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**A-06A471**

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IN THE  
**Supreme Court of the United States**

MAISOON MOHAMMED, *et al.*,

*Petitioners,*

v.

FRANCIS J. HARVEY, *et al.*,

*Respondents.*

**REPLY MEMORANDUM IN SUPPORT OF APPLICATION FOR TEMPORARY  
INJUNCTIVE RELIEF PURSUANT TO 28 U.S.C. § 1651**

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## Introduction

Mohammad Munaf, a U.S. citizen in the actual present physical custody of federal officials, has an indisputable right to challenge the lawfulness of his detention in a habeas action. The District Court’s decision that it lacked authority to review the indefinite detention or delivery for execution of a U.S. citizen by American military officers is unprecedented. Its vesting of the Executive Branch with unlimited detention authority presents “an important question of federal law that has not been, but should be, settled by this Court.”<sup>1</sup> Sup. Ct. R. 10(c).

We address three issues in this memorandum. *First*, the Respondents’ brief mirrors its earlier brief in the parallel *Omar v. Harvey* litigation, highlighting the need for a temporary injunction to ensure consistent adjudication of the same jurisdictional issue. *Second*, neither the precedent cited by Respondents nor their various procedural arguments diminish the propriety of and need for temporary injunctive relief. *Finally*, Respondents’ claim that the Multi-National Force-Iraq (“MNF-I”) is beyond U.S. control is belied by the facts.

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<sup>1</sup> Normally, Petitioners would exhaust review at the Court of Appeals before seeking relief from this Court. In this case, though, an immediate filing at the Supreme Court was necessary under the terms of the D.C. Circuit panel’s order to forestall Mr. Munaf’s transfer for execution. Petitioners simultaneously have sought review of the panel’s decision by the D.C. Circuit *en banc*, and have no objection whatsoever to this Court postponing its decision in this case to give the Court of Appeals the opportunity to control its own docket and ensure judicial consistency. In the event, however, that the Court of Appeals fails to grant Mr. Munaf the stand-still relief necessary for him to pursue his appeal on the merits, both below and ultimately here, it would be appropriate for this Court to act in order to preserve its ability to decide the highly consequential issues that this case presents.

## Argument

### 1. Temporary Injunctive Relief Should Issue To Permit Orderly and Consistent Appellate Review Of The Critical Issues In This Case

Respondents' arguments here track closely their contentions pressed in the parallel case of *Omar v. Harvey*, currently *sub judice* before the United States Court of Appeals for the District of Columbia Circuit. See *Omar v. Harvey*, 2006 WL 286861 (D.D.C. 2006); *Omar v. Harvey*, 416 F. Supp. 2d 19 (D.D.C. 2006); *Omar v. Harvey*, D.C. Cir. No. 06-5126. *Omar* raises the same legal question as this case: whether an American citizen in physical custody of the United States in Iraq can petition a federal district court for habeas relief.

In *Omar*, the petitioner was able to present the Court of Appeals with extensive briefing and oral presentations on the jurisdictional questions, and to provide detailed responses to the respondents' substantive arguments. The Court of Appeals will presumably issue a merits opinion benefiting from these advantages; but Mr. Munaf may well be hanged before that occurs.<sup>2</sup> A jurisdictional issue on which an American citizen's life and liberty depends ought not be decided on the basis of a curtailed proceeding, shorn of any opportunity for appellate consideration. If the D.C. Circuit does not act to forestall that inequity, then this Court should.

### 2. This Case Raises Vital Questions of Federal Law and Satisfies the Standard For Injunctive Relief

Contrary to Respondents' intimations, never before in the history of American jurisprudence has a federal court authorized the ongoing detention – and transfer to

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<sup>2</sup> To be sure, Respondents soothingly suggest that a transfer may not be imminent (Opp. at 28), but – despite the pointed invitation in Petitioners' initial papers (Appl. at 4 n.2) – refuse to commit themselves to any particular timetable or to forestall handing Mr. Munaf over to face execution before his appeal is decided.

execution – of an American citizen imprisoned in the physical custody of an American government official without habeas review. The District Court decision’s in this case is the first ever judicial authorization of indefinite detention of a U.S. citizen by the U.S. government without either Suspension of the Writ or any form of judicial process. The District Court, moreover, reached the remarkable conclusion that the U.S. military can render the Suspension Clause hollow by claiming it is detaining a U.S. citizen under the authority of a multinational military entity. In this posture, Mr. Munaf is unquestionably entitled to the relief requested in his application.<sup>3</sup>

To begin with, it is clear beyond cavil that a citizen detained in the actual, physical custody of U.S. government officials properly invokes the habeas jurisdiction of the federal courts. *Communist Party of Ind. v. Whitcomb*, 409 U.S. 1235, 1235 (1972) (Rehnquist, J., in chambers); *see also* Appl. at 12. “In England as in the United States, the chief use of habeas corpus has been to seek the release of persons held in *actual, physical custody* in prison or jail.” *Jones v. Cunningham*, 371 U.S. 236, 238 (1963) (emphasis supplied). It necessarily applies to “situations in which the applicant is in actual, physical custody” of a respondent. *Id.* at 240; *accord* *Wales v. Whitney*, 114 U.S. 564, 572 (1885) (“actual confinement or the present means of enforcing it” suffice to establish habeas jurisdiction). There is no exception to this rule merely because U.S.

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<sup>3</sup> Respondents incorrectly assert that in order to gain the relief he requests, Mr. Munaf’s entitlement to it must be “indisputably clear.” That standard, however, has no application where, as here, Mr. Munaf seeks judicial intervention merely to maintain the status quo. *See, e.g., Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Commission, et al.*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers). Mr. Munaf is in the actual and physical custody of the United States, and that is the status quo he wishes to maintain while he challenges the lawfulness of his detention and transfer. It is the United States that seeks to alter this condition. His request, therefore, is governed by the familiar standard discussed in his moving papers: a reasonable probability the Court will grant *certiorari* and relief. But regardless of the linguistic formulation employed by the Court, Mr. Munaf has met the standard for temporary injunctive relief.

government officials point to the acts of an international force to justify their actions, nor has any such exception been recognized by this or any other federal court.

Neither *Hirota v. MacArthur*, 338 U.S. 197 (1949) (*per curiam*), addressed at length in Mr. Munaf’s opening brief (App. at 10-13), nor the additional cases Respondents cite, supports their argument that the District Court lacked jurisdiction over Mr. Munaf’s petition.<sup>4</sup>

First, *Holmes v. Laird* does not support Respondents’ position. 459 F.2d 1211 (D.C. Cir. 1972); Opp. at 16, 23, 26-7, 29. *Holmes* concerned a U.S. serviceman criminally convicted in Germany who fled back to the United States. He sought not habeas relief, but injunctive relief against a transfer, arguing that his West German trial had been “unfair.” 459 F.2d at 1217. Before rejecting this collateral challenge to a foreign tribunal’s proceedings and judgment, the *Holmes* Court made clear that a different sort of challenge could be made against a proposed transfer to a foreign sovereign: “It is certainly the law that the power of the Executive Branch to invade one’s personal liberty by handing him over to a foreign government for criminal proceedings must be traced to the provisions of an applicable treaty.” *Id.* at 1219 n. 59.<sup>5</sup> *Holmes* thus

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<sup>4</sup> As with their reliance on *Hirota*, Respondents’ invocation of *Flick v. Johnson*, 174 F. 2d 983 (D.C. Cir. 1949), is misplaced. *Flick*, like *Hirota*, concerned a non-citizen: It anticipated the holding of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that non-citizens cannot invoke constitutional habeas jurisdiction to mount a collateral attack on the final judgment and criminal sentence of a non-Article III tribunal. *Flick* also asked and answered a distinct question from the one presented here. It was decided at a time when governing precedent dictated that (a) there was no statutory jurisdiction over habeas petitions filed on behalf of individuals detained overseas, see *Ahrens v. Clark*, 335 U.S. 188 (1948); and (b) there was mandatory constitutional jurisdiction for some non-citizens held overseas, see *Eisentrager v. Forrestal*, 174 F.2d 961, 967 (D.C. Cir. 1949), *rev’d sub nom Johnson v. Eisentrager*, 339 U.S. 763 (1950). The *Flick* Court was thus confronted with the question of how far it *had to* extend jurisdiction as a constitutional matter in the absence of statutory jurisdiction – and not whether there was an independent and absolute limit on habeas jurisdiction.

<sup>5</sup> Respondents (Opp. at 16) cite a passage in the *Holmes* opinion as the appellate court’s holding. That phrase, however, was used by the *Holmes* Court to describe the district court’s holding – and not the holding of the Court of Appeals. See *Holmes*, 459 F.2d at 1215.

distinguished between collateral challenges to a foreign court’s procedural choices, and a challenge to the lawfulness of the transfer to another sovereign of a U.S. citizen by U.S. officials. It is this second claim – a claim that falls into the historical heartland of habeas<sup>6</sup> – that Mr. Munaf presses here – a claim over which the District Court unquestionably has jurisdiction.

Second, Mr. Munaf’s indisputable right to habeas relief is reinforced by *Neely v. Henkel*, whose “rule of non-inquiry” is no bar to jurisdiction. 180 U.S. 109 (1889); Opp. at 26-27. In *Neely*, the petitioner challenged the government’s authority to transfer him to Cuban custody by disputing the legitimacy of the Cuban government. The *Neely* Court rejected that challenge on the merits, but nonetheless reviewed the contemplated extradition and transfer, concluding that it was authorized by treaty and consistent with the Constitution. *See* 180 U.S. at 112 (noting, *e.g.*, treaty requirement of a probable cause hearing). *Neely*, therefore, does not stand for the sweeping proposition (Opp. at 16) that a citizen can be transferred to another sovereign without adequate lawful process. To the contrary, it demonstrates that such transfers are necessarily subject to judicial review on habeas to ensure conformance with the Constitution and laws of the United States.

Building on *Neely*, this Court has made clear that:

[T]he Constitution *creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law.* It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of the treaty, it is not enough that statute or

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<sup>6</sup> *See, e.g.*, Gerald Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 995 (1998) (charting historical use of habeas in extradition proceedings); Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 Yale L. J. 229 (1990) (describing early dispute over extradition).

treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.

*Valentine v. United States*, 299 U.S. 5, 9 (1936) (emphasis supplied); accord *Terlinden v. Ames*, 184 US 270, 289 (1902) (“In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision.”). *Neely*’s rule of non-inquiry, then, affects the *scope* but not the *availability* of habeas review. Its purpose -- to limit the collateral review of foreign judgments rather than the lawfulness of U.S. transfers -- is irrelevant to the question presented here, a question the federal courts indisputably have the power and obligation to decide -- a question about the metes and bounds of the Executive Branch’s authority to deprive a U.S. citizen of his liberty and possibly his life.

Finally, *United States ex rel. Keefe v. Dulles* similarly confirms the federal courts’ authority to assess the lawfulness of a citizen’s proposed transfer to a foreign sovereign. 222 F.2d 390 (D.C. Cir. 1954). *Keefe* concerned a U.S. serviceman convicted in criminal proceedings in France. The petitioner argued that the United States was responsible for the conviction and detention because it had failed to prevent it; that is, the petition’s jurisdictional ground was the government’s *failure to act* to prevent a foreign prosecution, and not, as here, the lawfulness of the U.S. government’s actions. *Keefe*, indeed, made clear that courts must exercise habeas review where the prisoner is in the custody of U.S. respondents, as Mr. Munaf is. 222 F.2d at 391.

Beyond their fruitless search for authority, Respondents (Opp. at 13-14) argue that this Court should deny temporary relief because it is *jurisdiction* at issue.<sup>7</sup>

Respondents cite no authority for the proposition that jurisdictional matters are a *sui generis* species of legal issue for which special rules govern injunctive relief. To the contrary, the jurisdiction of both the District Court and this Tribunal to pass on the jurisdictional question at bar is well-settled: “A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators. There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court.” *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938); *accord Texas & Pac. R. Co. v. Gulf R. Co.*, 270 U.S. 266, 274 (1926); *Matter of Gregory*, 219 U.S. 210, 217 (1911). Whatever the merits of the jurisdictional arguments raised by Respondents, it is well-established that the District Court and this Court properly have “jurisdiction to determine jurisdiction.” This properly includes the power to issue temporary injunctive relief to permit fair litigation of contested legal matters. *See, e.g., United States v. United Mine Workers*, 330 U.S. 258, 290 (1947) (holding that “the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction”). Even if the Circuit Court and Supreme Court had no jurisdiction over a habeas petition, “this court, and this court alone, could decide that such was the law” and “necessarily had jurisdiction to decide whether the case was properly before it.” *United States v. Shipp*, 203 U.S. 563, 573 (1906) (noting court’s “duty to permit argument, and to take the time required for such consideration as it might need”). And, “[u]ntil judgment declining jurisdiction should be announced, [this Court]

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<sup>7</sup> Respondents (Opp. at 13) point to a “decision on appeal . . . that the courts lack such jurisdiction.” Of course, the Court of Appeals in this case has reached no such conclusion. To the contrary, Mr. Munaf seeks relief from this Court to preserve appellate resolution of this very question.

ha[s] authority, from the necessity of the case, to make orders to preserve the existing conditions and the subject of the petition.” *Id.*

The jurisdictional question at issue in this application, moreover, is qualitatively distinct from other jurisdictional matters. Habeas corpus is a fundamental right to judicial review guaranteed both by statute, 28 U.S.C. § 2241, and by the Constitution, Art. I., § 9, cl. 2, which “assures among other things that a prisoner may require his jailor to justify his detention under law.” *Peyton v. Rowe*, 391 US 54, 58 (1968). Indeed, it is precisely this guarantee that “has made the Writ both the symbol and the guardian of individual liberty.” *Id.* Moreover, unlike other constitutional rights, the citizen’s right to habeas can be vindicated only by means of the judicial act of demanding that the executive custodian justify the detention.

Equally unavailing is Respondents’ suggestion (Opp. at 17-18) that habeas relief is improper here because it would prolong Mr. Munaf’s detention.<sup>8</sup> Mr. Munaf’s habeas petition seeks his release to freedom. Transfer to Iraqi custody, *pace* Respondents, is not the factual and legal analog of release. Indeed, district courts routinely delay the transfer of prisoners to other sovereigns (and hence prolong detentions) to review their lawfulness when they adjudicate extradition petitions. The entire premise of extradition review is the possibility that the habeas corpus will bar such transfer as unlawful. Mr. Munaf seeks here only a temporary injunction to allow that review process to take place before he is handed over for execution.

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<sup>8</sup> Respondents’ assertion that Mr. Munaf makes a collateral challenge to the action of the Iraqi tribunal is simply wrong. He challenges only his detention and threatened transfer by officials of the United States. See *Mohammed v. Harvey*, Civil Action No. 06-1455, Petition for Writ of Habeas Corpus ¶¶ 5, 6.

3. The MNF Operates Under United States Control

Respondents argue (Opp. at 3-4) that although Mr. Munaf's custodians are U.S. soldiers, the MNF-I is an international force, which is "legally distinct from the United States and...operates under U.N. authority." Respondents are mistaken, however, as made plain by the repeated statements of senior United States military officials.

Federal law mandates that the chain of command for all United States forces in Iraq run directly to the Secretary of Defense and the President. *See* 10 U.S.C. §162(b). The U.S. army officer who has commanded MNF-I since its inception, General George W. Casey, Jr., ("General Casey"), has repeatedly stated that he is "subject to the authority, direction, and control of the Commander, U.S. Central Command," General John Abizaid. *Advance Questions for General George W. Casey, Jr., U.S. Army Nominee for Commander, Multi-National Force-Iraq*, 108<sup>th</sup> Cong. 3 (2004) ("Casey Response") available at <http://armed-services.senate.gov/statemnt/2004/June/Casey.pdf>. Asked during his Senate confirmation hearing whether there would be any limits on the U.S. Central Command's ("CENTCOM's") authority due to the international nature of the MNF-I, General Casey replied that there were "none at all," and that he had "no reporting chain that goes back to the United Nations....my chain of command is through the secretary of defense and the president." *Nomination of General George W. Casey, Jr., USA, for Reappointment to the Grade of General and to be Commander, Multi-National Force-Iraq: Hearing Before the S. Comm. on Armed Svcs.*, 108<sup>th</sup> Cong. (June 24, 2004) (Statement of Gen. George W. Casey, Jr.) (Lexis News-All) ("Casey Hearing Testimony").

The U.S. Central Command has the authority to give orders not only to every U.S. soldier serving in Iraq (Casey Response at 2) – including Mr. Munaf’s custodians – but also to military commanders of *other nations* serving in the coalition. See Casey Hearing Testimony (stating that multinational commanders would report to a U.S. Lieutenant General, and “[h]e reports to me, I report to General Abizaid.”). For this reason, General Casey told the Senate Armed Services Committee several times that the MNF-I was “a subordinate command to CENTCOM.” Casey Response at 2. See also *Fiscal 2006 Appropriations: Hearing Before the Comm. On H. Appropriations Subcomm. On Military Quality of Life and Veterans Affairs*, 109<sup>th</sup> Cong. (March 3, 2005) (statement of Gen. John P. Abizaid, Commander, U.S. Central Command) (Lexis News-All) (“United States Central Command ... remains engaged in three principal activities ... Multi-National Forces-Iraq (MNF-I) heads these efforts in Iraq.”); *The Imminent Transfer of Sovereignty of Iraq: Testimony Before the H. International Relations Comm.*, 108<sup>th</sup> Cong. (May 13, 2004) (statement of Lt. Gen. Walter L. Sharp, Director, Strategic Plans and Policy, The Joint Staff) (Lexis News-All) (“[The MNF] is subordinate to General Abizaid as Commander, US Central Command.”).

In contrast to the direct command relationship between MNF-I and the U.S. military, General Casey characterized the relationship between MNF-I and the United Nations as “a partnership pursuing the common goal of building a democratic Iraq.” Casey Response at 7. This is consistent with Secretary of State Colin Powell’s statement that the threshold U.N. resolution 1511 had little practical effect, and simply “gives a chapeau to the multinational force, as it will now be called.” Colin Powell, U.S. Sec’y of State, Media Availability Following Passage of Resolution 1511 (Oct. 16, 2003)

(transcript available at Lexis News-All); *cf.* Max Hilaire, *United Nations Law and the Security Council* 243 (2005) (“Resolution 1511 ... does not change the situation on the ground in Iraq ... [It] made no major changes in the role of the United Nations.”); Thomas D. Grant, *The Security Council and Iraq: An Incremental Practice*, 97 *Am. J. Int’l L.* 823, 839 (2003) (same).

In short, the existence of *international law* authorization (in the form a United Nations Security Council resolution) for the MNF-I does not alter the fundamental reality of U.S. command and control leading up to the President—who derives his authority from, and is governed and constrained by, the U.S. Constitution. The Executive cannot escape its legal duties to its citizens by acting in concert with its allies, and cannot replace the writ of habeas corpus with a U.N. resolution. *See Reid v. Covert*, 354 U.S. 1, 5-6, 16 (1957) (holding that “[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source.... [N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.”)

At minimum, the degree of U.S. control over MNF-I creates a question of jurisdictional fact properly resolved by the District Court.<sup>9</sup> *Cf. El Fadl v. Central Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996) (remanding to district court for jurisdictional discovery). This Court should not allow Mr. Munaf to be executed before these issues are fully explored and resolved.

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<sup>9</sup> The impropriety of the District Court’s summary action is accentuated by its refusal to make factual determinations, *e.g.*, regarding the involvement of the American government in the actions of a foreign government claimed to be acting independently, that have long been acknowledged to be of relevance to the jurisdictional issue. *Appl.* at 9 n.4. It is obviously immaterial that Respondents stand by their view of the facts; so does the Romanian Government, and the resulting factual controversy (*see Opp.* at 25 n.6) strongly supports the issuance of an injunction. An appeal raising issues as significant as this should be heard on a record permitting sure-footed adjudication.

## Conclusion

For the foregoing reasons and those stated in the Application, the government should be restrained from transferring Mr. Munaf from its custody pending the disposition by the Court of a petition for certiorari to review any adverse decision that may be rendered on the merits by the Court of Appeals.

Respectfully submitted,

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