satisfied the requirements of the Due Process Clause. When the litigation in this case moves to the merits, the district court may take the measure of this proceeding against the requirements imposed by the Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion) (military must demonstrate lawfulness of citizen's detention by judicial proceeding that satisfies Due Process Clause).

[3] General Casey's Senate testimony was to the same effect. *See Nomination of General George W. Casey, Jr., USA, for Reappointment to the Grade of General and to be Commander, Multi-National Force-Iraq: Hearing Before the S. Comm. On Armed Svcs.*, 108th Cong. (June 24, 2004) (U.S. soldiers in MNF-I do not answer to any component of the United Nations or to any entity other than the United States).

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 or violent act against the U.S. or its allies; that he had not supported forces hostile to American interests; that he had not been a member of or associated with al-Qaeda or any insurgent or militia group; and that his detention by the Executive without lawful process violated, *inter alia*, the Suspension Clause and the Due Process Clause of the Fifth Amendment to the U.S. Constitution. J.A. 7, 13, 85-86. Mr. Munaf invoked the court's jurisdiction pursuant to 28 U.S.C. §§ 2241(a), (c)(1), and (c)(3), as well as the Suspension and Due Process Clauses. *Id.* at 9.

Three weeks after Mr. Munaf began this litigation, counsel for the government advised Mr. Munaf's counsel that Mr. Munaf would 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, his counsel moved for a temporary restraining order ("TRO") to freeze the *status quo* and prevent any transfer pending the adjudication of his habeas petition. Pet'rs' Mot. for TRO, *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455). The government opposed the motion, contending the District Court lacked jurisdiction over Mr. Munaf's habeas petition. *Id.*, Resp'ts' Mem. in Opp. to Mot. for TRO, *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455).

On October 12, 2006, despite the application for a TRO pending in the District Court, U.S. military officers presented Mr. Munaf before the Central Criminal Court of Iraq ("CCCI") to face criminal charges related to his alleged role in the kidnapping of his three Romanian

companions. *Id.*, Resp. to Pet'rs' Supp. Mot. for TRO at 1, *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455).

Iraqi law requires that an aggrieved party issue a formal complaint against the accused before a prosecution can go forward. J.A. 53. Because Mr. Munaf was charged with kidnapping Romanian citizens, the CCCI could not begin a prosecution without a formal complaint from the Romanian government. *Id.* At the October 12 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. Lieutenant Pirone stated that the Romanian Embassy had authorized him to appear on its behalf. *Id.* at 52. He claimed this authorization was documented in a letter submitted in advance to the Iraqi court. *Id.* No such letter was produced, however. Nor is it part of the public record in either the U.S. or Iraqi courts. *Id.* at 48. Neither Mr. Munaf nor his counsel has seen it. The Government of Romania, meanwhile, has officially and emphatically denied that it authorized Lt. Pirone to speak on its behalf. *Id.* at 85; *see also* U.N. HRC, Communication No. 1539/2006, *Munaf v. Romania* (CCPR), Submissions of Romanian Gov't on Admissibility, ¶21 (Mar. 5, 2007) ("Romanian representatives from the Embassy in Iraq had no knowledge either of the trial, nor of the alleged authorization allegedly given by the Romanian authorities to U.S. officer Robert Pirone.").[4]

[4] Mr. Munaf has filed a complaint against the Government of Romania in the Inter-American Commission on Human Rights, alleging, *inter alia*, that Romania did not take actions within its power to protect Mr. Munaf from a death sentence. In its response, Romania has insisted Lt. Pirone had no authority to act for the Romanian

(Continued on following page)

After Lt. Pirone set forth what he claimed was Romania's position, he met *ex parte* with the presiding Iraqi judge for approximately fifteen minutes. Immediately thereafter, that judge convicted and sentenced Mr. Munaf to die. J.A. at 49. Mr. Munaf's appeal of his criminal conviction to the Iraqi Court of Cassation is still pending.

Mr. Munaf promptly notified the District Court that he had been convicted and sentenced to death. Pet'rs' Supp. Mot. for TRO, *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455). Nonetheless, on October 19, 2006, the District Court dismissed the case for want of subject matter jurisdiction and denied the TRO application as moot. *Munaf v. Harvey,* 456 F. Supp. 2d 115 (D.D.C. 2006) (App. B).

Mr. Munaf filed an immediate notice of appeal to the D.C. Circuit and asked the Court of Appeals to enjoin the government from transferring him to Iraqi custody pending the outcome of this litigation. On October 27, 2006, a divided motions panel denied the request over a written dissent, but granted an administrative injunction until November 6, conditioned upon Mr. Munaf seeking emergency relief in this Court by that date. *See Munaf v. Harvey,* No. 06-5324, Order (D.C. Cir. Oct. 27, 2006); *id.* (Tatel, J., dissenting). On November 6, petitioner filed simultaneous applications for injunctive relief here and with the *en banc* court of appeals.

Government in the Iraqi proceedings. The documents are available at http://www.brennancenter.org/dynamic/subpages/download_file_49032.pdf and http://www.brennancenter.org/dynamic/subpages/download_file_49034.pdf.

On November 10, 2006, the motions panel issued a *sua sponte* order extending its administrative injunction pending action by the *en banc* court. This removed any imminent risk to Mr. Munaf. Having been so informed, this Court on the next business day denied the motion which was still pending before it. *See Munaf v. Harvey,* No. 06-5324, Order (D.C. Cir. Nov. 10, 2006); *Munaf v. Harvey,* No. 06-A471, Order, 2006 WL 3262398 (U.S. Nov. 13, 2006). On December 15, the *en banc* court granted an injunction barring Mr. Munaf's transfer to Iraqi custody pending resolution of his appeal.

On April 6, 2007, a divided panel affirmed the dismissal of Mr. Munaf's habeas petition, concluding, reluctantly, that its hands were tied by this Court's terse *per curiam* opinion in *Hirota v. MacArthur*, 338 U.S. 197 (1948) (per curiam). *Munaf*, App. A at 5-6. Speaking for the panel majority, Judge Sentelle voiced dissatisfaction with "the logic of *Hirota*," "particularly as applied to U.S. citizens," and "acknowledged" that this Court's recent decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Rasul v. Bush*, 542 U.S. 466 (2004), cast doubt on "*Hirota*'s continuing vitality." *Munaf*, App. A at 5-6. Nonetheless, the majority concluded that clarity on this issue must await action by this Court, which alone enjoys "the prerogative of overruling its own decisions." *Id.* at 6 (quoting *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989)).

Concurring in the judgment, Judge Randolph rejected the government's jurisdictional argument out of hand. He agreed with Mr. Munaf that citizenship and detention by U.S. forces were "critical" distinctions between this case and *Hirota*. *Munaf*, App. A at 7 (Randolph, J. concurring in the judgment); *see also id.* at 8 (extending *Hirota* to bar

habeas petitions filed by or on behalf of U.S. citizens "would contradict . . . the majority and dissenting opinions in *Rasul*"). Judge Randolph, however, would have denied relief on the merits based on grounds neither party had briefed in the courts below. *Id.* at 7-9.

On April 26, 2007, Mr. Munaf moved the Court of Appeals to stay issuance of its mandate pending the filing and ultimate disposition of this petition. The government opposed the motion on the basis that the petition was unlikely to be granted. On May 9, the court below granted Mr. Munaf's motion. The effect of that order is to preserve the Court of Appeals' interim injunction of December 15, 2006, preventing Mr. Munaf's transfer to Iraqi custody. *Munaf v. Geren*, No. 06-5324, Order (D.C. Cir. May 9, 2007).

REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THE WRIT BECAUSE THE LOWER COURT IMPROPERLY EXTENDED *HIROTA v. MACARTHUR* TO A U.S. CITIZEN IMPRISONED BY U.S. SOLDIERS AT A U.S. MILITARY PRISON.

A. Introduction

The significance of this case can hardly be gainsaid. The Executive Branch argues, and the lower court held, that although Congress has not suspended the Great Writ of Habeas Corpus for U.S. citizens, the United States military may nonetheless detain an American citizen in an overseas American prison indefinitely, or dispatch him to his death at the hands of another sovereign, with no

obligation to demonstrate the lawfulness of either his imprisonment or his threatened transfer.

So framed, this case presents questions of surpassing importance: Is the Executive constrained by the Constitution and laws of the United States in its treatment of U.S. citizens detained by U.S. officers at a U.S. prison overseas? And if so, can those citizens enforce those constraints in a federal court by way of habeas corpus? The ruling below, which cast into doubt the long-settled answers to these questions, demands prompt review.

The Court of Appeals held that the Executive need not account for Mr. Munaf's imprisonment or threatened transfer because he has been convicted by an Iraqi court and is being detained "by United States military personnel serving as part of the Multi-National Force-Iraq." *Munaf*, App. A at 2. The lower court did not elaborate on the relative significance of these two facts except to conclude that they brought his case within *Hirota v. MacArthur*, 338 U.S. 197 (1948) (*per curiam*). *Id.* In *Hirota*, the Court declined to entertain a collateral challenge brought by the former Japanese prime minister to his conviction by an international war crimes tribunal. *Hirota* was a nine sentence *per curiam* by a divided and incomplete Court.[5] It was issued three days after oral argument, cited no authority, and has *never* been relied on by this Court for any proposition.

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[5] Justice Murphy dissented without writing in *Hirota*; Justice Rutledge reserved his decision but died before announcing his vote; and Justice Jackson did not participate. *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948). Justice Douglas concurred only in the result, believing the district court *would have had* jurisdiction over the case had it begun in a lower court. *Id.* at 203 (Douglas, J., concurring in the result).

The Circuit Court's decision has dangerously destabilized decades of settled precedent. Most importantly, it threatens to transform the legal landscape for U.S. citizens in U.S. custody. Almost sixty years ago, the Solicitor General asked the Court to deny habeas protections to U.S. citizens detained overseas. Unanimously, the Court refused. In the years that followed, the Court has consistently reaffirmed habeas as the preeminent protection of a citizen's physical liberty. The Circuit Court's decision casts this venerable doctrine in doubt.

At the same time, the lower court's proffered justification for its new rule introduces needless uncertainty into other settled areas of the law. According to the lower court, the bare fact of Mr. Munaf's foreign conviction, along with America's participation in the MNF-I, combine by some uncertain alchemy to strip a federal court of its power to examine the lawfulness of a citizen's detention and threatened transfer. But this simply makes no sense. As for the conviction, this Court has long recognized that a prisoner may use habeas to challenge the lawfulness of his threatened transfer to another sovereign, even in the shadow of a foreign conviction. And, as for American participation in the MNF-I, it is axiomatic that an executive agreement cannot authorize what the Constitution forbids. Executive membership in an international military force, therefore, cannot suspend the Great Writ for U.S. citizens.

The lower court went astray by extending *Hirota* to bar Mr. Munaf's habeas petition. Whatever argument may be made to deny the privilege of litigation to an enemy alien who attempts to mount a collateral challenge to his conviction by a foreign tribunal, it simply has no relevance to a direct challenge by a U.S. citizen to his detention and threatened transfer at the hands of his own countrymen.

The Court should grant *certiorari* and reverse the judgment below to prevent a dangerous erosion of the judiciary's power to hear habeas petitions from U.S. citizens detained abroad, and to prevent unnecessary ambiguities from distorting the settled law governing prisoner transfers and executive agreements.

B. Citizenship Has Been "A Head Of Jurisdiction" For Nearly Sixty Years.

In 1950, the Solicitor General asked the Court to hold that prisoners incarcerated overseas – whether citizen or alien – had no right to challenge their detention in habeas. The Court pointedly refused the invitation, drawing a distinction that has endured for nearly six decades. American citizens, the Court explained, enjoy a "status" distinct from "all categories of aliens":

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

Johnson v. Eisentrager, 339 U.S. 763, 769-70 (1950); *see also* Brief of Petitioner at 14-15, *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (No. 306) (arguing that citizens as well as aliens held overseas should be denied access to courts). Decided two years after *Hirota*, *Eisentrager* conclusively put to rest any argument that U.S. citizens enjoy no greater protection than enemy aliens when they find themselves imprisoned abroad by their government.

The decades since *Eisentrager* have only solidified the Court's commitment to this principle. *See, e.g.*, *Madsen v. Kinsella*, 343 U.S. 341 (1952) (entertaining habeas petition filed by U.S. citizen convicted and sentenced by a U.S.-controlled occupation court sitting in Germany); *Burns v. Wilson*, 346 U.S. 137, 139 (1953) (plurality opinion) (adjudicating habeas petition from U.S. soldiers imprisoned in Japan); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (granting writ to former U.S. soldier who sought habeas while imprisoned in Korea); *McElroy v. Guagliardo*, 361 U.S. 281, 282 (1960) (granting writ to U.S. citizen who sought habeas while held in Morocco).

By 1973, this principle had achieved sufficient clarity that the Court could proclaim the following general 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 v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973) (internal citations omitted). For U.S. citizens held abroad, the only relevant jurisdictional inquiry is whether an *ultimate* custodian is in the territorial jurisdiction of the district court. *Id.*

The most recent links in this unbroken chain are *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In *Rasul*, eight Justices "explicitly agreed that American citizens held by American officials overseas could invoke habeas jurisdiction." *Munaf*, App. A. 7 (Randolph, J., concurring in the judgment). Writing for five Justices, Justice Stevens pointed out that a U.S. citizen could invoke the habeas statute to challenge his imprisonment at Guantánamo Bay, Cuba. *Rasul*, 542

U.S. at 481. Dissenting on the ground that the writ did not extend to foreign nationals at Guantánamo, Justice Scalia observed for himself and two other Justices "that United States citizens throughout the world may be entitled to habeas corpus rights, [which] is precisely the position that this Court adopted in *Eisentrager*. . . ." *Id.* at 502.

Rasul concerned foreign nationals. *Hamdi*, however, involved an American citizen seized by a multinational force within a theater of active military operations. 542 U.S. at 510 (plurality opinion) (noting that Hamdi was captured in Afghanistan by Afghan, not American, forces).[6] Hamdi was transferred to the physical custody of the U.S. military, and held first in Afghanistan, then at the Guantánamo Bay Naval Base, and ultimately at military brigs in Virginia and South Carolina. *Id.* Like Mr. Munaf, Hamdi filed a habeas petition seeking to vindicate "the most elemental of liberty interests – the interest in being free from physical detention by one's own government." *Id.* at 529. Not one Justice suggested even a possibility that jurisdiction was wanting. *Id.* at 539; *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).

Like Hamdi, Mr. Munaf is a U.S. citizen taken into U.S. custody in the course of an overseas multinational

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[6] 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 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).

military operation. Like Hamdi, Mr. Munaf was initially seized by an ally of the United States. J.A. 12. And like Hamdi, Mr. Munaf is in the present and actual custody of U.S. officers. *Munaf*, App. A at 2 (Munaf "is being held, in Iraq, by United States military personnel . . . "); *id.* at 7 (Randolph, J., concurring in the judgment) ("[Munaf] is held by American forces overseas.").[7] Quite literally, U.S. military officers hold the key to his cell. They alone have the authority to release him, should a U.S. court order it done. *Braden*, 410 U.S. at 495. Habeas jurisdiction requires nothing more.

This entire jurisprudence – from *Eisentrager* to *Hamdi* – developed *after Hirota*. And the panel majority freely "acknowledged" that the most recent decisions in this line – *Rasul* and *Hamdi* – cast "*Hirota*'s continued vitality" into doubt. *Munaf*, App. A at 6. Indeed, the majority candidly confessed that the logic of *Hirota* was in no way "clear or compelling, particularly as applied to American citizens." Yet because "*Hirota* did not suggest any distinction between citizens and non-citizens," the lower court concluded, reluctantly, that it was bound by the decision, leaving it to this Court to resolve the inconsistencies in the doctrine. *Id.* Judge Randolph, however, disagreed, tersely dismissing reliance on *Hirota*. "To

[7] The fact that Mr. Munaf is being held in Iraq while Hamdi was held in South Carolina does not alter the result. As *Eisentrager* and its progeny make plain, detention overseas does not alter the jurisdictional calculus for American citizens. *See supra* at 11-14. Further, as Justice O'Connor cautioned in *Hamdi*, granting access to U.S. courts for American citizens held within the country but denying it to American 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, in any event, the location of Mr. Munaf's detention was irrelevant to the lower court's jurisdictional logic.

extend *Hirota* to habeas petitions filed by American citizens," he warned, "would contradict *Eisentrager* and the majority and dissenting opinions in *Rasul*." *Id.* at 8 (Randolph, J., concurring in the judgment).

The net effect of the lower court's decision is to upend almost six decades of settled precedent. The Circuit Court has introduced dangerous uncertainty into the law by holding that a U.S. citizen imprisoned by his government may not challenge his detention in an American court – precisely the result sought by the Solicitor General and denied by the Court in *Eisentrager*. The lower court understood perfectly well that this result dramatically extended *Hirota* and created a conflict with more recent Supreme Court authority. But the Court of Appeals left it to this Court to restore clarity and predictability to the law. The Court should accept the lower court's invitation. It should grant certiorari to reaffirm a bedrock principle of our constitutional democracy: Unless Congress has suspended the writ, a U.S. citizen may always challenge the lawfulness of his detention at the hands of his countrymen.

C. Treating Mr. Munaf's Case As An Exception To The Rule Of Habeas Jurisdiction For Citizens Has Created Dangerous Uncertainty In The Law.

The panel majority believed that Mr. Munaf's conviction by an Iraqi court, combined with the U.S. government's participation in the MNF-I, distinguished his case from *Eisentrager* and its progeny and brought it within *Hirota*. *Munaf*, App. A at 2. But the lower court's struggle to bring Mr. Munaf's case within *Hirota* has produced a rule that simply makes no sense, even as it destabilizes previously settled doctrines.

a. By Making Habeas Jurisdiction Hinge On The Fact Of A Foreign Conviction, The Lower Court Ignored Settled Constitutional Principles And Introduced Needless Ambiguity Into The Law Of Prisoner Transfers.

With respect to American citizens, the habeas statute is unambiguous and unequivocal: The writ may be granted by "the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions," so long as the prisoner "is in custody under or by color of the authority of the United States," or "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(a), (c)(1), (c)(3). In this regard, the statute has been a bulwark of remarkable constancy. Since 1789 when it was passed by Congress in the First Judiciary Act, and through several legislative refinements, Congress has *always* given an American citizen the right to challenge the lawfulness of his detention by the Executive. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82. And nothing in this statute has ever remotely depended on the presence or absence of a foreign conviction.

Equally, the law is unmistakably clear that "in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power." *Valentine v. United States*, 297 U.S. 5, 9 (1936); *see also, e.g., Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933) ("[T]he legal right to demand [a prisoner's] extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty") (collecting cases); *Quinn v. Robinson*, 783 F.2d 776, 782 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986) ("[N]o branch of the

United States government has any authority to surrender an accused to a foreign government except as provided for by statute or treaty"); *Holmes v. Laird*, 459 F.2d 1211, 1219 n.59 (D.C. Cir.) ("It is certainly the law that the power of the Executive Branch to invade one's personal liberty by handing him over to a foreign government for criminal proceedings must be traced to the provisions of an applicable treaty."), *cert. denied,* 409 U.S. 869 (1972).

Because the Executive may not transfer a prisoner to another sovereign "in the absence of a conventional or legislative provision," *Valentine, supra*, federal courts have for centuries relied on habeas to test the lawfulness of a prisoner's threatened transfer. *See generally* M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 70-72 (4th ed. 2002) (citing cases); *see also, e.g.*, *Holmes v. Jennison*, 39 U.S. 540, 561-63 (1840) (granting writ of habeas corpus to prisoner wanted for extradition to Canada). For as long as it has applied this doctrine, the Court has understood that this inquiry may take place under the shadow of a foreign conviction. *See, e.g.*, *Terlinden v. Ames*, 184 U.S. 270 (1902) (defining extradition as "the surrender by one nation to another of an individual accused *or convicted* of an offence . . . ") (emphasis added). Indeed, it is frequently the very fact of the foreign conviction that triggers the demand for the prisoner's surrender. *See, e.g.*, *Holmes*, 459 F.2d at 1212, 1214 (describing Germany's demand for surrender of U.S. citizen convicted of attempted rape). Habeas jurisdiction in these circumstances is abundantly well settled.

The court below nevertheless cast this settled doctrine into disarray by making "the fact of a criminal conviction in a non-U.S. court [] a fact of jurisdictional significance under the habeas statute." *Munaf*, App. A at 6. And the

same court has solidified this rule by taking a complementary (but correct) position in another case. In *Omar v. Harvey*, No. 06-5126, Slip Op. (D.C. Cir. Feb. 9, 2007), another panel of the Court of Appeals held that a U.S. citizen detained in Iraq by American forces could challenge his detention in habeas because he had not been charged or convicted by an Iraqi court. *Id.* at 12-13.[8] As a consequence, the law in the D.C. Circuit reduces to this: U.S. citizens convicted by a foreign court may *not* challenge the lawfulness of their threatened transfer in an American courtroom, but citizens who have not yet been convicted may.

The government and Mr. Munaf agree on one point: this rule is simply irrational. *See* Appellant's Pet. for Reh'g and Reh'g En Banc at 11, *Omar v. Harvey*, No. 06-5126 (D.C. Cir. Mar. 26, 2007) (making jurisdiction turn on fact of a foreign conviction is "contrary to . . . common sense"). Under the rule adopted by the Court of Appeals, the District Court apparently had jurisdiction when Mr. Munaf filed his habeas petition in August 2006, but somehow lost it two months later when he was convicted. *Cf. Grupo Dataflux v. Atlas Global Group,* 541 U.S. 567, 570-71 (2004) (affirming long-standing time-of-filing rule for calculation of federal-court jurisdiction). The power of the federal judiciary, in other words, turns on the timing of a foreign tribunal's decision. This rule is not merely nonsensical – it also creates an intolerable incentive for the Executive to engage in precisely the sort of manipulations of a foreign tribunal that are alleged to have

[8] Mr. Omar and Mr. Munaf are represented by the same counsel.

occurred here. Nothing in the habeas statute supports this result.

Nor will the state of the law improve through additional percolation of the issue: U.S. prisoners have either been convicted by a foreign court or they have not. If they have not, the longstanding rule of *Eisentrager*, confirmed in *Omar*, prevails and the District Court has jurisdiction; if they have, or if they are convicted at *any* point in their habeas proceeding, including on appeal, the rule in *Munaf* prevails and the Court's jurisdiction is ousted. No further development of the doctrine in the D.C. Circuit – the sole effective forum for citizens detained overseas – can bring reason to this rule.[9]

The lower court candidly conceded that this result was irrational and confessed its inability to understand "why, in cases such as this," the mere fact of Mr. Munaf's conviction should deprive him of a forum to test the lawfulness of his detention and threatened transfer. *Munaf*, App. A at 6. Still, the court considered itself "constrained" by *Hirota*, where the petitioner had also been convicted by a foreign tribunal. *Id.* at 2. But there is a simple solution to the lower court's conundrum: *Hirota* did not turn on the mere fact of a foreign conviction; it turned on the fact that the petitioner tried to challenge that conviction in this Court.

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[9] Rules concerning citizens detained overseas, much like patent cases, will rarely if ever develop into circuit splits because all such cases are typically filed in one federal circuit. *Cf.* R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* § 4.21 p. 263 (8th ed. 2002) (because "conflict among and with other federal courts [in patent cases] has been virtually eliminated[,]" decisions about certiorari "now turn largely on the importance of the questions presented").

Bare recitation of *Hirota*'s facts reveals how far that case is from this, and why the Circuit Court's expansion of *Hirota* was wholly unwarranted. Koki Hirota was a former Foreign Minister and Prime Minister of Japan. He swore allegiance to the Imperial Emperor and held governmental posts through the barbarous Rape of Nanking. For his role in these atrocities, Hirota was convicted of war crimes after a trial before a panel of eleven international judges, a trial that lasted almost two years. Pet'n for Writ of Habeas Corpus at 22, *Hirota v. MacArthur*, 338 U.S. 197 (1948) (No. 239). After his trial, Hirota attempted to mount a collateral challenge to the judgment and conviction of the foreign tribunal by seeking leave to file a habeas petition directly in this Court.

His petition contained three main arguments: that General MacArthur exceeded his constitutional authority in creating the international military tribunal; that the predicate acts for conviction were "beyond the scope and purview of the Japanese instrument of surrender"; and that the commission deprived him of the rights essential to a fair trial. *See* Pet'n for Writ of Habeas Corpus at 34, *Hirota v. MacArthur*, 338 U.S. 197 (1948) (No. 239); Brief of Petitioner-Appellant at 18-22, *Hirota v. MacArthur*, 338 U.S. 197 (1948) (No. 239) (tribunal deprived Hirota of right to cross-examine accusers, misapplied the rules of evidence, and ignored proscriptions contained in Bill of Attainder and *Ex Post Facto* Clauses of U.S. Constitution).

Hirota, in short, asked the Court to second-guess the legitimacy and operation of a foreign court. But it is axiomatic that an American court does not provide collateral review of the proceedings in a foreign tribunal. *Cf. Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004) ("the courts of one state will not question the validity of

public acts . . . performed by other sovereigns within their own borders, even when such courts have jurisdiction"); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) ("[T]he courts of one country will not sit in judgment on the acts of the government of another done within its own territory."). In this respect, the result in *Hirota* is uncontroversial.[10]

By contrast, the litigation that Mr. Munaf commenced in the District Court stands on an entirely different footing. Though Mr. Munaf has been convicted by an Iraqi court, he does *not* challenge his foreign conviction or sentence. Instead, he challenges the legality of three specific actions taken or threatened *by his American jailers*: 1) holding him 24 months without legal justification;[11] 2) interfering in the Iraqi proceedings in order to create the conviction now relied upon by the government to strip the courts of jurisdiction;[12] and 3) delivering him to

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[10] Hirota's litigation suffered from a second fatal defect as well. As the lower court recognized, he sought leave to file directly in the Supreme Court. *Munaf*, App. A at 2; *see also Omar v. Harvey*, No. 06-5126, Slip Op. at 11 (D.C. Cir. Feb. 9, 2007) (*Hirota* was filed "as an original petition for habeas corpus"). But jurisdiction in that instance is either original or appellate. U.S. Const. Art. III, § 2, cl. 2. Hirota's litigation was neither, and the Court had no choice but to deny him leave to file his habeas petition.

[11] The Court of Appeals in *Omar* correctly recognized this distinction. *See Omar*, Slip. Op. at 12 (Omar "seeks not to collaterally attack a final international conviction, but only to test the lawfulness of his extrajudicial detention in Iraq, where he has remained in the control of U.S. forces for over two years without legal process.").

[12] It is well-established that the district courts will investigate on habeas corpus whether American officials have directed or participated in the ostensibly independent actions of a foreign sovereign. *See, e.g., Barr v. United States Department of Justice*, 819 F.2d 25, 27-28 (2d Cir. 1987) (U.S. government bears legal responsibility for actions that foreign government takes at its request); *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 64 (D.D.C. 2004) (court has jurisdiction over habeas

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face execution by the Iraqi Government without the requisite judicial inquiry into whether that transfer is lawful.[13] While the outcome of these claims turns on

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petition filed by U.S. citizen held in Saudi Arabia to determine whether U.S. controls his detention).

In this case it is undisputed that Lt. Pirone purported to act on behalf of the Government of Romania at Mr. Munaf's trial. But it is sharply disputed whether he had any authorization from Romania to do so. *Compare* J.A. 52 (declaration of Robert M. Pirone stating he was authorized to act by the Romanian Embassy in Iraq) *with* J.A. 86 (Romanian "Embassy has not authorized any American official to represent the Romanian Government during the Iraqi judicial procedures") *and* U.N. HRC, Communication No. 1539/2006, *Munaf v. Romania* (CCPR), Submissions of Romanian Gov't on Admissibility, ¶21 (Mar. 5, 2007) ("Romanian representatives from the Embassy in Iraq had no knowledge either of the trial, nor of the alleged authorization allegedly given by the Romanian authorities to US officer Robert Pirone.") (available at http://www.brennancenter.org/dynamic/subpages/download_file_49032.pdf and http://www.brennancenter.org/dynamic/subpages/download_file_49034.pdf; *and id.* at Annex 4 ("The Ministry of Justice never empowered any American official to represent Romania within the Iraqi legal proceedings concerning Mohammad Munaf and has no knowledge of the existence of such a delegation"). The district court must resolve this factual conflict on remand.

[13] *See Valentine*, *supra*; *Laubenheimer*, *supra*. In the District Court, the government conceded that no treaty or statute authorized Mr. Munaf's transfer to Iraqi custody. Arg. Tr., *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455). In the Court of Appeals, Judge Randolph ignored that concession and opined that "the Congressional Authorization for Use of Military Force Against Iraq . . . in conjunction with United Nations Security Council Resolutions 1546 and 1637," provided sufficient legal basis for the transfer. *Munaf*, App. A at 8-9 (Randolph, J., concurring in the result) (citations omitted). Perhaps mindful of its concession below, the government did not advance such an argument in the lower courts, and Mr. Munaf has never had an opportunity to be heard on this matter. At a minimum, the lawfulness of Mr. Munaf's transfer raises complex questions that lie at the intersection of extradition law, treaty law, the laws of war, and customary international law, none of which was addressed by Judge Randolph in his hasty short-circuit of the judicial process. But Judge Randolph

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factual inquiries that the District Court must conduct on the merits, each claim falls squarely within the heartland of habeas.

In sum, the decision below introduces needless confusion into the law of prisoner transfers because it fails to recognize the difference between a collateral challenge to the judgment of a foreign tribunal and a direct challenge to the detention by American jailers. Oblivious to this difference, the Court of Appeals has made a citizen's right to the Great Writ turn on the timing of a foreign tribunal's judgment. The Court should grant review to restore reason to the doctrine.

b. Neither An Executive Agreement Nor A U.N. Resolution Can Suspend The Great Writ.

While the Court of Appeals placed principal reliance on the fact of Mr. Munaf's conviction, it also mentioned several times that Mr. Munaf's custodians were part of an international, or multinational, force. *Munaf*, App. A at 3, 4, 5. The lower court did not elaborate on the significance of this fact except to imply that it helped bring the case within an unexpressed penumbra of *Hirota*. *Id.* at 4 ("As in *Hirota*, Munaf's case involves an international force, detention overseas, and a conviction by a non-U.S. court."). But the Executive's decision to participate in the MNF-I has no effect on the habeas jurisdiction of a federal court.

It is inherent in our constitutional democracy that our government cannot entreat with a foreign sovereign to do

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was correct in one respect: these issues go to the merits, and not to jurisdiction. They must be taken up on remand.

that which the Constitution forbids. In *Reid v. Covert*, 354 U.S. 1 (1957), 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*, 354 U.S. at 15-16 (plurality opinion).[14] Covert protested that the tribunal had not provided for trial by jury, in violation of the Sixth Amendment. Defending the conviction, the government invoked the executive agreement and argued that it 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. This part of the *Reid* plurality, of course, has long been the law. *See, e.g., Missouri v. Holland*, 252 U.S. 416, 432-34 (1929) (treaty cannot authorize the national government "to do that which the Constitution forbids"); *Geofroy v. Riggs,* 133 U.S. 258, 267 (1890) (treaty power cannot "authorize what the Constitution forbids").

At the same time, the Court has long held that the constitutional authority to suspend the writ lies in Congress, not the Executive. *See, e.g., Ex parte Bollman*, 8 U.S. 75, 101 (1807) ("If at any time the public safety

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[14] *See* Executive Agreement of July 27, 1942, 57 Stat. 1193 (cited in *Reid v. Covert*, 354 U.S. 1, 16 n.29 (1957)).

should require the suspension of [habeas] ... it is for the *legislature* to say so") (emphasis added); *Hamdi*, 542 U.S. at 562 (Scalia, J., dissenting on other grounds) ("[S]uspension must be effected by, or authorized by, a legislative act."); *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (Taney, C.J.) (President has no power to suspend habeas).

The lower court turned these ancient doctrines upside down. If membership in the MNF-I contributes somehow to the outcome, as the lower court implies, then a unilateral determination by the Executive to participate in multilateral military operations could suspend the Great Writ for American citizens, even in the teeth of congressional opposition.[15] The Court should take review of this case to correct this dangerous distortion of settled separation-of-powers law.

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[15] Not even the government suggests that Congress has suspended the habeas writ for citizens. On the contrary, as the Court knows, in late 2006, Congress passed the Military Commissions Act, divesting the district courts of habeas jurisdiction over certain *alien* "enemy combatants." 28 U.S.C. § 2241(e)(1); Military Commissions Act of 2006, P.L. 109-366, 120 Stat. 2600 (Oct. 17, 2006). Conspicuously, the MCA *does not* apply to U.S. citizens – a point repeatedly emphasized by its drafters and supporters. During a floor debate in the Senate, for instance, Jon Kyl (R-AZ) insisted: "This legislation has nothing to do with citizens. The decision cited by the Senator from Pennsylvania is the *Hamdi* decision, which dealt with a U.S. citizen. *And, of course, the writ of habeas corpus applies to U.S. citizens.*" 152 Cong. Rec. S10243-01, S10267, 2006 WL 2771411 (Sept. 27, 2006) (emphasis added). Similar declarations echoed throughout the House. The "limitations on habeas corpus," California Representative Dan Lungren explained, "only apply to alien enemy combatants. . . . *[U]nder the expressed terms of the bill, an American citizen will have the unencumbered ability to challenge his or her detention as they have under the Constitution.*" 152 Cong. Rec. H7925-02, H7946, 2006 WL 2796911 (daily ed. Sept. 29, 2006) (emphasis added).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the D.C. Circuit Court of Appeals. On review, the ruling of that court that the District Court lacked subject matter jurisdiction should be reversed, and the case remanded for further proceedings on the merits in the District Court.

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