

[ORAL ARGUMENT NOT YET SCHEDULED]
No. 06-5324

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAISOON MOHAMMED,
Next Friend of
MOHAMMAD MUNAF,
Petitioners-Appellants,

v.

FRANCIS J. HARVEY, *et. al.*,
Respondents-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANTS

Joseph Margulies
MACARTHUR JUSTICE CENTER,
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
357 East Chicago Avenue
Chicago, IL 60611
Telephone: (312) 503-0890
Facsimile: (312) 503-1272

Vincent Moccio
Amy Magid
ROBINS, KAPLAN, MILLER &
CIRESI L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
Telephone: (612) 349-8500

Jonathan Hafetz
Aziz Z. Huq
BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY
SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
Telephone: (212) 998-6730

Eric M. Freedman
HOFSTRA LAW SCHOOL
121 Hofstra University
Hempstead, N.Y. 11549
Telephone: (516) 463-5167
Facsimile: (516) 463-5129

Susan L. Burke
Katherine Hawkins
BURKE PYLE LLC
4112 Station Street
Philadelphia, PA 19127
Telephone: (215) 487-6590

COUNSEL FOR APPELLANTS

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1
ARGUMENT	4
Introduction	4
I. The Lower Court Had Jurisdiction Over Mr. Munaf’s Habeas Petition	7
A. The Executive Branch May Not Confer Upon itself a Right to Imprison an American Citizen at Will by Signing an Executive Agreement	7
B. If The Executive Has Correctly Construed The Agreements Upon Which It Relies, They Are Unconstitutional	10
C. <i>Hirota</i> Cannot Sustain Respondents’ Claims	14
II. Determining The Lawfulness Of A Citizen’s Detention Is A Core Judicial Function	22
CONCLUSION	26
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)	27
CERTIFICATE OF SERVICE	28

TABLE OF AUTHORITIES

CASES

<i>Abu Ali v. Aschroft</i> , 350 F. Supp. 2d 28 (D.D.C. 2004).....	23
<i>Ahrens v. Clark</i> , 335 U.S. 18 8 (1948).....	15
<i>Al-Hela v. Bush</i> , No. 05-1048 (D.D.C. June 3, 2005).....	22
<i>Al-Joudi v. Bush</i> , No. 05-301, 2005 WL 774847 (D.D.C. April 4, 2005)....	22
<i>Al-Marri v. Bush</i> , No. 04-2034, 2005 WL 774843 (D.D.C. Apr. 4, 2005)...	22
<i>Al-Shiry v. Bush</i> , No. 04-0490, 2005 WL 1384680 (D.D.C. Apr. 1, 2005)..	22
<i>Baker v. Carr</i> , 369 U.S. 186 (1962).....	24
<i>Bancoult v. McNamara</i> , 445 F.3d 427 (D.C. Cir. 2006)	3, 23
<i>Barr v. United States Department of Justice</i> , 819 F. 2d 25 (2d Cir. 1987).....	20, 22
<i>Bishop v. Reno</i> , 210 F.3d 1295 (11th Cir. 2000)	20
* <i>Braden v. 30th Judicial Circuit</i> , 410 U.S. 484 (1973).....	5, 16
<i>Center for Law and Educ. v. Department of Educ.</i> , 396 F.3d 1152 (D.C. Cir. 2005).....	5, 20
<i>Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council</i> , 485 U.S. 568 (1988).....	9
<i>Everett ex rel. Bersin v. Truman</i> , 334 U.S. 824 (1948)	16
<i>Ex parte Betz</i> , 329 U.S. 672 (1946)	16
<i>Ex parte Bollman</i> , 8 U.S. (4 Cranch) 75 (1807)	11
<i>Ex parte Merryman</i> , 17 F. Cas. 144 (1861).....	11

<i>Flick v. Johnson</i> , 174 F. 2d 983 (D. C. Cir. 1949)	16
<i>Flynn v. Schultz</i> , 748 F. 2d 1186 (7 th Cir. 1984).....	23
<i>Geofroy v. Riggs</i> , 133 U.S. 258 (1890).....	10
* <i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004)	2, 3, 11, 12, 13, 18, 24, 25
<i>Hatim v. Bush</i> , No. 05-1549 (D.D.C. Aug. 22, 2005)	22
* <i>Hirota v. MacArthur</i> , 338 U.S. 197 (1948).....	2, 13, 14, 15, 16
<i>Holmes v. Laird</i> , 459 F.2d 1211 (D.C. Cir. 1972).....	19
<i>In re Dammann</i> , 336 U.S. 922 (U.S. 1949)	16
<i>INS v. St. Cyr</i> , 533 U.S. 289 (2001).....	9
<i>Johnson v. Eisentrager</i> , 339 U.S. 763 (1950).....	2, 14
<i>Korematsu v. United States</i> , 323 U.S. 214 (1944).....	24
<i>Madsen v. Kinsella</i> , 343 U.S. 341 (1952).....	13
<i>Missouri v. Holland</i> , 252 U.S. 416 (1929).....	10
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989).....	25
<i>Quinn v. Robinson</i> , 783 F.2d 776 (9th Cir. 1986).....	19
<i>Rasul v. Bush</i> , 542 U.S. 466 (2004).....	3, 5, 25
* <i>Reid v. Covert</i> , 357 U.S. 1 (1957).....	1, 7, 9, 13
<i>United States ex rel. Attorney General v. Delaware & Hudson Corp.</i> , 213 U.S. 366 (1909).....	8
<i>United States ex rel. Keefe v. Dulles</i> , 222 F.2d 390 (D.C. Cir. 1954).....	14
<i>Valentine v. United States</i> , 297 U.S. 5 (1936)	18, 19

<i>Walker v. True</i> , 399 F.3d 315 (4th Cir. 2005).....	17
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968).....	23
<i>Wilson v. Girard</i> , 354 U.S. 524 (1957).....	19, 21
<i>Wong Kim Ark v. U.S.</i> , 169 U.S. 649 (1898)	10
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952).....	13

BRIEFS IN OTHER CASES

<i>Hamdi v. Rumsfeld</i> , No. 03-6696, Brief for the Respondents.....	3, 24
<i>Rasul v. Bush</i> , No. 03-334, Brief for the Respondents.....	5, 25

INTERNATIONAL TREATIES AND RESOLUTIONS

Executive Agreement of July 27, 1942, 57 Stat. 1193.....	9
U.N. Resolution 1386 ¶ 1 (Dec. 20, 2001).....	12
U.N. Resolution 1511 ¶ 13 (Oct. 16, 2003).....	12
U.N. Resolution 1546 ¶ 10 (June 8, 2004).....	13

JOURNAL ARTICLES AND BOOKS

Charles Wright et al., <i>Federal Practice and Procedure</i> § 3534.2 (2d ed. 1984).....	23
James Pfander, <i>The Limits of Habeas Jurisdiction and the Global War on Terror</i> , 91 Cornell L. Rev. 497, 517, nn. 131-32 (2004)	16
Richard H. Fallon, Jr. et al., <i>The Federal Courts and the Federal System</i> 316 (5th ed. 2003).....	16

STATUTES

28 U.S.C. § 2241 (c) (3)..... 20

OTHER AUTHORITIES

John Burns, *To Halt Abuses, U.S. Will Inspect Jails Run By Iraq*,
N.Y. Times, Dec. 14, 2005 at A1 21

Marc Santora, *British Soldiers Storm Iraqi Jail, Citing Torture*,
N.Y. Times, Dec. 26, 2006 at A1 21, 22

Michael Moss, *Iraq's Legal System Staggers Beneath the Weight of War*,
N.Y. Times, Dec. 17, 2006, at A1 18

* Authorities Principally Relied Upon

SUMMARY OF ARGUMENT

1. The district court had jurisdiction over Mr. Munaf’s habeas petition. Mohammed Munaf is a U.S. citizen in the actual and physical custody of U.S. soldiers at a U.S. prison in Iraq. His ultimate custodians are U.S. officials within the territorial jurisdiction of the District Court. Both his ultimate custodian—Respondent Francis J. Harvey—and his immediate custodian—Respondent Lt. Col. Quentin K. Crank—answer solely to the Constitution and laws of the United States. As we demonstrated in our opening brief, these uncontested facts establish the district court’s jurisdiction over Mr. Munaf’s action.

In opposition, Respondents point to the unilateral decision by the Executive to enter into an agreement with foreign countries. According to Respondents, this agreement vests the U.S. military with independent authority to detain Mr. Munaf, unconstrained by the Constitution and laws of the United States. Respondents are wrong. The power and authority of the United States Government, including the Executive Branch, flows from the Constitution, and “no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the [Constitution’s] restraints.” *Reid v. Covert*, 357 U.S. 1, 5-6, 16 (1957) (emphasis added). No federal official traces his authority to anything other than the Constitution.

If accepted by this Court, Respondents' argument would produce disastrous, and unconstitutional, results. It would allow the Executive Branch to suspend the Great Writ of its own will. It would allow the U.S. military to imprison a U.S. citizen anywhere in the world, including the homeland, with no obligation to account for his detention before an impartial judiciary. In short, it would create precisely the "unchecked system of detention" that the Constitution forbids. *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) (plurality opinion).

In support of their remarkable argument, Respondents rely almost exclusively on *Hirota v. MacArthur*, 338 U.S. 197 (1948). As we made clear in our opening brief, however, this reliance is misplaced. Unlike Mr. Munaf, Hirota was an enemy alien who could not claim citizenship as "a head of jurisdiction and a ground of protection." *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950). Unlike Mr. Munaf, Hirota filed directly in the Supreme Court, which had neither appellate nor original jurisdiction and therefore had no choice but to deny his application. And unlike Mr. Munaf, Hirota challenged the lawfulness and legitimacy of the international military tribunal that tried and convicted him of war crimes. Mr. Munaf, by contrast, does not challenge any Iraqi proceeding or multilateral decision-making. Instead, he challenges the actions of officials who wear the uniforms of the United States and answer solely to other United States officials in the chain of command—and thus to the Constitution.

2. Mr. Munaf's action is not a political question. Respondents have raised this argument repeatedly since September 11, 2001, always without success. In *Hamdi*, Respondents insisted that the determination of Hamdi's status was "a quintessentially military judgment" and "a core exercise of the Commander-in-Chief authority." *Hamdi v. Rumsfeld*, No. 03-6696, Brief for the Respondents at 25. The Court, however, "reject[ed] the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts." *Hamdi*, 542 U.S. at 535 (plurality opinion).

Likewise, in *Rasul v. Bush*, Respondents argued that the determination of a prisoner's status was "a quintessential political question." No. 03-334, Brief for the Respondents' at 49. The Supreme Court rejected the contention without so much as a comment. 542 U.S. 466 (2004). It is impossible to maintain that the detention of an alien is a judicial question, but the detention of a citizen is a political question.

More recently, this Court has reaffirmed that "claims based on the most fundamental liberty and property rights of this country's citizenry, such as the Takings and Due Process Clauses of the Fifth Amendment, are justiciable, even if they implicate foreign policy decisions." *Bancoult v. McNamara*, 445 F.3d 427, 435 (D.C. Cir. 2006) (internal quotations omitted). This statement of the law has

been universally endorsed, and no court has ever ranked the lawfulness of executive detention of a U.S. citizen as anything other than a judicial question.

ARGUMENT

Introduction

The Executive Branch may not imprison an American citizen indefinitely based on the unilateral fiat of its officials. Rather, the Executive must subject the legal and factual bases of his actions to adversary testing before a neutral judiciary. These simple rules divide power to protect liberty. Enshrined in the Anglo-American legal system after centuries of struggle, they provide the essential framework of a constitutional democracy. Respondents chafe at these restraints, resenting their very purpose of constricting the Executive's unfettered latitude to act as he sees fit. But their brief consists of a series of claims that are simply wrong.

To begin with, they misapprehend the narrow issue before the Court, which is only whether the lower court had jurisdiction to determine the lawfulness of Mr. Munaf's detention and proposed transfer to Iraqi custody. Whether, as his petition alleges, Mr. Munaf is an innocent U.S. citizen imprisoned without lawful process by U.S. soldiers at a U.S. prison, or instead a "security internee" whose circumstances were the subject of "a comprehensive review" that provided Mr. Munaf with a meaningful opportunity to hear and test the basis for his detention, as

Respondents claim, is the merits question that the District Court will be required to determine on remand. J.A. 21-22. For now, however, it is *Mr. Munaf's* allegations, and not Respondents', that the Court must accept as true. *See, e.g., Center for Law and Educ. v. Department of Educ.*, 396 F.3d 1152, 1156 (D.C. Cir. 2005) ("In reviewing a ruling on a motion to dismiss, the court must accept as true all facts alleged by the nonmoving party and must draw all inferences in favor of the nonmoving party.").

The Executive Branch also misapprehends the controlling legal rule. A district court has habeas jurisdiction over petitions filed by U.S. citizens in U.S. custody so long as the ultimate custodian will answer to the court's command. Petitioners' Brief at 10-17; *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973); *Rasul v. Bush*, 542 U.S. 466, 478-79 (2004) ("[B]ecause the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody, a district court acts 'within [its] respective jurisdiction' within the meaning of [the habeas statute] as long as the custodian can be reached by service of process."). Nothing more is needed; nothing else is relevant. The test, therefore, is not, and has never been, whether a citizen is held under "international authority." Respondents' Brief at 17-21.

In addition, the Executive Branch is wrong about Mr. Munaf's claims for relief. Though Mr. Munaf has been convicted by an Iraqi court, he does not challenge his foreign conviction or sentence in this proceeding. Instead, he challenges the legality of specific actions taken or threatened *by his American captors* – viz.: 1) holding him without legal justification long before any Iraqi criminal charges were brought, based on allegations that operate entirely independent of those charges; 2) interfering in the Iraqi proceedings in order to create the conviction now relied upon by Respondents in this proceeding; and 3) transferring him to face execution by the Iraqi Government without the requisite judicial inquiry into whether that transfer is lawful. Each of these claims falls squarely within the traditional heartland of habeas, and it was the duty of the district court to determine their merits.¹

Finally, the Executive Branch is wrong in its radical and unprecedented claim of an unreviewable power to incarcerate an American citizen forever or, at its option, to transfer him to whatever fate awaits him at the hands of a foreign government. Respondents purport to derive this authority from a unilateral decision by the Executive to participate in “MNF-I.” *See, e.g.*, Respondents’ Brief at 12, 21. But the United States “is entirely a creature of the Constitution. *Its*

¹ Respondents agree that Mr. Munaf’s conviction is irrelevant to the underlying jurisdictional question. *See* Respondents’ Brief at 56 n 10 (*Munaf* “presents the same threshold jurisdictional question” as *Omar v. Harvey*, No. 06-5126). As the Court is aware, Mr. Omar has not been convicted.

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.” *Reid v. Covert*, 357 U.S. 1, 5-6, 16 (1957) (emphasis added). The Executive Branch may not free itself from its constitutional duty to account for a citizen’s detention by entering an international agreement. Even during war – or perhaps, especially during war – the lawfulness of a citizen’s imprisonment remains a *judicial* question.

I. The Lower Court Had Jurisdiction Over Mr. Munaf’s Habeas Petition.

A. The Executive Branch May Not Confer Upon itself a Right to Imprison an American Citizen at Will by Signing an Executive Agreement.

In our opening brief, we discussed at length the test for habeas jurisdiction over a U.S. citizen detained abroad: the district court has jurisdiction so long as the ultimate custodian will comply with the court’s command. *See* Petitioners’ Brief at 10-17. This rule developed over the past fifty years, eventually producing a doctrine of enviable clarity. In a brief of nearly 14,000 words, Respondents make no attempt to challenge this statement of the law, nor could they. Instead, they purport to find an exception, without basis in the habeas statute or Constitution, for citizens detained under “international authority,” even when they are held by U.S. jailers. Respondents’ Brief at 17-21. Respondents are wrong.

First, and simply as a matter of fact, Mr. Munaf’s American jailers do not, and cannot, act pursuant to “international authority.” On the contrary, Petitioners’ brief recites the unequivocal testimony of senior military officials, including that of General George W. Casey, the commander of MNF-I, whose remarks could not be more clear: neither the Resolutions of the U.N. Security Council nor the provisions of MNF-I diminish or alter the obligation of every U.S. soldier to comply with the Constitution and laws of the United States. As General Casey explained, these instruments create “no reporting chain that goes back to the United Nations,” and in no way displace the ultimate and irreducible authority of U.S. law. *See* Petitioners’ Brief at 18-21. In a silence that speaks volumes, Respondents do not so much as mention this testimony.

Nor do the international agreements proffered by Respondents include any language remotely supporting the result they urge.² Hence, the Court need not

² Even if they did, the courts would do everything possible to read the language so as to avoid the need to answer the serious constitutional questions raised. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 298-303 (2001) (interpreting the habeas statute to avoid constitutional questions arising from indefinite detention of aliens without judicial review); *see also, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (avoiding statutory interpretations that raise serious constitutional problems is a cardinal rule of statutory construction); *United States ex rel. Attorney General v. Delaware & Hudson Corp.*, 213 U.S. 366, 408 (1909) (“[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”).

decide any proposition of constitutional law in this case. It is axiomatic that *Congress* cannot strip the federal courts of habeas jurisdiction without a clear and unequivocal statement to that effect. *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). It would be anomalous in the extreme if the *Executive* could unilaterally strip the courts of habeas jurisdiction by silent implication. The Court should simply reject the Executive's belated attempt to improve its litigation posture by imagining language that does not exist.

Second, even if the international instruments relied upon by the Executive included explicit language purporting to strip the federal courts of all power in this matter, the district court would still have jurisdiction. Such language would simply bring the case within the terms of *Reid v. Covert*, where the Government argued that an executive agreement between the United States and Great Britain vested military courts with exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents.³ Pursuant to this agreement, the United States tried and convicted Covert before a military tribunal. 357 U.S. 1, 15-16 (1957). Covert complained that the tribunal had not provided for trial by jury, in violation of the Sixth Amendment. Defending the conviction, the Government argued that the executive agreement trumped the Constitution. *Id.* at 16.

³ See Executive Agreement of July 27, 1942, 57 Stat. 1193 (cited in *Reid v. Covert*, 357 U.S. 1, 16, n. 29 (1957)).

The Court disagreed. “No agreement with a foreign nation,” the Court held, “can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.” *Id.* Covert was therefore entitled to a jury trial regardless of the agreement with Great Britain. *Reid*, moreover, hardly broke new ground. On the contrary, it has long been the law that even a treaty cannot empower the United States to violate the Constitution. *See, e.g., Missouri v. Holland*, 252 U.S. 416, 432-34 (1929) (treaty cannot authorize the national government to do that which the Constitution disallows); *Wong Kim Ark v. U.S.*, 169 U.S. 649 (1898) (invalidating treaty provision as unconstitutional); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (treaty power “cannot authorize what the Constitution forbids”). If a treaty, negotiated and signed by the President and ratified by the Senate, is still subordinate to the Constitution and Bill of Rights, the same must necessarily be true of an arrangement made by the Executive alone. Respondents simply ignore this line of authority.

B. If The Executive Has Correctly Construed The Agreements Upon Which It Relies, They Are Unconstitutional.

Alternatively, if the Executive’s interpretation here is correct and the international agreements divest the courts of habeas jurisdiction, they are unconstitutional. A *treaty* containing such provisions would offend numerous provisions of the Constitution, including Article III, the Due Process Clause, and

the Suspension Clause. But an executive agreement that did so would founder on an even more basic objection: the Executive's action would be *ultra vires*.

The Executive Branch cannot, of its own will, suspend the writ. “[U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining th[e] delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions.” *Hamdi*, 542 U.S. at 537 (plurality opinion); *see also id.* at 545 (opinion of Souter, J.) (noting “need for an assessment *by Congress* before citizens are subject to lockup”) (emphasis added); *id.* at 562 (Scalia, J., dissenting); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (“If at any time the public safety should require the suspension [of habeas], *it is for the legislature to say so.*”) (emphasis added); *Ex parte Merryman*, 17 F. Cas. 144 (1861) (Taney, C.J., in chambers) (“[The constitutional article authorizing the suspension of habeas] is devoted to the legislative department of the United States, and has not the slightest reference to the executive department.”).

If the Executive Branch is entitled to do what it claims to have done in this case, then it has the single-branch power to create precisely the “unchecked system of detention” that the Constitution forbids. *Hamdi*, 542 U.S. at 530 (plurality opinion). By virtue of having entered into international agreements – even silent ones – that create an “international authority,” it is entitled to seize American

civilians anywhere in the world, whether in Beirut, Lebanon or Lebanon, Pennsylvania, and imprison them anywhere in the world, whether in Cairo, Egypt or Cairo, Illinois, entirely free from judicial review. In Respondents' paradigm, the existence of habeas jurisdiction depends simply on whether the prisoner is held "under the laws of the United States or, instead, under international authority." Respondents' Brief at 18. Indeed, Respondents frame their opening argument in precisely these terms: "Courts of the United States Lack Jurisdiction over the Habeas Claims of Individuals Held under International Authority." *Id.* at 17

These claims are insupportable and flatly inconsistent with the Supreme Court's recent ruling in *Hamdi*.⁴ As in Iraq, the U.S. military intervention in Afghanistan was authorized by a Resolution of the U.N. Security Council. Indeed, as we pointed out in our opening brief (Petitioners' Brief at 15-16), the U.N. Resolutions that authorized multinational operations in Afghanistan closely mirror the Resolutions that established the multinational force in Iraq. *Compare* U.N. Resolution 1386 ¶ 1 (Dec. 20, 2001) (authorizing an "International Security Force" to maintain security in Afghanistan), *with* U.N. Resolution 1511 ¶ 13 (Oct. 16,

⁴ Respondents claim that *Hamdi* is distinguishable because the prisoner was detained in the United States. Respondents' Brief at 27. But the plurality in *Hamdi* anticipated and foreclosed that very argument. Granting access to U.S. courts for citizens held inside the country but denying it to citizens held overseas would create a "perverse incentive" for the military to "simply keep citizen-detainees abroad." *Hamdi v. Rumsfeld*, 542 U.S. 507, 524 (2004) (plurality opinion).

2003) (authorizing a “multinational force” to maintain security in Iraq); U.N. Resolution 1546 ¶ 10 (June 8, 2004) (authorizing the “multinational force” to take all necessary steps to maintain and stabilize Iraq). Hamdi, therefore, no less than Mr. Munaf, was held under “international authority.” If Respondents’ just-minted argument were correct, the courts in *Hamdi* would have been without jurisdiction. Yet no Justice implied that jurisdiction was lacking.

Respondents are driven to respond that in *Hamdi*, the military derived its authority from a congressional authorization for the use of force, whereas here the military supposedly derives its authority from the MNF-I. Respondents’ Brief at 27. The fact that the Executive Branch endeavors to advance its argument by intimating that its power increases in the absence of congressional authorization, *but see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 37 (1952) (Jackson, J., concurring); or that an international agreement can grant the Executive a power withheld by Congress, *but see Reid, supra*, only serves to demonstrate the argument’s fatal flaws.⁵

⁵ Respondents likewise fail to distinguish *Madsen v. Kinsella*, 343 U.S. 341 (1952). Respondents assert that Madsen, unlike Mr. Munaf, was detained by a court “established under United States authority” in a U.S. occupation zone, staffed by executive officers who took their orders from the President. Respondents’ Brief at 25-6. But Mr. Munaf’s captors also take their orders from the President, in a country occupied by U.S. soldiers. Saying that those soldiers operate under a “Multi-National Force” does not change these undisputed facts. In any case, as we pointed out in our opening brief, the courts that tried Madsen were established

C. *Hirota* Cannot Sustain Respondents' Claims.

Against the overwhelming weight of history, constitutional principle, and unbroken precedent, the Executive clings stubbornly to *Hirota v. MacArthur*, 338 U.S. 197 (1948). But even if a single, old and much-vexed case could save Respondents, *Hirota* is not that case. As we explained at length in our opening brief, *Hirota* differs from this case in three fundamental respects.

(1)

Hirota, unlike Mr. Munaf, was an enemy alien who could not claim citizenship as “a head of jurisdiction and a ground of protection.” *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950); Petitioners’ Brief at 8.

Respondents argue that citizenship *by itself* cannot be a basis for jurisdiction since it would allow U.S. citizens held by foreign governments to seek habeas relief. Respondents’ Brief at 22-24. But this argument wrestles with a straw man. As we made plain our opening brief, federal courts have habeas jurisdiction over U.S. citizens *when they are in the physical custody of U.S. officials* because habeas operates against the custodian. *Braden*, 410 U.S. at 495. The reason federal courts do not have jurisdiction over an imprisoned American in Paris is that his French jailers are not subject to the order of a federal district court and will not answer to the court’s command. *See United States ex rel. Keefe v. Dulles*, 222 F.2d 390, 391-

under *international* authority, which did not deprive the U.S. courts of jurisdiction. *See* Petitioners’ Brief at 13-14 n 1.

92 (D.C. Cir. 1954) (no habeas jurisdiction over American held in French prison by French jailers). But as Respondents acknowledge (albeit grudgingly in a footnote), Mr. Munaf’s American custodians answer *only* to U.S. law and are necessarily subject to the order of a federal district judge. Respondents’ Brief at 31 n 4.

In short, the legal rule is clear: American citizenship plus American custody equals federal habeas jurisdiction.

(2)

Hirota, unlike Mr. Munaf, attempted to sue directly in the Supreme Court because his attorneys believed the recent decision in *Ahrens v. Clark*, 335 U.S. 188 (1948), foreclosed jurisdiction in the district court. Hirota was rebuffed because his action was not within either the original or appellate jurisdiction of the Court. Petitioners’ Brief at 27-32.

Respondents point out that the majority in *Hirota* does not cite *Ahrens*. In an effort to make something from nothing, Respondents claim to hear in this judicial silence an unspoken conclusion: that the Court must have ruled as it did because Hirota was detained “under international authority.” See Respondents’ Brief at 33. But Respondents fail to point out that the Court in *Hirota* did not cite *any* cases in its three-paragraph *per curiam* opinion.

The indisputable fact is that Hirota filed directly in the Supreme Court. Under Article III, the Court cannot entertain an action unless it falls within its

original or appellate jurisdiction. Hirota’s litigation came within neither, and the Court had no choice but to deny his application. *See* Petitioners’ Brief at 28-29.⁶

This Court need not try to predict how the Supreme Court would rule if Mr. Munaf had filed directly in the Supreme Court – a step that would have brought his case more in line with *Hirota*.⁷ The fact is that Mr. Munaf, unlike Hirota, filed in the district court. And as Petitioners demonstrated in their opening brief, it has been the law at least since *Braden* that federal courts have jurisdiction over American citizens detained by American jailers abroad so long as the ultimate custodian is within the court’s reach.⁸

⁶ Respondents observe that the summary order in *Hirota* did not say that the Court’s decision turned on the limits of its original or appellate jurisdiction. Respondents’ Brief at 33. Yet, as we pointed out in our opening brief, in numerous cases after *Hirota*, the Supreme Court explicitly denied leave to file petitions like the one filed by Hirota *precisely because the Court lacked original jurisdiction*. *See, e.g., Ex parte Betz*, 329 U.S. 672, 672 (1946) (denying original habeas writ “for want of original jurisdiction”); *Everett ex rel. Bersin v. Truman*, 334 U.S. 824 (1948) (same); *In re Dammann*, 336 U.S. 922, 923 (U.S. 1949) (same); Richard H. Fallon, Jr. et al., *The Federal Courts and the Federal System* 316 (5th ed. 2003) (collecting cases); James Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 Cornell L. Rev. 497, 517 nn 131-32 (2004) (same). Respondents conspicuously ignore this authority.

⁷ Respondents argue that *Hirota* remains “good law” and cannot be disregarded by this Court. Respondents’ Brief at 31-32. But we do not argue that *Hirota* has been overruled. On the contrary, we state explicitly that *Hirota*’s holding remains the law. Petitioners’ Brief at 25. That holding, however, has nothing to do with Mr. Munaf. *See* Petitioners’ Brief at 12-17; 26-27.

⁸ Respondents also get no comfort from this Court’s decision in *Flick v. Johnson*, 174 F. 2d 983 (D. C. Cir. 1949). Flick, a German national, challenged the

(3)

Hirota, unlike Mr. Munaf, attempted to mount a collateral attack on the judgment and sentence of a foreign tribunal, rather than a direct challenge to the lawfulness of his detention by American officers. Petitioners' Brief at 32-34.

Respondents' struggle to fit the square peg of Hirota's claims (*see* Petitioners' Brief at 32-33 (summarizing Hirota's attacks on proceedings in tribunal that convicted him)) into the round hole of Mr. Munaf's petition. They argue that Mr. Munaf's action "is tantamount to a collateral challenge on [his] Iraqi conviction." Respondents' Brief at 48. Respondents are mistaken. Mr. Munaf does not seek an inquiry into his Iraqi conviction. Rather, he challenges three specific steps taken by American officials. In accordance with bedrock principles of habeas law, the district court must first find the relevant facts and thereafter rule on the lawfulness of the Government's actions. *See, e.g., Walker v. True*, 399 F.3d 315, 319 (4th Cir. 2005).

First, the lower court must determine the factual and legal basis on which American officials are holding Mr. Munaf. Though Respondents imply that they only hold Mr. Munaf for the benefit of the Iraqi Government, the record indicates

judgment and sentence imposed on him by an international tribunal, and the Court, after concluding the foreign tribunal was a "legitimate and appropriate instrument[] of judicial power," affirmed the dismissal of his habeas petition. *Id.* at 986. If Mr. Munaf were a foreign national, and if he challenged the judgment and sentence of the Iraqi court, *Flick* may have some bearing on this litigation. But he isn't and he doesn't, and *Flick* is simply immaterial.

otherwise. As we noted in our opening brief, the United States has held Mr. Munaf since May 23, 2005 – long before the start of any Iraqi proceedings. Indeed, by the time Mr. Munaf began this action through his next friend, he had already been detained by the United States for more than a year; only after the filing of this petition were the Iraqi charges brought. And despite the pointed invitation in our papers, Petitioners’ Brief at 9, Respondents refuse even now to concede that they would release Mr. Munaf should the Iraqi charges be dismissed or the Iraqi appeal end in his favor. Instead, Mr. Munaf would remain in U.S. custody – precisely the fate that has befallen at least *five dozen* other prisoners whose cases were dismissed by the Iraqi courts but who remained American prisoners. Michael Moss, *Iraq's Legal System Staggers Beneath the Weight of War*, N.Y. Times, Dec. 17, 2006, at A1.

Because the U.S. holds Mr. Munaf on its own authority and for its own purposes, the inquiry into the lawfulness of its actions will be controlled by *Hamdi*, where the Court described the application of the Due Process Clause to alleged “enemy combatants” held in ostensible connection with the conflict in Afghanistan. The district court will need to apply *Hamdi* to determine whether the Government has appropriately defined some category of “security detainees” who

may be held by the U.S. military, and whether it has implemented valid procedures for making the necessary determination.⁹

Second, the lower court will have to determine the lawfulness of Mr. Munaf's proposed transfer. This basis for this inquiry is provided by cases like *Wilson v. Girard*, 354 U.S. 524 (1957), and *Valentine v. United States*, 297 U.S. 5 (1936), where the Supreme Court established and applied the principle that, "in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power." *Valentine*, 297 U.S. at 9; *see also, e.g., Quinn v. Robinson*, 783 F.2d 776, 782 (9th Cir. 1986) ("[N]o branch of the United States government has any authority to surrender an accused a foreign government except as provided for by statute or treaty."); *Holmes v. Laird*, 459 F.2d 1211, 1219 n.59 (D.C. Cir. 1972) ("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.").

⁹ Respondents describe an administrative proceeding that they claim took place in Iraq, which supposedly led to the conclusion that Mr. Munaf is a "security internee." Respondents' Brief at 5-6. It is undisputed that Mr. Munaf did not have the benefit of counsel at this event, and Respondents pointedly do not suggest it satisfied the requirements of the Due Process Clause. Should Respondents make that argument on remand, the lower court will take the measure of this proceeding against the requirements imposed by the Supreme Court in *Hamdi*.

Third, the lower court will have to determine whether U.S. officials unlawfully manipulated the Iraqi criminal proceeding in order to secure Mr. Munaf's conviction. To be sure, the Executive insists that Lieutenant Pirone's actions were entirely above board when he claimed to represent Romania's interests at trial. Respondents' Brief at 6, 49-50. Yet the Romanian Government and trial observers insist quite the opposite, and we note with some interest that the Executive has yet to produce the letter that supposedly deputized Lt. Pirone to speak on Romania's behalf. Petitioners' Brief at 6; JA 85-86. If Mr. Munaf's allegations prove correct, he is unquestionably entitled to habeas relief. *See, e.g., Barr v. United States Department of Justice*, 819 F. 2d 25, 27-28 (2d Cir. 1987) (U.S. government bears legal responsibility for actions that foreign government takes at its request).¹⁰ And as we have noted, at this stage of the litigation Mr.

¹⁰ *Bishop v. Reno*, 210 F. 3d 1295 (11th Cir. 2000), on which Respondents rely, is distinguishable on this point. Bishop had been tried and convicted in the Bahamas and transferred at his own request to the United States, pursuant to a treaty which bound the United States to honor sentences imposed by other sovereigns. *Id.* at 1299-1304. He then tried to mount a collateral challenge to his Bahamian sentence in the United States, but made no allegation that any American official had engaged in misconduct. After noting that Bishop's sentence did not violate "the Constitution, or laws, or treaties of the United States," the Eleventh Circuit held the lower court had no authority to abrogate the treaty. *Id.* at 1305 (quoting 28 U.S.C. § 2241 (c) (3)).

Munaf's allegations are *presumed* correct, with all inferences drawn in his favor. *See, e.g., Center for Law and Educ.*, 396 F.3d at 1156.¹¹

Furthermore, even if the Iraqi proceeding were entirely independent of U.S. intermeddling – a contention that cannot be maintained on the current record – and even if the proposed turnover did not violate legal limits on the Executive's authority, *but see Wilson, supra*, that would not end the inquiry. Suppose the sentence imposed by a foreign tribunal called for Mr. Munaf to be tortured to death – to have his hands and feet crushed, his skin charred by electric shocks, his genitalia burned by cigarettes, and his knees and legs shot. *See, e.g., Marc Santora, British Soldiers Storm Iraqi Jail, Citing Torture*, N.Y. Times, Dec. 26, 2006 at A1 (“A significant number [of prisoners rescued from Iraqi “serious crimes unit”] showed signs of torture. Some had crushed hands and feet, Major Burbridge said, while others had cigarette and electrical burns and a significant number had gunshot wounds to their legs and knees.”); John Burns, *To Halt Abuses, U.S. Will Inspect Jails Run By Iraq*, N.Y. Times, Dec. 14, 2006 at A1 (torture techniques used by Iraqi militia against Sunni prisoners “have included extracting fingernails, suspending victims upside-down from roof hooks for long periods, applying

¹¹ Respondents concede the existence of this factual dispute about Lt. Pirone's behavior, but misconstrue its relevance. They mistakenly characterize it as a collateral attack on the foreign conviction, Respondents' Brief at 49-50, when in fact it is a *direct* attack on Pirone's misconduct. Whether that misconduct occurred, as the Government of Romania and others attest, is a matter for the lower court on remand.

electric shocks to their genitals and other sensitive body parts and pressing lighted cigarettes to their bodies.”). Or, alternatively, suppose the sentence would lead to Mr. Munaf being tortured in just this fashion prior to his execution, as apparently happens with appalling and frightening frequency. Santora, *British Soldiers Storm Iraqi Jail* (according to British officials, tortured prisoners faced “almost certain execution.”).

Habeas is an equitable remedy and in circumstances like these “the federal courts will not allow themselves to be placed in the position of putting their imprimatur on unconscionable conduct.” *Barr*, 819 F.2d at 28 n. 2 (collecting cases). Hence the district court must inquire into the risk that Mr. Munaf would be tortured upon his transfer to Iraqi custody and, if it finds the risk unacceptable, enjoin the transfer.¹²

II. Determining The Lawfulness Of A Citizen’s Detention Is A Core Judicial Function.

Respondents’ alternative contention – that the “political question” doctrine bars review – is equally misguided. Respondents’ Brief at 34-48. This Court

¹² Recognizing their duty in this regard, numerous courts in this District have granted provisional relief to aliens detained at Guantánamo Bay, Cuba requiring the Government to give notice of potential transfers in order to permit judicial consideration of whether to restrain them. *See, e.g., Hatim v. Bush*, No. 05-1549 (D.D.C. Aug. 22, 2005) (Urbina, J.); *Al-Hela v. Bush*, No. 05-1048 (D.D.C. June 3, 2005) (Urbina, J.); *Al-Marri v. Bush*, No. 04-2034, 2005 WL 774843 (D.D.C. Apr. 4, 2005) (Kessler, J.); *Al-Joudi v. Bush*, No. 05-301, 2005 WL 774847 (D.D.C. April 4, 2005) (Kessler, J.); *Al-Shiry v. Bush*, No. 04-0490, 2005 WL 1384680 (D.D.C. Apr. 1, 2005) (Friedman, J.).

recently confirmed that “claims based on the most fundamental liberty and property rights of this country’s citizenry, such as the Takings and Due Process Clauses of the Fifth Amendment, are justiciable, even if they implicate foreign policy decisions.” *Bancoult*, 445 F.3d at 435 (internal quotations omitted).

This statement of the law echoes the universally recognized view. “[A]n area concerning foreign affairs that has been *uniformly* found appropriate for judicial review is the protection of individual or constitutional rights from government action. This protection of the individual *unquestionably* extends to cases involving United States Government action taken against our own citizens abroad.” *Flynn v. Schultz*, 748 F. 2d 1186, 1191 (7th Cir. 1984) (emphasis added); *see also, e.g., Williams v. Rhodes*, 393 U.S. 23, 40 (1968) (Douglas, J., concurring) (“fundamental rights and liberties” have a “well-established claim to inclusion in justiciable, as distinguished from ‘political,’ questions”); *Abu Ali v. Aschroft*, 350 F. Supp. 2d 28, 64 (D.D.C. 2004) (habeas review of petition filed by U.S. citizen detained in Saudi Arabia, allegedly on behalf of United States, not barred by political question doctrine); 13A Charles Wright et al., *Federal Practice and Procedure* § 3534.2, at 504 (2d ed. 1984) (“[T]he pervasive influence of political question doctrine in fields touching on foreign affairs has not led courts to surrender their power to protect individuals against government action.”). Not

surprisingly, *no court* has ever ranked the lawfulness of executive detention of a U.S. citizen as anything other than a judicial question.

Respondents' political question argument is but a variant of the separation of powers argument it has repeatedly, and unsuccessfully, urged in other detention cases since September 11, 2001. *Cf. Baker v. Carr*, 369 U.S. 186, 210 (1962) (political questions are "primarily a function of the separation of powers"). In *Hamdi*, for instance, Respondents insisted that the determination of Hamdi's status was "a quintessentially military judgment" and "a core exercise of the Commander-in-Chief authority." *Hamdi v. Rumsfeld*, No. 03-6696, Brief for the Respondents at 25. The Court, however, "reject[ed] the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts," even when American citizens are detained during combat. 542 U.S. at 535 (plurality opinion):

[I]t does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here "[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled" *We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.*

Id. at 535-36 (quoting *Korematsu v. United States*, 323 U.S. 214, 233-34 (1944) (Murphy, J., dissenting)) (internal citations omitted and emphasis added).

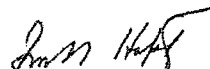
“Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.” *Hamdi*, 542 U.S. at 535; accord *Mistretta v. United States*, 488 U.S. 361, 380 (1989).

And in *Rasul*, the Executive argued that determining the prisoners’ status was “a quintessential political question” and that habeas jurisdiction “would directly interfere with the Executive’s conduct of the military campaign against al Qaeda and its supporters.” *Rasul v. Bush*, No. 03-334, Brief for the Respondents at 49, 53; see generally *id.* at 52-59 (arguing that habeas would offend separation of powers). The Supreme Court rejected the argument without so much as a comment, holding that aliens captured within the theater of operations may challenge their detention in federal court. *Rasul*, 542 U.S. at 485 (“[T]he federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.”). It simply cannot be credibly maintained that the lawfulness of an *alien’s* detention is a *judicial* question, but the lawfulness of a *citizen’s* detention is a *political* question.

CONCLUSION

The lower court had both the power and the duty to rule on Mr. Munaf's challenge to his detention and proposed transfer by the Executive. The decision below should be reversed and the case remanded to the District Court for it to exercise that duty as the Constitution and laws of the United States require.

Respectfully submitted,



Joseph Margulies
MACARTHUR JUSTICE CENTER,
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
357 East Chicago Avenue
Chicago, IL 60611
Telephone: (312) 503-0890
Facsimile: (312) 503-1272

Jonathan Hafetz
Aziz Z. Huq
BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY
SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
Telephone: (212) 998-6730

Vincent Moccio
Amy Magid
ROBINS, KAPLAN, MILLER &
CIRESI L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
Telephone: (612) 349-8500

Eric M. Freedman
HOFSTRA LAW SCHOOL
121 Hofstra University
Hempstead, N.Y. 11549
Telephone: (516) 463-5167
Facsimile: (516) 463-5129

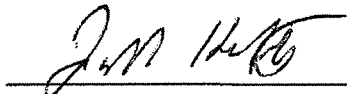
Susan L. Burke
Katherine Hawkins
BURKE PYLE LLC
4112 Station Street
Philadelphia, PA 19127
Telephone: (215) 487-6590

COUNSEL FOR APPELLANTS

Dated: January 5, 2007

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6335 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally space typeface using Microsoft Word 97-2003 with Times New Roman 14 point font.



Jonathan Hafetz

CERTIFICATE OF SERVICE

I, Amy Magid, hereby certify that, by agreement of the parties, on January 5, 2007, I caused to be served an electronic copy of the foregoing Reply Brief for Appellants upon Douglas N. Letter at Douglas.Letter@usdoj.gov, and upon Lewis S. Yelin at Lewis.Yelin@usdoj.gov. In addition, I hereby certify that, by agreement of the parties, on January 5, 2007, I caused to be served two true and correct copies of the foregoing Reply Brief for Appellants by overnight mail, for delivery Monday, January 8, 2007, upon the following individuals at the address indicated:

Douglas N. Letter, Esquire
Civil Division, Room 7513
DEPARTMENT OF JUSTICE
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001

Lewis S. Yelin, Esquire
Civil Division, Room 7318
DEPARTMENT OF JUSTICE
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001



Amy Magid