

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MOHAMMAD MUNAF, ET AL., :

4 Petitioners :

5 v. : No. 06-1666

6 PETE GEREN, SECRETARY OF :

7 THE ARMY, ET AL. ; :

8 and :

9 PETE GEREN, SECRETARY OF :

10 THE ARMY, ET AL., :

11 Petitioners :

12 v. : No. 07-394

13 SANDRA K. OMAR AND AHMED :

14 S. OMAR, AS NEXT FRIENDS OF :

15 SHAWQI AHMAD OMAR. :

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17 Washington, D.C.

18 Tuesday, March 25, 2008

19 The above-entitled matter came on for oral
20 argument before the Supreme Court of the United States
21 at 10:14 a.m.

22 APPEARANCES:

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25 of Pete Geren, Secretary of the Army, et al.

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2 Munaf, et al. and Omar, et al.

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P R O C E E D I N G S

(10:14 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 06-1666, and the consolidated Case 07-394, Munaf versus Geren, Secretary of the Army, and Geren versus Omar.

Mr. Garre.

ORAL ARGUMENT OF GREGORY G. GARRE

ON BEHALF OF PETE GEREN,

SECRETARY OF THE ARMY, ET AL.

MR. GARRE: Thank you, Mr. Chief Justice, and may it please the Court:

Under this Court's precedents and universal international law norms, the Government of Iraq, like all sovereign nations, has a sovereign right and jurisdiction to try and punish individuals, including American citizens, who voluntarily enter its borders, commit crimes in its country, and remain there. In two independent respects, the court of appeals in the Omar case lost sight of that principle and departed from this Court's precedents: First by exercising habeas jurisdiction at all; and second by sustaining an injunction that the court of appeals itself recognized prevented the Government of Iraq from trying and punishing Mr. Omar for any crimes that he committed in

1 Iraq.

2 As to the jurisdictional question, we
3 believe that this Court's decision Hirota versus
4 MacArthur points to the conclusion that habeas
5 jurisdiction is lacking over these cases because the
6 habeas Petitioners are being held under international
7 authority pursuant to determinations made by an
8 international Multi-National Force acting and carrying
9 out a United Nations mandate, and in Mr. Munaf's case
10 pursuant to an order of the Iraqi courts that he remain
11 in custody while proceedings go forward in the trial
12 court.

13 JUSTICE SOUTER: Isn't the problem with the
14 argument that Hirota did not at any point in the per
15 curiam opinion saying -- say, we're coming to the
16 conclusion that we come to of no jurisdiction because
17 there's an international force? I mean, Hirota said,
18 you know, there's this, that, and the other thing, and
19 under all these circumstances we don't think there's
20 jurisdiction. Well, one of the things that's different
21 here is you had Japanese soldiers in Hirota and you've
22 got American citizens here.

23 MR. GARRE: Well, that is a difference,
24 Justice Souter. And I think, to be clear, if this Court
25 does find jurisdiction in these cases, we think that

1 citizenship would be a basis -- would have to be the
2 basis for jurisdiction, and we'd urge this Court to limit
3 its decision to that ruling, because that would have
4 profound practical consequences.

5 JUSTICE GINSBURG: There's another
6 difference, too. There was a conviction and a sentence
7 in Hirota, and here in Omar's case he has not yet been as
8 far as we know even investigated by the Iraqi courts,
9 certainly no conviction; and in Munaf's case the
10 conviction has been quashed.

11 MR. GARRE: That's true, and let me explain
12 why we think that Hirota does govern the circumstances
13 in this case, notwithstanding that this case involves
14 citizens and notwithstanding that the petitioners in
15 Hirota had been the subject of an international
16 conviction. First of all, we don't think that Hirota
17 would have come out differently if the habeas
18 petitioners had filed suit earlier and sought to enjoin
19 the international proceedings in Hirota and sought an
20 injunction that would have prevented the conviction from
21 taking place.

22 Secondly, we do think that, although one
23 obviously has to take a careful look at the Court's
24 decision in Hirota, we think that what the Court did say
25 points to the conclusion that it was the international

1 authority that was key to the Court's finding that there
2 was no jurisdiction. I think there's at least a couple
3 --

4 JUSTICE SOUTER: If it is, there's
5 something -- the implication of that I think is what is
6 bothersome, because in effect it means, if that rule is
7 applied to this case, it means that the President acting
8 alone can make an agreement for an international force
9 or a cooperative force and that agreement of the
10 Executive alone in effect eliminates habeas jurisdiction
11 over an American citizen. And that obviously is in
12 tension, if not inconsistent, with the Suspension Clause
13 and it's a little scary.

14 MR. GARRE: Well, obviously the Court
15 reached that conclusion in Hirota as to aliens. With
16 respect to citizens, I think that the key for the
17 jurisdictional question under the habeas statute is
18 whether or not these individuals are in custody "under
19 and by color of" United States authority. Just as the
20 Court presumably concluded in Hirota that the
21 petitioners in Hirota were not under custody under color
22 of United States authority, we think that the
23 Petitioners here are not. And so we think --

24 JUSTICE SOUTER: No, but in real world terms
25 isn't it the case that they are under United States

1 authority? You've got an American commander, you've got
2 straight-line authority right through, and one knows --
3 I mean, to be realistic, one knows perfectly well that
4 if any order were given to the American military
5 involved, they would not hand them over, i.e., they
6 would obey the order, international -- agreement for
7 international cooperation or not.

8 MR. GARRE: Well, if I can make --

9 JUSTICE SOUTER: Go ahead.

10 MR. GARRE: -- two points in response to
11 that. First, ultimately the United Nations controls the
12 strings and the source and the scope of international
13 authority. If it -- the -- the current Security Council
14 resolutions are set to expire in December. It could --
15 it could eliminate those resolutions today and that
16 source of international authority would exist and we
17 wouldn't be here arguing that these individuals are
18 being held pursuant to international mandate. Second --

19 JUSTICE SOUTER: Okay, but --

20 JUSTICE GINSBURG: Mr. Garre, just to
21 clarify one point. The -- at the time of the briefing,
22 the U.N. resolution was due to expire in December of
23 2007. Has it been renewed?

24 MR. GARRE: There has been a subsequent
25 resolution. It's Resolution 1790, and that resolution

1 is set to expire this December. And the -- the
2 Government of Iraq and the other parties have indicated
3 that this will be the last extension. Obviously,
4 they'll have to assess the situation in December. But
5 the international authority that existed at the time of
6 the briefing continues to exist.

7 The other point I was going to make,
8 Justice Souter, is your point about American domination
9 or influence over the Multi-National Force was equally
10 true with respect to the force in Hirota. You had --

11 JUSTICE SOUTER: I think -- I think you're
12 right.

13 MR. GARRE: So I don't think that that's a
14 basis for distinguishing Hirota. The -- our opponents --

15 JUSTICE SOUTER: But it may be -- I mean,
16 Hirota was a literally, I think, a two- or three-day per
17 curiam opinion. It occupied less than a page, and it had
18 this kind of whole-ball-of-wax sort of reasoning involved
19 in it.

20 And as precedential authority, if this case
21 turned on the question of whether we look to the theory
22 of international authority rather than, I think, the
23 realistic fact of American domination, I don't think
24 Hirota is a very strong precedent against our at least
25 taking the realistic view of it.

1 MR. GARRE: Well, again, I think that Hirota
2 -- the amount of influence that the United States forces
3 have over the international force isn't a basis for
4 distinguishing Hirota.

5 But to get to your point about citizenship,
6 I guess we would say a few things. One, we think
7 that Justice Douglas in his concurring opinion in Hirota
8 and the court of appeals below recognized that the
9 theory of the Court's decision in Hirota doesn't lend
10 itself to a citizenship exception. The habeas statute,
11 as this Court emphasized in the Rasul case, doesn't have
12 a citizenship -- doesn't distinguish between citizens
13 and aliens, and it has since 1789 contained the
14 requirement that the person be in custody under or by
15 color of United States' authority.

16 CHIEF JUSTICE ROBERTS: So once again you're
17 relying on a concurring opinion by Justice Douglas?

18 MR. GARRE: Not the concurring opinion.
19 We're relying on the Court's decision in Hirota, but we
20 look at the concurring opinion; we've looked at the
21 briefs. We've tried to discern the best principle of
22 law from that decision. And the principle that we think
23 it stands for is that where individuals are held under
24 international authority by the judgment of several
25 nations, not the law of any single nation, this Court

1 lacks jurisdiction to review the custody of such
2 individuals.

3 JUSTICE GINSBURG: Mr. Garre, it is at least
4 equally plausible, I think, because it's the only factor
5 that Hirota mentioned more than once, that the Court was
6 going on its lack of power "to review, to affirm, set
7 aside, or annul the judgments and sentences imposed"
8 there. And here we have no judgment or sentence.

9 So I don't think you can pick one of these
10 strands, citizenship, and say, oh, that's it and it
11 isn't the judgment and sentence. So I think we know
12 your position. This is an opinion that says "under the
13 foregoing circumstances." I don't think you can take it
14 much further than saying citizenship was one of those
15 circumstances.

16 MR. GARRE: If I can make a couple of
17 points. One, the parties in Hirota, the habeas
18 petitioners, made very clear that they weren't asking
19 this Court to review the international conviction. They
20 made very clear that they were asking this Court to
21 review the actions of American officers under United
22 States law. They made that clear on page 14 of their
23 merits brief, where they said -- and I'm quoting here --
24 "We are not asking this Court to review the decision of
25 international court" -- end quote. And quoting again:

1 "All the questions deal solely with official actions
2 taken by General MacArthur as citizen and U.S. Army
3 officer." -- end quote. And again on page 15, quote:
4 "We repeat again that we bring into question only
5 unlawful action taken by General MacArthur for us."

6 The other point that I would make is these
7 individuals -- they haven't been convicted pursuant to a
8 trial, like the individuals in Hirota -- but these
9 individuals are being held pursuant to determinations
10 made by the Multi-National Force carrying out the
11 international mandate.

12 In Mr. Omar's case, he not only received a
13 three-judge tribunal shortly after his detention, his
14 capture, but he also received a determination before a
15 nine-officer combined review-and-release release board,
16 consisting of six Iraqi officials and three
17 Multi-National Force officials, who determined that he
18 was a security internee who should be detained in
19 accordance with the United Nations mandate.

20 Now, Mr. Munaf's case did proceed before the
21 Iraqi criminal court because an injunction was not
22 entered against those proceedings. The Iraqi court
23 initially did enter a conviction. That conviction was
24 reversed on appeal by the court of cassation. We think
25 that -- that the recent decision is significant in a

1 couple of respects. I think, one, it underscores that
2 there is an Iraqi legal system, that that system is
3 capable of processing these cases and hearing from these
4 individuals, and is capable of granting relief where
5 appropriate action isn't taken.

6 And, two, the Iraqi court order setting
7 aside the conviction, much like an appellate order in
8 this country would, remanded the case for further
9 proceedings but directed that Mr. Munaf and his
10 codefendant --

11 JUSTICE STEVENS: Mr. Garre, may I ask you --

12 JUSTICE KENNEDY: It's in the materials,
13 then perhaps I should have known, but did the -- I take
14 it Munaf was present and was represented by counsel?

15 MR. GARRE: Yes, both.

16 JUSTICE KENNEDY: But how did that work?
17 Was he present in American custody and then he goes to
18 the Iraqi court?

19 MR. GARRE: The individuals are detained by
20 the Multi-National Force while there are proceedings
21 before the Iraqi courts going forward.

22 JUSTICE KENNEDY: So then he just goes every
23 day to the Iraqi court and then he comes back at night
24 to U.S. custody?

25 MR. GARRE: Yes. In Mr. Munaf's case, there

1 were four investigative hearings and a trial, after
2 which he was convicted.

3 In Mr. Omar's case, if he were -- if the
4 proceedings were allowed to go forward, he would remain
5 in MNF-I custody during the course of the Iraqi
6 proceedings. And then, if there is a conviction and
7 that conviction is sustained on appeal, the Iraqi
8 Government issues an order, a transfer order, to the
9 Multi-National Force. The Multi-National Force makes a
10 determination to carry out that order.

11 JUSTICE GINSBURG: There are --

12 MR. GARRE: And, again --

13 JUSTICE GINSBURG: There are in the U.S.
14 custody a number of non-citizens. Is that -- how many
15 people are being held in the custody of this
16 Multi-National Force that the United States controls?

17 MR. GARRE: There are 24,000 people
18 currently being held by the Multi-National Force, the
19 vast majority of whom obviously are aliens. Two
20 thousand individuals held by the Multi-National Force
21 have been transferred to Iraqi custody. Many if not
22 most of those individuals have undergone court
23 proceedings because the Multi-National Force is obviously
24 working in close coordination with the Iraqi Government
25 to bring to justice people who have committed crimes in

1 Iraq.

2 And if I could turn to the second question,
3 because we think that there is --

4 JUSTICE BREYER: One more -- I'd like -- on
5 the first question, in reading through this, my
6 impression was that the government -- and the green
7 briefs, you know, the dark green briefs against you from
8 the Military Justice Institute and the national security
9 specialists really don't disagree. That is that
10 everybody seems to agree, to use the words General Casey
11 said, that U.S. soldiers in Iraq are subject to the
12 authority, direction, and control of the commander of
13 the U.S. Central Command. And you say in your brief
14 that really this multilateral force operates subject to
15 a unified American command, and the chain of command
16 ultimately runs to the President. So as a practical
17 matter it's the President and the Pentagon, the
18 Secretary of Defense, and the American commanders that
19 control what our American soldiers do.

20 I take it there's agreement on that point,
21 but where there's disagreement is that you say, well,
22 the same was true with that tribunal at issue in Hirota.
23 Am I right about that?

24 MR. GARRE: We say the same is true with
25 respect to the allied forces --

1 JUSTICE BREYER: So we're not -- we're
2 not -- I take it you say that, as a practical matter
3 and as a matter of the chain of command, it runs through
4 American officers to American commanders to the
5 Secretary of Defense to the President of the United
6 States. There is no disagreement about that, or is
7 there?

8 MR. GARRE: There is not, Justice Breyer.
9 An American --

10 JUSTICE BREYER: There is not.

11 MR. GARRE: -- official has the supreme
12 command of the Multi-National Force in Iraq --

13 JUSTICE BREYER: Yes. Then if there
14 is not -- if there is not, am I right in thinking the
15 issue is whether, because the words -- there's some
16 connection with foreign governments, absolutely.
17 There's some, but it doesn't interfere with that chain
18 of command. And now your point is: But the same was
19 true with the tribunal at issue in Hirota.

20 MR. GARRE: The same was true with respect
21 not only to the tribunal, but the allied forces --

22 JUSTICE BREYER: Yes, yes.

23 MR. GARRE: -- in Hirota.

24 JUSTICE BREYER: The same was true. It was
25 General MacArthur.

1 MR. GARRE: That's correct. And ultimately
2 the key point, we think, is that those forces were
3 acting under international mandate. The Far Eastern
4 Commission in Hirota ultimately had say over what the
5 force could do --

6 JUSTICE BREYER: Well --

7 MR. GARRE: -- just like the United Nations
8 here ultimately has say over --

9 JUSTICE BREYER: But that's because the
10 President, I take it, would follow what the UN says, not
11 because the chain of command would change.

12 MR. GARRE: No, I think that that's true,
13 but the point I wanted to make is that the United
14 Nations today could repeal the resolutions authorizing
15 this international force and the specific mission.

16 JUSTICE BREYER: And if that happened, these
17 people would be released?

18 MR. GARRE: They would be under the
19 authority of the United States. We wouldn't be here
20 arguing that this Court didn't have jurisdiction. So,
21 ultimately, an international body distinct from the
22 United States is controlling the strings of this
23 authority.

24 JUSTICE BREYER: But the relevance of that
25 is General MacArthur was an agent of several allied

1 powers.

2 MR. GARRE: As is, in our view, General
3 Petraeus. He is carrying out the authority granted to
4 the --

5 JUSTICE BREYER: Then, to me, it's a matter
6 of Hirota at the moment, and the only distinction you
7 haven't addressed is at that time, I think in 1946, the
8 basic habeas rule was that you wouldn't question a
9 judgment of a tribunal, at least not a foreign tribunal.
10 And it was just beginning in the issue -- to question
11 judgments in American tribunals. And, therefore, the
12 obvious question is: Well, doesn't that explain Hirota?

13 MR. GARRE: I don't think it does, for the
14 reasons that I have already indicated to
15 Justice Ginsburg. That wasn't the argument the parties
16 were making in Hirota. They went out of their way to
17 say that they weren't challenging the international
18 conviction, that they were challenging the actions of
19 American officers acting under international law.

20 JUSTICE GINSBURG: But the Court certainly
21 listed it as a circumstance; and, as I said before, it's
22 the only thing that's repeated in the opinion. But I
23 think that we've come to a standoff on that.

24 MR. GARRE: It did. And if I could turn now
25 to the second issue, because we do think that it is --

1 JUSTICE STEVENS: May I ask just one
2 question? Would your argument be the same if the place
3 of detention was in the United States?

4 MR. GARRE: Analytically, it would be the
5 same, Justice Stevens. As a practical matter, United
6 States forces don't act under international authority;
7 and, thank goodness, Multi-National Forces don't act in
8 the United States.

9 It would make a difference as to the second
10 question, which is to say if the individuals were
11 detained in the United States and there was a question
12 of transferring back to Iraq, that would be a classic
13 extradition situation. And we'd have a whole different
14 body of case law governing these individuals --

15 CHIEF JUSTICE ROBERTS: And I suppose if he
16 were -- it would make a huge difference whether such an
17 individual were released in the United States as opposed
18 to being released in Iraq.

19 MR. GARRE: Absolutely. In Iraq it's
20 undisputed that if the Multi-National Force were to
21 release them, the Iraqi authorities could arrest them,
22 take them into their custody. The injunction that we
23 face today is one preventing the Iraqi courts from going
24 forward with any proceedings against Mr. Omar,
25 preventing the Multi-National Force from sharing

1 information with Iraqi authorities about the
2 circumstances of his release, and directly preventing
3 the Multi-National Force from transferring these
4 individuals to Iraqi custody if they are convicted.

5 The law of this Court -- we go back to Reid
6 versus Covert, The Schooner Exchange -- makes clear that
7 when American citizens go abroad, voluntarily enter other
8 countries, commit crimes in those countries, and remain
9 in those countries, they cannot come back to this
10 country and complain about the offenses they committed,
11 nor complain about the modes of trial and punishment
12 available in those countries.

13 The Court made that express in the Neely
14 versus Henkel case. And at least on the second
15 question, we think that that principle establishes that
16 the U.S. courts, even assuming they have habeas
17 jurisdiction to review their detention by the MNF-I,
18 shouldn't be in a position of directly thwarting Iraq's
19 sovereign right and jurisdiction to try these individuals
20 and, if they find that they committed offenses, punish
21 them for offenses committed in Iraq. American citizens
22 --

23 CHIEF JUSTICE ROBERTS: Is there a limit to
24 your proposition? In other words, let's stipulate that
25 the individuals are going to be released in a situation

1 where you know that they won't receive anything
2 resembling due process and will be subject to abuse.
3 What happens in that case?

4 MR. GARRE: I think we would maintain that
5 American citizens, when they go abroad, they have to
6 take what they get. I think there is some suggestion --

7 JUSTICE KENNEDY: Well, could they be
8 released to a lynch mob?

9 MR. GARRE: What -- I think what this Court
10 said in Neely versus Henkel -- and I'm quoting from page
11 122, and I think it partially answers your question,
12 Justice Kennedy: "The Suspension Clause has no relation
13 to crimes committed without the jurisdiction of the
14 United States and against the laws of a foreign
15 country."

16 If this Court thinks that it would be
17 different if there were no system of fairness or
18 process, then it could reserve that question for another
19 case. That's not --

20 JUSTICE KENNEDY: But habeas corpus is
21 concerned with the safety of the prisoner to the extent
22 that it's controlled by our authorities. And if you're
23 in the United States, could an officer release a
24 prisoner knowing that a lynch mob was outside? I should
25 think not.

1 MR. GARRE: No. And here, Justice Kennedy,
2 the Iraqi courts are functioning under principles that
3 require fundamental standards and --

4 JUSTICE KENNEDY: Of course, this is just a
5 hypothetical question.

6 MR. GARRE: Right.

7 JUSTICE KENNEDY: Of course.

8 MR. GARRE: Right. And --

9 CHIEF JUSTICE ROBERTS: Do you agree
10 that -- do you concede that habeas is concerned with the
11 safety of the individual as opposed to his custody?

12 MR. GARRE: Habeas, as this Court has made
13 clear, is concerned with the fact or duration of
14 custody. I think if we're talking about things that
15 could happen to people that would be a different type of
16 action. American courts might be open in that extreme
17 situation. I don't -- that wouldn't be an exercise
18 that's ever been available in habeas.

19 I think that the closest analog of this
20 Court's cases to this situation is perhaps Wilson versus
21 Girard, where you had an American serviceman stationed
22 in Japan who committed alleged offenses in Japan, and
23 the Japanese authorities made a request that they take
24 jurisdiction of that person to prosecute him for
25 offenses in Japan, and this Court considered the

1 question. There was an injunction against the transfer
2 of that individual to Japanese authorities. This Court
3 set the injunction aside because it found no affirmative
4 bar on the exercise of that discretion, recognizing the
5 sovereign right and jurisdiction of the Government of
6 Japan to prosecute individuals, including American --
7 citizens.

8 JUSTICE GINSBURG: There's an important
9 distinction, I think. At least in this case it has been
10 alleged that if these people are released to Iraqi
11 custody, there is a high risk that they will be subject
12 to torture and other abuse.

13 You know the brief that was filed on behalf
14 of the NGOs where there is a quotation from Iraq's
15 deputy justice minister: "We cannot control the
16 prisons. It's as simple as that. Our jails are
17 infiltrated by the militias from top to bottom, from
18 Basra to Baghdad."

19 MR. GARRE: Let me make a practical and a
20 legal point on that, Justice Ginsburg. First, as a
21 practical matter, it is important to keep in mind that
22 reports of torture and abuses in the Iraqi system all
23 deal with the Minister of the Interior and the Minister
24 of Defense. We point that out --

25 JUSTICE GINSBURG: This is a quotation from

1 the deputy justice minister.

2 MR. GARRE: And I don't believe he was
3 pointing to any reports of systematic abuses within the
4 department, the Ministry of Justice. And that's what
5 our -- our own State Department concluded in its most
6 recent reports on this. And if you look at all the
7 reports, including the most recent report that came out
8 a couple weeks ago from the United Nations Assistance
9 Mission in Iraq, they point to alleged abuses within the
10 Ministry of Interior and Defense. These individuals
11 would be going to the justice system. We don't have
12 reports of those systematic --

13 JUSTICE SOUTER: Doesn't that -- doesn't
14 that issue that you raise at least deserve litigation
15 before the court?

16 MR. GARRE: No, and that was the legal point
17 that I was going to make. Even in the extradition
18 context, where everyone agrees that there would be
19 habeas jurisdiction to review a transfer for some
20 reasons, the courts have not entertained allegations of
21 torture, recognizing that those considerations are
22 uniquely for the Executive, except in one situation.

23 JUSTICE SOUTER: Why shouldn't they? I
24 mean, if a -- if a court may consider the imminence of
25 lynch-mob action either sanctioned by the requesting

1 government or tolerated by it, why cannot the same point
2 be made about a claim of torture if there is at least
3 enough color in the claim to say there's something to
4 inquire into?

5 MR. GARRE: I think because for centuries,
6 Justice Souter, the courts have recognized that these
7 are matters for the Executive to assess, because the
8 Executive has --

9 JUSTICE SOUTER: Then why don't you have --
10 why isn't your answer different in the lynch-mob case?

11 MR. GARRE: Well, I think there we weren't
12 talking about habeas. I think if -- and my answer was
13 if the Court is concerned about that situation, this
14 isn't it. It can reserve it for a different case.

15 JUSTICE SCALIA: A lynch mob doesn't require
16 investigation by American courts of the internal
17 workings of a foreign government.

18 MR. GARRE: Well, that's true,
19 Justice Scalia.

20 JUSTICE SOUTER: No, but it seems to me --

21 JUSTICE SCALIA: I mean, I would find it
22 quite extraordinary to investigate the Government of
23 Iraq. That's a matter that the Executive can take into
24 account.

25 MR. GARRE: And that's what --

1 JUSTICE SCALIA: But it would be a strange
2 thing for an American court to do.

3 MR. GARRE: That's what a district court,
4 court of appeals, or maybe this Court would have to
5 do if it were going to entertain these allegations --

6 JUSTICE ALITO: In answer to a previous
7 question, I understood you to say that if the
8 individuals here were tried by an Iraqi tribunal they
9 would remain in the custody of the Multi-National Force
10 during the course of the trial. Is that correct? Does
11 that mean that they would simply be transported to court
12 and then brought back to the custody where they are at
13 the present time during the course of those proceedings?

14 MR. GARRE: That's right, and General Garner
15 explains that on page 48 of the appendix.

16 The other thing I wanted to make on torture
17 --

18 JUSTICE ALITO: Well, just to follow up on
19 that, at what point during that, during the trial, would
20 there be any potential for torture by Iraqi authorities?

21 MR. GARRE: There would be none,
22 Justice Alito. And these individuals are represented by
23 Iraqi counsel, by American counsel. They have access to
24 Iraqi ombudsmen. They can make reports. They can make
25 reports, as some detainees have, to the Iraqi

1 investigative judges of alleged mistreatment; not
2 torture, but Iraqi investigative judges have directed
3 that mistreatment not occur.

4 JUSTICE SOUTER: Sure, but once they're
5 turned over to the prison authorities they're in the
6 situation that the NGO brief describes. I mean, that's
7 it seems to me ultimately what the concern is.

8 MR. GARRE: It's not the situation that the
9 NGO brief described, because all of those reports are
10 focused on Ministry of Interior and Defense, where these
11 individuals are not going. U.S. courts, even in the
12 extradition context, don't review these allegations. And
13 Congress has made --

14 JUSTICE SOUTER: Well, I guess that just
15 gets me back to my earlier question. Isn't that
16 something that ought to be explored as an evidentiary
17 matter in determining whether there should be a
18 permanent injunction?

19 MR. GARRE: I don't think so. Respect for
20 the prerogative of the Executive in making these
21 determinations, respect for the sovereignty of the Iraqi
22 courts. You have a habeas court having discovery and
23 who knows what types of proceedings as to what is going
24 on in Iraqi's criminal justice system. I think this
25 Court would give respect to the justice systems of other

1 sovereign nations. This is a system which, as we say in
2 our brief, is founded on principles of fairness.

3 If I could reserve the remainder of my time.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Mr. Garre.

6 Mr. Margulies.

7 ORAL ARGUMENT OF JOSEPH MARGULIES

8 ON BEHALF OF MUNAF, ET AL.

9 AND OMAR, ET AL.

10 MR. MARGULIES: Mr. Chief Justice, and may
11 it please the Court:

12 To resolve any confusion about the habeas
13 Petitioners' claims, I'd like to focus on two points
14 this morning. The first is we believe the
15 jurisdictional question is governed by the following
16 rule: When a United States citizen is detained abroad
17 by United States military officials who have effective
18 authority and control over his continued detention, as
19 Mr. Garre concedes is the case today, the United States
20 district court has jurisdiction over that citizen's
21 habeas petition. Second --

22 CHIEF JUSTICE ROBERTS: Did General
23 MacArthur have effective jurisdiction and control in
24 Japan?

25 MR. MARGULIES: Frankly, Your Honor, the

1 record in that regard is unclear. As we point out in
2 our brief, Solicitor General Perlman argued precisely
3 the opposite. But let us concede for the moment that he
4 would, that Justice Douglas had the better of that
5 position, which the Court in Hirota did not resolve.

6 Our position, Your Honor, is that it is
7 irrelevant to this question, because the problems that
8 doomed the habeas applications in Hirota had nothing to
9 do with MacArthur's status in the chain of command. The
10 problems with Hirota were these:

11 Nothing in General MacArthur's status as an
12 American officer would have transformed those
13 petitioners from enemy aliens to American citizens.
14 Nothing in General MacArthur's status would have
15 transformed their complaint as something other than an
16 attack on the judgments and sentences of an international
17 tribunal imposed upon them. That, in fact, is exactly
18 what the Court said in its nine sentences in Hirota,
19 that it was an attack on the judgments and sentences
20 imposed upon them by an international tribunal.

21 And lastly, vis-a-vis the narrow question
22 before the Court in Hirota, nothing in General
23 MacArthur's status would have made this anything other
24 than an improper attempt to invoke the original and
25 appellate jurisdiction of this Court.

1 JUSTICE STEVENS: Does your case -- does
2 your case depend entirely on the fact that these are
3 American citizens?

4 MR. MARGULIES: It is a sufficient ground,
5 Your Honor, but it does not --

6 JUSTICE STEVENS: If they were not American
7 citizens, would there be jurisdiction?

8 MR. MARGULIES: We believe there would be
9 jurisdiction, Your Honor, but no basis to proceed on the
10 merits.

11 JUSTICE STEVENS: So then citizenship is
12 irrelevant on the jurisdictional issue?

13 MR. MARGULIES: Only vis a vis jurisdiction,
14 Your Honor, but I would stress we disagree very
15 vigorously with Mister -- with the government that if
16 jurisdiction were to extend here to foreign nationals --
17 a position on which we take no issue -- that it would
18 be --

19 JUSTICE STEVENS: I don't know how you can
20 avoid taking that question. That what bothers me. How
21 can you avoid addressing that question?

22 MR. MARGULIES: Frankly, Your Honor, we are
23 inclined to agree with Justice Scalia's position in --
24 my interpretation of the habeas statute accords with
25 Justice Scalia's view of the interpretation of the

1 statute giving a right to citizens --

2 JUSTICE STEVENS: Are you aware of any cases
3 in which we have held that habeas jurisdiction is
4 available to a citizen where it would be not available
5 to a non-citizen?

6 MR. MARGULIES: No, Your Honor.

7 And as I say, what we know from -- certainly
8 with -- made explicit in Eisentrager, where the Court
9 described citizenship as a head of jurisdiction and then
10 reaffirmed for people detained abroad, some detained
11 pursuant to international authority, like Toth v.
12 Quarles, Burns v. Wilson, Wilson v. Girard, Ex parte
13 Hayes, Guagliardo --

14 JUSTICE STEVENS: May I ask this second
15 question: Do you think the place of detention has any
16 relevance to the issue?

17 MR. MARGULIES: No, Your Honor. And one of
18 the worrisome positions --

19 JUSTICE STEVENS: Do you think whether or
20 not it's a -- there are ongoing hostilities would have
21 any relationship to the issue?

22 MR. MARGULIES: We think that that question
23 is answered in Hamdi, Your Honor. We do not challenge
24 the zone of military discretion that exists at the
25 moment of capture.

1 JUSTICE STEVENS: But you say that does not
2 exist in Iraq today?

3 MR. MARGULIES: Oh, no, we do accept that it
4 exists in Iraq today, Your Honor. And we are not
5 challenging -- Your Honor, in this case we did not file
6 the habeas petition until Mr. Omar had been in custody
7 for -- in United States custody, for more than a year.
8 We did not file in Munaf until Mr. Munaf had been in
9 United States custody for more than a year.

10 JUSTICE STEVENS: But the place of detention
11 has always been Iraq?

12 MR. MARGULIES: I'm sorry, Your Honor?

13 JUSTICE STEVENS: The place of detention has
14 always been Iraq?

15 MR. MARGULIES: Yes, Your Honor. The United
16 States has made the decision to retain these people --
17 they have moved them around within Iraq, but they have
18 made the decision to keep them in Iraq.

19 JUSTICE STEVENS: Would the legal issue be
20 the same if there were violent ongoing hostilities in
21 Iraq?

22 MR. MARGULIES: Your Honor, we accept that
23 there are violent ongoing hostilities in Iraq, but the
24 United States Government takes the position that the
25 Geneva Conventions, with which they are complying

1 here -- in this case the conflict is governed by Geneva
2 Convention 4 -- obligates the United States to move
3 prisoners to a safe location, and they have done that by
4 taking these prisoners to Camp Cropper. I have been to
5 Camp Cropper and I agree with the United States that
6 they are complying with the Geneva Conventions in that
7 regard.

8 And upon moving the Petitioners to Camp
9 Cropper, at that moment the case becomes functionally
10 litigable just as Hamdi would have been. That is, the
11 government will assemble its proof to defend the
12 detentions and present it in a district court. The only
13 difference is that Mr. Munaf and Mr. Omar won't appear
14 personally.

15 JUSTICE ALITO: If citizenship is --

16 JUSTICE KENNEDY: But I really wanted to get
17 your answer to Justice Stevens' first question
18 straight. You think citizenship is not relevant?

19 MR. MARGULIES: Oh, no, Your Honor, I think
20 it's extraordinarily relevant, and I think that we
21 are entitled --

22 JUSTICE KENNEDY: But I thought you said you
23 were not basing your case on the citizenship?

24 MR. MARGULIES: No, Your Honor. I apologize
25 if I misspoke. We are basing it on citizenship --

1 JUSTICE KENNEDY: I might have --

2 MR. MARGULIES: -- but it is only one of the
3 grounds upon which we would distinguish this case from
4 Hirota.

5 JUSTICE GINSBURG: Let me ask you about
6 that, because if your basic point is that here is an
7 officer of the United States that has someone in
8 custody --

9 MR. MARGULIES: Yes.

10 JUSTICE GINSBURG: -- someone who is in
11 jeopardy, among other things, of being tortured --

12 MR. MARGULIES: Yes.

13 JUSTICE GINSBURG: -- that United States
14 official has to safeguard a citizen?

15 MR. MARGULIES: Yes.

16 JUSTICE GINSBURG: But can throw a
17 non-citizen into the lion's den? Is that the
18 instruction that the United States gives to its
19 officers, take care of our citizens, but the rest of the
20 world, we don't care?

21 MR. MARGULIES: Frankly, Your Honor, I do
22 not believe the United States makes that instruction to
23 its uniformed officers.

24 JUSTICE GINSBURG: But you're making this
25 distinction now. Justice Kennedy asked you does -- does

1 your case turn on citizenship, and you said citizenship
2 is very important.

3 MR. MARGULIES: Yes.

4 JUSTICE GINSBURG: There are thousands of
5 non-citizens that are being held in the very same
6 circumstance.

7 MR. MARGULIES: Your Honor, there are
8 important reasons embedded in the laws of war that
9 authorize the United States in this context to transfer
10 foreign nationals back -- in this case the overwhelming
11 number of which are Iraqis -- back to the custody of the
12 Iraqi Government, that the laws of war do not allow
13 for -- with U.S. citizens. That is a distinction.

14 JUSTICE SCALIA: Mr. Margulies, the prologue
15 to the Constitution does say "to preserve the blessings
16 of liberty to ourselves and our posterity." There is
17 something to the notion, isn't there, that the
18 Constitution provides constitutional rights, including
19 the right to the writ of habeas corpus, to Americans or
20 to anyone who is in America; but to say that the whole
21 world has rights under the Constitution is extravagant.

22 MR. MARGULIES: I take no position on
23 whether it's extravagant, Your Honor, but I certainly
24 take the position that that's not what we argue. And
25 there are grounds -- there are grounds predicated on the

1 laws of war, on the terms of the extradition treaty, on
2 the possible application of the Fifth Amendment, that
3 simply make differentiations between citizens and
4 non-citizens.

5 CHIEF JUSTICE ROBERTS: So a habeas court
6 here has to look at all those different factors and come
7 to a determination of whether it has jurisdiction?
8 There's no bright line? It has to look at whether
9 hostilities have ceased or haven't ceased? It's got to
10 look at how far the prisoners have been removed from the
11 zone of hostility?

12 MR. MARGULIES: No. No, emphatically not,
13 Your Honor.

14 CHIEF JUSTICE ROBERTS: So what is the
15 bright line that determines whether there's habeas
16 jurisdiction or not?

17 MR. MARGULIES: Control. That is what
18 habeas turns on, Your Honor. And the bright-line test
19 that we propose, which is the one that has been followed
20 by this Court --

21 CHIEF JUSTICE ROBERTS: So a control in
22 the middle of a zone of hostilities of a foreign
23 national allows -- creates habeas jurisdiction? That's
24 your bright line?

25 MR. MARGULIES: No, I'm sorry, Your Honor.

1 What I mean to suggest, the rule that I propose -- the
2 rule that I propose is that when a U.S. citizen is
3 detained abroad by U.S. military officials who have
4 effective authority and control over his continued
5 detention, that citizen can invoke the jurisdiction of
6 the United States district court.

7 CHIEF JUSTICE ROBERTS: Well, so then it's
8 not just control. It looks to citizenship, which brings
9 up the questions Justice Stevens was raising.

10 MR. MARGULIES: Yes, Your Honor, and I
11 apologize. What I said at the outset is that this is a
12 test which turns on the jurisdictional facts that I have
13 identified, which is when a citizen is detained by the
14 U.S. military abroad and the military has effective
15 control.

16 JUSTICE STEVENS: Do we have any -- any
17 precedent in our cases for saying that that test would
18 apply during an active combat in a zone of hostilities?

19 MR. MARGULIES: Toth v. Quarles, of course,
20 Your Honor, involved a person who was brought from the
21 United States to Korea when there was still hostilities
22 ongoing.

23 But Your Honor, again I would suggest that
24 what the Court will have to inquire into has been
25 addressed already by Hamdi, because we will not look at

1 the period of time --

2 JUSTICE STEVENS: It's a very different
3 place of detention.

4 MR. MARGULIES: Oh, absolutely, Your Honor.
5 But we are not focusing on the moment of capture. The
6 United States already has --

7 JUSTICE ALITO: I still don't -- I don't
8 understand what you're saying about citizenship. You
9 said earlier it wasn't necessary, and it make a big
10 difference. There are thousands of non-U.S. citizens
11 being held in Iraq. Your argument with respect to your
12 clients is that they have -- they can file habeas
13 petitions in the District of Columbia and they can't be
14 turned over except pursuant to the extradition treaty
15 between the United States and Iraq; is that correct?

16 MR. MARGULIES: Not quite, Your Honor. Our
17 position is -- and I want to come back --

18 JUSTICE ALITO: If I could just then finish
19 the question. Pursuant to the extradition treaty or
20 some other authorization; if citizenship isn't
21 important, then why can't all of those thousands of
22 non-citizens -- or can all of those thousands of
23 non-citizens -- who are being held in Iraq file habeas
24 petitions in the District of Columbia and argue that
25 they can't be turned over except pursuant to the

1 extradition treaty or some other authorization?

2 MR. MARGULIES: For several reasons, Your
3 Honor. First of all, as the Court knows, the habeas
4 statute itself has been amended in a way that excludes
5 access for foreign nationals outside the country. The
6 Court -- or rather Congress, very carefully did not
7 exclude it for U.S. citizens. Second, there may be
8 limitations on whether foreign nationals can invoke the
9 protections of the Fifth Amendment.

10 Third, as I pointed out, the extradition
11 treaty bars the transfer of citizens, but does not bar
12 the transfer of non-citizens. And fourth, the laws of
13 war allow the United States to transfer Iraqis, but
14 contemplate the continued application of extradition
15 principles that were in place prior to the start of the
16 conflict.

17 So there are four brakes, if you will, on
18 the slippery slope. There is no floodgates problem in
19 this case. So far as we are aware --

20 JUSTICE BREYER: But you have only the --
21 the citizenship to stop the floodgate. What I'm
22 wondering is -- when I read the briefs, I put in my mind
23 a spectrum and on one side is the military occupation of
24 Japan, where there is basically peace but it's a
25 military occupation. On the other side, it's a hot war

1 or a guerilla war where the U.S. forces are rounding up
2 troops, nightly perhaps, and rounding up guerillas. And
3 I had put this case quite close to the military
4 occupation in my mind because of the nature of these
5 particular individuals' offense and treatment. But was
6 I wrong to do that? Should I assimilate this case to
7 either a hot war or at least a guerilla warfare, where
8 troops are actively engaged in rounding up those who
9 want to shoot them?

10 MR. MARGULIES: You should definitely not
11 assimilate this case to the latter category, Your Honor.
12 That is not what this case is about. And let me turn
13 then --

14 JUSTICE SOUTER: In answering that question,
15 would you go back, please, and clarify something that
16 I'm not too clear on in your answers to comparable
17 questions from Justice Kennedy and Justice Stevens? And
18 that is, you say we do not claim that there would be
19 jurisdiction within the zone of hostilities. Is it your
20 point -- and you then go on to say, well, they've been
21 moved to this camp. Is your point the simple point that
22 the camp gets them out of the zone of hostilities? And
23 is that the reason that you answered Justice Breyer's
24 question by saying this is comparable to an occupation
25 rather than a war zone? Is that the simple point?

1 MR. MARGULIES: No, Your Honor. What I am
2 -- what I am seizing upon is the conclusion in Hamdi
3 that there is a zone of military discretion within which
4 the judiciary ought not intrude. And that has both
5 spatial and temporal qualities.

6 This is a person who has been moved from
7 that place, and the detention has been made, a decision
8 has been made to continue detention long after --

9 JUSTICE SOUTER: So you're saying within
10 what is technically a zone of hostility, there are
11 places, physical places, I take it, within which the
12 military has a degree of discretion; and that discretion
13 is what makes this situation comparable to an
14 occupation?

15 I mean, I'm just not following how you're
16 getting from A to B. That's -- that's my problem.

17 MR. MARGULIES: Your Honor, what we are
18 suggesting is that we recognize that there are
19 hostilities going on inside Iraq. But the United States
20 has made a decision to move the person, as required by
21 the Geneva Conventions, to a safe location.

22 JUSTICE STEVENS: Are you saying then
23 that the zone of hostilities does not include all of
24 Iraq?

25 MR. MARGULIES: Absolutely. That is --

1 JUSTICE STEVENS: So what if we thought
2 otherwise?

3 MR. MARGULIES: I'm sorry, Your Honor?

4 JUSTICE STEVENS: What if we thought
5 otherwise? What if we thought all -- all of Iraq is a
6 zone of hostilities? Would we have a different result?

7 MR. MARGULIES: We would not, Your Honor.
8 We would not have a different result either
9 jurisdictionally or on the merits. If the United States
10 Government has custody and control of a United States
11 citizen, there is habeas jurisdiction.

12 JUSTICE SOUTER: Then you've got to say that
13 there is habeas jurisdiction within the zone of
14 hostilities. And I thought you said the opposite.

15 MR. MARGULIES: No, Your Honor. I do say --
16 our position is that the habeas statute would give
17 jurisdiction, but there may be a period in which it
18 would be inappropriate, unwise, just as in Hamdi, for
19 the Court to intrude. And that may be --

20 JUSTICE SOUTER: An abstention kind of
21 doctrine then is what you are getting at?

22 MR. MARGULIES: Yes. It is abstention --

23 CHIEF JUSTICE ROBERTS: So that's pretty far
24 removed from the bright line. I mean, now you've got to
25 decide whether it's in the zone of hostilities or not.

1 You've got to decide is this within the time period
2 that the court should not exercise jurisdiction or not.
3 And what's going to happen, of course, is the
4 district court is going to look at this and say, I can't
5 decide all of that right away. Let's enter an
6 injunction, a preliminary injunction such as at issue
7 here, while I decide these questions. And that's going
8 to have the effect of intruding quite extensively on the
9 exercise of executive authority.

10 MR. MARGULIES: I -- we think not, Your
11 Honor.

12 First of all, it does not alter in the
13 slightest the jurisdictional rule. The jurisdictional
14 rule given to us by the habeas statute is still a
15 bright-line rule. There may be some cases where the
16 petitioner is asking to -- the court to inquire into the
17 lawfulness of -- the two inquiries in this case, the --
18 both of them governed by the Due Process Clause -- the
19 lawfulness of the detention for security threats, and
20 the lawfulness of the proposed transfer. Those are two
21 different inquiries. Those are the two inquiries.

22 There may be some instance where that
23 request is made fairly shortly after the decision was
24 made to continue to detain.

25 JUSTICE SCALIA: Mr. Margulies, could I ask

1 a few questions about the Multi-National Force involved
2 here? Do you acknowledge that in theory, at least, the
3 United States in its capacity here is subject to the
4 control of the United Nations?

5 MR. MARGULIES: No.

6 JUSTICE SCALIA: You do not?

7 MR. MARGULIES: We do not. It is
8 emphatically not the case. The resolutions which bring
9 the Multi-National Force into existence say that it will
10 operate under the unified command of the United States
11 military, which is precisely the position that the
12 government pressed in its brief, on page 2 of its brief.
13 General Casey when he testified said that the MNF is a
14 subordinate command to the United States military.
15 There is nothing in the record which suggests that the
16 MNF could, if it wanted to, give an order that the
17 United States could not countermand. There is nothing
18 that gives this anything other than -- and we do not --
19 we do not denigrate or diminish the significance of any
20 other country's participation. But the buck stops with
21 the United States Government when it comes to these
22 detentions. Let me turn --

23 CHIEF JUSTICE ROBERTS: Could I move
24 you to the merits?

25 MR. MARGULIES: Please.

1 CHIEF JUSTICE ROBERTS: I had thought that
2 the historic purpose of the Great Writ was to challenge
3 custody. And it seems to me that the last thing your
4 clients want in this case is to be released.

5 MR. MARGULIES: That is incorrect, Your
6 Honor, and let me make it clear. There is some question
7 that emerged in the earlier argument on the potential
8 equivalence between release and transfer. So let me
9 address that directly.

10 With respect to transfer -- again that's a
11 separate question from detention simpliciter -- with
12 respect to transfer, there are two questions: The
13 transfer will either be lawful or it will not; Iraq will
14 either want him or it will not.

15 That obviously produces four different
16 possible outcomes, a matrix with four boxes. It is too
17 early to ascertain which of those boxes we will be in,
18 but let me give an illustration.

19 JUSTICE GINSBURG: But in the cases --

20 CHIEF JUSTICE ROBERTS: Well, you don't want
21 the district court to say you win, you can be released
22 tomorrow at noon.

23 MR. MARGULIES: Yes, we do. In fact, Your
24 Honor --

25 CHIEF JUSTICE ROBERTS: Well, I thought you

1 wanted to block the transfer. I mean, the Iraqi
2 authorities can pick him up at the gate.

3 MR. MARGULIES: Your Honor, let's say we
4 had -- my understanding of the evidence in Munaf leads
5 me to believe that on remand this is where we -- this is
6 where the state of play will go: The transfer will be
7 unlawful, and the Iraqi Government will not want him.

8 Transfer unlawful. Iraqi Government won't
9 want him. He can be released to his home --

10 JUSTICE GINSBURG: But he -- he is still
11 within the Iraqi criminal justice system. He wasn't --
12 his case wasn't dismissed. It was sent back for further
13 investigation.

14 MR. MARGULIES: Correct.

15 JUSTICE GINSBURG: So what's happening in
16 his case is he's undergoing a criminal process in Iraq;
17 and we are holding him during that process. So if
18 you're not objecting to our holding him while the
19 process is going on, what is -- what is he seeking
20 through habeas?

21 He -- he can't get out from under the Iraqi
22 criminal justice system. He is alleged to have
23 committed crimes within Iraq. We are holding him safe
24 while that process is going on. So what is the basis of
25 his petition?

1 MR. MARGULIES: Your Honor, his petition,
2 like Mr. Omar's petition, seeks his release. The only
3 complexity arises in one of the possible boxes; that is,
4 the court concludes that the transfer is unlawful, but
5 there is no -- but the Iraqi Government wants him. The
6 transfer is unlawful, but the Iraqi Government wants
7 him.

8 In that situation, in order to give effect
9 to the legal conclusion that the transfer is unlawful --

10 JUSTICE GINSBURG: I don't get up to
11 transfer. This man is now under investigation in the
12 Iraqi system.

13 MR. MARGULIES: Yes.

14 JUSTICE GINSBURG: Nobody -- transfer isn't
15 an issue.

16 What do you want done with him while he's
17 subject to the criminal process in Iraq?

18 MR. MARGULIES: Your Honor, you are correct
19 that we do not object to the idea that, while the
20 district court is determining whether it is lawful to
21 detain a U.S. citizen in this circumstances or transfer
22 a U.S. citizen in those circumstances -- those two
23 inquiries -- it is okay to detain Mr. Munaf for the
24 benefit of the Iraqi Government. If the court --

25 CHIEF JUSTICE ROBERTS: I thought the relief

1 that was awarded by the district court also enjoined
2 prosecution.

3 MR. MARGULIES: It does not, Your Honor, and
4 to the extent that the D.C. Circuit in Omar interprets
5 that, we do not -- we disavow that. There -- as the
6 court pointed out, the -- first of all, they can try a
7 prisoner in absentia. All we object to is that -- a
8 physical transfer of Mr. Omar or Mr. Munaf, while the
9 lawfulness of that transfer is being determined. And
10 that is all we sought.

11 JUSTICE BREYER: The question is, look,
12 suppose the government comes in tomorrow, or in the
13 district court, you're back there. And the government
14 says you want us to release him. At noon tomorrow, we
15 will take him to the front gate and release him. Do you
16 want us to do it? Yes or no?

17 MR. MARGULIES: Yes.

18 JUSTICE BREYER: Yes?

19 MR. MARGULIES: Yes.

20 JUSTICE BREYER: Okay.

21 CHIEF JUSTICE ROBERTS: You want -- I'm
22 sorry. I just want to make sure I understand. You want
23 the relief in both of these cases to be, okay, we will
24 release him tomorrow at noon? And by the way, we're
25 going to notify the Iraqi authorities because we think

1 we're releasing a dangerous criminal and want to make
2 sure they have the opportunity to do whatever they want?

3 MR. MARGULIES: There is -- there is no
4 question that we do not challenge any right of
5 sovereignty in Iraq to share information. The only
6 circumstance in which it potentially arises is one in
7 which release has the effect of being transfer and there
8 is a prior determination by a United States district
9 court that the transfer would be unlawful. So in that
10 situation --

11 JUSTICE KENNEDY: Well, then why didn't you
12 answer Justice Breyer -- and we've interrupted you a
13 couple of times. You have the box. He's going to be
14 released. They want him. I don't see then why you
15 didn't answer Justice Breyer's question differently.

16 MR. MARGULIES: Because what I understood
17 the hypothetical to mean is that there had not been a
18 prior determination that the transfer would be unlawful.
19 In other words, if they just released him tomorrow --
20 they said, we have lost interest in him; we're releasing
21 him tomorrow -- there is no prior determination that the
22 transfer is unlawful.

23 JUSTICE KENNEDY: Well, what we're --

24 MR. MARGULIES: So you're not --

25 JUSTICE KENNEDY: What we're doing is we're

1 testing the authority and the propriety of the district
2 judge to proceed.

3 MR. MARGULIES: Yes.

4 JUSTICE KENNEDY: And that's why we are
5 asking if, at the end of the day, the order is a
6 release, is there a problem? And I should think you'd
7 yes.

8 MR. MARGULIES: No. Your Honor, if the
9 conclusion is that the transfer would be unlawful, then
10 you cannot release him in a way that effects the
11 transfer.

12 JUSTICE SCALIA: Who says? I mean, a
13 transfer is one thing and saying you're free to go and
14 the Iraqi Government picks him up is something else.
15 Why -- why do you equate the two?

16 MR. MARGULIES: Because, Your Honor, we
17 think that the district court can order, under 28 U.S.C.
18 2243, as law and justice requires, a release -- or
19 rather, relief that gives effect to the contours of the
20 right.

21 JUSTICE SCALIA: But -- of course it can.

22 MR. MARGULIES: Yes.

23 JUSTICE SCALIA: It can, but --

24 JUSTICE SOUTER: What kind of relief -- what
25 exactly do you want --

1 JUSTICE KENNEDY: It seems to me that you're
2 begging -- you're begging a question -- you're inserting
3 a premise that we have to decide, whether the release is
4 unlawful. We're asking, that's part of the equation.
5 I'm the district judge. Can I say, I've looked at all
6 this, I want this prisoner released tomorrow morning;
7 and if the Iraqis pick him up, fine with me? Can I say
8 that?

9 MR. MARGULIES: Yes, you can.

10 But if there is a determination that the
11 transfer would be unlawful, then you need to release the
12 person in a manner -- for instance, Your Honor --

13 JUSTICE SOUTER: All right. Let's get to
14 that. What manner? Tell me exactly what such an
15 order would look like.

16 MR. MARGULIES: It -- we would ask the
17 district court to order precisely what the military
18 already does, which is to remove a person to a safe
19 place. When United States citizens are released from
20 Camp Cropper, they are brought from --

21 JUSTICE SOUTER: In other words, release him
22 at place A, not place B.

23 MR. MARGULIES: That's correct.

24 JUSTICE SOUTER: Don't push him out the
25 gates; take him somewhere else, and then release him.

1 That's the order?

2 MR. MARGULIES: Yes.

3 JUSTICE SOUTER: Okay.

4 CHIEF JUSTICE ROBERTS: And don't tell --

5 MR. MARGULIES: That's the --

6 CHIEF JUSTICE ROBERTS: And don't tell the
7 Iraqis where that's going to be?

8 MR. MARGULIES: They don't do that now, Your
9 Honor. When -- when United States citizens are released
10 from Iraq, what they do is they put them in a car out of
11 Camp Cropper, the same thing when I left Camp Cropper.
12 They put them in a car from Camp Cropper. They drive
13 them to the American --

14 CHIEF JUSTICE ROBERTS: Well, that's within
15 the Executive's discretion. I want to know if you are
16 saying that the district court in this case can require
17 the custodian not simply to release the person, but to
18 release them somewhere else and to keep the point at
19 which they're going to release someone whose been
20 determined by the MNF-I tribunal to be a dangerous
21 criminal, to keep the point of his release secret from
22 the Iraqi Government.

23 MR. MARGULIES: If the determination has
24 already been made that the transfer would be unlawful,
25 yes, we think that in law and equity they can do that.

1 CHIEF JUSTICE ROBERTS: Okay. Now the
2 determination that the transfer would be unlawful, I --
3 again, I get back -- maybe I'm repeating myself. I had
4 always understood habeas to be concerned with custody,
5 rather than this broad range of determinations about
6 what's lawful and unlawful, other than as are necessary
7 to rule on the question of custody.

8 In other words, of course, if there's been a
9 Fourth Amendment violation, you bring a habeas action,
10 we determine whether the custody is lawful or not.
11 Here you want a determination whether the transfer is
12 unlawful or not.

13 MR. MARGULIES: Yes. Because the United
14 States Government simply lacks the power under the Due
15 Process Clause to surrender a citizen to the custody of
16 another sovereign. That -- it just lacks that power.

17 CHIEF JUSTICE ROBERTS: Whether it does or
18 does not, I just question whether habeas is an
19 appropriate remedy in that situation, again because it's
20 not concerned with the legality of transfer; it's
21 concerned with the legality of custody.

22 MR. MARGULIES: Habeas has long been used to
23 test the lawfulness, under the Fifth Amendment, of a
24 proposed transfer.

25 JUSTICE STEVENS: How can you say that the

1 United States lacks the power to transfer? Suppose this
2 fellow had been arrested in the street by a sergeant in
3 the Army and he says, what will I do with him? I'll
4 take him to the Iraqis and turn him over. Would that be
5 an illegal transfer?

6 MR. MARGULIES: It -- once the United States
7 has the authority to --

8 JUSTICE STEVENS: The sergeant caught this
9 guy, and he wants to turn him over to the Iraqis. Does
10 he -- is there some law that prevents him from doing
11 that?

12 MR. MARGULIES: It may be the Constitution
13 and the habeas statute could combine to prevent that.

14 JUSTICE STEVENS: That applies to the
15 sergeant in the city of --

16 MR. MARGULIES: As I said before, Your
17 Honor -- as I tried to say, and I apologize if I'm not
18 being clear -- there is a zone of military discretion
19 where it may not be appropriate --

20 JUSTICE STEVENS: Why isn't all of this
21 within the zone of military discretion?

22 MR. MARGULIES: Because we filed this
23 application more than a year after the United States
24 made a decision to continue the detention. Think about
25 it this way, Your Honor: If Hamdi -- exact same facts

1 -- had simply been kept in Afghanistan, instead of
2 brought to Charleston, South Carolina, we think there
3 still would have habeas jurisdiction. The court would
4 have undertaken the exact same inquiry.

5 CHIEF JUSTICE ROBERTS: So if you had filed
6 it -- if you had filed it six months rather than a year
7 after, would there be habeas jurisdiction?

8 MR. MARGULIES: We think in six months, yes.

9 CHIEF JUSTICE ROBERTS: You see where I'm
10 going. Three months?

11 MR. MARGULIES: There may be some cases that
12 become difficult, Your Honor. In this case, for
13 instance --

14 CHIEF JUSTICE ROBERTS: The bright line is
15 getting awfully fuzzy, as far as I can tell.

16 MR. MARGULIES: Your Honor, in this case --
17 in both cases, after two months they made the
18 determination to continue to hold them in the MNF-I
19 tribunals. So at the very least, at that point we're
20 covered.

21 JUSTICE KENNEDY: But it seems to me your
22 statement is wildly overbroad: That there is a
23 due-process restriction on release by the United States
24 Government to another sovereign?

25 MR. MARGULIES: Yes.

1 JUSTICE KENNEDY: Suppose we have an
2 undercover agent in Japan who finds a drug dealer,
3 he gives him to the Japanese police.

4 MR. MARGULIES: Your Honor --

5 JUSTICE KENNEDY: I don't understand that.
6 That's a sweeping statement. That just can't be right.

7 MR. MARGULIES: Your Honor, with all due
8 respect, it has been the law for over a century in this
9 country. It ordinarily arises in the classic
10 extradition context. But even when a person is already
11 overseas and the United States wants to transfer them to
12 the custody of another sovereign --

13 JUSTICE STEVENS: Yes, but you're talking
14 about a transfer in what I assume you said was a zone of
15 hostilities.

16 MR. MARGULIES: I'm sorry, Your Honor?

17 JUSTICE STEVENS: I thought you are talking
18 about a transfer in an area that you say is engaged in
19 active hostilities.

20 MR. MARGULIES: Your Honor, we --

21 JUSTICE STEVENS: Does that affect the
22 decision at all?

23 MR. MARGULIES: It does not affect a
24 citizen's due-process entitlement. In the metes and
25 bounds, the way we would analyze it under Mathews

1 versus Eldridge, it may affect what inquiry the
2 government has to make in order to justify it. But it
3 does not affect the citizen's right, the citizen's
4 constitutional entitlement, to challenge the lawfulness
5 of a transfer at the hands of his government to another
6 sovereign.

7 JUSTICE KENNEDY: But you've just said that
8 it's unlawful. You said that an American law
9 enforcement officer working in another country who takes
10 custody of a wanted criminal cannot turn him over to the
11 government of that country. That's just got to be
12 wrong.

13 MR. MARGULIES: Your Honor, just to finish
14 the answer, the transfer may take place, but it may only
15 take place as authorized by law. That is, they have to
16 show a legal and factual basis. The legal basis is they
17 have to show a treaty or a statutory authority; and the
18 factual basis is they have to show that the person comes
19 within it.

20 So, of course, they can pass a person.
21 Those -- those transfers take place all the time, but it
22 must take place consistent with the requirements of the
23 law.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Mr. Margulies, let

1 me make sure there are no other questions.

2 JUSTICE BREYER: Do you need all that to win
3 this case? That is, as I started the case I thought
4 this involved an American being held by the military for
5 over a year pending the resolution of criminal charges
6 in Iraq, which are charges of kidnapping in respect to
7 which whatever hot war is going on over there has very
8 little to do with his being held.

9 MR. MARGULIES: Correct. We do not --

10 JUSTICE BREYER: Well, you've been arguing
11 for all sorts of things that seem far broader than that.
12 So I'd like to focus you for a second on that matter.

13 MR. MARGULIES: Your Honor, we -- all of
14 these other matters we do not need in order to prevail.
15 The district court, examining two claims under the
16 Due Process clause, will examine whether there is legal
17 authority to detain a person, to detain these prisoners
18 as security internees or as security threats. That is a
19 classic Hamdi inquiry. And they will examine under the
20 Due Process clause whether it is lawful to transfer
21 them.

22 JUSTICE SCALIA: Well, why do you say it has
23 nothing to do with the war, then? They are holding them
24 as security detainees. Aren't they -- aren't they
25 worried that if they just let them go, they'll go right

1 back to killing Americans and Iraqis?

2 MR. MARGULIES: Your Honor, this is what
3 came up in Hamdi. In Hamdi, you had a conflict, boots
4 on the ground. They captured a United States citizen in
5 a battlefield situation. And this Court made a
6 decision, made a determination, that that person can
7 challenge the lawfulness of his -- of his detention.

8 JUSTICE SCALIA: I'm not arguing that. I'm
9 just questioning your statement that it's irrelevant
10 that this is occurring in a war zone. It is not at all
11 irrelevant.

12 One of the -- the reason they're being
13 detained is precisely because this is a war zone.

14 MR. MARGULIES: Your Honor, we think that
15 point is answered by the suggestion in Hamdi that you
16 don't want to create a perverse incentive to keep people
17 there. They have made a decision to keep them there.
18 The inquiry that the district court will undertake is
19 the same in Hamdi as in this case. There is nothing
20 that -- there is nothing about that inquiry that is
21 altered by the United States' determination to move them
22 to a safe --

23 JUSTICE GINSBURG: One distinct difference
24 in Munaf's case: He is undergoing a criminal process in
25 Iraq, and Omar has also -- it is alleged that he has

1 committed offenses in Iraq.

2 Has no prosecution, no investigation been
3 started with respect to Omar?

4 MR. MARGULIES: That is correct, Your Honor.
5 What the district court did in its preliminary
6 injunction, the Rosetta Stone of the preliminary
7 injunction appears on page 143 of the joint appendix.

8 And there you have an e-mail from the United
9 States Government, from opposing counsel to us,
10 indicating to us on February 2, 2006, that a decision
11 had been made to refer Mr. Omar to proceedings in the
12 CCCI, but telling us in the second-to-the-last sentence
13 of that page that we would not receive notice of when
14 that referral took place.

15 And it pointedly -- they did not say that
16 Mr. Omar would remain in U.S. custody once the referral
17 took place.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 Mr. Margulies.

20 MR. MARGULIES: Thank you, Your Honor.

21 CHIEF JUSTICE ROBERTS: Mr. Garre, seven
22 minutes.

23 JUSTICE SOUTER: Mr. Garre, would you
24 address this question at some point? Assuming -- assume
25 an officer in the National Government arrests somebody

1 unlawfully in Portland, Oregon, and transfers the person
2 across the country to Portland, Maine. The person files
3 for habeas in the district court in Maine, and the
4 district court says: Yes, you are right. You are being
5 held unlawfully.

6 Does the court have the authority to tell
7 the United States to take him back to Portland, Oregon,
8 and then release him?

9 REBUTTAL ARGUMENT OF GREGORY GARRE

10 ON BEHALF OF PETE GEREN,

11 SECRETARY OF THE ARMY, ET AL.

12 MR. GARRE: I think this Court confronted a
13 similar situation in the Padilla case a couple of years
14 ago. And what it -- it -- was a habeas petition
15 filed in New York, and it -- the Court held that that
16 habeas petition was improperly filed and a different
17 petition should be filed in South Carolina.

18 And it didn't get into the question of the
19 transfer. I mean, we certainly -- we don't think that
20 transfer is a traditional element --

21 JUSTICE SOUTER: Do you have a position on
22 the answer to my question?

23 MR. GARRE: Whether the habeas court could
24 direct that he be brought back to Portland?

25 JUSTICE SOUTER: Yes.

1 MR. GARRE: I think the habeas court would
2 --

3 JUSTICE SOUTER: The habeas court says,
4 look, it is not complete relief just to put him out on
5 the street in Portland, Maine. He's broke, and
6 he's 3,000 miles from home. Take him back to Portland,
7 Oregon.

8 Does the habeas court have the authority to
9 do that?

10 MR. GARRE: I would say probably not,
11 Justice Souter. I mean there are transfers all the time
12 where habeas petitions are filed, and people are going
13 from State authority to Federal authority. And the rule
14 is that those transfers, of course, can take place. The
15 habeas proceedings can continue, that habeas hasn't
16 traditionally been used to block transfers.

17 Here -- and I think it is important to focus
18 on the injunction that the court of appeals sustained.
19 It is an injunction against allowing the Iraqi
20 prosecutions to proceed because the court enjoined
21 American officials from presenting Mr. Omar to the Iraqi
22 courts. Now, Mr. Margulies said that they didn't enjoin
23 --

24 JUSTICE GINSBURG: I didn't see that in the
25 injunction itself. It just -- the injunction was very

1 spare.

2 MR. GARRE: What the injunction says -- and
3 it is on page 59a -- is that it bars -- of the petition
4 appendix to the Omar petition, the gray petition, and I
5 am quoting now: "Shall not remove the Petitioner from
6 the United States or MNF-I custody, or take any other
7 action inconsistent with this court's memorandum
8 opinion."

9 "Any other action inconsistent with this
10 court's memorandum opinion" is allowing the prosecution
11 to proceed, and the court of appeals makes this express
12 on page 25a of the petition appendix where the court of
13 appeals majority says, quote, "we agree with the dissent
14 that the injunction prohibits the military from
15 presenting Omar to the CCCI for trial."

16 Now, Mr. Margulies says that the proceedings
17 can go forward just without his client's presence,
18 but that --

19 JUSTICE GINSBURG: But one could agree --
20 let's say one could agree that was overbroad. Does that
21 mean that the whole injunction falls? Let's say, take
22 two pieces out of it: No information sharing; that's
23 beyond the pale. And you can't make an order that a
24 foreign court shouldn't hear a case. Take those two
25 out.

1 MR. GARRE: That would be a vast improvement
2 over the injunction that was held by the court of
3 appeals.

4 JUSTICE GINSBURG: But how about the rest of
5 it that says --

6 MR. GARRE: And then you are dealt -- you
7 are left with the transfer, the injunction on the
8 transfer to the Iraqi authorities in the event that
9 Mr. Omar is convicted.

10 And on that, I confess to being not -- not
11 being entirely clear as to what my friend's position is.
12 He says that we can release him because, of course, that
13 is the office of the writ of habeas corpus.

14 But then he goes on to say: But we can't
15 release him in a way that would affect a transfer. I'm
16 not sure what that means because I thought he also
17 said that we were entitled --

18 JUSTICE SOUTER: Well, I think it means the
19 same thing that the point of my question was.

20 He is saying you can't release him at point
21 A, which would be tantamount to transfer; you've got to
22 take him to point B, somewhere where his release will
23 not result in the automatic arrest. And that's why I
24 asked my question.

25 MR. GARRE: Just to underscore the affront

1 to the Iraqi sovereignty on this, his clients
2 acknowledge that they can be arrested by Iraqi officials
3 for crimes that they allegedly committed in Iraq if they
4 were released. But the injunction that they're asking
5 this Court to sustain is an injunction that prevents the
6 Multi-National Force in Iraq from telling Iraqi
7 authorities: We are going to release these Petitioners
8 at twelve o'clock tomorrow. In effect, they're asking
9 for an eight-hour head start so that these individuals
10 who the Multi-National Force has determined pose
11 threats to the security of Iraq, who Iraq has determined
12 pose threats to the security of Iraq, that an American
13 court is enjoining the Multi-National Force from
14 conveying that information to the Iraqi authorities so
15 that these individuals who went to Iraq voluntarily can
16 be held to account in the Iraqi system for crimes that
17 they committed.

18 JUSTICE SCALIA: Do you think an eight-hour
19 lead is enough? I don't know if --

20 MR. GARRE: Well, I --

21 JUSTICE SCALIA: It would make a good movie.

22 MR. GARRE: Yes.

23 (Laughter.)

24 JUSTICE GINSBURG: So we have a basic
25 question: Is there habeas jurisdiction? And, as I

1 understand the posture of this case, the Federal courts
2 did not examine the merits of the habeas petition. They
3 were just hung up on the bare jurisdictional question.

4 MR. GARRE: That's true. But we think that
5 it is quite clear from this Court's decisions that if
6 they don't have the authority to enter the preliminary
7 injunctive relief that they did at the end of the day
8 they have no authority to enter it as a preliminary
9 matter.

10 I think on the jurisdictional point, the one
11 point I wanted to stress is that if this Court does find
12 jurisdiction, we think it has to be because of a reading
13 of the habeas statute informed by the Constitution
14 that's limited to citizens. Extending jurisdiction to
15 everyone in Iraq would be an extraordinary expansion of
16 this Court's decision in Rasul. Just to be clear, Camp
17 Cropper in Iraq bears none of the characteristics of the
18 Guantanamo base that this Court discussed in its opinion
19 in Rasul and that Justice Kennedy emphasized in his
20 concurrence. So any jurisdictional ruling by this
21 Court, we would urge it to rule only to the
22 circumstances here of the fact of citizenship.

23 CHIEF JUSTICE ROBERTS: The 20,000-plus
24 people being detained, are they all in connection with
25 security threats? Or do they involve what I guess we

1 could call common criminals?

2 MR. GARRE: I think there are both. There
3 have been 2,000 transfers of individuals from
4 Multi-National Force to Iraqi custody, most in connection
5 with criminal proceedings. The other individuals are
6 held because they're a security threat. A lot of
7 individuals come in and out of detention.

8 Obviously the Multi-National Force tries to
9 limit the detention as much as possible. Here the
10 reason why these people have been detained so
11 long is because the American courts have stood in the
12 way of the Iraqi criminal proceedings where the Iraqi
13 courts have sought to bring justice to these people
14 under Iraqi law.

15 JUSTICE STEVENS: Mr. Garre, is it the
16 position of the government that this is a war zone?

17 MR. GARRE: It's -- we don't take the
18 position this is like a battlefield situation. The
19 occupation --

20 JUSTICE STEVENS: Do you think any part of
21 Iraq is like a battlefield situation?

22 MR. GARRE: Certainly there are active
23 hostilities in parts of Iraq. There are not active --

24 JUSTICE STEVENS: Why isn't it a war zone?

25 MR. GARRE: Well, the occupation has ended.

1 I think there are active hostilities in part of it. We
2 have not argued that there is no habeas jurisdiction
3 because of the hostilities there. We've argued that
4 there is no habeas jurisdiction because they're being
5 held under international --

6 JUSTICE STEVENS: Maybe you haven't made
7 your strongest argument.

8 MR. GARRE: Well, if the Court believes that
9 that's our strongest argument, certainly we don't have
10 any objection to have you addressing it.

11 (Laughter.)

12 JUSTICE BREYER: But am I right to assume
13 the underlying situation to be that of Hirota?

14 MR. GARRE: That's our jurisdictional --
15 that's jurisdictional.

16 JUSTICE BREYER: Yes, but you see what I
17 mean by that? I mean, these issues of the war zone and
18 so forth are not really there in this case; that we're
19 talking here about a person whose being held in a manner
20 that's comparable for habeas purposes to the Japanese or
21 aliens who were held in Hirota. They're being held by
22 the Army, which is in part, which is in relevant part
23 serving as an occupying force, to be turned over to a
24 different tribunal.

25 MR. GARRE: That's correct, Justice Breyer.

1 JUSTICE BREYER: Okay, thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,

3 Mr. Garre.

4 The case is submitted.

5 (Whereupon, at 11:23 a.m., the case in the
6 above-entitled matter was submitted.)

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