No 07-394 and 06-1666

IN THE

Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, ET AL., PETITIONERS,
v.
SANDRA K. OMAR AND AHMED S. OMAR, AS NEXT FRIENDS OF SHAWQI AHMAD OMAR

MOHAMMAD MUNAF, ET AL.
v.
PETE GEREN, SECRETARY OF THE ARMY, ET AL.

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

BRIEF OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS AMICUS CURIAE IN SUPPORT OF HABEAS PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Pages(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes

Other Authorities

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

BRIEF OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS AMICUS CURIAE IN SUPPORT OF HABEAS PETITIONERS

INTEREST OF AMICUS CURIAE[1]

The National Institute of Military Justice ("NIMJ") is a nonprofit corporation organized to advance the fair administration of military justice and foster improved understanding of the military justice system. NIMJ regularly appears as amicus curiae in cases raising important issues of military law and policy, including numerous previous appearances before this Court. NIMJ's boards of directors and advisors include law professors, private practitioners, and experts, none of whom is on active duty, but most of whom have served as military lawyers, including several as flag and general officers. Several of NIMJ's directors and advisors have served as part of multinational or coalition forces in Iraq and in previous conflicts.

NIMJ's interest as amicus stems from its fundamental institutional view that American authority always underlies the actions of the

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

American military. NIMJ disagrees with the Government's contention that the United States has ceded command authority over its military to an international body or multinational force. In addition, NIMJ believes that the Government's argument pays too little heed to the constitutional role of the President as Commander in Chief of the United States military and Congress's authority to adopt rules and regulations governing the armed forces. Finally, NIMJ maintains that, if the Court adopts the Government's arguments in these cases, the result would be an unacceptable lack of any clear law governing United States servicemembers participating in multinational forces.

SUMMARY OF ARGUMENT

Shawqi Omar and Mohammed Munaf are American citizens who were taken into custody by American servicemembers in Iraq. They continue to be detained aboard an American military base pursuant to orders issued by American military officers through the American chain of command.

The central question in this case is the color of authority under which American servicemembers have acted in effectuating the detention and custody of Omar and Munaf. In a departure from statements previously made by Pentagon officials, the Government here contends that the existence of the Multi-National Force – Iraq ("MNF-I") transforms the official actions of American servicemembers in Iraq into actions undertaken pursuant to an "international authority," rather than actions taken under or by color of United States authority.

Despite its posture in this litigation, the Government has maintained from the inception of its

current involvement in Iraq that United States military forces in Iraq do *not* operate under a distinct legal entity, nor do they answer to any authority apart from the United States chain of command. Rather, the Government has consistently averred that these forces always act pursuant to the unified command of the United States, and to that authority alone. As stated succinctly by the first MNF-I Commanding General in his Senate confirmation hearings: "U.S. forces operate under U.S. command."

Although the United Nations has sanctioned the United States military's presence in Iraq as a member of the MNF-I, this participation in a multinational force does not abrogate the obligations of United States servicemembers, who remain in all circumstances bound to support and defend the Constitution and to follow all lawful orders issued by their chain of command. The United States military in Iraq operates under the sole authority of the United States and is subject to its Constitution, laws, and treaties. Neither the existence of MNF-I nor the sanction of that force by the United Nations transforms or transfers this ultimate source of authority for the United States military in Iraq; the United States retains ultimate command of its own military.

In short, official actions of the United States military in Iraq are taken "under or by color of the authority of the United States," notwithstanding the existence of MNF-I. Accordingly, NIMJ respectfully submits that the District Court has jurisdiction over these habeas corpus petitions.

STATEMENT

The MNF-I

The MNF-I is composed of military personnel from twenty-six countries. *See* Operation Iraqi Freedom, Official Website of Multi-National Force-Iraq, www.mnf-iraq.com. Sixteen of those countries currently have fewer than 100 servicemembers deployed with the MNF-I; five have fewer than ten. *See* Joshua Partlow, *List of 'Willing' U.S. Allies Shrinks Steadily in Iraq*, Wash. Post, Dec. 8, 2007, at A1. Many countries contribute no combat personnel, *see*, *e.g.*, www.mnf-iraq.com (describing, *inter alia*, the work of Danish forces in initiating Civil Reconstruction projects and the South Korean forces in instituting literacy programs and building community centers), and most do not participate in the detention of prisoners.[2] Estimates suggest that American servicemembers constitute at least 93% of the personnel in the current MNF-I. *See* Partlow, *supra*.

The current Commanding General of the MNF-I, General David Petraeus, is an American military officer, as have been all prior Commanding Generals of the MNF-I. The upper echelons of command in Iraq are populated almost exclusively with United States military personnel.

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[2] Detentions in Iraq are overwhelmingly, if not entirely, undertaken by United States servicemembers. As noted herein, the relevant Task Force involved in the detention and custody of both Omar and Munaf is composed virtually exclusively of American servicemembers.

The MNF-I operates with the permission of the United Nations. *See* S.C. Res. 1511, U.N. Doc. S/RES/1511 (Oct. 16, 2003); S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004). The United Nations Security Council has extended the MNF-I's authorization several times since 2004, most recently through December 2007. *See* S.C. Res. 1723, U.N. Doc. S/RES/1723 (Nov. 28, 2006).

Neither Resolution 1511 nor the resolutions extending its mandate describe a framework for cooperation and coordination among the participating countries. However, in a letter dated June 5, 2004 to the President of the United Nations Security Council, then-Secretary of State Colin Powell wrote: "[T]he MNF must continue to function under a framework that affords the force and its personnel the status that they need to accomplish their mission, and in which the contributing states have responsibility for exercising jurisdiction over their personnel . . . . *The existing framework governing these matters is sufficient for these purposes*." 07-394 Petitioners' Apppendix [hereinafter "Pet. App."] 87a (emphasis added). That "existing framework" was the Coalition Provisional Authority's Revised Order 17, executed by L. Paul Bremer on June 27, 2004. Section 2, subsection 2 of Order 17 states: "All MNF, CPA and Foreign Liaison Mission Personnel, and International Consultants shall be subject to the exclusive jurisdiction of their Sending States."[3]

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[3] Order 17 was in effect at the time of both Omar's and Munaf's capture and detention. *See* Coalition Provisional

The MNF-I has no unitary Rules of Engagement or general orders to which every servicemember in the MNF-I must adhere. Instead, each member state instructs its own servicemembers as to permissible actions in Iraq, as well as to the limits of their authority. *See* Def. Dep't News Briefing, *available at* 2004 WL 1472829, at *5 (F.D.C.H. July 1, 2004) (statement of Brigadier General David Rodriguez, Deputy Director for Operations, J-3, Joint Staff) [hereinafter "Rodriguez Briefing"] ("[A]ll our allies [in the MNF-I] have a chain of command that goes up to their national leaders, just like we do. For us, all Americans [are] under [the] command and control of American leadership . . . ."). Generally each country accomplishes this task by promulgating, and sharing along its chain of command, country-specific Rules of Engagement.

Such Rules of Engagement are generally classified; however, Japanese legislation deploying Japanese forces to Iraq provides a typical example of the limitations that an MNF-I-participating country may place upon its servicemembers.[4] Per legislative authorization, Japanese servicemembers in Iraq were non-combat troops only, banned from using force except in self-defense and expressly prohibited from participating in detainee operations. *See* Eric

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Authority Revised Order Number 17, § 20 (June 17, 2004) [hereinafter "CPA Order 17"].

[4] At present, all Japanese forces have been withdrawn from Iraq; the Japanese still provide some aircraft and five staff members to the MNF-I. *See*; Operation Iraqi Freedom, Official Website of Multi-National Force – Iraq, www.mnf-iraq.com.

Schmitt, *After the War: The Allies*, N.Y. Times, July 27, 2003, § 1, at 1. Although acting as part of the MNF-I, Japanese servicemembers could not follow orders given by any MNF-I personnel that conflicted with their national mandate. The ultimate authority as to the extent of participation of Japanese servicemembers remained with Japan; neither the United States nor any international body or force could overrule these limitations. *Cf.* Rodriguez Briefing, 2004 WL 1472829, at *5 ("All allies, for example, can decline to participate in an operation sometimes, just like they have different ROEs sometimes and that, because that comes to their national leadership.").

Similarly, the United States military promulgated Rules of Engagement to direct its servicemembers deployed as part of the MNF-I. These Rules of Engagement, along with the United States Constitution, laws, and treaties, and the laws of war, set forth the permissible boundaries of actions undertaken by United States servicemembers in Iraq. *Cf.* 10 U.S.C. § 502(a) (enlistment oath); 10 U.S.C. § 892 (making failure to obey a lawful order or regulation a punishable offense); Joint Service Committee on Military Justice, *Manual for Courts Martial United States*, pt. IV, ¶ 16.c.(1)(c) (2008 ed.) (defining a lawful general order or regulation).

Accordingly, the MNF-I is *not* a legally distinct force with its own independent authority, as the Government argues. *See*, *e.g.*, Brief for the Federal Parties [hereinafter "Gov't Br."] 2 ("[T]he MNF-I operates under the 'unified command' of United States military officers, but it is legally distinct from the United States military . . . ." (citation omitted)).

Rather the MNF-I is a functional cooperative, consisting of the autonomous individual military units of participating countries. This means that a United States servicemember in the MNF-I might be obligated to follow a command that a servicemember from, for example, Japan, though serving beside him, would not and could not obey. This is true even though both individuals might, as the Government stresses, be wearing the insignia of the MNF-I. By the same token, a United States servicemember would not, and could not, follow an order from an MNF-I superior officer if that order were inconsistent with the United States Rules of Engagement or with the orders issued by the United States chain of command. Although loosely confederated under an MNF-I umbrella, each country's military retains its independence with regard to what actions its servicemembers may undertake.

The ultimate military autonomy of each participating country, including the United States, is underscored and reinforced by the statements of United States and MNF-I leadership at the highest levels of command. General George W. Casey, U.S. Army, seeking to allay Congressional concerns about the chain of command in the MNF-I, assured the Congress in written testimony that United States servicemembers in Iraq are "subject to the authority, direction, and control of the Commander, U.S. Central Command." U.S. Senate Committee on Armed Forces, Advance Questions for General George W. Casey, Jr., U.S. Army Nominee for Commander, Multi-National Force – Iraq (June 2004), *available at* http://armed-services.senate.gov/statemnt/2004/June/Casey.pdf. Shortly thereafter, General Casey acknowledged that

United States servicemembers do not answer to any component of the United Nations or to any entity other than the United States. U.S. Senate Armed Services Committee Hearing on the Nomination of General Casey to be Commander of the Multinational Force - Iraq, *available at* 2004 WL 1436402, at *34 (F.D.C.H. June 24, 2004) (testimony of General George Casey Jr.) [hereinafter "Casey Testimony 2004"].

In 2007, after having commanded the MNF-I for more than two years, General Casey again testified that "[t]here is a parallel chain of command [in Iraq] . . . [with] U.S. forces operat[ing] under U.S. command." U.S. Senate Armed Services Committee Hearing on the Nomination of General Casey to be Commander of the Multinational Force - Iraq, *available at* 2007 WL 275562, at *57 (F.D.C.H. Feb. 2, 2007) (testimony of General George Casey) [hereinafter "Casey Testimony 2007"]. This is consistent with United States participation in previous multinational military operations. The practice reinforces the President's role as Commander in Chief of all American forces, whether or not they are engaged in a multinational force, and recognizes Congress's power to adopt rules and regulations to govern the military.

American Detention Facilities in Iraq

According to military and Congressional officials, Camp Cropper — where Omar and Munaf are presently detained — is "run by the United States military and guarded by the United States military police." Douglas Jehl, *The Struggle for Iraq: Prisoners*, N.Y. Times, May 17, 2004, at A1. Task Force 134, the American military unit in Iraq "charged with detainee command and control," is

responsible for running detention operations at Camp Cropper. Navy Senior Chief Jon McMillan, *Navy's JAG visits Baghdad, observes trials*, March 13, 2007, http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=10579&Itemid=128; *see also* Thom Shanker, *With Troop Rise, Iraqi Detainees Soar in Number*, N.Y. Times, Aug. 25, 2007, at A1.

For decision-making purposes, Task Force 134 is composed entirely of American servicemembers. The Commanding General of Task Force 134 is an American officer reporting directly to General Petraeus. The Deputy Commanding Officer for Detainee Operations is also an American servicemember, as are Task Force 134's legal advisor, spokesman, military police unit, military legal support unit, and the head of detainee operations at Camp Cropper. United States military authority over Task Force 134 and the detainee operations at Camp Cropper is plenary.[5]

In these consolidated cases, the Government has never denied this plenary authority. Nor has the

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[5] For instance, the United States military is the contracting authority for provision of food and other logistical services to detainees and guards at these facilities. *See, e.g.*, Department of Defense Contract No. DAAA09-02-D-0007, Dec. 14, 2001 (awarding the Logistics Civil Augmentation Program ("LOGCAP") contract to KBR), Task Order 139 (covering logistical services at Camp Cropper and other bases); *see also* Walter Pincus, *U.S. Expects Iraq Prison Growth*, Wash. Post, Mar. 14, 2007, at A10. Such facts illustrate that the United States military makes all relevant decisions, large and small, with regard to the management of Camp Cropper's detention facilities.

Government contended that it lacks the ability to release Munaf and Omar, or that it would require the consent of other countries or the United Nations to do so. Indeed, it has provided evidence suggesting the contrary. *See* Joint Appendix [hereinafter "J.A."] 44 (Declaration of John D. Gardner) ("U.S. authorities indicated no objection to Iraqi plans to prosecute Mr. Munaf in the [Central Criminal Court of Iraq]."") (emphasis added); 07-394 Pet. App. 104a (Declaration of John D. Gardner) (same regarding plans to prosecute Omar); *see also generally* Rodriguez Briefing, 2004 WL 1472829, at *5 (describing the MNF-I as a "cooperation between allies" in which "there's not anything like veto authority").

Involvement of United States Servicemembers with the Detention of Munaf and Omar

Without unnecessarily repeating the facts set forth in the parties' briefs, it is imperative to emphasize that United States servicemembers instigated the capture of Munaf and Omar, authorized and oversaw their continued detention, and have maintained exclusive custody of Munaf and Omar from the date of their capture to the present.[6]

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[6] According to the Pentagon, detainees in the Abu Ghraib prison were "in U.S. custody." U.S. Senate Armed Services Committee Hearing on Treatment of Iraqi Prisoners, *available at* 2004 WL 1027359, at *5. (F.D.C.H. May 7, 2004) (testimony of Donald H. Rumsfeld, U.S. Secretary of Defense). Like Camp Cropper, Abu Ghraib was a functioning detention center commanded and operated by the U.S. military. Detainee operations at Abu Ghraib have since ceased with detainees transferred to Camp Cropper.

The story of Munaf and Omar's detention is one of solely American actors.

In October 2004, United States servicemembers arrested Omar in his Baghdad home, J.A. 111; approximately seven months later, in May 2005, United States servicemembers seized and arrested Munaf in Baghdad, J.A. 33. Following these arrests, United States servicemembers oversaw the transfer of Omar and Munaf to United States detention facilities at Camps Bucca and Cropper. J.A. 31-33; J.A. 111-12. Since their arrests, both Munaf and Omar have been detained by United States servicemembers and kept exclusively in United States custody. *Id.* Each of the detention facilities in which Munaf and Omar have been held is operated by Task Force 134, an American military unit under the exclusive command of United States military officers and reporting to General Petraeus through an American chain of command. *See* McMillan, *supra*.

Not only have Munaf and Omar been detained and held in continuous custody by United States servicemembers, but those servicemembers have played integral roles in maintaining or justifying their detentions. The three-member panels that designated Munaf a "security internee" and Omar a "security internee" and "enemy combatant" consisted exclusively of United States servicemembers. Oral Arg. Tr. 31-32, *Omar v. Harvey*, No. 06-5126 (D.C. Cir. Sept. 11, 2006). In Munaf's case, United States servicemembers transferred Munaf to the Central Criminal Court of Iraq for trial, J.A. 44, 47, 61; in Omar's case, United States servicemembers indicated that they were willing to so transfer him, J.A. 132-33. In neither case is there any indication

that these decisions were cleared through non-United States military personnel. At every step of the detention process, United States servicemembers, acting under orders, have held the actual and constructive keys to Munaf's and Omar's cells.

ARGUMENT

I. UNITED STATES SERVICEMEMBERS IN IRAQ UNDERTAKE ALL OFFICIAL ACTIONS UNDER OR BY COLOR OF THE AUTHORITY OF THE UNITED STATES

A. United States Servicemembers In Iraq Act Pursuant To United States Authority And Report Through A United States Chain Of Command

The United States servicemembers deployed in Iraq who were ordered to seize and detain Munaf and Omar received that order through the United States chain of command. This chain of command begins with the President, the Commander in Chief of the United States armed forces, and continues through the Secretary of Defense and the Commanding General of the MNF-I. *See* Casey Testimony 2004, 2004 WL 1436402, at *34.

By contrast, the MNF-I has no legal authority to issue orders to United States servicemembers, except to the extent that those orders are ratified by the United States chain of command. The mere existence of the MNF-I does not convert the solely American authority under which American servicemembers in Iraq act into authority derived from a multinational source. To the contrary, the United States servicemembers ordered to detain

Munaf and Omar undertook that custody — as they undertake all official actions — "under or by color of the authority of the United States." 28 U.S.C. § 2241(c)(1) (2006).

1. The President Has Confirmed That The United States Has Retained Command Of Its Forces In Iraq

President George W. Bush, the Commander in Chief of the United States armed forces, has stated that American military forces in Iraq "operate *under American command* as part of a multinational force." President George W. Bush, Remarks by the President on Iraq and the War on Terror at the United States Army War College (May 24, 2004) (emphasis added). A month prior to the creation of the MNF-I, President Bush asserted his intent that the authority of the United States chain of command over its military operations in Iraq would remain absolute: "Commander, USCENTCOM, under the authority, direction, and control of the Secretary of Defense, shall continue to be responsible for U.S. efforts with respect to security and military operations in Iraq." National Security Presidential Directive 36 (May 11, 2004), *available at* http://www.fas.org/irp/offdocs/nspd/ nspd051104.pdf.

The Government's position in this case fails to appreciate the important distinction between *command*, which the United States has affirmatively retained, and *operational control*, which the United States appears to have retained but which is ultimately irrelevant to this case. A 1994 Presidential Decision Directive distinguished these concepts as follows:

No President has ever relinquished command over U.S. forces. Command constitutes the authority to issue orders covering every aspect of military operations and administration. The sole source of legitimacy for U.S. commanders originates from the U.S. Constitution, federal law and the Uniform Code of Military Justice and flows from the President to the lowest U.S. commander in the field. The chain of command from the President to the lowest U.S. commander in the field remains inviolate.

***

Operational control is a subset of command. It is given for a specific time frame or mission and includes the authority to assign tasks to U.S. forces already deployed by the President, and assign tasks to U.S. units led by U.S. officers. Within the limits of operational control, a foreign UN commander cannot: change the mission or deploy U.S. forces outside the area of responsibility agreed to by the President, separate units, divide their supplies, administer discipline, promote anyone, or change their internal organization.

***

If it is to our advantage to place U.S. forces under the operational control of a

> UN commander, the fundamental elements of U.S. command still apply.

United States: Administration Policy on Reforming Multilateral Peace Operations, May 1994, 33 I.L.M. 795.

Whether or not the United States has ceded operational control over its forces in Iraq to MNF-I, it has retained command of those forces.

2. Top United States Commanders Repeatedly Confirm That American Troops In Iraq Are Subject To American Command

From the beginning of the current action in Iraq, American military leaders have recognized that the American chain of command governs American forces. The Commanders of the MNF-I have repeatedly confirmed during public hearings before the United States Congress that American servicemembers operate under the authority of the United States, notwithstanding the multinational nature of the operational force in Iraq.

At his confirmation hearing before the Senate Armed Services Committee prior to assuming his duties as the first Commander of the MNF-I, General Casey unequivocally stated that American forces operate exclusively under American command:

> [SENATOR LEVIN:] Will U.S. forces at any level be under the command of any other commander but a U.S. commander?

> CASEY: No, Senator, they will not.

Casey Testimony 2004, 2004 WL 1436402, at *9.[7]

General Casey further testified that the chain of command for American servicemembers flows from the President through the Secretary of Defense. While General Casey's command "was specifically established really by the United Nations resolutions," *id.* at 34, Casey was clear that his authority derived from the United States and not from the United Nations or any other source of authority:

> WARNER: [W]hat reporting chain do you have, if any, up through your command to the United Nations.
>
> CASEY: Senator, I know of no reporting chain that goes back to the United Nations. . . . If that changes, I'll come back to you.
>
> WARNER: And just provide it in today's record at the earliest possible time because I think that's very important. . . . And reporting up and what directions,

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[7] By this interrogation of General Casey, Congress assured itself of the intentions of the President and his chain of command. Had it not been convinced that the United States would be in complete control of its own military, Congress might well have exercised its legislative function to ensure that the United States did not cede authority to the United Nations or a multinational force. Throughout the history of the United States, the executive and legislative branches have been consistent in preserving United States control over United States forces.

> if any, could they send down to you in your capacity as commander.
>
> CASEY: Yes. All right, Senator, I understand. But . . . my chain of command is through the secretary of defense and the [P]resident.

Id. at 34.

Two and a half years later, General Casey was again before the Senate Armed Services Committee prior to his confirmation as United States Army Chief of Staff. His answers at that time reflected the Pentagon's consistent position — and the facts on the ground — that American servicemembers in Iraq were operating under the authority of the United States:

> [GENERAL CASEY:] There is a parallel chain of command. And as you know better than anyone, U.S. forces operate under U.S. command.

Casey Testimony 2007, 2007 WL 275562, at *57.

Under specific questioning from Senator Warner, General Casey confirmed unified American command and the accountability of United States servicemembers to the American chain of command:

> WARNER: Well, heretofore we've had a unified command of the American structure and you're assuring me that that has not been changed?
>
> CASEY: Absolutely has not changed.
>
> WARNER: The American G.I. is accountable for the orders he gets from

> American chain of command right up to your successor, is that correct?
>
> CASEY: That's correct, Senator.

Id. at 58.

General Casey's successor as Commander of MNF-I, General David Petraeus, likewise affirmed in 2007 that American troops are under the command (as well as the operational control) of the United States military:

> LEVIN: Who will have the operational and tactical control of U.S. battalions that are partnered with the nine Iraqi brigades in the nine sectors of Baghdad?
>
> PETRAEUS: U.S. commanders, sir.

U.S. Senate Armed Services Committee Hearing on the Nomination of Army Lieutenant General David Petraeus to be General and Commander of the Multi-National Forces - Iraq, *available at* 2007 WL 172546, at *11 (F.D.C.H. Jan. 23, 2007) (testimony of Lieutenant General David Petraeus).

It is clear from this testimony and that of other representatives of the United States Government — most notably the State Department, which maintained the position consistently from the inception of the United Nations in the mid-twentieth century through 2007[8] — that the orders given to

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[8] *See*, *e.g.*, House Armed Services Committee, Subcommittee on Oversight and Investigations Hearing on Development of Iraqi Security Forces, *available at* 2007 WL 1701722, at *34 (F.D.C.H. June 12, 2007) (testimony of Deputy Assistant Defense Secretary for Near Eastern and South Asian Affairs

United States servicemembers in Iraq to detain United States citizens derive solely from the United States chain of command, even when those servicemembers are part of the MNF-I. The Government conceded this point at oral argument before the Court of Appeals. *See* Oral Arg. Tr. 12, *Omar v. Harvey*, No. 06-5126 (D.C. Cir. Sep. 11, 2006) ("[The Court:] The Government agrees with the District Court that Omar is in the authority and control of the United States. Is that right?" [Counsel for the Government]: It is, Your Honor . . . .").

This unified and consistent American chain of command under which American servicemembers operate in Iraq belies the Government's current

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Mark Kimmett) ("[T]he chain of command goes from Multi-National Forces-Iraq through Central Command to the Department of Defense and the joint staff."); U.S. Senate Committee on Foreign Relations Hearing on Iraq Transition (Part II), *available at* 2004 WL 865477, at *13 (F.D.C.H. Apr. 22, 2004) (testimony of Marc Grossman, Undersecretary Of State For Political Affairs) ("There have also been questions about the command and control of U.S. forces in Iraq after June 30, and I can tell you that U.S. forces in Iraq will report to the U.S. commander of the [MNF-I, who] will report to the [P]resident through the military chain of command."); To Amend the United Nations Participation Act of 1945, Hearing on H.R. 3085, H.R. 4497, and H.R. 4708 Before the H. Comm. on Foreign Affairs, 81st Cong. 17 (1949) (testimony of Ernest A. Gross, Assistant Secretary of State) ("[U]nder the Constitution, America military personnel cannot be made available to foreign powers or foreign organizations, except by authority of law, [thus] it has been necessary, instead of detailing the personnel to the United Nations . . . to keep them within American control.").

position that American servicemembers are acting "under or by color of" an "international authority" when following orders to detain Munaf and Omar. *Cf.* Gov't Br. 22 ("Omar and Munaf are being held by a multinational force abroad pursuant to international authority."). Such ultimate "international authority" over United States servicemembers simply does not exist.

3. The United States Has Never Ceded To Any International Or Multinational Force The Authority To Command United States Troops In Iraq

The Government argues that "the key" to the jurisdictional determination in these cases "is that the American forces that command and in part comprise the MNF-I are not operating solely under the United States authority, but rather 'as the agent of' a multinational force that was established by and operates pursuant to international authority." Gov't Br. 23. For this proposition, the Government repeatedly cites U.N. Security Council Resolution 1546 and letters from the Iraqi government to the U.N. Security Council requesting that the Security Council renew the MNF-I's mandate under Resolution 1546. *See* 07-394 Pet. App. 89a-94a, 95a-97a. However, an examination of these documents reveals that, while the MNF-I was sanctioned by the U.N. and coalition countries, those bodies do not have independent authority to command United States servicemembers.

Nowhere in the United Nations Resolutions, nor in any other United Nations documents, does the United Nations provide Rules of Engagement to govern MNF-I or United States forces. Furthermore,

nowhere do individual countries electing to participate in the MNF-I agree to subordinate their national chains of command to a distinct international or multinational entity; certainly the United States made no such concession. *Cf.* Rodriguez Briefing, 2004 WL 1472829, at *5 ("[A]ll our allies [in the MNF-I] have a chain of command that goes up to their national leaders, just like we do. For us, all Americans [are] under [the] command and control of American leadership, of U.S. leadership. . . .").

The Government's "international authority" theory confuses international sanction of United States military involvement overseas with ceding to an international body the power and authority to command United States servicemembers. While the U.N. (by resolution) and the Iraqi government (by request) undoubtedly consented to the presence in Iraq of United States forces operating under certain specified conditions, the United States never relinquished its authority over its armed forces, and neither the U.N. nor any other body had or has the power to command United States forces.[9] That authority remains in the hands of the United States chain of command.

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[9] Indeed, the United Nations expressly disclaims responsibility for acts committed by troops operating pursuant to its authorizations when those troops remain under the "operational command" of their home countries. *See*, *e.g.*, The Secretary-General, Report of the Secretary-General on the Financing of United Nations Peacekeeping Operations, ¶ 17, U.N. Doc. A/51/389 (Sept. 20, 1996); U.N. Gen. Assembly, Int'l Law Comm'n, Responsibility of International Organizations, at 63, U.N. Doc. A/CN.4/556 (May 12, 2005).

United Nations documents pre-dating Resolution 1546 buttress this contention. For instance, under the Coalition Provisional Authority's Revised Order 17, service members participating in the MNF-I are subject to the jurisdiction of their home courts and *only* the jurisdiction of their home courts. *See* CPA Order 17, § 2(2) ("All MNF, CPA and Foreign Liaison Mission Personnel, and International Consultants shall be subject to the exclusive jurisdiction of their Sending States.").

The Government claims that "if the United States courts were to assume authority [over the habeas petitions of Omar and Munaf], there is no reason why the courts of other nations could not do so, potentially subjecting decisions of multinational bodies like the MNF-I . . . to review and inconsistent judgments in multiple fora worldwide." Gov't Br. 26. But Order 17 clearly anticipated and addressed such concerns. Contrary to the Government's assertions, the United States Courts' exercise of jurisdiction over cases in which individuals are held in custody by United States servicemembers would have no practical or legal consequence not already contemplated under Order 17.[10]

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[10] Components of the MNF-I are, in fact, already subject to inconsistent laws governing their conduct. For example, the United States military engages in conduct prohibited by Japan to its military; thus, a United States servicemember could be prosecuted in the United States for refusing to do what a Japanese servicemember could be prosecuted in Japan for doing. If an American court were to hold that the Constitution or laws of the United States prohibited or required certain actions, its decision would have no impact on that which servicemembers from other countries could do. This is implicit

Finally, the Gardner Declarations, heavily relied upon by the Government, state that "U.S. authorities indicated no objection to [an] Iraqi plan[] to prosecute" Omar or Munaf. J.A. 44; 07-394 Pet. App. 104a. At oral argument before the Court of Appeals in *Omar*, the Government confirmed that "in response to [a] multi-national force request to have [Omar] tried in the Central Court of Iraq, the U.S. could have said no." Oral Arg. Tr. 25-26, *Omar v. Harvey,* No. 06-5126 (D.C. Cir. Sept. 11, 2006). Both statements indicate that United States authority in Iraq was not subsumed under international authority; rather, the United States retained full autonomy to command its military to retain custody of detainees.[11] At all times, Munaf and Omar have been detained under orders coming directly through the United States chain of command.

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in the structure of the MNF-I. Indeed, if the United States did not retain jurisdiction over its servicemembers in Iraq, the result would be an unacceptable absence of clear law governing their actions.

[11] Not only does the Government make no claim that it lacks the power to release Munaf and Omar, but any such claim would raise serious questions under the Constitution. The Government's argument suggests that the United Nations could, if it chose, supersede the President's authority as Commander in Chief and Congress's authority with respect to the American military. But there is no precedent for the United Nations, which itself has no sovereign power, to override the constitutionally allocated power of the President and Congress.

B. All Lawful Orders Through The United States Chain Of Command Are Promulgated And Obeyed Under The Authority Of The Constitution

1. All Orders Lawfully Issued Ultimately Derive From The Constitution

The power of the President to command United States military forces is conferred by Article II of the United States Constitution. U.S. Const. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."); *see also Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) ("The President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief.).

Likewise, Congress has constitutional powers over military action. Congress funds the military and "make[s] Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14. These rules include the Uniform Code of Military Justice and other laws that govern United States personnel at home and abroad.

Not only do the President's power to command the military and Congress's power to make rules governing the military flow directly from the Constitution; the Constitution is also the ultimate constraint upon the actions of the President, including in his role as Commander in Chief, and upon congressional lawmaking. *See* U.S. Const. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under

the Authority of the United States, shall be the supreme Law of the Land . . . ."). *Cf. Ex parte Quirin*, 317 U.S. 1, 25-26 (1942) ("Congress and the President, like the courts, possess no power not derived from the Constitution."), *quoted in Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006).

In recognition of these constraints, this Court has long held that no action by any branch of the United States Government, including by the President acting as Commander in Chief, may be undertaken if it conflicts with the fundamental requirements of the Constitution. *See*, *e.g.*, *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality opinion) ("[N]o agreement with a foreign country can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."); *Quirin*, 317 U.S. at 25 (affirming the power of the courts to set aside an action taken by the President as Commander in Chief when the courts possess "the clear conviction that [the presidential action is] in conflict with the Constitution or laws of Congress constitutionally enacted"); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) ("The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States.") The President — even acting at the apex of his power to command the military — may not lawfully order servicemembers to take any actions forbidden by the Constitution.

While the President controls the military power of the United States, that control is not absolute. "Even though 'theater of war' be an expanding

concept," the President's orders are constrained by the Constitution. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (upholding "faithfulness to our constitutional system" by rejecting government's argument that the President's military power as Commander in Chief of the Armed Forces gives the President "broad powers" beyond those authorized by the Constitution). As Justice Black explained half a century ago:

> [W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government. It was recognized long before Paul successfully invoked his right as a Roman citizen to be tried in strict accordance with Roman law.

Reid, 354 U.S. at 5-6 (plurality opinion).

No subordinate officer in the United States chain of command could lawfully issue an order which his superior, the President and Commander in Chief, could not. Thus it is beyond doubt that neither the President nor any United States military officer

could lawfully order any servicemember to undertake any action contrary to the Constitution.

2. United States Servicemembers May Not Follow Orders That Contravene The Constitution

Every individual who enlists in the United States armed forces must take an oath:

> I, _____, do solemnly swear (or affirm) that I will *support and defend the Constitution* of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will *obey the orders of the President of the United States and the orders of the officers appointed over me*, according to regulations and the Uniform Code of Military Justice. So help me God.

10 U.S.C. § 502(a) (emphasis added).[12] From their first day in the military, United States servicemembers are trained to follow orders in accordance with this oath. The military carefully distinguishes between lawful orders and unlawful orders. Servicemembers have a legal duty to follow all lawful orders; they also have a corollary legal duty to disobey any unlawful orders. A servicemember violating either duty is subject to trial by court-martial. *See* 10 U.S.C. §892; *see also*

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[12] The President of the United States takes a similar oath to the Constitution upon taking office, promising to "preserve, protect and defend the Constitution of the United States." U.S. Const. art. II, § 1, cl. 8.

United States v. Stanley, 483 U.S. 669, 703 n.26 (1987) (Brennan, J., concurring in part and dissenting in part) (citing *United States v. Calley*, 48 C.M.R. 19 (1973) (obedience to orders no defense where defendant should have known that order to kill civilians was illegal) and *United States v. Kinder*, 14 C.M.R. 742 (1954) (obedience to orders no defense for soldier who executed order to shoot subdued prisoner at South Korean air base)).

Whether an order is lawful is constrained by the Constitution, federal law, and the authority of the issuing officer. In short, "[a] general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it." *Manual for Courts-Martial United States*, pt. IV, ¶ 16.c.(1)(c) (2008 ed.).

As a United States servicemember faces grave consequences for failing to follow a lawful order or wrongfully following an unlawful one, it is incumbent upon every commanding officer to ensure that subordinates know and understand the applicable Rules of Engagement. Furthermore, superior officers must ensure that their subordinate United States servicemembers understand their obligations under the Constitution, the laws of the United States, and the laws of war. The United States military provides training at all stages of a servicemember's career (from basic training to pre-deployment training to continuing military education) on the contours of these obligations.

3. This Duty Of Servicemembers Is Not Abrogated Through Participation In The MNF-I

The United States has not subordinated its military to the control or authority of a multinational force in Iraq. Even were it to do so, the actions of United States servicemembers taking part in such a force would still be subject to all orders consistent with the Constitution and laws of the United States and the limits to which the President had shared military control with that multinational force. Official actions undertaken by United States servicemembers are always under United States authority.

Any contrary position would not only threaten our deeply held constitutional values, but would undermine the national autonomy of our military. No matter the circumstance, American servicemembers remain subject to their oath to support and defend the laws and Constitution of the United States and to follow all, and only, lawful orders.

The extensive reach of the Constitution, laws, and authority of the United States also manifests itself in the broad power of courts-martial. United States courts-martial may be convened anywhere in the world, and they have jurisdiction over every United States servicemember. *See* Unif. Code of Mil. Justice §§ 805 ("This chapter applies in all places."), 817 (granting jurisdiction over all servicemembers). This power of courts-martial over United States servicemembers is in no way abrogated by the participation of United States forces in the MNF-I. All United States courts-martial, wherever they may be convened, remain subject to the habeas

jurisdiction of federal courts. *See, e.g., Clinton v. Goldsmith*, 526 U.S. 529, 538 n.11 (1999); *Burns v. Wilson*, 346 U.S. 137, 142 (1953). No matter the circumstances, United States servicemembers deployed abroad remain subject to the Constitution, laws, and authority of the United States.

C. Official Actions Of United States Servicemembers, Lawfully Ordered, Are Always Undertaken "Under Or By Color Of Authority Of The United States"

United States servicemembers following orders in the course of their service always act under or by color of the authority of the United States. Action "under color of" authority is the use of power "possessed by virtue of" the authority and "made possible only because the [actor] is clothed with the authority." *See United States v. Classic*, 313 U.S. 299, 326 (1941) (defining action "under color of" state law); *see also Clinton v. Browning*, 292 F.3d 235, 250 (D.C. Cir. 2002) (applying same definition to federal government action); *Jackson v. Brigle*, 17 F.3d 280, 284 (9th Cir. 1994) (reasoning that military law enforcement officers' following the order of a superior officer was action under color of their authority as servicemembers).

United States servicemembers not only hold the keys to these men's cells — but the United States military also owns, staffs, and operates the camps in which those cells are located. Further, that military has issued all of the orders relating to their detentions. The authority underlying these orders is the United States chain of command in Iraq. The orders are promulgated "under or by color of" the twin authorities to which a servicemember swears an oath to bear true allegiance and obey: the

Constitution of the United States; and the President of the United States and the officers appointed over the servicemember. *Cf.* 10 U.S.C. § 502(a). Munaf and Omar indisputably are in custody "under or by color of the authority of the United States." 28 U.S.C. § 2241(c)(1).

II. HIROTA POSES NO BAR TO THE DISTRICT COURT'S JURISDICTION TO ENTERTAIN OMAR'S OR MUNAF'S HABEAS PETITION

The Government does not dispute that Munaf and Omar are in the custody of the United States military. *See* Gov't Br. 5 ("Since his capture, Omar has remained in the custody of members of the United States armed forces operating as part of the MNF-I."), 13 ("Omar and Munaf are held overseas . . . by United States forces acting as part of a multinational force."). Instead, the Government argues that that "United States courts lack jurisdiction to review the detention of individuals held abroad pursuant to international authority, including individuals held by United States forces acting as part of a multinational force." *Id.* at 17. For this proposition, the Government relies on *Hirota v. MacArthur*, 338 U.S. 197 (1948) (per curiam).

The Government's brief makes clear that it believes application of the supposed "rule of *Hirota*" to these petitions rests upon the premise that the United States military forces that captured and currently maintain custody of Omar and Munaf did so "pursuant to *international authority*." *See*, *e.g.*, Gov't Br. 21 ("Here, as in *Hirota*, the habeas petitioners are in the physical custody of United States military officers, but those officers are acting

as part of a multi-national force under international authority."), 31 ("[T]he critical focus in Hirota was on the source of detention authority."). Indeed, the Government argues that "the key [to the jurisdictional issue] is that the American forces that command and in part comprise the MNF-I are not operating solely under the United States authority, but rather 'as the agent of' a multinational force that was established by and operates pursuant to international authority." *Id.* at 23.

Neither the Government's excessively broad interpretation of *Hirota* nor the premise underlying the argued application of that case to these petitions survives scrutiny. The *Hirota* decision made clear that when a particular constellation of circumstances align, this Court lacks jurisdiction to entertain the proffered habeas petition. 338 U.S. 197. But as the Court of Appeals noted below, "*Hirota* nowhere explains which 'circumstances' were controlling." *Omar*, 479 F.3d at 7. Nevertheless, four fundamental and insurmountable differences between *Hirota* and the instant cases — namely, the applicants' citizenship, the absence of a challenge to a foreign criminal judgment, the composition of the relevant tribunal, and the nature of its determination — demonstrate that the circumstances compelling the decision in *Hirota* simply are not present here.

A. Munaf And Omar, Unlike Hirota, Are Citizens Of The United States Being Detained By Their Own Government

Kōki Hirota, the would-be petitioner in *Hirota*, was a Japanese citizen. *Hirota*, 338 U.S. at 198. By contrast, Munaf and Omar are both United States citizens.

Munaf and Omar's citizenship alone makes *Hirota*'s application to these cases questionable at best. As Munaf persuasively argued in his certiorari petition, decisions of this Court extending from *Johnson v. Eisentrager*, 339 U.S. 763 (1950) — handed down just two years after *Hirota* — to *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), have consistently affirmed that "United States citizens enjoy . . . greater protection than enemy aliens when they find themselves imprisoned abroad by their government." Petition for Writ of Certiorari 12, *Munaf v. Geren*, No. 06-1666.

B. Hirota Does Not Govern Because The Determinations Challenged By Munaf And Omar Are Not Convictions By A Foreign Tribunal

Contrary to the Government's claim that *Hirota* "focused on the source of authority pursuant to which the petitioners were being held," Gov't Br. 19, the *Hirota* Court specified the grounds for its decision quite clearly: it lacked the "power to grant the relief prayed" because it had "no authority to review, affirm, set aside or annul the judgments and sentences" of the international military tribunal imposing the judgment and sentence on the would-be petitioner. 338 U.S. at 198. The "crucial point" in the *Hirota* Court's view was not, as the Government claims, that "when General MacArthur established the relevant tribunal, he was 'acting as' the Commander and agent of the Allied Powers"; rather, the crucial point was that the military tribunal that sentenced Hirota was "not a tribunal of the United States." *Id.* In other words, despite Hirota's allegations that he was "not asking this court to review the decision of an international court," Brief

for Petitioner at 14, *Hirota v. MacArthur*, 338 U.S. 197 (1948) (No. 239, Misc.), this Court viewed his habeas petition as seeking precisely that: a collateral attack on his foreign conviction.

Neither Omar nor Munaf, by contrast, seeks to challenge a foreign conviction; indeed, neither is being held on the basis of any such conviction. Rather, both are being held as "security internees" on suspicion of criminal activity in Iraq pursuant to the determination of a panel made up of three United States military officers.[13] *See Omar v. Harvey*, 479 F.3d 1, 3 (D.C. Cir. 2007) ("Following Omar's arrest, an MNF-I panel of three American military officers conducted a hearing to resolve his status."); Gov't Br. 22 (arguing that Omar and Munaf "are like thousands of other security internees held by the MNF-I"). Thus, the Government is simply wrong that "the habeas petitioners in these cases ask the United States courts to review decisions made . . . by the MNF-I *or the Iraqi government*." Gov't Br. 27 (emphasis added). The only decisions relevant to Omar's and Munaf's challenged detentions are those

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[13] While Munaf is allegedly being detained following a conviction in the CCCI, the Government admits that he is also being held for the independent reason that he was designated a "security internee." *See* Gov't Br. 22. In any case, Munaf's petition was filed, as the Government acknowledges, "before his trial and conviction by the CCCI." *Id.* at 10. And the Government itself points out the "longstanding principle that the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Id.* at 29 (quoting *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993)) (internal quotation marks omitted). Consequently, Munaf's purported conviction in the CCCI is irrelevant to this Court's jurisdictional inquiry.

in which the three-person panels of American military officers determined that Omar and Munaf were "security internees."[14]

Even a brief examination of the military tribunal at issue in *Hirota* illuminates its fundamentally different character. The International Military Tribunal for the Far East ("IMTFE") was presided over by judges nominated by each country represented in the Far East Commission, including the nine signatories to the instrument of Japan's surrender. *See Hirota*, 338 U.S. at 207 (Douglas, J., concurring). The Australian nominee served as IMTFE's president; about half of the attorneys working under him were from countries other than the United States; and decisions about whom to indict were made by a committee chaired by a British barrister. Arnold C. Brackman, *The Other Nuremberg: The Untold Story Of The Tokyo War Crimes Trials* 54-64, 76 (1987).

By contrast, the three-person panels which declared Omar and Munaf to be "security internees" were made up exclusively of American military officers. *See Omar*, 479 F.3d at 3. The Gardner Declarations and the Government's brief to this Court elide this crucial fact, which undermines any

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[14] In any event, United States courts may review and grant habeas petitions based upon an individual's conditions of confinement, even if the conviction upon which that confinement is based was entered by a foreign tribunal. *See Bishop v. Reno*, 210 F.3d 1295, 1305 (11th Cir. 2000). Both Munaf and Omar raised challenges of this nature in their habeas petitions, particularly with regard to denial of access to counsel. J.A. 39; J.A. 121-22.

argument that the tribunal was international in character. The Gardner Declarations also reveal that detainees before these tribunals are not represented by counsel and that all proceedings — including the questioning of witnesses and the introduction of documentary evidence — are conducted by the three American officers. *See* 07-394 Pet. App. 103a. Finally, as the Court of Appeals noted in *Omar*, "security internee" and "enemy combatant" determinations, "based as they are on military considerations, are a far cry from trial, judgment, and sentencing" of criminal guilt by an international tribunal. *Omar*, 479 F.3d at 8 (citing *Hamdi*, 542 U.S. at 518-19 and Major General George R. Fay, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 12 (Aug. 23, 2004)).

These details amply demonstrate that the panel of United States servicemembers at issue in these petitions is not of the same multinational character as the Tokyo tribunal; this fact alone distinguishes *Hirota*. When all of the differences between *Hirota* and the instant cases are considered, application of *Hirota* is clearly inapposite.

CONCLUSION

The United States military in Iraq has expressly elected not to subordinate its forces to the MNF-I. Even had it chosen to do so, the participation of the United States military in a multinational force could not change the fact that the United States military operates subject to the Constitution, laws, and treaties of the United States. Today, Omar and Munaf are in the custody of the United States military, under orders from the United States chain

of command, and such custody is by definition "under or by color of the authority of the United States." For the foregoing reasons, the National Institute of Military Justice respectfully submits that the District Court has jurisdiction over their petitions for habeas corpus.

Respectfully submitted.

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