No. 07-394

In The
Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, ET AL.,

Petitioners,

v.

SANDRA K. OMAR, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent Shawqi Omar is a United States citizen who has been in the physical custody and control of American military personnel overseas for more than three years. Petitioners, all federal officials, are his immediate and ultimate custodians. They answer solely to the Constitution and laws of the United States.

1. Can the petitioners evade respondent's challenge to the lawfulness of his detention by claiming they act pursuant to the authorization of an international body?

2. Should this Court grant *certiorari* merely to review whether the District Court abused its discretion when it issued a standstill preliminary injunction under the All Writs Act and the habeas corpus statute to preserve its jurisdiction so that the litigation could proceed?

LIST OF PARTIES

List of Respondents:

Sandra K. Omar

Ahmed S. Omar

Shawqi Ahmad Omar

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The opinion of the Court of Appeals for the District of Columbia is reported at 479 F.3d 1 (D.C. Cir. 2007). The opinion of the district court is reported at 416 F. Supp. 2d 19 (D.D.C. 2006).

JURISDICTION

The Court of Appeals entered its judgment February 9, 2007. Petitioners' request for rehearing and rehearing en banc was denied May 24, 2007. On August 15, 2007, the Chief Justice extended the time within which to file a petition for certiorari up to and including September 21, 2007. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

STATEMENT

In this habeas action, a U.S. citizen challenges the legal and factual basis of his prolonged detention in the actual, physical custody of U.S. officials. The issue in this interlocutory posture is narrow: Did the District Court (Urbina, J.) abuse its discretion by issuing a standstill preliminary injunction to preserve its jurisdiction and enable the case to proceed? The government seeks certiorari on the ground that there is no jurisdiction over a habeas petition filed by a U.S. citizen in the sole custody of U.S. officials. It also finds an abuse of discretion in the District Court's preliminary injunction.

But jurisdiction exists, and the preliminary injunction properly falls within the District Court's sound discretion. The government's arguments train on a hypothetical permanent injunction, which would be ripe only at a later stage of this litigation, if ever. Granting certiorari now would only encourage other litigants to use interlocutory appeals to short-circuit the litigation process.

I. Facts

1. The government's petition confuses disputed allegations for settled fact. *See, e.g.,* Pet. 3-4, 19-20. But at this stage of the proceeding, it is *the habeas petitioner's* allegations that must be "taken as admitted." *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Turning this time-honored principle on its head is particularly anomalous here, where the habeas petitioner (respondent here) is seeking to test the very allegations the government improperly asserts as true. It is past bizarre for the government to use contested facts to deny a U.S. citizen the chance to demonstrate that those facts are otherwise.

2. Respondent Shawqi Omar ("Mr. Omar") is an American citizen. Mr. Omar first came to the United States almost thirty years ago as a student. Habeas Pet. ¶ 17; Br. in Opp. ("BIO") App. at 8. After Baghdad's fall in April 2003, Mr. Omar traveled to Iraq with his ten-year-old son seeking contract work in reconstruction. *Id.* ¶ 18. On October 29, 2004, U.S. soldiers arrested Mr. Omar in front of his son at their

Baghdad home. *Id.* ¶ 19. From the moment of his arrest, Mr. Omar has insisted he is innocent of all allegations against him and has sought access to U.S. counsel. *Id.* ¶ 31.

Since his arrest, Mr. Omar has been in the exclusive physical custody and control of United States officials. *See* Pet. 4 ("Since his capture, respondent has remained in the custody of members of the United States armed forces acting as part of the MNF-I [Multi-national Forces – Iraq]."); *see also* Habeas Pet. ¶ 22; BIO App. at 10 (U.S. Consul's statement that Mr. Omar is in "United States military care, custody and control"). All U.S. personnel in Iraq, including members of the MNF-I, operate under the exclusive control of the United States. In oral argument before the D.C. Circuit, counsel for the government confirmed that Mr. Omar's jailors "operate 'subject to' no independent MNF-I authority." *Omar v. Harvey*, 479 F.3d 1, 9 (D.C. Cir. 2007) (*citing* Tr. of Oral Argument at 11 ("Tr")). Indeed, the appellate court specifically asked government counsel whether the government "agree[d] with the District Court that Omar is in the authority and control of the United States. Is that right?" Tr. at 11-12. Government counsel responded: "It is, Your Honor. . . . " *Id.* at 12.

The parties thus agree: Mr. Omar's immediate and ultimate custodians report to, receive commands from, and answer to U.S. officials and U.S. officials alone. The government does not suggest – nor could it – that these officials would disobey a federal court order.

3. While detained by the United States, Mr. Omar was questioned by American agents who told him they worked for the Federal Bureau of Investigation. Burke Decl., Ex. A. to Renewed Request for Access & Motion for Records, ¶ 6, *Omar v. Harvey*, No. 1:01-cv-02374-RMU (D.D.C. April 21, 2006) (dkt. 29-3). During these interrogations, Mr. Omar was beaten, and interrogators threatened his wife and son. *Id.* In each interrogation, and at each stage of his detention, Mr. Omar unavailingly asserted his innocence and sought counsel. Habeas Pet. ¶ 29; BIO App. at 12.

According to the government, a decision was made to refer Mr. Omar to the Central Criminal Court of Iraq (CCCI) in August 2005. *See* Pet. App. 104a. In November 2005, U.S. authorities determined that they had "no objection to Iraqi plans to prosecute Mr. Omar in the CCCI." *Id.* The record discloses no subsequent Iraqi judicial or investigative actions concerning Mr. Omar, including in the three months before the District Court issued the preliminary injunction.

II. Proceedings Below

1. On December 12, 2005, Mr. Omar's wife and son filed a next-friend Petition for a Writ of Habeas Corpus in the U.S. District Court for the District of Columbia. On January 27, 2006, the District Court issued a show cause order, and the government secured an extension to respond. Also on or about

that day, Mr. Omar's counsel learned from Mr. Omar's wife that the U.S. government had "transferred Mr. Omar to Abu Ghraib for some type of court proceeding that had been scheduled for February 3, 2006." Burke Decl. in Support of Supp. Briefing in Motion for TRO, ¶ 2, *Omar v. Harvey*, No. 1:01-cv-02374-RMU (D.D.C. Feb. 2, 2006) (dkt. 10). Counsel promptly applied to the State and Justice Departments for leave to participate in this proceeding. *Id.*

On February 2, 2006, the Justice Department rejected the request, advising counsel that no hearing was scheduled for February 3, 2006, but warning that "a determination was previously made to refer [Mr. Omar's] case to the Central Criminal Court of Iraq," and that the date of any transfer to Iraqi custody, "whenever scheduled," would be kept secret from counsel. *Id.* ¶ 3.

Because the government refused to give notice when it might transfer Mr. Omar to Iraqi custody, counsel sought an *ex parte* emergency motion for a temporary restraining order ("TRO"). The District Court granted the TRO, and entered a preliminary injunction temporarily barring respondents from transferring Mr. Omar to Iraqi custody. *See Omar v. Harvey*, 416 F. Supp. 2d 19 (D.D.C. 2006).

2. The District Court rejected the government's argument that *Hirota v. MacArthur*, 338 U.S. 197 (1948) (per curiam), precluded habeas jurisdiction. "*Hirota* is inapplicable," the Court held, for three reasons. 416 F. Supp. 2d at 24. First, *Hirota*

concerned non-citizens' access to the federal court. Second, Mr. Omar was in the "constructive custody" of U.S. officials. Third, Supreme Court precedent after *Hirota* had confirmed the availability of habeas jurisdiction for citizens seized overseas. *Id.* at 24-26.

3. With respect to the preliminary injunction, the District Court applied the settled four-factor test: (1) "substantial likelihood of success on the merits"; (2) "irreparable injury if the injunction is not granted"; (3) no "substantial" injury to "other interested parties" from the injunction; and (4) the furtherance of "the public interest." *Id.* at 22 (citation and quotations omitted).

Mr. Omar met the first factor because his petition "'raise[d] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for litigation and thus for more deliberation.'" *Id.* at 23-24 (*quoting Wash. Metro. Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 844 (D.C. Cir. 1977)). As the District Court found, this standard applies "when the moving party seeks to maintain the status quo pending a final determination of the merits." *Id.* at 22 (*citing Holiday Tours*, 559 F.2d at 844).

On the remaining factors, the District Court underscored the unrebutted evidence that Mr. Omar would be tortured after transfer to Iraqi custody. *Id.*

at 28.[1] It also expressed "concern that any physical transfer of the petitioner may prematurely moot the case or undo [the] court's jurisdiction." *Id.* at 28 (citing 28 U.S.C. § 1651). Finally, the Court concluded that "the threat of tangible harm to the petitioner resulting from the court's failure to act outweighs any potential harm to the Executive's exercise of its war powers," and that "it is in the public's interest to have a judiciary that does not shirk its obligations." *Id.* at 29.

The District Court thus entered a standstill preliminary injunction to preserve its jurisdiction, directing that "respondents, their agents, servants, employees, confederates, and any persons acting in

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[1] In support of this contention, Mr. Omar submitted, *inter alia*, a February 28, 2005, U.S. State Department report on Iraq, *citing* "numerous, serious human rights abuses," including "coerced confessions and interrogation [as a] favored method of investigation by police." *See* United States Department of State, *Iraq: Country Reports on Human Rights Practices 2004*, Feb. 29, 2005, http://www.state.gov/g/drl/rls/hrrpt/2004/41722.htm. He also submitted expert declarations describing how Iraqi government forces systematically torture prisoners – especially Sunni Muslims such as Mr. Omar – with electric shocks, strangulation, breaking of limbs, sexual abuse, cigarette burns, electric drills, and suffocation. *See* BIO App. 23-27. Finally, Mr. Omar pointed out that respondents' own declarant, Major-General John Gardner, had stated that the military would not turn over any prisoners to the Iraqis because of the risk of torture. *See* Jonathan Finer & Ellen Knickermeyer, *Shiite Militias Control Prisons, Officials Say*, Wash. Post, June 16, 2006, at A1. The government has never challenged or rebutted these allegations.

concert or participation with them, or having actual or implicit knowledge of this Order by personal service or otherwise, shall not remove the petitioner from United States or MNF-I custody, or take any action inconsistent with this court's memorandum order." *See* Pet. App. 59a.

4. The government sought interlocutory review pursuant to 28 U.S.C. § 1292(a)(1). The Court of Appeals affirmed. 479 F.3d 1 (D.C. Cir. 2007).

a. All three judges agreed that "the district court has jurisdiction to entertain Omar's habeas petition." *Id.* at 9; *accord id.* at 15 (Brown J., concurring in part and dissenting in part). Writing for the unanimous court, Judge Tatel rejected the government's argument that *Hirota v. MacArthur*, 338 U.S. 197 (1948) (per curiam), foreclosed judicial inquiry into the lawfulness of Mr. Omar's detention by U.S. officials. *Hirota*, the court held, turned on four necessary "circumstances": "detention overseas," "the existence of a multinational force," "foreign citizenship," and a "criminal conviction." *Id.* at 7. Absent the latter two, the court concluded, *Hirota* did not govern. *Id.*

Mr. Omar's petition, the Court of Appeals explained, instead aligned with one of "the most fundamental purposes of habeas . . . [:] 'reviewing the legality of Executive detention.'" *Id.* (*quoting INS v.*

St. Cyr, 533 U.S. 289, 301 (2001)).[2] "[W]here, as here, the Executive detains an individual without trial, the risk of unlawful incarceration is at its apex." *Id.* Further, the Court of Appeals cautioned that this Court's recent decisions also "provide a basis for questioning *Hirota*'s vitality." 479 F.3d at 6.

b. The Court of Appeals also unanimously rejected the government's political question argument. "The Supreme Court's recent decision in *Hamdi* makes abundantly clear that Omar's challenge to his detention is justiciable." *Id.* at 10 (*citing Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)). "'[I]t does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.'" *Id.* (citing *Hamdi*, 542 U.S. at 535).

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[2] Indeed, not one of the six Court of Appeals judges that have been presented with the government's view of *Hirota* has unreservedly endorsed it. *Cf. Munaf v. Geren*, 482 F.3d 582, 584 (D.C. Cir. 2007) ("[W]e do not mean to suggest that we find the logic of *Hirota* especially clear or compelling, particularly as applied to American citizens."); *id.* at 585 (Randolph, J., concurring in the judgment) (stating that *Hirota* does not apply to U.S. citizens). A petition for certiorari for Mr. Munaf was filed on June 13, 2007. *See* Pet. for Cert. *in Munaf v. Geren* (No. 06-1666). The government filed a brief in response September 21, 2007, asking this Court to hold *Munaf* and grant certiorari review in *Omar*, or, alternatively, to grant both petitions. *See* Br. in Opp. *in Munaf v. Geren* (No. 06-1666), at 19. A reply on behalf of Mr. Munaf is being filed concurrently with this brief in opposition. Mr. Munaf is represented by the same counsel as Mr. Omar.

The Court of Appeals also found Mr. Omar's challenge to his threatened transfer justiciable, and unaffected by the rule of non-inquiry. *Id.* (*citing* both *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936), and *Wilson v. Girard*, 354 U.S. 524 (1957) (per curiam)). Precedent confirmed "that courts may determine whether the Executive possesses the necessary authority for transfer." *Id.* (*citing Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972)).

Because the parties had neither briefed nor argued the underlying *merits* question of whether statutory or treaty authority for such a transfer existed, the Court of Appeals held that the issue should be addressed in the first instance by the District Court. *Id.* at 10.

c. The Court of Appeals also upheld the preliminary injunction over the dissent of Judge Brown. The majority noted that "the injunction does not bar a bona fide release of Omar," but does prohibit a transfer, which might "obviously defeat the district court's habeas jurisdiction." *Id.* at 12, 14. So understood, it merely enables "unremarkable" federal-court review of U.S. officials' actions for compliance with U.S. laws and constitutional provisions. *Id.* at 14.

The government's "primary challenge" to the preliminary injunction, the appellate court noted, was the contention that transfer was properly treated as "a subset of release." *Id.* at 12. Rejecting this sophism, the court highlighted the "obvious and quite significant difference between transferring Omar to

Iraqi authorities and releasing him to walk free from his current detention." *Id.*

The Court of Appeals then rejected Judge Brown's contention that no preliminary injunction could issue because at the close of the habeas proceeding, and assuming Mr. Omar prevailed, "Iraqi authorities might arrest Omar the moment U.S. forces release him" based on a hypothetical U.S. "'tip-off.'" *Id.* at 12-13. The majority noted that Judge Brown's argument rested not on the *preliminary* injunction, but on "speculation" about the contours of a possible *permanent* injunction. *Id.* But, as the majority cautioned, there is "no way of knowing how the U.S. military would release Omar if the district court ruled in its favor." *Id.* at 12. "[T]he appearance of defects in the government's case or the introduction of exculpatory evidence" might lead Iraqi authorities to "decide that Omar is no longer worth prosecuting." *Id.* "Or perhaps by the time the district court ordered Mr. Omar's release, Iraqi priorities would have changed, leaving Iraqi authorities uninterested in allocating scarce military resources . . . to his arrest." *Id.* at 12-13. "[A] preliminary injunction protecting Omar from the *certainty* of transfer," and also of torture, therefore was proper. *Id.* at 13 (emphasis in original).

For similar reasons, the majority rejected as "speculative" the dissenting judge's argument that final relief would necessarily go beyond release. "Speculating about the conditions under which the military might release Omar or the lawfulness of

those conditions is not only premature – *the matter may never arise* – but irrelevant" because "the petition does not seek 'release-plus' . . . [it] seeks [only Mr. Omar's] release from military custody." *Id.* at 13-14 (emphasis added).

d. In dissent, Judge Brown would have affirmed the district court's jurisdiction but would have vacated the preliminary injunction based on the "practical equivalence" of transfer and release. *Id.* at 18 (opinion of Brown, J.).

e. The government sought en banc review. On May 24, 2007, the full District of Columbia Circuit voted to deny rehearing, with two judges dissenting. *See* Order Denying Rehearing and Rehearing En Banc, *Omar v. Geren*, No. 06-5126 (D.C. Cir. May 24, 2007) (per curiam).

REASONS NOT TO GRANT THE PETITION

The government's petition, in Question 1, attacks *sub silentio* the holding of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). *Hamdi* reaffirmed the settled rule that habeas jurisdiction obtains whenever a U.S. citizen is seized overseas and held in the actual, physical custody of U.S. officials. After *Hamdi*, Congress amended the habeas statute twice, both times preserving U.S. citizens' plenary habeas entitlement. The government gives no reason to second-guess those careful, recent, judgments. Its sole reliance is

on a single per curiam, *Hirota*, which, as many subsequent cases show, is inapposite.

Nor should this Court grant certiorari on Question 2 to review the District Court's discretionary grant of preliminary, standstill relief. To do so would involve fact-bound review of an interlocutory question absent a circuit split. The District Court had clear statutory authority to issue the injunction. It acted well within its sound discretion, carefully considering fact-bound separation-of-powers concerns. In any case, the consequences about which the government complains do not follow from the *preliminary* injunction. Rather, they flow from a hypothetical *permanent* injunction. Such consequences, should they materialize, can be reviewed as an actual, ripe controversy. To grant review now would encourage future litigants to use interlocutory appeals to short-circuit this process to obtain review of issues that may never materialize.

I. The District Court Had Jurisdiction Under The Habeas Statute.

The District Court properly took jurisdiction over a habeas corpus petition filed here on behalf of a U.S. citizen detained in the actual, physical custody of U.S. officials overseas. This unexceptional result warrants no certiorari review.

A. The Government's Attempt To Overrule *Hamdi Sub Silentio* Should Be Rejected.

1. It is undisputed that Mr. Omar is a U.S. citizen in the actual, physical custody of U.S. officials.[3] Further, the government acknowledged to the Court of Appeals that Mr. Omar's jailors "operate 'subject to' no independent MNF-I authority." *Omar*, 479 F.3d at 9 (quoting Tr. 11). Rather, "[t]he government agrees with the District Court that Omar is in the authority and control of the United States." Tr. at 12; *see supra* at 3.

In 2004, the Court in *Hamdi v. Rumsfeld*, unanimously confirmed the availability of habeas jurisdiction for a U.S. citizen seized overseas in multinational military operations. *See* 542 U.S. at 513 (plurality op.). *Hamdi* involved a seizure during a multilateral military operation materially indistinguishable from this case. In both instances, U.S. forces operating as part of a multinational force with U.N. Security Council sanction seized and detained a U.S. citizen.[4] The Court held that a citizen seized in a

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[3] The government identifies Mr. Omar as a dual-citizen, as though it were somehow significant that he was not born in this country. *See, e.g.*, Pet. 3. But "[u]nder 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).

[4] *Compare* S.C. Res. 1386, ¶ 1, U.N. Doc. S/Res/1386 (Dec. 20, 2001) (authorizing an "International Security Force" to maintain security in Afghanistan) *with* S.C. Res. 1511, ¶ 13, U.N. Doc. S/Res/1511 (Oct. 16, 2003) (authorizing a

(Continued on following page)

multinational military operation overseas can challenge the factual and legal bases for his detention. Jurisdiction in this case follows necessarily from *Hamdi*.[5]

2. The Court in *Hamdi* applied 28 U.S.C. § 2241, the federal habeas statute. Both the text of the statute and the construction it has received from the Court confirm that actual custody by a U.S. official is the sufficient jurisdictional predicate for habeas review. Since 1789, the Writ has been available for anyone either "in custody, under or by colour of the authority of the United States." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82 (currently codified at 28

"multinational force" to maintain security in Iraq); S.C. Res. 1546 ¶ 10, U.N. Doc. S/Res/1546 (June 8, 2004) (authorizing the "multinational force" to take all necessary steps to maintain and stabilize Iraq); *see also* S.C. Res. 1378, ¶ 4, U.N. Doc. S/Res/1378 (Nov. 14, 2001) (calling on U.N. member states to support the formation of a transition administration and new government in Afghanistan, including "quick impact" projects and long-term social and economic assistance).

[5] In *Hamdi*, the Court made clear that habeas jurisdiction did not depend on where the U.S. citizen was detained. 542 U.S. at 523-24 (plurality op.). Such a rule, it said, would create "a perverse incentive" for the government "simply [to] keep citizen-detainees abroad." *Id.* at 524. Therefore, it is irrelevant to federal habeas jurisdiction that Mr. Omar is held overseas, unlike Mr. Hamdi. Moreover, the government's "source of authority" rule does not contain a geographic element, as government's counsel conceded at oral argument below. *See* Tr. 27-29. Thus, adopting it would require directly overruling *Hamdi*, and would foreclose habeas review for any citizen seized in a multi-national operation, regardless of where he is ultimately detained.

U.S.C. § 2241(c)(1)). Today, the statutory language "requires nothing more" than a custodian who will answer to the court's command. *See Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973); *accord Rasul v. Bush*, 542 U.S. 466, 483-84 (2004). Undisputed here is the fact that Mr. Omar's custodians, all U.S. officials, "operate 'subject to' no independent MNF-I authority." *Omar*, 479 F.3d at 9.[6] They certainly obey the federal courts and will answer to its commands.

Twice in the past two years, Congress has amended the habeas statute to limit jurisdiction in certain instances when designated non-citizens are detained overseas. Yet on each occasion, Congress preserved citizens' plenary jurisdictional entitlement. *See* Military Commissions Act of 2006, § 7, Pub. L. No. 109-366, 120 Stat. 2600; Detainee Treatment Act of 2005, § 1005(e), Pub. L. No. 109-148, 119 Stat. 2680 ("DTA").

3. Nor did *Hamdi* break with precedent. Instead, it confirmed a long line of authority. The United States has collaborated in many multinational military operations since World War II with U.N.

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[6] In 2004, General George W. Casey, Jr., sole commander of the MNF-I, affirmed to Congress 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.

authorization. This Court has not once rejected habeas petitions arising out of these multinational operations.

In postwar Germany, for example, occupation authorities operated under an "Allied high command," but with U.S. officials in charge. U.S. citizens could be charged and sentenced by the "United States Court of the Allied High Commission for Germany." *Madsen v. Kinsella*, 343 U.S. 341, 343-44 & n.3 (1952). Yet when the rights of citizens so charged were at stake, federal courts reviewed and ascertained the lawfulness of those *Allied* courts.

U.S. forces deployed in the Korean War also operated under a U.N. Security Council mandate and worked alongside non-American forces.[7] Under the government's proposed logic, arrests and detentions carried out in connection to the Korean War would have been out of jurisdictional bounds. In *United*

[7] *See* S.C. Res. 84, ¶¶ 3-5, U.N. Doc. S/Res/84 (July 7, 1950) ("3. *Recommends* that all Members providing military forces and other assistance pursuant to the aforesaid Security Council resolutions make such forces and other assistance available to a unified command under the United States of America; 4. *Requests* the United States to designate the commander of such forces; 5. *Authorizes* the unified command at its discretion to use the United Nations flag in the course of operations against North Korean forces concurrently with the flags of the various nations participating. . . . "); *see also* S.C. Res. 83, U.N. Doc. S/Res/83 (June 27, 1950); Max Hilaire, *United Nations Law and the Security Council* 9, 186 (2005); Louis Henkin, *Foreign Affairs and the United States Constitution* 255 (2d ed. 1996) (noting "unified command" of multinational forces in Korea).

States ex rel. Toth v. Quarles, 350 U.S. 11 (1955), however, the Court held that a district court properly issued a habeas writ for a citizen detained for crimes allegedly committed in Korea during U.S. military operations there.

More recently, American military forces have operated under the mantle of international authorizations in Haiti and Afghanistan.[8] *Hamdi,* which arose from the latter operation, was thus simply the most recent invocation and confirmation of federal court jurisdiction to assess the lawfulness of a U.S. citizen's detention by U.S. military forces without regard to the fact that those forces happen to be operating as part of a multinational coalition.

B. *Hirota* Creates No Exception To The Custody Rule For Habeas Jurisdiction.

1. In the teeth of precedent and statute, the government argues that a nine-sentence per curiam opinion, *Hirota v. MacArthur*, 338 U.S. 197 (1948), creates a previously-undiscovered exception to a citizen's right to habeas. Pet. 9, 11-16. The government's argument is that U.S. officials can seize and detain a U.S. citizen and evade habeas review provided they invoke a foreign-law or international-law "source of authority." Pet. 13. The profound

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[8] *See, e.g.*, United Nations, *Haiti Facts and Figures* (2003), http://www.un.org/Depts/dpko/dpko/co_mission/unmihfacts.html (last visited October 31, 2007).

consequences of this argument cannot be exaggerated. As the government concedes, it would not hinge on the locus on detention. On the contrary, its "source of authority" reasoning would apply to the detention of U.S. citizens on U.S. soil. *See* Tr. 28-30.

Not surprisingly, the Court of Appeals rejected this argument. It accurately observed that this "Court . . . has never cited *Hirota* for any substantive proposition, much less the one the government claims it supports." *Omar*, 479 F.3d at 7. Quite the contrary, this Court has repeatedly heard cases concerning detentions arising out of multinational military operations overseas. *See supra* at 17-18. Yet it has never cited *Hirota* to forsake jurisdiction.[9]

2. *Hirota* in fact stands for a limited technical proposition about the limits of this Court's jurisdiction under Article III, Section 2 of the Constitution.

Hirota and his co-petitioners filed original petitions for writs of habeas corpus in this Court. They did not seek District Court review because a mere five months beforehand, the Court had held in *Ahrens v. Clark*, 335 U.S. 188, 192 (1948), that federal district courts lacked jurisdiction to issue the Writ for

[9] The Court of Appeals for the District of Columbia Circuit in one early case extended *Hirota* beyond its holding. *See Flick v. Johnson*, 174 F.2d 983 (D.C. Cir. 1949). This extension was not compelled by the holding of *Hirota*, however, and is inconsistent with subsequent cases, including *Hamdi*.

persons imprisoned outside their *territorial* jurisdiction. *See* Br. in Opp. to Motions for Leave to File Pets. for Writs of Habeas Corpus at 7-8, *Hirota v. MacArthur*, 338 U.S. 197 (1948) (No. 239) (dated November 1948) (citing *Ahrens*, and observing that there was no "person who has . . . control and custody . . . within the jurisdiction of any district court of the United States").

After oral argument in *Hirota*, the Court denied the motions for leave to file the habeas petitions. 338 U.S. at 198. In a per curiam opinion joined by five Justices, the Court stated that "the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments or sentences imposed on these petitioners." *Id.*

The Court reached this ruling because the *Hirota* petitions fell outside the strictly delimited jurisdictional bounds of this Court. Four of the five Justices who joined the per curiam opinion had already indicated their belief that the petitioners' motions should be dismissed specifically because "there is want of jurisdiction," and cited the original jurisdiction clause of Article III. *Hirota*, 338 U.S. at 876. Only ten days later these four Justices (plus one other) denied Hirota's motion for leave to file. 338 U.S. at 198.

As the four Justices indicated, it was then and is now black-letter law that the Supreme Court lacks original jurisdiction over a habeas corpus petition filed with it directly. *See Felker v. Turpin*, 518 U.S. 651, 667 n.1 (1996) (Stevens, J., concurring) ("Such a

petition is commonly understood to be 'original' in the sense of being filed in the first instance in this Court, but nonetheless for constitutional purposes an exercise of this Court's appellate (rather than original) jurisdiction."); *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175-76 (1803).

But the Court's appellate jurisdiction is entirely statutory. In *Hirota*, as in *Ex parte Vallandigham*, 68 U.S. 243, 253-54 (1863), there was no statutory authority to review directly the military tribunal's ruling. Moreover, the Court had recently decided in *Ahrens* that the federal habeas corpus statute did not give district courts any jurisdiction over habeas petitions filed on behalf of persons outside the courts' territorial jurisdiction. *See* 335 U.S. 188, 192 (1948). Hence, this Court could not exercise appellate jurisdiction by that route either.

But that aspect of *Ahrens* is obsolete. In *Braden v. 30th Judicial Circuit Court of Kentucky*, the Court held that "the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the *custodian*." 410 U.S. 484, 495 (1973) (emphasis added); *accord Rasul,* 542 U.S. at 483-84. This case was filed in district court against respondents who are within the federal courts' jurisdiction and who have physical custody of Mr. Omar. It therefore falls properly within the federal courts' jurisdiction.

Hirota dealt with the bounds of this Court's subject matter jurisdiction against the backdrop of a

now defunct statutory understanding. In arguing otherwise, the government makes the untenable assumption that five Justices were ignorant of basic jurisdictional principles and that four of them said one thing but then did another.

Most damning of all, the government asks this Court to ignore an unbroken line of precedent after *Hirota* holding citizenship is "a head of jurisdiction and a ground of protection [that] was old when Paul invoked it in his appeal to Caesar." *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950); *accord McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 282 (1960) (jurisdiction exercised over U.S. citizen petition filed by petitioner detained in Morocco); *Burns v. Wilson*, 346 U.S. 137, 139 (1953) (citizen petitions filed from Guam). The government's "source of authority" rule turns longstanding principle on its head. It allows the government to violate citizens' rights by purporting to stand in another state's shoes.[10] This the government cannot do.

Unless *Hamdi* is to be overruled, and the coin of citizenship debased, the government's claim that a foreign "source of authority" allows U.S. officials to

[10] Further, the government's proposed "source of authority" rule directly contradicts the "immediate custodian" rule that it pressed with unstinting vigor three years ago in *Padilla*. *See* Br. for Petr., *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027), at 17-21.

detain U.S. citizens indefinitely should be rejected.[11] That claim's unanimous rejection below provides no warrant for certiorari review.

C. The Opinion Below Opens No Floodgates.

The government claims that certiorari review is needed to dam a (hypothetical) flood of non-citizen petitions. Pet. 10 & 14-15, n.5. Petitioners respectfully suggest that the Court reject this baseless scare tactic.

1. The Court of Appeals *did* "distinguish between aliens and citizens." Pet. 14. It explicitly said *both* "foreign citizenship and criminal conviction" were relevant to its understanding of *Hirota*. *Omar*, 479 F.3d at 7. It thus gave no invitation to non-citizen petitions. In any case, the habeas statute's text as

[11] Indeed, not even the government believes in its proposed rule. In an October 8, 2007, filing in the District Court, the government cited the Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, as authority for detaining persons in Iraq; the government also concedes that were Mr. Omar transferred out of Iraq, it would be illegal to transfer him to Iraqi custody in the absence of a treaty. *See* Response to Order to Show Cause, *Omar v. Harvey*, No. 1:05-cv-02374-RMU (D.D.C. Oct. 8, 2007) (dkt. 44), at 15. The government also concedes that it lacks the necessary treaty-based authority to transfer Mr. Omar. *See id.*; *see also* Extradition Treaty, U.S.–Iraq, art. VIII, June 7, 1934, 49 Stat. 3380 ("Under the stipulations of this Treaty, neither of the High Contracting Parties shall be bound to deliver up its own citizens.").

amended clearly distinguishes U.S. citizens from non-citizens, addressing the government's concern. *See* 28 U.S.C. § 2241(e). Federal courts simply will not be deluged with foreign-national habeas petitions as a result of the judgment below. Pet. 15 n.5.[12]

2. Moreover, the government's proposed reading of *Hirota* would have the perverse result of rendering non-citizens detained overseas better off than citizens such as Mr. Omar. Under the DTA §1005(e)(2(A), aliens who are not entitled to habeas at least obtain some administrative and judicial review. By contrast, on the government's theory citizens like Mr. Omar would be entitled to no legal process whatsoever.[13] Congress would never have intended such an absurd result. *Cf. Clinton v. City of New York*, 524 U.S. 417, 429 & n.14 (1998) (construing statute to avoid "absurd" result).

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[12] In fact, courts have summarily dismissed the handful of such cases filed. *See* Pet. 14-15 n.5 (citing cases). And, moreover, if some problem arises in another case because the federal courts are seeking "to interfere with the criminal prosecution of individuals before foreign tribunals," *id.* at 15-16, it can be dealt with then.

[13] The government does not – and could not – assert that the hearing Mr. Omar allegedly received as a matter of administrative grace satisfied the due process floor of *Hamdi*. *See* Pet. 14 n.4. The "mimimum requirements of due process" include "notice" of the charges, "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker," and counsel – none of which Mr. Omar received. *Hamdi*, 542 U.S. at 533, 538-39 (plurality op.).

II. Interlocutory Review Of The District Court's Standstill Preliminary Injunction Is Not Warranted.

The government argues that its petition for certiorari should be granted on the separate question whether the District Court's standstill preliminary injunction was proper. The government argues that the preliminary injunction does not have a basis in law, Pet. 17-22, and constitutes an impermissible judicial intrusion, *id.* at 22-25.[14]

Certiorari review of the narrow standstill preliminary injunction, however, is unwarranted for three reasons. *First*, black-letter law supports a district court's authority to issue standstill injunctions to allow adjudication of the merits in a habeas action. There is no circuit split on this question. The government does not cite, let alone challenge, the operative law on point. At best, by invoking the political question doctrine, it seeks fact-bound reweighing of the four preliminary injunction factors.

Second, the government's argument focuses on the effects of a *final* injunction that has not been litigated and that is as yet hypothetical. This final injunction may never issue, and the factual consequences of which the government complains may never arise. If they do, the government will have an

[14] Dissenting below, Judge Brown relied on the second point alone. *See Omar v. Harvey*, 479 F.3d 1, 19 (D.C. Cir. 2007) (Brown, J., concurring in part and dissenting in part).

opportunity to seek review in the Court of Appeals and this Court. Until then, the issue is unripe.

Finally, the government's petition tries to leverage an interlocutory appeal to get a merits ruling on an issue not pressed, briefed, or addressed below. This would widen the scope of permissible appellate review of preliminary injunctions. It would force this Court into the review of legal questions without the benefit of lower-court consideration or factual development. This attempt should be rejected, and review on Question 2 should be denied.

A. The District Court Had Authority To Issue This Standstill Injunction And Did Not Abuse Its Discretion.

1. The government incorrectly asserts that "[t]here is no legal basis" for the standstill preliminary injunction – the sole issue in this interlocutory appeal. Pet. 17. Two such bases exist.[15]

First, the District Court correctly invoked the All Writs Act, 28 U.S.C. § 1651, which provides unquestioned authority for a federal court to preserve its own jurisdiction during a case's pendency. *See Omar*, 416 F. Supp. 2d at 28; *accord United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977) ("This Court has repeatedly recognized the power of a federal court to

[15] And as the government concedes, *see* Pet. 19 n.7, review of the preliminary injunction here implicates no circuit split.

issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.") (*citing Harris v. Nelson*, 394 U.S. 286, 299 (1969)).

Second, it is well recognized that federal courts have the power and the obligation to enter interlocutory orders necessary to ensure fair litigation of a habeas petition. *See, e.g., Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) ("'[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.'") (ellipsis in original; *quoting Harris*, 394 U.S. at 300); *cf.* 28 U.S.C. § 2251(a)(1) (authorizing federal courts to stay state criminal proceedings pending adjudication of habeas petitions).

Under these provisions, the District Court unquestionably had power to do what is done routinely in extradition proceedings: direct U.S. officials[16] to stay their hand, preserving jurisdiction of the legal and constitutional issues tendered for adjudication.

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[16] Contrary to the government's insinuations, the injunction in no fashion directs Iraqi authorities either to do, or to refrain from doing, anything. *Cf.* Pet. 23-24. The fact that U.S. officials cannot hand a suspect to a foreign sovereign temporarily is a routine occurrence in extradition proceedings. It entails no entanglement in foreign proceedings.

Cf. Omar, 479 F.3d at 12 ("[C]ourts routinely stay extraditions[.]") (*citing Ntakirutimana v. Reno,* 184 F.3d 419 (5th Cir. 1999), and *Then v. Melendez,* 92 F.3d 851 (9th Cir. 1996)). Such orders are committed to the district court's sound discretion. *Omar*, 479 F.3d at 14.

The standstill relief entered below is fully supported by these authorities, and does not warrant certiorari review.

2. Despite this clear authority, the government argues that political question concerns warrant this Court's immediate interference with the standstill preliminary injunction. *See* Pet. 24-25. This argument for factbound review of the injunction is misplaced for two reasons.

First, the Court of Appeals followed settled law, articulated in *Hamdi,* in rejecting the government's separation-of-powers arguments for jurisdictional ouster. *See Omar*, 479 F.3d at 9-10 (*citing Hamdi*, 542 U.S. at 535). This Court in *Hamdi* held that, absent a proper suspension of the writ, federal courts have jurisdiction over habeas actions such as Mr. Omar's. Without the power to enter effective orders preserving the ability to hear claims, this jurisdiction would be an empty gesture.

Second, the government's argument in effect seeks error correction of the scope of the standstill injunction based on factors the lower court considered. *Cf. Omar*, 416 F. Supp. 2d at 29 (weighing separation-of-powers concerns that the government

here invokes and concluding that under these circumstances "the threat of tangible harm to the petitioner resulting from the court's failure to act outweighs any potential harm to the Executive's exercise of its war powers"). But this Court does not sit to tinker with the factual balance of an interlocutory order. *Cf. United States v. Johnston*, 268 U.S. 220, 227 (1925). It should not grant review of fact-bound concerns about the scope of a particular preliminary injunction. That is particularly true in this case because all of the concerns the government raises now can be addressed in the District Court, which can tailor the injunctions in light of new evidence. *See Judicial Watch v. Dep't of the Army*, 466 F. Supp. 2d 112, 122-23 (D.D.C. 2006); *see also* Fed. R. Civ. P. 54(b) (allowing reconsideration of interlocutory orders).

In short, there was nothing the least bit untoward about the standstill preliminary injunction in this case, an order that takes the "unremarkable" precaution of ordering petitioners to refrain from steps that would divest the federal courts of jurisdiction. *Omar*, 479 F.3d at 14.

B. The Court Should Not Grant Review Of A Hypothetical Final Injunction To Issue An Advisory Opinion.

This appeal is from a standstill *preliminary* injunction. But the government seeks review by invoking the specter of consequences flowing from a hypothetical *permanent* injunction. *See* Pet. 10-11,

22-25. It conjures a hypothetical scenario in which the merits have been adjudicated, a permanent injunction issued, and Mr. Omar has been released with "a head start." *Id.* at 22-23. It proposes that such release would have to be accompanied by a new prohibition on "sharing information" to supplement the preliminary injunction in place now. *Id.* at 23. And it suggests that an Iraqi process would be thwarted by this hypothetical final injunction. *Id.* at 23.[17]

None of these scenarios could occur until a final judgment on the merits questions. And a permanent injunction could not issue until the lower court considered evidence and legal arguments on the merits of Mr. Omar's petition and decided in his favor. The rulings on both the merits and the appropriate remedy would then be subject to Court of Appeals review on a full record. The government asks this Court to short-circuit this process by imagining and ruling on a situation that does not presently exist. But it would be unprecedented and unwarranted for this Court to rule on unripe "matter[s that] may never arise." *Omar*, 479 F.3d at 13-14.

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[17] The government correctly notes it cannot facilitate any ongoing Iraqi proceedings. Pet. 24. There is no evidence in the record, however, that any such proceedings ever began, or that Iraqi authorities have made any move toward their beginning. If the government should in the future desire to assist the Iraqi government in some way that is not prejudicial to Mr. Omar, it will be free to make its proposal to the District Court.

C. The Court Should Decline To Review A Merits Question Neither Briefed Nor Passed On Below.

Finally, the Court should not grant certiorari at this stage because to do so would expand the scope of interlocutory review in ways the Court has always rejected. In effect, the Court would be inviting the use of interlocutory reviews of *preliminary injunctions* in order to obtain preemptive resolution of the final *merits* of a case.

1. In granting a preliminary injunction, the District Court made clear that it was *not* rendering a final ruling on the merits of Mr. Omar's habeas petition. *See Omar*, 416 F. Supp. 2d at 23. In that forum, and then on appeal, the government argued *only* that the court lacked jurisdiction.

Since the government did not even argue the merits below, the Court of Appeals, quite understandably, expressly declined to opine on the merits question "whether Omar's transfer . . . requires treaty or statutory authorization," and whether such authority exists. *Omar*, 479 F.3d at 10. Consequently, this Court has no reasoned lower court opinion on the matter to review.

Now, however, the government presses the merits question whether it has power to transfer Mr. Omar to Iraqi custody and torture. *See* Pet. 17-25. It frames its challenge as a request for a ruling "on the merits of . . . a challenge [to Mr. Omar's transfer]." *Id.* at 22.

Having pressed only jurisdictional grounds below, the government should not be permitted to switch tracks now. This Court has been reluctant to deal with non-jurisdictional arguments not properly pressed and passed on below. Rather, "where the ground presented . . . has not been raised below," the Court reaches that issue "'only in exceptional cases.'" *Heckler v. Campbell*, 461 U.S. 458, 469 n.12 (1983) (*quoting McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434 (1940)); *see also Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund,* 527 U.S. 308, 319 n.3 (1999) (disfavoring petitioners' arguments not pressed or passed on below); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 456 (1995) (same); *cf. Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989) (same for respondents' arguments).

To be sure, *likelihood* of success on the merits is one element in the discretionary calculus as to whether a preliminary injunction should issue. But the Court has stressed that 28 U.S.C. § 1252 "does not give the Court license to depart from established standards of appellate review. If the underlying constitutional question is close, therefore, [it] should uphold the injunction and remand for trial on the merits." *Ashcroft v. ACLU*, 542 U.S. 656, 664-665 (2004) (citation and quotation marks omitted). To leap-frog to the merits here would forego the model of "prudent and incremental" adjudication that this Court has previously demanded. *Hamdi*, 542 U.S. at

539 (plurality op.). There is no reason to break with that principle here.

2. In any case, the government's merits argument does not withstand scrutiny. The government relies on *Wilson v. Girard*, 354 U.S. 524 (1957) (per curiam). *See* Pet. 18-20.[18] But *Wilson* does not aid the government's claim. In *Wilson*, the question presented was whether the Uniform Code of Military Justice trumped an executive agreement that was signed pursuant to a 1952 treaty and that allowed the transfer of a U.S. soldier. *See Wilson*, 354 U.S. at 530, *overruling Girard v. Wilson*, 152 F. Supp. 21, 26 (D.D.C. 1957) (describing argument). *Wilson*'s holding – that no statute affirmatively precluded transfer – does not support the government's contention here that no statute or treaty is needed for a citizen's transfer.[19]

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[18] In the Court of Appeals, the government cited *Wilson* only once in its brief – and then only in a parenthetical to a quotation of another case. *See* Brief for Appellants, at 36, *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir. 2007) (No. 06-5126). The government's argument at that point was that a line of cases demonstrated that courts "refus[ed], for separation of powers reasons, to review the Executive's decision to turn over an individual to a foreign country for criminal prosecution." *Id.* at 37. This was an argument about jurisdiction, not the merits.

[19] Nor does the "rule of non-inquiry" preclude jurisdiction. The "rule of non-inquiry" merely delimits *merits* inquiries into a foreign criminal process once *Congress* sanctions transfers to that jurisdiction. *See Lo Duca v. United States*, 93 F.3d 1100, 1103 (2d Cir. 1996) (rule of non-inquiry operates within a "legal framework" for extradition that "interpose[s] the judiciary

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The government's argument logically entails the conclusion that the United States can seize and hand over its citizens for foreign criminal prosecution whenever the alleged crime is committed on foreign soil – even if the citizen suspect is in the United States – given the "plenary" nature of the other sovereign's authority. Pet. 18 (citation omitted). But this is not the law. *See Valentine v. United States*, 299 U.S. 5, 9 (1936) ("[I]n 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.") (citation and quotation marks omitted).[20]

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between the executive and the individual"). It does not eliminate the need for legal sanction, and does not trump the rule that U.S. officials cannot hand over a U.S. citizen to another sovereign knowing that he will be subject to treatment that shocks the conscience in violation of the substantive component of the Due Process Clause. *See, e.g., Rosado v. Civiletti*, 621 F.2d 1179, 1195-96 (2d Cir. 1980) (extradition cannot "expose [American citizen] to procedures or punishment 'antipathetic to a federal court's sense of decency' ") (*quoting Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960)); *see also Khouzam v. Hogan*, 497 F. Supp. 2d 615, 624-26 (M.D. Pa. 2007) (finding procedural due process and substantive due process challenges to a removal decision cognizable where torture is concerned).

[20] The government's proposed new rule would also destabilize expectations of U.S. military personnel, contractors, and civilians stationed overseas, who would find themselves suddenly exposed to the unchecked risk of transfer to foreign hands. *See, e.g., Starks v. Seamans*, 334 F. Supp. 1255, 1256 (E.D. Wisc. 1971) (issuing a temporary restraining order against the U.S. transfer of a U.S. soldier to Chinese custody following criminal trial was "a mockery of justice"); *see also Williams v. Rogers*, 449

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3. The government, moreover, proposes to have this Court adjudicate this case without an evidentiary record. But to do so would be unjust, and would also unfairly disadvantage Mr. Omar.

As a result of conditions imposed by his jailers, Mr. Omar has never had a chance to develop the facts of this case. To date, he has not as yet even had access to his counsel, much less received production of discovery materials, including a return to the petition, that the government long ago represented it would provide.[21] As a result, factual issues related to both the merits (and to the government's speculations about a permanent injunction) remain unresolved. Critically, Mr. Omar has had no opportunity to demonstrate his innocence of the allegations against him and the unreliability of the government's evidence. He has had no chance to develop a full record of torture in Iraqi custody. Nor has he been permitted to produce facts showing that the government's

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F.2d 513, 516, 521 (8th Cir. 1971) (where petitioner airman sought review of transfer to Philippine authorities, preliminary injunction granted to permit litigation, and vacated only when federal courts had concluded that the international agreement concerning transfers "meets the fiat of *Valentine*").

[21] Only on October 8, 2007, did the government set forth how visitation might occur. Counsel now are negotiating in the hope of expeditiously visiting Mr. Omar. The District Court has ordered disclosure of long-promised medical records and photographs pertaining to Mr. Omar's treatment while in U.S. custody. *See Omar v. Harvey*, No. 1:05-cv-02374-RMU (D.D.C. Sept. 28, 2007) (dkt. 42).

speculations about a permanent injunction are all unfounded.

For the Court to adjudicate this case's complex statutory and constitutional questions without the benefit of factual development would be both imprudent and profoundly unfair. It is simply not the American system "to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

4. Moreover, granting certiorari on a merits question from an appeal on purely jurisdictional grounds would create a strong incentive for other litigants to take interlocutory appeals in hopes of being able to evade the final judgment rule. But this Court has cautioned against precisely that temptation: "Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Even in the criminal context, the gateways to interlocutory review have been guarded "with the utmost strictness." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (internal quotation marks and citation omitted); *see also Abney v. United States*, 431 U.S. 651, 656 (1977) (maintaining "there has been a firm congressional policy against interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy"). The government asks this Court to set aside these strong considerations to

reach an issue that has neither been pressed nor passed on below – and that is, to boot, not yet ripe for review. Its request should be denied.

CONCLUSION

In *Hamdi*, the Court stated three years ago that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi*, 542 U.S. at 536. Today, the government petitions this Court for precisely that "blank check" – albeit no longer denominated in U.S. dollars. Petitioners respectfully urge that there is no reason for the Court to reconsider *Hamdi*. And there is certainly no reason for it to review the District Court's sound exercise of discretion in issuing a limited standstill injunction.

The petition should be denied.

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