

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

**SANDRA K. OMAR,
AHMED S. OMAR,
Next Friends of
SHAWQI AHMAD OMAR,
Petitioners-Appellees,**

v.

**FRANCIS J. HARVEY,
MAJOR GENERAL WILLIAM H. BRANDENBRUG,
LIEUTENANT COLONEL TIMOTHY HOUSER,
Respondents-Appellants.**

No. 06-5126

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
[Not Yet Scheduled for Oral Argument]**

BRIEF FOR APPELLEES

Susan L. Burke (D.C. Cir. Bar No. 41659)
Heather L. Allred
BURKE PYLE LLC
4112 Station Street
Philadelphia, PA 19127
(215) 487-6590

Joseph Margulies (D.C. Cir. Bar No. 48487)
MACARTHUR JUSTICE CENTER,
UNIVERSITY OF CHICAGO LAW SCHOOL
1111 East 60th Street
Chicago, IL 60637
(773) 702-9560

Aziz Z. Huq
Jonathan Hafetz (D.C. Cir. Bar No. 49761)
BRENNAN CENTER FOR JUSTICE, NEW
YORK UNIVERSITY SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(212) 998-6730

Counsel for Petitioners- Appellees

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for Petitioners-Appellees certify as follows:

A. Parties, Intervenors, and Amici Curiae.

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Respondents-Appellants.

B. Rulings Under Review

The ruling under review is the Feb. 13, 2006 order of the District Court for the District of Columbia (J. Urbina) in Civil Action No. 05-2374, granting Petitioners' motion for a preliminary injunction. Joint Appendix ("J.A.") 161. The memorandum opinion (J.A. 162-77) is reported at 416 F. Supp. 2d 19 (D.D.C. 2006).

C. Related Cases

Undersigned counsel are not aware of any related cases pending in this Court or any other Court specifically regarding the detention of an American citizen by the U.S. military on Iraqi soil.

Susan L. Burke

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
GLOSSARY	xiii
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	8
STANDARD OF REVIEW	12
ARGUMENT	13
I. THE DISTRICT COURT HAS HABEAS JURISDICTION TO TEST THE LAWFULNESS OF RESPONDENTS’ PHYSICAL CUSTODY OF MR. OMAR.	13
II. HABEAS JURISDICTION EXISTS WHEN A U.S. CITIZEN IS DETAINED BY AMERICAN FORCES OPERATING AS PART OF A MULTINATIONAL FORCE UNDER A U.N. MANDATE	20
A. Federal Courts Have Habeas Jurisdiction To Examine the Legality of Detentions by U.S Forces Under Multinational or U.N. Auspices.....	24
B. <i>Hirota v. MacArthur</i> Stands for a Limited Proposition About the Supreme Court’s Article III Jurisdiction.	29
C. Developments Since <i>Hirota</i> Support the District Court’s Habeas Jurisdiction.	34
III. THE DISTRICT COURT PROPERLY PRESERVED ITS HABEAS JURISDICTION TO REVIEW PETITIONER’S THREATENED TRANSFER TO IRAQ.....	36

A.	Habeas Corpus Guarantees Judicial Review of Petitioner’s Threatened Transfer to Iraqi Custody.	37
B.	The Preliminary Injunction Does Not Affect the Functioning of the Iraqi Courts.....	45
C.	Transfer and Release Are Legally and Factually Distinct.	47
IV.	THE POLITICAL QUESTION DOCTRINE DOES NOT STRIP FEDERAL COURTS OF HABEAS JURISDICTION.....	49
A.	The Separation of Powers Compels Judicial Review of Unilateral Executive Detention.....	51
B.	Respondents’ Political Question Argument Is a Naked Attempt at Bootstrapping Contested Facts Beyond Review.	55
C.	Respondents’ Political Question Arguments Do Not Strip This Court of Jurisdiction.....	57
	CONCLUSION.....	58
	CERTIFICATE OF COMPLIANCE WITH RULE 32(a)	60

TABLE OF AUTHORITIES

CASES

* <i>Abu Ali v. Aschroft</i> , 350 F. Supp. 2d 28 (D.D.C. 2004)	17, 35, 36, 49, 50, 58
<i>Ahrens v. Clark</i> , 335 U.S. 188 (1948)	passim
<i>Al-Hela v. Bush</i> , No. 05-1048 (D.D.C. June 3, 2005)	39
<i>Al-Joudi v. Bush</i> , No. 05-301, 2005 WL 774847 (D.D.C. April 4, 2005).....	40
<i>Al-Marri v. Bush</i> , No. 04-2034, 2005 WL 774843 (D.D.C. Apr. 4, 2005)	39
<i>Al-Shiry v. Bush</i> , No. 04-0490, 2005 WL 1384680 (D.D.C. Apr. 1, 2005)	40
<i>Ashcraft v. Tennessee</i> , 322 U.S. 143 (1944).....	43
<i>Baker v. Carr</i> , 369 U.S. 186, 210 (1962).....	49
<i>Banco Nacional de Cuba v. Sabbatino</i> , 376 U.S. 398 (1964)	46
<i>Bancoult v. McNamara</i> , 445 F.3d 427 (D.C. Cir. 2006)	49, 58
<i>Barr v. U.S. Dep't of Justice</i> , 819 F.2d 25 (2d Cir. 1987).....	35
<i>Benitez v. Garcia</i> , -- F.3d --, 2006 WL 1391096 (9th Cir. May, 23, 2006).....	42
<i>Benton v. Maryland</i> , 395 U.S. 784 (1979).....	43
<i>Bishop v. Reno</i> , 210 F.3d 1295 (11th Cir. 2000)	54
<i>Braden v. 30th Judicial Circuit Court of Kentucky</i> , 410 U.S. 484 (1973).....	16
<i>Burns v. Wilson</i> , 346 U.S. 137 (1953)	18, 20, 35

* Authorities upon which we chiefly rely are marked with asterisks.

<i>Carafas v. LaVallee</i> , 391 U.S. 234 (1968).....	48
<i>Chatman-Bey v. Thornburgh</i> , 864 F.2d 804 (D.C. Cir. 1988).....	20, 24
<i>The Civil Rights Cases</i> , 109 U.S. 3 (1883)	35
<i>Cobell v. Norton</i> , 391 F.3d 251 (D.C. Cir. 2004)	12
<i>Cohens v. Virginia</i> , 19 U.S. (6 Wheat.) 264 (1821)	50
<i>Committee of U.S. Citizens Living in Nicaragua v. Reagan</i> , 859 F.2d 929 (D.C. Cir. 1988).....	44, 49
<i>Conley v. Gibson</i> , 355 U.S. 41 (1957)	12
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004)	56
<i>CSX Transp., Inc. v. Williams</i> , 406 F.3d 667 (D.C. Cir. 2005)	12
<i>Day v. Wilson</i> , 247 F.2d 60 (D.C. Cir. 1957)	14
<i>Duchow v. United States</i> , No. 95-2121, 1995 WL 425037 (E.D. La. July 19, 1995).....	17
<i>Durousseau v. United States</i> , 10 U.S. (6 Cranch) 307 (1810).....	29
<i>Duncan v. Kahanamoku</i> , 327 U.S. 304 (1946).....	52
<i>Eain v. Wilkes</i> , 641 F.2d 504 (7th Cir. 1981)	42, 43
<i>Edwards v. Carter</i> , 580 F.2d 1055 (D.C. Cir. 1978)	43
<i>Elias v. Ramirez</i> , 215 U.S. 398 (1910)	38
<i>Everett ex rel Bersin v. Truman</i> , 334 U.S. 824 (1948)	31
<i>Ex parte Betz</i> , 329 U.S. 672 (1946)	31

<i>Ex parte Bollman</i> , 8 U.S. (4 Cranch) 75 (1807)	17, 30
<i>Ex parte Endo</i> , 323 U.S. 283 (1944).....	16
<i>Ex parte Flick</i> , 76 F. Supp. 979 (D.D.C. 1948).....	33
<i>Ex parte Hayes</i> , 414 U.S. 1327 (1973).....	32
<i>Ex parte McCardle</i> , 73 U.S. (6 Wall.) 318 (1867)	16
<i>Ex parte Milligan</i> , 71 U.S. 2 (1866)	52, 53, 56, 57
<i>Ex parte Quirin</i> , 317 U.S. 1 (1942)	18
<i>Ex parte Siebold</i> , 100 U.S. 371 (1879).....	29
<i>Ex parte Vallandingham</i> , 68 U.S. 243 (1863)	30
<i>Ex parte Yamashita</i> , 327 U.S. 1 (1946)	52
<i>Ex parte Yerger</i> , 78 U.S. 85 (1868).....	32
<i>Factor v. Launbenheimer</i> , 290 U.S. 276 (1933).....	38
<i>Fassler v. United States</i> , 858 F.2d 1016 (5th Cir. 1988).....	47
<i>Felker v. Turpin</i> , 518 U.S. 651 (1996).....	30
<i>Frank v. Mangum</i> , 237 U.S. 309 (1915).....	20
<i>Gallina v. Fraser</i> , 278 F.2d 77 (2d Cir. 1960).....	44
<i>Geofroy v. Riggs</i> , 133 U.S. 258 (1890).....	43, 53
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	43
<i>Grisham v. Hagan</i> , 361 U.S. 278 (1960)	14

* <i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004)	passim
<i>Harbury v. Deutch</i> , 233 F.3d 596 (D.C. Cir. 2000).....	43
<i>Harris v. Nelson</i> , 394 U.S. 286 (1969)	20
<i>Hatim v. Bush</i> , No. 05-1549 (D.D.C. Aug. 22, 2005)	39
<i>Hirota v. MacArthur</i> , 338 U.S. 197 (1949)	passim
<i>Holmes v. Laird</i> , 459 F. 2d 1211 (D.C. Cir. 1972).....	17, 37, 38, 42
<i>Home Bldg & Loan Ass’n v. Blaisdell</i> , 290 U.S. 398 (1934)	18
<i>In re Burt</i> , 737 F.2d 1477 (7th Cir. 1984).....	44
<i>In re Extradition of Howard</i> , 996 F.2d 1320 (1st Cir. 1993).....	40, 43
* <i>In re Kaine</i> , 14 F. Cas. 84 (C.C.S.D.N.Y. 1852) (No. 7,598)	37, 38
<i>In re Mackin</i> , 668 F.2d 122 (2d Cir. 1981).....	42
<i>In re Ross</i> , 140 U.S. 453 (1891).....	34
<i>In re Sanborn</i> , 148 U.S. 222 (1893)	30
<i>INS v. St. Cyr</i> , 533 U.S. 289 (2001).....	17, 39
<i>Johnson v. Eisentrager</i> , 339 U.S. 763 (1950).....	9, 14, 34
<i>Jones v. Cunningham</i> , 371 U.S. 236 (1963)	16, 19, 48
<i>Kinsella v. United States ex rel. Singleton</i> , 361 U.S. 234 (1960).....	14
<i>Kirkland v. Preston</i> , 385 F.2d 670 (D.C. Cir. 1967)	41
<i>Korematsu v. United States</i> , 323 U.S. 214 (1944).....	51

<i>Kowal v. MCI Commc'ns Corp.</i> , 16 F.3d 1271 (D.C. Cir. 1994).....	12
<i>Lebron v. Nat'l R.R. Passenger Corp.</i> , 513 U.S. 374 (1995)	35
<i>Lee v. Illinois</i> , 476 U.S. 530 (1986).....	56
<i>Lo Duca v. United States</i> , 93 F.3d 1100 (2d Cir. 1996)	40
* <i>Madsen v. Kinsella</i> , 343 U.S. 341 (1952).....	passim
<i>Maleng v. Cook</i> , 490 U.S. 488 (1989)	16
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803)	29, 30
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989).....	51
<i>Neely v. Henkel</i> , 180 U.S. 109 (1989).....	41, 42, 45
<i>Ornelas v. Ruiz</i> , 161 U.S. 502 (1896).....	42
<i>Palko v. Connecticut</i> , 302 U.S. 319 (1937)	43
<i>Peyton v. Rowe</i> , 391 U.S. 54 (1968).....	16
<i>Pfeifer v. U.S. Bureau of Prisons</i> , 615 F.2d 873 (9th Cir. 1980)	54
<i>Plaster v. United States</i> , 720 F.2d 340 (4th Cir. 1983)	43
<i>Quinn v. Robinson</i> , 783 F.2d 776 (9th Cir. 1986)	37, 42, 43
* <i>Rasul v. Bush</i> , 542 U.S. 466 (2004).....	15, 16, 22, 52
* <i>Reid v. Covert</i> , 354 U.S. 1 (1957).....	passim
<i>Rochin v. California</i> , 342 U.S. 165 (1952).....	43
<i>Rosado v. Civiletti</i> , 621 F.2d 1179 (2d Cir. 1980).....	44

<i>Rumsfeld v. Padilla</i> , 542 U.S. 426 (2004)	33
<i>San Francisco Arts & Athletics Inc. v. U.S. Olympics Comm.</i> , 483 U.S. 522(1987).....	35
<i>Sinclair v. Kleindienst</i> , 711 F.2d 291 (D.C. Cir. 1983)	12, 51, 56
<i>Sosa v. Alvarez-Machain</i> , 542 U.S. 692 (2004).....	44
<i>Toure v. Attorney Gen. of the U.S</i> , 443 F.3d 310 (3d Cr. 2006).....	46
<i>United States v. Kin-Hong</i> , 110 F.3d 103 (1st Cir. 1997)	41, 44
<i>United States ex rel. Keefe v. Dulles</i> , 222 F.2d 390 (D.C. Cir. 1955).....	17
* <i>United States ex rel. Toth v. Quarles</i> , 350 U.S. 11 (1955)	14, 25, 32, 34
* <i>Valentine v. United States</i> , 299 U.S. 5 (1936)	37
<i>Veith v. Jubelirer</i> , 541 U.S. 267 (2004).....	58
<i>Wales v. Whitney</i> , 114 U.S. 564 (1885).....	16
* <i>Wilson v. Girard</i> , 354 U.S. 524 (1957).....	15, 38, 42

CONSTITUTION, STATUTES & OTHER LEGISLATIVE MATERIALS

U.S. Const. art. I	17
U.S. Const. art. II	18
U.S. Const. art. III,	21, 23, 29, 57
18 U.S.C. § 3184	41
18 U.S.C. § 4001	52
28 U.S.C. § 1292	1
28 U.S.C. § 2241	1, 15, 36, 48
28 U.S.C. § 2242	1
28 U.S.C. § 2243	1
Act of Sept. 24, 1789, ch. 20, 1 Stat. 82	15
Habeas Corpus Act of 1679, 31 Car. 2, cl.2	48
<i>Fiscal 2006 Appropriations: Hearing Before the Comm. On H. Appropriations Subcomm. On Military Quality of Life and Veterans Affairs, 108th Cong. (March 3, 2005)</i>	<i>28</i>
<i>The Imminent Transfer of Sovereignty of Iraq: Testimony Before the H. International Relations Comm., 108th Cong. (May 13, 2004).....</i>	<i>28</i>

BRIEFS IN OTHER CASES

Brief in Opposition, <i>Hirota v. MacArthur</i> , 338 U.S. 197 (1949) (Nos. 239, 240, and 248)	31, 32
Brief for Petitioner, <i>Johnson v. Eisentrager</i> , 339 U.S. 763 (1950) (No. 306)	34
Brief for Respondents, <i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004) (No. 03-6696)	26
Motion for Leave to File Petition for Writ of Habeas Corpus, <i>Hirota v. MacArthur</i> , 338 U.S. 197 (1949) (No. 249)	21

INTERNATIONAL TREATIES AND RESOLUTIONS

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (Dec. 10, 1984)	44
S.C. Res. 83, U.N. Doc. S/RES/83 (June 27, 1950)	26
S.C. Res. 84, U.N. Doc. S/RES/84 (July 7, 1950).....	26
S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001)	27
U.N. Charter	26, 27

JOURNAL ARTICLES AND BOOKS

M. Cherif Bassiouni, <i>International Extradition: United States Law and Practice</i> (4th ed. 2002).....	44
Joseph W. Bishop, Jr., <i>Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions</i> , 61 Colum. L. Rev. 40 (1961)	14
Alex Conte, <i>Security in the 21st Century: The United Nations, Afghanistan and Iraq</i> (2005).....	27
Charles Fairman, <i>Some New Problems of the Constitution Following the Flag</i> , 1 Stan. L. Rev. 587 (1949).....	33
Richard H. Fallon, Jr. et al., <i>The Federal Courts and the Federal System</i> (5th ed. 2003).....	31, 33
Clarke D. Forsythe, <i>The Historical Origins of Broad Federal Habeas Review Reconsidered</i> , 70 Notre Dame L. Rev. 1079 (1995)	15
W. Friedmann, <i>The Allied Military Government of Germany</i> (1947)	25
Thomas D. Grant, <i>The Security Council and Iraq: An Incremental Practice</i> , 97 Am. J. Int'l L. 823 (2003).....	28
Alexander Hamilton, James Madison, and John Jay, <i>The Federalist</i> (Clinton Rossiter, ed., 1961).....	12, 51
Louis Henkin, <i>Foreign Affairs and the US Constitution</i> (2d ed. 1996).....	26
Max Hilaire, <i>United Nations Law and the Security Council</i> (2005)	25, 26, 28
O.W. Holmes, <i>The Common Law</i> (1881)	48
Gerald Neuman, <i>Habeas Corpus, Executive Detention, and the Removal of Aliens</i> , 98 Colum. L. Rev. 961 (1998).....	37, 38

Eli Nobleman, <i>American Military Government Courts in Germany: Their Role in the Organization of the German People</i> (1950).....	24
Note, <i>Habeas Corpus Protections Against Illegal Extraterritorial Detention</i> , 51 Colum. L. Rev. 368 (1951).....	34
Dallin H. Oaks, <i>The “Original” Writ of Habeas Corpus in the Supreme Court</i> , 1962 Sup. Ct. Rev. 153.....	30
Alexander Orakhelashvili, <i>The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions</i> , 16 Eur. J. Int’l L. 59	45
Francis Paschal, <i>The Constitution and Habeas Corpus</i> , 1970 Duke L.J. 605 ...	19, 32
James Pfander, <i>The Limits of Habeas Jurisdiction and the Global War on Terror</i> , 91 Cornell L. Rev. 497 (2006).....	30, 31
David Schweigman, <i>The Authority of the Security Council under Chapter VII of the UN Charter</i> 195 (2001).....	45
Charles Wright et al., <i>Federal Practice and Procedure</i> (2d ed. 1984).....	50
John Yoo, <i>UN Wars, US War Powers</i> , 1 Chi. J. Int’l L. 355 (2000).....	54. 55

MEDIA AND INTERNET SOURCES

President George W. Bush, “Weekly Radio Address” (Oct. 25, 2003)	28
Jonathan Finer & Ellen Knickermyer, <i>Shiite Militias Control Prisons, Officials Say</i> , Wash. Post, June 16, 2006, at A1	6
Colin Powell, U.S. Sec’y of State, Media Availability Following Passage of Resolution 1511 (Oct. 16, 2003)	28
U.S. Department of State Office of the Spokesman Fact Sheet, available at www.state.gov/r/pa/prs/2006/600083.htm	26

GLOSSARY

J.A. Joint Appendix

MNF-I Multi-National Forces-Iraq

TRO Temporary Restraining Order

U.N. United Nations

STATEMENT OF JURISDICTION

The United States District Court for the District of Columbia exercised jurisdiction pursuant to 28 U.S.C. §§ 2241(a), (c)(1), (c)(3), 2242, and 2243. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does the United States District Court for the District of Columbia have power to adjudicate a Petition for a Writ of Habeas Corpus filed by a U.S. citizen held for more than nineteen months without lawful process by U.S. military officials overseas?

2. Does a United Nations resolution authorizing military action, or an executive decision to collaborate with foreign sovereigns, suspend the Habeas Writ for U.S. citizens held by U.S. military custodians abroad?

3. Does the District Court have power to preserve the status quo in order to determine the lawfulness of a threatened transfer of a U.S. citizen to Iraqi custody?

4. Is the legality of a U.S. citizen's nineteen-month-plus detention in U.S. custody without lawful process a "political question"?

STATEMENT OF THE CASE

This is a habeas action filed on December 12, 2005, by a U.S. citizen in U.S. military custody overseas. *See* J.A. 7-24. On February 3, 2006, habeas counsel

learned that respondent-appellant federal officials (“respondents”) intended to transfer Petitioner-Appellee Shawqi Omar (“Mr. Omar”) from U.S. custody to Iraqi custody, where he would likely be tortured. *Id.* at 90-99. Petitioners sought, and the District Court granted, a temporary restraining order (“TRO”) to preserve jurisdiction by barring Mr. Omar’s proposed transfer from U.S. custody. *Id.* at 132-35. On February 13, 2006, after supplemental briefing, the District Court converted the TRO into a preliminary injunction preventing respondents from “[d]ivesting the court of jurisdiction, either as a matter of law or *de facto*[, which] would abuse the process now put in place for the purpose of adjudicating matters on the merits.” *Id.* at 175.

Sixty days later, respondents filed a notice of interlocutory appeal. *Id.* at 178-79.

STATEMENT OF FACTS

U.S. Arrest & Detention. On October 29, 2004, American forces arrested Mr. Omar, an American citizen, at his Baghdad home. J.A. 14, 88. While his ten-year-old child stood by, U.S. soldiers ransacked Mr. Omar’s house and beat Mr. Omar. *Id.* at 88. U.S. forces initially imprisoned Mr. Omar at Camp Cropper (near Baghdad), and then moved him to Camp Bucca (near Basra), where he was held for almost one year. *Id.* On or about October 27, 2005, the U.S. government moved Mr. Omar to Abu Ghraib prison. *Id.* at 15, 88. U.S. forces subsequently

shuttled Mr. Omar between Bucca, Abu Ghraib, and Camp Cropper prisons. *Id.* at 14, 15, 88, 89, 90, 92. Mr. Omar is now detained at Camp Cropper. *Id.* at 92.

The U.S. Government, responding to repeated inquiries from Mr. Omar's wife, Petitioner-Appellee Sandra Omar ("Ms. Omar"), assured Ms. Omar her husband was in "United States military care, custody and control." *Id.* at 14, 88; *id.* at 169 (U.S. official stating that Mr. Omar "remains in control of Coalition Forces (U.S. and MNF)" (November 1, 2005)); *cf. id.* at 151A (United States "ha[s] responsibility for exercising jurisdiction over their personnel" in Iraq).

Mr. Omar has repeatedly asserted his innocence and sought counsel. *Id.* at 16-17. But interrogations without counsel continue. *Id.* at 16.¹ Yet Mr. Omar has not been charged with a crime. *Id.* at 8, 163. Rather, fifteen months after Mr. Omar's arrest, respondents submitted a declaration by Major-General John Gardner briefly enumerating inflammatory and uncorroborated allegations of criminal conduct based on multiple hearsay. *Id.* at 136-41.

Habeas Petition and Subsequent Threatened Transfer to Iraq. On December 12, 2005, Mr. Omar's wife and son filed a next-friend Petition for Writ of Habeas Corpus in the United States District Court for the District of Columbia,

¹ Habeas counsel sought meaningful access to Mr. Omar without avail. J.A. 23, 44. Counsel received four unexpected phone calls from Mr. Omar after the preliminary injunction issued, each monitored and limited to 5-15 minutes. Respondents apparently concede Mr. Omar's right to counsel but impose such unreasonable and infeasible conditions as to prevent access. *See* Partial Opp'n to Renewed Motion for Access (Dist. Ct. dkt. no. 30).

challenging Mr. Omar's unlawful detention. *Id.* at 7-24. On January 27, 2006, after the District Court (Urbina, J.) issued a show cause order and the government received an extension to respond, counsel learned that U.S. officials might be convening some form of legal proceedings relating to Mr. Omar on or after February 3, 2006. *Id.* at 90. Counsel asked the Departments of State and Justice for leave to participate. *Id.* at 94-99.

On February 2, 2006, the Justice Department, responding to this request, advised counsel that respondents were planning to hand Mr. Omar over to Iraqi authorities, but would not provide notice to counsel or the District Court. *Id.* at 91. In an email to one of Mr. Omar's attorneys, government counsel stated that no hearing was scheduled for February 3, but "a determination was previously made to refer [Mr. Omar's] case to the Central Criminal Court of Iraq. . . . [W]henever scheduled, we would not be able to disclose to you the date of any hearing for security reasons" *Id.* at 91. Counsel immediately filed an *ex parte* emergency motion for a TRO to stop Mr. Omar being transferred to Iraqi custody, where he would likely be tortured. *Id.* at 25-26. The District Court granted the TRO. *Id.* at 62-64, 132-35. After expedited briefing, the District Court entered a preliminary injunction enjoining respondents from transferring Mr. Omar to Iraqi custody. *Id.* at 161.

In the District Court, respondents represented that Mr. Omar was not in their custody. *See* Resp'ts' Opp'n to Pet'rs' *Ex Parte* Motion for a TRO at 2-3 (Dist. Ct. dkt. no. 12) (asserting that saying "Mr. Omar is in the custody of the United States" was "incorrect"); *id.* at 13 ("Mr. Omar is [n]ot in United States [c]ustody."). Respondents now concede Mr. Omar has been in their custody since his arrest. Resp'ts Br. 15 ("[Mr.] Omar is being held by the United States"); *id.* at 32 (same).

Likelihood of Torture in Iraqi Custody. The District Court noted that Mr. Omar is a Sunni Muslim, and acknowledged Petitioners' uncontested evidence of torture of such individuals in Iraqi prisons. J.A. 104-31, 134; *accord id.* at 35-36, 52-61. This evidence includes a February 2005 U.S. State Department report on Iraq, citing "numerous, serious human rights abuses," including "coerced confessions and interrogation [as the] favored method of investigation by police." *Id.* at 116-31. It also includes Declarations from Curt Goering, Deputy Executive Director of Amnesty International, USA, and Hania Mufti, Iraq expert for Human Rights Watch. The Goering Declaration confirms that Iraqi government forces systematically torture with electric shocks, strangulation, breaking of limbs, sexual abuse, cigarette burns, electric drills, and suffocation. *Id.* at 104-05. Mr. Goering noted that criminal charges of "terrorist activities" are often based on confessions secured by torture. *Id.* In Mr. Goering's view, Mr. Omar "would be at grave and

serious risk of being tortured if he were turned over to the Iraqi criminal authorities.” *Id.*

The Mufti Declaration established that systemic torture persists in Iraqi jails:

Detainees in pre-trial detention on security-related offenses, in particular, are subjected to various forms of torture or ill-treatment, including routine beatings, sleep deprivation, electric shocks to sensitive parts of the body, prolonged suspension from the wrists with the hands tied behind the back, deprivation of food and water for prolonged periods, and severely overcrowded cells.

Id. at 106, 112.

American officials confirm these abuses, and respondents did not – and do not – dispute the fact of such abuse. In January 2006, Ambassador Zalmay Khalilzad stated: “U.S. officials believe that . . . the Interior Ministry has condoned torture of Sunni prisoners.” *Id.* at 55-56. U.S. officials report Iraqi authorities using “breaking of bones, torture with electric shock, extraction of fingernails, and cigarette burns to the neck and back.” *Id.* at 57. Respondents’ own declarant, Major-General Gardner, promised the military would not turn over any prisoners to Iraq given the risk of torture. *Id.* at 52; Jonathan Finer & Ellen Knickermeier, *Shiite Militias Control Prisons, Officials Say*, Wash. Post, June 16, 2006, at A1 (same).

The District Court’s Preliminary Injunction. Recognizing the high likelihood of irreparable harm caused by torture, the District Court issued a TRO,

subsequently converted to a preliminary injunction, to prevent respondents from “[d]ivesting the court of jurisdiction, either as a matter of law or *de facto*[, which] would abuse the process now put in place for the purpose of adjudicating matters on the merits.” *Id.* at 175.

Petitioners satisfy the first prerequisite for a preliminary injunction, the District Court explained, because this matter presents “serious and difficult questions” that “make them a fair ground for litigation,” even if subsequent jurisdictional discovery might be warranted. *Id.* at 174. Turning to respondents’ jurisdictional argument, the Court concluded that allegations that U.S. officials hold Mr. Omar in violation of due process “alone allow the court to entertain the petitioner’s habeas petition.” *Id.* at 172. Mr. Omar, the Court noted, “has not been convicted by a foreign tribunal and is not contesting a decision taken by another sovereign nation.” *Id.* at 171, n.11. Rejecting separation-of-powers arguments, the District Court held its judicial obligation “requires inquiry into the legality of American officials holding American citizens.” *Id.* at 173.

The District Court also found Petitioners satisfy the second requirement for a preliminary injunction: “[T]he risk of irreparable injury is high.” *Id.* at 166, 174-75. In granting the TRO, the Court accepted un rebutted evidence that Mr. Omar was likely to be tortured if placed in Iraqi hands. *Id.* at 134-45. It noted the

government's failure to allay these concerns and the risk of "prematurely moot[ing] the case or undo[ing] ... jurisdiction." *Id.* at 175.

Turning to the third and fourth prongs, the District Court weighed the harm to respondents and the public interest, and found they favored injunctive relief securing the *status quo*. The "threat of tangible harm to the petitioner resulting from the court's failure to act outweighs any potential harm to the Executive's exercise of its war powers," and "the public interest strongly favors vigorous application of the writ of habeas corpus on behalf of United States citizens." *Id.* at 175-77; *see also id.* at 161 (order barring transfer to Iraqi custody).

This appeal ensued.

SUMMARY OF ARGUMENT

This appeal concerns a narrow question: whether the District Court properly issued preliminary injunctive relief to stop respondents "[d]ivesting the court of jurisdiction, either as a matter of law or *de facto*[, which] would abuse the process now put in place for the purpose of adjudicating matters on the merits." J.A. 175. Respondents contend that the District Court lacks *any* power to determine whether U.S. officials can detain a U.S. citizen for more than nineteen months in violation of federal law and the Constitution.

Unquestioned, binding Supreme Court precedent confirms the federal courts' power to adjudicate habeas petitions of American citizens detained by their

own government overseas. Only two years ago, the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), confirmed that the Suspension Clause, Due Process Clause, and habeas statute together ensure judicial oversight when federal officials detain American citizens abroad. Habeas review comprises independent assessment of the legal and factual bases for detention. Respondents' efforts to avoid this longstanding habeas review founder against *Hamdi*.

A. The Due Process and Suspension Clauses embody citizens' vital right to freedom from unlawful executive detention and federal courts' correlative power to protect that right by testing detention's legal and factual basis. In *Hamdi*, every Justice agreed that district courts can review the legal and factual grounds for U.S. detention of an American citizen held overseas. Eight Justices also concluded that detention in federal custody without *any* judicial process is unconstitutional. *Hamdi* extends an unbroken chain of precedent, beginning with *Johnson v. Eisentrager*, 339 U.S. 763 (1950), in which federal courts reject government efforts to shield overseas federal custody of American citizens from independent judicial scrutiny. It is now clear beyond doubt that the executive cannot use the legal and factual grounds that the Habeas Writ tests to shield against judicial scrutiny of those very same issues.

Hamdi – a case respondents do not address – is binding precedent here. Like Mr. Hamdi, Mr. Omar has been lengthily imprisoned in U.S. custody and control.

He has been beaten, interrogated, and denied counsel. At the eleventh hour, respondents announce a transfer to another government that will likely torture him. The District Court clearly has power to ensure Mr. Omar's ongoing detention and mooted transfer accord with the Constitution and federal law.

B. Respondents rely on the asserted multinational and international complexion of U.S. operations in Iraq and the sole precedent of *Hirota v. MacArthur*, 338 U.S. 197 (1949) (per curiam), to block the District Court's jurisdiction. But *Hirota* concerned a fundamentally different fact situation, arose in a fundamentally different procedural posture, and presented a fundamentally different legal issue from this case. It is irrelevant to the jurisdictional question here.

Filed at a time when district courts lacked habeas jurisdiction beyond their respective territories, *Hirota* involved a non-citizen's collateral appeal from the final judgment of an international military tribunal. In this case, an American citizen, detained without lawful process, seeks direct review of the factual and legal grounds for his detention. An unbridgeable gulf separates the two cases. Moreover, the *Hirota* petitions were filed directly in the Supreme Court – and not in a district court, as here.

In at least three cases after *Hirota*, the Supreme Court confirmed district court jurisdiction to ascertain the lawfulness of overseas detentions in U.S. custody

under international or multinational auspices. These cases show that respondents' extravagantly wide reading of *Hirota* cannot be correct. In any case, the procedural posture of *Hirota* – a direct filing in the Supreme Court – meant that the case hinged on whether the *Supreme* Court had either original or appellate jurisdiction under Article III of the Constitution over a habeas petition seeking collateral review of a final judgment from an international military tribunal. The Court concluded that neither its original nor its appellate jurisdiction reached that case. That analysis has no bearing on the *District Court's* plenary jurisdiction to assess federal officials' custody of an American citizen.

C. Also unavailing is respondents' effort to rely upon a planned transfer to Iraqi judicial proceedings. The executive has no power to transfer American citizens to a foreign government – no matter how serious the allegations against him – without treaty or statutory authority. Ensuring the executive comports with the Constitution and laws in such transfers is a core function of habeas. Respondents' "rule of non-inquiry," if applicable here, concerns only the scope of review: No rule prohibits District Court assessment whether a transfer will expose Mr. Omar to torture. Moreover, transfer to an Iraqi jailor is factually and legally distinct from release into freedom.

D. The separation of powers doctrine counsels *for* habeas jurisdiction here. The goal of separation of powers is preventing "[t]he accumulation of all powers,

legislative, executive, and judiciary, in the same hands.” *The Federalist* No. 47 (James Madison), at 301 (Clinton Rossiter, ed., 1961). As the *Hamdi* Court recently held, the political question doctrine cannot block judicial review of a citizen’s detention in American custody.

STANDARD OF REVIEW

Examining the grant of a preliminary injunction, this Court applies an abuse-of-discretion standard, examining the District Court’s factual determinations for clear error and legal conclusions *de novo*. *Cobell v. Norton*, 391 F.3d 251, 256 (D.C. Cir. 2004). This Court also “review[s] the district court’s weighing of the four [preliminary injunction] factors under the abuse of discretion standard.” *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 670 (D.C. Cir. 2005). “The test is a flexible one. ‘If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are weak.’” *Id.* (citation omitted).

Respondents here challenge the District Court’s factual and legal conclusions pertaining to subject matter jurisdiction. Dismissal for lack of jurisdiction is proper only if “‘it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” *Sinclair v. Kleindienst*, 711 F.2d 291, 293 (D.C. Cir. 1983) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *Kowal v. MCI Commc’ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994) (allegations of non-moving party are “construed liberally”).

ARGUMENT

I. THE DISTRICT COURT HAS HABEAS JURISDICTION TO TEST THE LAWFULNESS OF RESPONDENTS' PHYSICAL CUSTODY OF MR. OMAR.

The Suspension Clause, Due Process Clause, and habeas statute guarantee *American citizens* in the U.S. military's *physical custody* the right to challenge their detention's lawfulness in federal court. The Supreme Court reaffirmed this bedrock principle in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). *Hamdi* concerned a habeas petition from a U.S. citizen seized overseas by U.S. allies in multinational military operations. *See* 542 U.S. at 513 (plurality op.). Not one Justice suggested a want of jurisdiction. *See id.* at 539, 553-54. Indeed, eight Justices agreed that a U.S. citizen could not be held without meaningful judicial process to challenge the legal and factual bases of detention. Even Justice Thomas, who alone endorsed limited habeas review, stated that “whether Hamdi’s executive detention is lawful is a question properly resolved by the Judicial Branch.” *Id.* at 585 (Thomas, J., dissenting).

Hamdi controls here. Like Mr. Hamdi, Mr. Omar is physically detained by federal officials. *See id.* at 529 (plurality op.) (habeas protects “the most elementary of liberty interests—the interest in being free from physical detention by one’s own government”). Like Mr. Hamdi, Mr. Omar has a due process right to test the truth of the government’s allegations against him before an independent

magistrate. Whatever legal authority the executive asserts to justify detention, the Suspension Clause guarantees judicial testing of those legal grounds. *Id.* at 536 (plurality op.); *id.* at 554-55 (Scalia, J., dissenting) (“The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.”); *see infra* at 18-20. Remarkably, respondents cite *Hamdi* only once – for a proposition *eight* Justices roundly rejected. Resp’ts’ Br. 45 (arguing *Hamdi* supports no habeas review).

Hamdi is the most recent link in an unbroken chain of fifty years’ exercise of habeas review for American citizens in the military’s physical custody overseas:

Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen’s claims upon his government for protection.

Eisentrager, 339 U.S. at 769. “When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.” *Reid v. Covert*, 354 U.S. 1, 6 (1957) (plurality op.); *accord Grisham v. Hagan*, 361 U.S. 278, 280 (1960); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 249 (1960); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955); *Day v. Wilson*, 247 F.2d 60, 62 (D.C. Cir. 1957); Joseph W. Bishop, Jr., *Civilian Judges and Military Justice: Collateral*

Review of Court-Martial Convictions, 61 Colum. L. Rev. 40, 51-52 n.60 (1961) (collecting cases); *cf. Wilson v. Girard*, 354 U.S. 524, 530 (1957) (per curiam) (exercising habeas jurisdiction over government transfers overseas of citizens to other sovereigns).

Here, the two requisite facts needed for habeas jurisdiction are undisputed: Mr. Omar is a *U.S. citizen* in the *physical custody* of “United States military officers.” Resp’ts’ Br. 15, 32.² “[N]othing more” is needed to anchor the District Court’s habeas jurisdiction. *Rasul v. Bush*, 542 U.S. 466, 482-83 (2004).

The habeas statute’s text confirms that the U.S. military’s physical custody over Mr. Omar triggers judicial scrutiny of his detention’s lawfulness: The Writ is available for anyone “in custody in violation of the Constitution or laws or treaties of the United States.” 22 U.S.C. § 2241(c)(3); *see also* Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82 (currently codified at 28 U.S.C. § 2241(c)(1)) (Writ available for anyone “in custody, under or by colour of the authority of the United States”); *Rasul*, 542 U.S. at 473-74 (quoting 1867 Act extending habeas to “all cases where any person may be restrained of his or her liberty in violation of the constitution”); *cf. Clarke Forsythe, The Historical Origins of Broad Federal Habeas Review*

² This was contested in the District Court, but not here. *Compare* Resp’ts’ Opp’n to Pet’rs’ *Ex Parte* Motion for a TRO at 2-3, 13 (Dist. Ct. dkt. no. 12) (“Mr. Omar is Not in United States Custody.”), *with* Respt’s Br. 15, 32 (“[Mr.] Omar is being held by the United States”); *supra* at 5.

Reconsidered, 70 Notre Dame L. Rev. 1079, 1098-99 (1995) (habeas in 1789 was broad remedy against detention absent lawful authority).

Precedent interpreting the statute confirms district court jurisdiction. “Read literally, the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian.” *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973); *see also Rasul*, 542 U.S. at 483-84. “[I]n 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 added).³ Courts focus on one question: Who holds the *actual* jailhouse key? *See Ex parte Endo*, 323 U.S. 283, 306 (1944) (“[T]he court may act if there is a respondent within reach of its process who has custody of the petitioner.”); *Peyton v. Rowe*, 391 U.S. 54, 58 (1968) (a habeas petitioner “may require his jailer to justify the detention under the law”); *Wales v. Whitney*, 114 U.S. 564, 572 (1885) (so long as there is “actual confinement or the present means of enforcing it,” the Writ can issue); *Ex parte McCordle*, 73 U.S. (6 Wall.) 318, 325-26 (1867) (habeas statute has “the most comprehensive character”). This “very liberally construed” custody rule, *Maleng v. Cook*, 490 U.S. 488, 492 (1989) (per curiam), reflects habeas’s “historical core .

³ At common law too, a court’s power to issue the Great Writ turned on whether the crown exercised sufficient power and control to secure obedience to the writ’s command. *See Rasul*, 542 U.S. at 482.

. . . as a means of reviewing the legality of Executive detention,” *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). Precisely “in that context [of unilateral detention, the Writ’s] protections have been strongest.” *Id.*⁴

Congress alone can curtail this jurisdiction. *See* U.S. Const. art. I, § 9, cl. 2. “[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 op.); *id.* at 545 (opinion of Souter, J.) (noting “need for an assessment by Congress before citizens are subject to lockup”); *id.* at 562 (Scalia, J., dissenting) (same); *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.”). Only Congress – not the United Nations (“U.N.”) or other multinational body – can delegate to

⁴ The Writ reaches situations of active and constructive custody. *See United States ex rel. Keefe v. Dulles*, 222 F.2d 390, 392-93 (D.C. Cir. 1955) (exercising habeas jurisdiction, but denying the Writ, when petitioner, detained by French government, could not show constitutional rights violated by U.S. action); *accord Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 56-57 (D.D.C. 2004); *cf. Duchow v. United States*, No. 95-2121, 1995 WL 425037, 1995 U.S. Dist. LEXIS 10261 (E.D. La., July 19, 1995) (to determine if petitioner was in U.S. “custody” in Bolivia, court inquired whether “the Bolivian government is acting as a mere ‘puppet’ of the United States”). In both *Keefe* and *Holmes v. Laird*, 459 F.2d 1211, 1217-19 (D.C. Cir. 1972), this Court exercised habeas jurisdiction, but rejected claims on the merits. Respondents thus incorrectly state that the *Keefe* Court “refused to hear” the petition. Resp’ts’ Br. 29. Rather, the Court examined Keefe’s contention that his “constitutional rights were violated” but concluded “the record . . . sufficiently shows that the contrary is true.” 222 F.2d at 393.

federal officials legal authority to resist habeas review. *See Burns v. Wilson*, 346 U.S. 137, 148-49 (1953) (Frankfurter, J., concurring) (“[I]f imprisonment is the result of a denial of due process, it may be challenged no matter under what authority it was brought under.”). The District Court’s habeas jurisdiction hence reflects the Constitution’s limitation of executive power. “The United States is entirely a creature of the Constitution. Its power and authority have no other source.” *Reid*, 354 U.S. at 5-6 (plurality opinion) (footnote omitted); *id.* at 44 (Frankfurter, J. concurring) (Article I’s enumeration determines whether Congress can authorize courts-martial of civilians); *Ex parte Quirin*, 317 U.S. 1, 25 (1942) (“Congress and the President, like the courts, possess no power not derived from the Constitution.”).

Even “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” *Hamdi*, 542 U.S. at 536 (plurality op.); *Home Bldg & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934) (“[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.”). The Constitution never vests federal officers with power without correlative responsibility to respect constitutional rights. Even in war, federal officers must “take Care that the [l]aws be faithfully executed.” U.S. Const., art. II, §3.

Seeking to evade the habeas review triggered when federal officials detain an American citizen, respondents point to untested hearsay allegations against Mr.

Omar and respondents' alleged multinational/U.N. "auspices." *See* Resp'ts' Br. 25-32, 45-49; *cf. supra* at §§ II-IV (responding in detail). But as *Hamdi* demonstrated, the function of habeas review is to *test* the putative legal authority and factual basis for detentions: The custodian of a habeas petitioner cannot invoke the very issues of law and fact that are contested to *evade* habeas review. Allowing respondents to shield their detention of U.S. citizens under non-U.S. law and contested facts would gut the Great Writ. But courts have zealously guarded the "fundamental ... citizen's right to be free from involuntary confinement by his own government without due process of law" against casuistic efforts to evade review once physical custody is clear. *Hamdi*, 542 U.S. at 531 (plurality op.); *cf.* Francis Paschal, *The Constitution and Habeas Corpus*, 1970 Duke L.J. 605, 608-17 (Constitutional "Convention had the firm purpose of guaranteeing the routine availability of the privilege of the writ").

Accepting respondents' effort to evade habeas review by invoking contested hearsay evidence or disputed legal authorization would also run contrary to the Great Writ's usage. The Habeas Writ "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Cunningham*, 371 U.S. at 243. It "cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not

in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.” *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting); *Harris v. Nelson*, 394 U.S. 286, 291 (1969) (noting habeas’s “ability to cut through barriers of form and procedural mazes”); *Burns*, 346 U.S. at 148-49 (Frankfurter, J., concurring) (habeas corpus “is not to be confined by any *a priori* or technical notions of ‘jurisdiction’”); *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 807 (D.C. Cir. 1988) (*en banc*) (noting “strong High court disapproval of formalistic analysis in the context of habeas corpus”).

Respondents’ attempts to defeat the Writ by invoking untested hearsay and non-U.S. law must fail. The District Court has jurisdiction over the habeas petition of Mr. Omar – an American citizen in the physical custody of U.S. military personnel overseas – unless Congress suspends the Writ. Yet it has not done so here.

II. HABEAS JURISDICTION EXISTS WHEN A U.S. CITIZEN IS DETAINED BY AMERICAN FORCES OPERATING AS PART OF A MULTINATIONAL FORCE UNDER A U.N. MANDATE.

Respondents seek to evade the dispositive fact – their physical custody of Mr. Omar – by arguing that habeas review is blocked when U.S. forces act as part of “multinational forces acting in fulfillment of the authority and mandate of an international body.” Resp’ts’ Br. 14, 30; *see also id.* at 15-16, 25-26, 32. This

argument rests on a sole case, *Hirota v. MacArthur*, 338 U.S. 197 (1949) (per curiam). Resp'ts' Br. 25-32.⁵

But *Hirota* is leagues apart from the case at bar. *Hirota* concerned a fundamentally different fact situation, arose in a fundamentally different procedural posture, and presented a fundamentally different legal question from the case at bar. It does not control.

Hirota and his co-petitioners, senior Japanese officials, were tried and convicted in the Allies' International Military Tribunal for the Far East, and then imprisoned in Tokyo. Merely five months before Hirota filed his petition, the Supreme Court had held in *Ahrens v. Clark*, 335 U.S. 188, 192 (1948), that federal district courts lacked jurisdiction to issue the Writ for those imprisoned outside their territorial jurisdiction. See Motion for Leave to File Pet. for Writ of Habeas Corpus at 36, *Hirota v. MacArthur*, 338 U.S. 197 (1949) (No. 239) (dated November 1948). Hirota and his co-petitioners therefore filed habeas petitions *directly* in the Supreme Court. See *id.* at 1. The Supreme Court faced the question whether it could entertain these petitions either via its limited original jurisdiction, or as an exercise of appellate review, consistent with Article III. In a three-paragraph per curiam issued in December 1948, the Court focused on the fact that

⁵ Respondents' political question contention also largely relies on facts they present as determinative under *Hirota*. See Resp'ts' Br. 40-41, 47-50, 53-56. This argument is incorrect for the same reasons their *Hirota* argument is unsustainable.

“the tribunal sentencing these petitioners is not a tribunal of the United States,” and concluded that “courts of the United States have no power or authority to review, to affirm, set aside, or annul the judgments and sentences imposed.” *Hirota*, 338 U.S. at 198. Its holding meant *Hirota* was barred not only from the district courts, *see Ahrens*, 335 U.S. at 192, but also from the High Court.

Hirota bears no resemblance to this case. Its facts, its procedural posture, and its dispositive legal issues are wholly different. As respondents concede, *Hirota* held solely that “federal courts lacked habeas jurisdiction over individuals *convicted in a multinational military court[.]*” Resp’ts’ Br. 11 (emphasis added). The Supreme Court focused on whether “judgments and sentences imposed” on the non-citizen *Hirota* petitioners could be disturbed. *Hirota*, 338 U.S. at 198. But Mr. Omar has not been indicted by *any* criminal tribunal. Nor has he been tried. Nor judged, nor sentenced. And, unlike *Hirota*, he is an American citizen. *Hirota* concerned *collateral, appellate* review of a *non-citizen’s final conviction* in an international tribunal – not judicial scrutiny of *a citizen’s indefinite detention without lawful process in U.S. hands*. *Cf. Rasul*, 542 U.S. at 475-76 (“six ... facts,” including citizenship and the fact of prior conviction, were relevant to *Eisentrager’s* analysis of statutory jurisdiction). Further, *Hirota*, decided when *Ahrens* barred district court review, focused on solely the Supreme Court’s jurisdiction to adjudicate habeas petitions from overseas detainees.

The fundamentally flawed nature of respondents' reading of *Hirota* is evident in three distinct ways. *First*, the Supreme Court has held in three cases after *Hirota* that district courts have jurisdiction over habeas petitions from U.S. citizens detained overseas under multinational or international "auspices." These cases – arising from Occupied Germany, Korea, and Afghanistan – demonstrate that respondents read *Hirota* incorrectly. District courts have long exercised habeas jurisdiction, with Supreme Court approval, in circumstances analogous to Mr. Omar's.

Second, *Hirota*'s procedural posture also means the case is irrelevant here. *Hirota* involved habeas petitions filed *directly* in the Supreme Court. Article III gives the Court limited original jurisdiction and such appellate jurisdiction as Congress grants. But the *Hirota* petitions were not within the Constitution's specific grant of original jurisdiction, and the Court's "appellate" jurisdiction did not extend to international military tribunals. This logic has no application to district courts, which have plenary *original* jurisdiction to hear challenges to executive detention.

Finally, the District Court correctly observed that the Supreme Court clarified the broad availability of habeas corpus after 1949 in ways that conclusively undercut respondents' suppositions. J.A. 169-72. Whatever force a

Hirota-based prudential bar on jurisdiction might once have had, it lacks vitality today.

A. Federal Courts Have Habeas Jurisdiction To Examine the Legality of Detentions by U.S Forces Under Multinational or U.N. Auspices.

Between 1952 and 2004, the Supreme Court endorsed district courts' exercise of habeas jurisdiction in three habeas cases involving American citizens detained in U.S. military operations with multinational or U.N. auspices. These cases demonstrate that respondents' reading of *Hirota* cannot be correct. In line with "strong High court disapproval of formalistic analysis in the context of habeas corpus," federal officials always remain under the habeas supervision of the district courts. *Chatman-Bey*, 864 F.2d at 807; *supra* at 19-20.

First, respondents' argument contradicts the Supreme Court's ruling in *Madsen v. Kinsella*, 343 U.S. 341 (1952). In October 1949, Yvette Madsen, a U.S. civilian, committed homicide in occupied Germany. She was tried and sentenced by the "United States Court of the Allied High Commission for Germany" established by the "Allied High Command." *Id.* at 343-44, 370. Like the tribunal that judged and sentenced Hirota, the court that sentenced Madsen was established by a U.S. officer, General Dwight Eisenhower, acting "as Supreme Commander of the Allied Expeditionary Force." Eli Nobleman, *American Military Government Courts in Germany: Their Role in the Organization of the German People* 44-45

(1950) (citing Combined Directive for Military Government in Germany Prior to Defeat or Surrender, April 28, 1944); *see generally* W. Friedmann, *The Allied Military Government of Germany* 300-03 (1947); *cf. Hirota*, 338 U.S. at 198. The *Madsen* Court was well aware that General Eisenhower established the tribunal at issue under *Allied* authority. *See* 343 U.S. at 370. Nevertheless, it did not dismiss Madsen's petition for lack of habeas jurisdiction, as it would have done if respondents' reading of *Hirota* were correct. Rather, it addressed the merits of Madsen's argument, tracing authorization for the military tribunal that tried her back to the Articles of War, which "forestalled precisely [Madsen's] contention." *Id.* at 350-51.

By reaching the merits, the *Madsen* Court endorsed the district court's exercise of habeas jurisdiction to hear Madsen's argument and to determine if the international tribunal had power to try Madsen. 343 U.S. at 354. It thus affirmed habeas jurisdiction even though the Allied High Command was legally distinct from the U.S. *Madsen* hence shows a person can be "in custody" for habeas purposes, even if the relevant legal authority has a partially multinational character.

In a second landmark case, *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13-15 & n.3 (1955), the Court held that a district court properly issued the habeas Writ for a citizen detained for crimes allegedly committed in Korea during U.S. military operations there. U.S. operations in the Korean conflict were

authorized by U.N. resolution. See Max Hilaire, *United Nations Law and the Security Council* 9, 186 (2005); cf. Louis Henkin, *Foreign Affairs and the US Constitution* 255 (2d ed. 1996) (noting U.S.’s “unified command” of multinational forces in Korea).⁶ Hence, a U.N. mandate for U.S. military action does not mean that the Constitution ceases to apply.

Finally, respondents’ argument is inconsistent with *Hamdi*. That case concerned an individual allegedly captured on the Afghan battlefield during Operation Enduring Freedom, a multinational operation under U.N. Charter auspices. According to the State Department, “Enduring Freedom ... is a *multinational* coalition military operation.” U.S. Department of State Office of the Spokesman Fact Sheet, (Jan. 31, 2006) www.state.gov/r/pa/prs/2006/600083.htm (emphasis added); Brief for Respondents at 2-3, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696) (“U.S. and coalition forces removed the Taliban”). U.S. Ambassador John Negroponte further explained that U.S. forces in Afghanistan

⁶ U.N. resolutions authorizing force in Korea used language akin to the Iraq resolutions and created a legally distinct multinational command with a large U.S. role. See S.C. Res. 84, ¶ 3-5, U.N. Doc. S/RES/84 (July 7, 1950) (“3. *Recommends* that all Members providing military forces and other assistance pursuant to the aforesaid Security Council resolutions make such forces ... available to a unified command under the United States of America; 4. *Requests* the United States to designate the commander of such forces; 5. *Authorizes* the unified command at its discretion to use the United Nations flag in the course of operations against North Korean forces concurrently with the flags of the various nations participating.”); see also S.C. Res. 83, U.N. Doc. S/RES/83 (June 27, 1950); Hilaire, *supra*, at 11, 242-45.

acted “in accordance with the inherent right of individual and collective self-defense” granted by Article 51 of the U.N. Charter. Alex Conte, *Security in the 21st Century: The United Nations, Afghanistan and Iraq* 43-44 (2005); cf. U.N. Charter art. 51. Subsequently, a U.N. Resolution “authorize[d]” “all necessary measures” to “root out terrorism.” S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001). The force that detained Mr. Hamdi, like the forces detaining Mr. Omar, had both a multinational tint *and* a U.N. mandate. Nevertheless, as discussed, the Supreme Court did not question the district courts’ jurisdiction over Mr. Hamdi’s petition to test the factual and legal basis of his detention. *See supra* at 13.

Even if this clearly applicable precedent were insufficient, respondents’ own submissions demonstrate that the U.S. retains command and also legal jurisdiction over respondents. U.S. forces in Iraq “operat[e] in accordance with the mandate of United Nations Security Council Resolution 1546 (2004) and 1637 (2005).” Resp’ts’ Br. 5. Attached to Resolution 1546 is a letter from Secretary of State Colin Powell stating:

[T]he MNF must continue to function under a framework that affords the force and its personnel the status they need to accomplish their mission, *and in which the contributing states have responsibility for exercising jurisdiction over their personnel*

J.A. 151A (emphasis added); President George W. Bush, “Weekly Radio Address” (Oct. 25, 2003) (transcript available at Lexis News-All) (“Resolution 1511 ... endorses a multinational force in Iraq under U.S. command.”).⁷

In summary, international entanglements provide no back door from constitutional scrutiny. Multinational or international “auspices” do not strip federal courts of jurisdiction. Issuing a preliminary injunction to preserve its jurisdiction, the District Court properly guaranteed adjudication of the lawfulness of Mr. Omar’s detention. *See* J.A. 175.

⁷ According to Secretary of State Colin Powell, U.N. resolution 1511 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.* Hilaire, *supra*, at 243 (“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).

For all practical purposes, the U.S. controls all coalition forces in Iraq. *See Fiscal 2006 Appropriations: Hearing Before the Comm. On H. Appropriations Subcomm. On Military Quality of Life and Veterans Affairs*, 108th 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.*, 108th Cong. (May 13, 2004) (statement of Lieutenant General 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.”). At minimum, the degree of U.S. control creates a question of jurisdictional fact properly resolved by the District Court.

B. *Hirota v. MacArthur* Stands for a Limited Proposition About the Supreme Court’s Article III Jurisdiction.

Respondents’ contention that *Hirota* demonstrates *district courts’* inability to exercise habeas jurisdiction when U.S. forces act under multinational or international “auspices” must fail for another reason: *Hirota’s* holding concerns the scope of Supreme Court jurisdiction under Article III of the Constitution. The *Hirota* petitions were rejected because they could not be reviewed under either the Supreme Court’s original or appellate jurisdiction. This simply has no bearing on the District Court’s power to adjudicate challenges to executive detention of American citizens.

Article III states that the Supreme Court has two kinds of jurisdiction – original and appellate. U.S. Const. Art. III § 2, cl.2. It defines the Supreme Court’s original jurisdiction in limited terms. It also provides that the Court’s appellate jurisdiction depends wholly on “such regulations as the Congress shall make.” U.S. Const. art. III, § 2, cls. 1-2; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-76 (1803) (Article III’s original jurisdiction is exclusive); *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810) (appellate jurisdiction depends on statute).

Supreme Court original jurisdiction over a habeas petition filed directly in the Court is rare. See *Ex parte Siebold*, 100 U.S. 371, 374-75 (1879) (Court can only issue habeas writs in its original jurisdiction “in cases affecting ambassadors,

public ministers, and consuls, and other cases in which a State is a party.”). No such Writ has ever been granted, apparently. For practical purposes therefore, “[t]he decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus*, and this writ must always be for the purpose of revising that decision, and therefore *appellate* in its nature” in the Supreme Court. *Bollman*, 8 U.S. at 101 (emphasis added); *accord Felker v. Turpin*, 518 U.S. 651, 667 n.1 (1996) (Souter, J., concurring); Dallin Oaks, *The “Original” Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Ct. Rev. 153, 156-63. The *Hirota* Court thus lacked original jurisdiction.

Moreover, it also lacked *appellate* jurisdiction. “It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause.” *Marbury*, 5 U.S. at 175; *In re Sanborn*, 148 U.S. 222, 224 (1893) (appellate jurisdiction involves review of “judicial power”); Oaks, *supra*, at 166-67. Hence, the Supreme Court lacks “appellate” jurisdiction over military commissions. *See Ex parte Vallandigham*, 68 U.S. 243, 253 (1863). *A fortiori*, it lacked *appellate* jurisdiction over the military tribunal in *Hirota*. It thus had no choice but to dismiss the petitions as “a forbidden exercise of its original jurisdiction.” James Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 Cornell L. Rev. 497, 517 (2006); Oaks, *supra*, at 173 (same).

Overwhelming and uncontradicted evidence supports this reading of *Hirota*. First, Justice Douglas’s concurrence indicated his agreement with the Court’s determination that “no original jurisdiction” obtained, and “no court of the United States to which the potential appellate jurisdiction of [the Supreme] Court extends,” but then argued that *Ahrens* did not preclude Hirota from re-filing in the District Court for the District of Columbia. *Hirota*, 338 U.S. at 199-201 (Douglas, J., concurring). It was one thing to say the Supreme Court lacked “authority to review the judgment of an international tribunal,” Justice Douglas noted, and quite another to hint, even obliquely, that “the [habeas] inquiry [could] be thwarted merely because the jailer acts not only for the United States but for other nations as well.” *Id.* at 204. As discussed, *Madsen* made clear no such rule applies to U.S. citizens. *See supra* at 24-25.

Second, rejecting petitions like Hirota’s, the Court noted its lack of *original* jurisdiction. *See 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); Richard H. Fallon, Jr. et al., *The Federal Courts and the Federal System* 316 (5th ed. 2003) (citing cases); Pfander, *supra*, at 517, nn. 131-32 (same).

Finally, the Solicitor General himself pressed this same explanation in his brief in *Hirota* as his opening argument. *See* Brief in Opposition at 5-8, *Hirota v.*

MacArthur, 338 U.S. 197 (1949) (Nos. 239, 240, and 248) (“*Hirota* Brief”). He explained that the “[Supreme] Court ... ha[d] no appellate supervisory jurisdiction”; he then added that under *Ahrens*, no *district* court had such jurisdiction. *Id.*

District courts have long had *original* jurisdiction over habeas challenges to imprisonment without *any* antecedent judicial decision to review. *See Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 96-97 (1868) (noting gap between the Supreme Court’s “appellate” habeas jurisdiction, and “that of the English courts,” which “is original”); *cf. Ex parte Hayes*, 414 U.S. 1327, 1327-28 (1973) (Douglas, J., in chambers) (transferring habeas writ of American citizen in overseas military detention filed in chambers to the District Court for the District of Columbia); Paschal, *supra*, at 637 (§ 14 of the 1789 Judiciary Act “makes no distinction in terms of original and appellate jurisdiction.... [T]he grant [of habeas jurisdiction] to the district court, where the jurisdiction could only be original, is included in the very same words.”). Hence, the district courts in *Madsen*, *Toth*, and *Hamdi* all had jurisdiction despite the multinational or international “auspices” of the detention. Equally, in the case at bar, the District Court also properly exercised original jurisdiction.

Furthermore, *Hirota* included dicta that lower federal courts lacked *statutory* jurisdiction to hear the petitions, as urged by the Solicitor General. *See Hirota*

Brief 7-8, 30-34. This dicta is explained by *Hirota*'s context. The recent *Ahrens* decision stripped district courts of habeas jurisdiction for detentions outside their territorial jurisdiction. 335 U.S. at 192. By 1948, more than one hundred Japanese and German detainees in custody overseas had filed habeas petitions directly in the Supreme Court. See Fallon et al, *supra*, at 316; Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 Stan. L. Rev. 587, 593-603 (1949). Seeking to stop this tide rerouting to lower courts, the High Court reminded petitioners of *Ahrens*'s bar to lower-court jurisdiction. *Hirota*, 338 U.S. at 198; see also *Ex parte Flick*, 76 F. Supp. 979, 980 (D.D.C. 1948) (dismissing petition for lack of territorial jurisdiction). This dicta prompted protest from Justice Douglas, who explained that "a District Court of the United States does have jurisdiction" to entertain a petition from an Allied tribunal because:

If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least the Constitution follows the flag. It is no defense for him to say that he acts for the Allied Powers. He is an American citizen who is performing functions for our government. It is our Constitution which he supports and defends.

See *Hirota*, 338 U.S. at 204 (Douglas, J., concurring). Justice Douglas's view – that *Ahrens* merely allocates jurisdiction when a prisoner is detained in *some* federal court's territorial jurisdiction – eventually prevailed. See, e.g., *Rumsfeld v. Padilla*, 542 U.S. 426, 435 nn.8-9 (2004). More pertinently, Justice Douglas's

view that the “Allied” character of the tribunal did not bar review was confirmed in *Madsen, Toth, and Hamdi*.

C. Developments Since *Hirota* Support the District Court’s Habeas Jurisdiction.

As the District Court observed, developments since *Hirota* further eliminate any argument that U.S. officials can detain American citizens without habeas review. J.A. 169-71; *cf.* Resp’ts’ Br. 30-32. Later cases applied the longstanding principle discussed in Section I that “[c]itizenship [is] a head of jurisdiction” in federal court. *Eisentrager*, 339 U.S. at 769; *supra* at 14-15. Also, *Ahrens*’ broad reading was rejected and the Court confirmed the Constitution’s application to joint action between federal entities and others.

First, when *Hirota* was decided, it was not clear habeas availed American citizens overseas. *Cf. In re Ross*, 140 U.S. 453, 480 (1891) (authorizing trial by consular court). Two years after *Hirota*, a “writ of habeas corpus ha[d] never issued from a court of the United States on the petition of anyone, citizen or alien, held in American custody beyond the territorial limits of the United States.” Note, *Habeas Corpus Protections Against Illegal Extraterritorial Detention*, 51 Colum. L. Rev. 368, 368 (1951). In 1950, the Solicitor General in *Eisentrager* argued that federal courts lacked habeas jurisdiction over citizens’ challenges to overseas detention. Brief for Petitioner at 14-15, *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (No. 306). *Eisentrager* squarely rejected this argument. 339 U.S. at 769-

70. Three years later, in *Burns v. Wilson*, the Court held that district courts have jurisdiction over petitions filed by citizens detained overseas. *See* 346 U.S. at 137. As explained above, the availability of habeas review when U.S. officials have custody of a U.S. citizen is now beyond doubt. *See supra* at § I.

Second, as discussed above, the Supreme Court rejected *Ahrens* as an *absolute* territorial limit on habeas jurisdiction. *See supra* at 14-15. Today, American citizens have a clear right to habeas review when detained overseas “in the custody of United States military officers.” Resp’ts’ Br. 30.

Finally, the Court since 1949 has confirmed that constitutional norms apply to non-government actors who act jointly with the government. *Cf. The Civil Rights Cases*, 109 U.S. 3, 17 (1883) (narrow application of “state action” doctrine). When federal officials act jointly with a multinational force, they do not escape constitutional scrutiny as respondents suggest. *Cf. Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 392-93 (1995) (“The Constitution constrains governmental action ‘by whatever instruments or in whatever modes that action may be taken.’”); *San Francisco Arts & Athletics Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (describing federal action); *Barr v. U.S. Dep’t of Justice*, 819 F.2d 25, 27-28 (2d Cir. 1987) (finding “federal action” in Swiss government’s freezing of bank deposits at U.S. request); *Abu Ali v. Aschroft*, 350 F. Supp. 2d 28, 59-61

(D.D.C. 2004) (U.S. does not evade liability for constitutional violations by collaborating with foreign government).

III. THE DISTRICT COURT PROPERLY PRESERVED ITS HABEAS JURISDICTION TO REVIEW PETITIONER'S THREATENED TRANSFER TO IRAQ.

The District Court unquestionably has jurisdiction to determine not only the lawfulness of Mr. Omar's nineteen-month-plus detention in U.S. custody, but also the lawfulness of any prospective transfer to Iraqi custody. To muddy this clear rule, respondents invoke a "rule of non-inquiry" precluding "second-guessing [of] decisions by the Executive" to transfer citizens to foreign custody, and point to a "compelling interest in the functioning of Iraqi ... court[s]" furthered by handing over Mr. Omar. They also contend that transfer to Iraqi custody is relief no different from release. *See* Resp'ts' Br. 33- 41, 47, 50, 56-59

Federal courts have long exercised habeas jurisdiction to ensure the lawfulness of transfers of American citizens into foreign custody. Such review is not only proper, but mandatory under the habeas statute, 28 U.S.C. § 2241, and Suspension Clause. Citizen transfers to foreign governments are subject to constitutional constraints, including Due Process protections against torture. To preserve this jurisdiction, the District Court properly enjoined respondents from transferring Mr. Omar pending this action's resolution. This injunction, moreover, focuses exclusively on U.S. action; it does not interfere with Iraqi proceedings.

Finally, a citizen's transfer to Iraqi custody and his release are legally and factually distinct.

A. Habeas Corpus Guarantees Judicial Review of Petitioner's Threatened Transfer to Iraqi Custody.

The executive cannot transfer an American citizen to a foreign government, no matter how serious the allegations against him, absent authority from treaty or statute. *See Valentine v. United States*, 299 U.S. 5, 9 (1936) (“[I]n the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power.”); *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 to 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.”).

Determining a transfer's lawfulness is a core judicial function, long secured by the habeas statute and Suspension Clause. “A stipulation in the treaty prohibiting [habeas] jurisdiction [over extradition], equally with a like enactment in a statute, would be void, as in opposition to the constitution.” *In re Kaine*, 14 F. Cas. 84, 87 (C.C.S.D.N.Y. 1852) (No. 7,598); Gerald Neuman, *Habeas Corpus*,

Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 995 (1998) (habeas guarantees “inquiry into detention for the purpose of delivery to a foreign government” to examine its legality). Federal courts routinely exercise habeas jurisdiction to review decisions to extradite individuals from the United States. *See, e.g., Factor v. Laubenheimer*, 290 U.S. 276, 290-91 (1933) (reviewing whether crime charged is extraditable offense under treaty); *Elias v. Ramirez*, 215 U.S. 398, 409 (1910) (same); *Kaine*, 14 F. Cas. at 87 (confirming “authority of the judiciary to inquire, through a writ of habeas corpus, into the cause of commitment, in case of arrest of fugitives from justice”); Neuman, *supra*, at 994-1004 (detailing history of such review).

Indeed, federal courts review proposed transfers to foreign governments of U.S. citizens detained overseas. One month after *Reid v. Covert*, the Court exercised habeas jurisdiction over the proposed transfer to Japanese custody of an American serviceman stationed in Japan. *Wilson v. Girard*, 354 U.S. 524, 525-26 (1957) (per curiam). The Court considered “whether, upon the record before us, the Constitution or legislation ... prohibited” Japan’s jurisdiction. *Id.* at 530. The Court thus ensured there was a sufficient basis in law before validating the transfer. *Accord Holmes*, 459 F.2d at 1218.

Respondents’ argument that a District Court cannot review Mr. Omar’s handover, or issue preliminary injunctive relief to preserve its jurisdiction would

yield a paradoxical situation, with habeas corpus guaranteeing judicial review over executive transfers of *non-citizens* to foreign governments, but not of *citizens*. Cf. *St. Cyr*, 533 U.S. at 300 (denial of judicial review over alien’s deportation “would raise serious constitutional problems”).

The District Court’s preliminary injunction, crafted narrowly to preserve jurisdiction, rested on unrebutted evidence that “[P]etitioner faces the possibility of transfer to a government where he might be tortured or indefinitely confined, which undeniably would constitute irreparable harm.” J.A. 134, 175 (citation omitted); *id.* at 57-58, 104-107; *supra* at 5-6. Respondents’ own declarant Major-General Gardner stated that the United States would not turn over any detainees to Iraqi jailors “until they meet [U.S.-mandated] standards.” J.A. 52. Respondents’ only response is to state that, “Of course, Executive branch officials would not turn Omar” over to torturers. Resp’ts’ Br. 19. This will not do. Given the uncontested evidence that the Iraqi judicial system engages in torture, and lacks even minimal due process, a transfer here would be illegal. The District Court, in short, did not abuse its discretion when it concluded that status-quo-preserving injunctive relief was needed to prevent irreparable harm to an American citizen. J.A. 135.⁸

⁸ Numerous courts in this District have granted similarly limited relief to aliens detained at Guantánamo Bay, Cuba, barring transfers in order to address the lawfulness of their detention. *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,

Seeking to circumvent the District Court's proper exercise of its historic habeas jurisdiction, respondents invoke the rule of non-inquiry. Their argument, which amounts to an unprecedented, impermissible assertion of executive authority to transfer an American citizen for torture without judicial review, was properly rejected by the District Court for three reasons.

First, the rule of non-inquiry does not apply to Mr. Omar's threatened transfer to Iraq. That rule is not an open-ended separation-of-powers doctrine. Rather, its application depends on a carefully negotiated treaty specifying terms and conditions of transfer, which "indicates that . . . the executive *and legislative* branches consider the treaty partner's justice system sufficiently fair to justify sending accused persons there for trial." *In re Extradition of Howard*, 996 F.2d 1320, 1329 (1st Cir. 1993) (emphasis added). Here, the U.N. resolutions respondents cite do not mention, let alone authorize, transfer from U.S. to Iraqi custody for criminal investigation or prosecution. *Cf.* Resp'ts' Br. 41 n.6 (conceding no statutory authority for extradition exists).

The rule of non-inquiry also operates within and depends upon an underlying "legal framework" that "interpose[es] the judiciary between the executive and the individual." *Lo Duca v. United States*, 93 F.3d 1100, 1103 (2d

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.).

Cir. 1996) (citation and quotation marks omitted). A foreign government seeking extradition of a prisoner in U.S. custody must first submit to a judicial authority a formal complaint requesting an arrest warrant and setting forth legal and factual grounds for transfer. The judge must then determine, upon an evidentiary hearing, whether the alleged offense is extraditable and whether probable cause exists supporting the charge. 18 U.S.C. § 3184; *United States v. Kin-Hong*, 110 F.3d 103, 109 (1st Cir. 1997); *Kirkland v. Preston*, 385 F.2d 670, 677 n.19 (D.C. Cir. 1967) (summarizing extradition procedures). The judge issues a certificate of extradition *only* if the warrant meets these requirements. The decision is then subject to habeas corpus review. *Kin-Hong*, 110 F.3d at 107-08. Here, by contrast, respondents seek to transfer an American citizen detained for more than nineteen months outside any legal framework and without judicial review. The rule of non-inquiry plainly provides no basis for such unilateral, unchecked executive power.

Second, even assuming that the rule of non-inquiry applies here, it does not hinder the District Court's habeas inquiry into the lawfulness of an American citizen's detention and proposed transfer to foreign custody. In every case respondents cite, courts reviewed the transfer of an individual to a foreign government to ensure it complied with the laws and Constitution of the United States. *See, e.g., Neely v. Henkel*, 180 U.S. 109, 121-23 (1901) (reviewing

contemplated extradition and concluding transfer was authorized by treaty and consistent with Constitution); *Holmes*, 459 F.2d at 1218 (reviewing contemplated transfer of American servicemen to West Germany following conviction there, and concluding transfer was “precise response required of the United States by its treaty commitments”). At most, the rule of non-inquiry affects the *scope* of habeas review over a proposed transfer, not its *availability*. Cf. *Benitez v. Garcia*, -- F.3d --, 2006 WL 1391096 at *4, 2006 U.S. App. LEXIS 12606 (9th Cir. May, 23, 2006) (granting habeas relief to extradited prisoner on the basis of limitations in treaty). In *Neely* and *Holmes*, moreover, minimal guarantees of due process were present; nothing suggested the individual’s transfer would result in torture. See *Neely*, 180 U.S. at 112; *Holmes*, 459 F.2d at 1213 (“importantly. . . NATO [Status of Forces Agreement] surrounds prosecutions by receiving nations with fair-trial safeguards”); accord *Wilson*, 354 U.S. at 547.

More tellingly, courts uniformly use habeas review to determine whether an offense is “political” in nature, and so exempt from extradition. See *Ornelas v. Ruiz*, 161 U.S. 502, 510-12 (1896) (reviewing whether offenses were “purely political” under the treaty); *Quinn*, 783 F.2d at 790 (federal courts “have a responsibility to construe the [relevant] treaty” to determine whether there is a lawful basis for transfer); *In re Mackin*, 668 F.2d 122, 136 (2d Cir. 1981); *Eain v. Wilkes*, 641 F.2d 504, 513 (7th Cir. 1981). Inquiry into a foreign legal system, and

into the political circumstances surrounding specific prosecutions, is hence feasible and routine, does not encroach on executive prerogatives, and does not lack judicially discoverable and manageable standards. *See, e.g., Quinn*, 783 F.2d at 787-91; *Eain*, 641 F.2d at 513-17.

Third, the rule of non-inquiry notwithstanding, executive authority to transfer an American citizen to a foreign power necessarily remains subject to the Constitution. *See Edwards v. Carter*, 580 F.2d 1055, 1058 (D.C. Cir. 1978) (“[T]he treaty power can only be exercised in a manner which conforms to the Constitution”); *accord Reid*, 354 U.S. at 16-17; *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *Plaster v. United States*, 720 F.2d 340, 348 (4th Cir. 1983) (“[I]n carrying out its treaty obligations, [the United States must] conform its conduct to the requirements of the Constitution.”).

The rule of non-inquiry is not constitutionally mandated. *Howard*, 996 F.2d at 1330 n.6. But a citizen’s right to be free from torture is fundamental. *See Palko v. Connecticut*, 302 U.S. 319, 326 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1979); *see also Gregg v. Georgia*, 428 U.S. 153, 169-70 (1976); *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944). The prohibition against torture and cruel mistreatment embodied in the Fifth Amendment’s Due Process guarantee categorically prohibits treatment that “shocks the conscience.” *Rochin v. California*, 342 U.S. 165, 172-73 (1952); *Harbury v. Deutch*, 233 F.3d 596, 602

(D.C. Cir. 2000), *rev'd on other grounds*, 536 U.S. 403 (2002). For decades, this fundamental prohibition has been recognized by U.S. courts as a *jus cogens* norm universally and categorically prohibited by the law of nations. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004); *accord Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 935, 941 (D.C. Cir. 1988) (“*CUCLN*”).

An American citizen’s right to be free of torture means the U.S. cannot render him to a foreign power for torture without violating the Fifth Amendment’s Due Process Clause. *Cf. Rosado v. Civiletti*, 621 F.2d 1179, 1195-96 (2d Cir. 1980) (extradition cannot “expose [American citizen] to procedures or punishment ‘antipathetic to a federal court’s sense of decency’”) (quoting *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960)); *Kin Hong*, 110 F.3d at 112 (extradition cannot “shoc[k] the conscience”); *In re Burt*, 737 F.2d 1477, 1487 (7th Cir. 1984) (reviewing extradition to ensure “standards of fair play and decency”); *see also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 (“Convention Against Torture”) (“No ... Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”); M. Cherif Bassiouni, *International Extradition: United States Law and Practice* § 7.2, at 575 (4th ed. 2002) (courts “could easily rely on [binding] international instruments” to prevent individual’s

transfer based on risk of torture).⁹ Indeed, federal courts have jurisdiction to prevent non-citizens' transfer from the United States to foreign governments when this would place them at risk of torture. *See, e.g., Toure v. Attorney General of the U.S.*, 443 F.3d 310 (3d Cir. 2006). An American citizen detained by the United States is entitled to no less protection.

In sum, it may be settled that the Constitution grants no "immunity" to commit crimes in another country and no right to the same "modes of trial" as in the United States, *Neely*, 180 U.S. at 123, but it is also settled that Constitution contains no untrammelled executive power to transfer an American citizen for likely torture without judicial review. The Constitution forbids that result, even as it permits transfers that accord with the law and constitutional rights.

B. The Preliminary Injunction Does Not Affect the Functioning of the Iraqi Courts.

The District Court's injunction preserves habeas jurisdiction to assess the lawfulness and constitutionality of Mr. Omar's nineteen-month detention and

⁹ No U.N. resolution could ever authorize the United States from departing from its obligations under the Convention Against Torture, which codifies the *jus cogens* prohibition against torture. *See* David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter* 195 (2001); *see also* Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 *Eur. J. Int'l L.* 59, 68 (2005) ("[T]he provisions of the UN Charter on the powers of the Security Council have to be interpreted and executed in a way that is compatible with *jus cogens*....").

any proposed transfer to Iraqi custody. J.A. 175. It has no effect on any Iraqi “investigation and prosecution” of Mr. Omar, Resp’ts’ Br. 34, but rather ensures that U.S. action conforms with law.

Judicial review of a transfer for compliance with the law and the Constitution does not impede foreign prosecution: Such review, as a prerequisite of due process of law, is a routine part of extradition procedures the U.S. uses to *assist* foreign criminal proceedings. Further, Iraqi criminal proceedings have a distinctly hypothetical cast at this stage. Respondents’ declarant states that the multinational force in consultation with U.S. authorities “ascertained that the Iraqi Judiciary would proceed with charging Mr. Omar.” J.A. 139. While respondents’ declarant states “Mr. Omar is currently pending an Investigative Hearing,” the record is bare of evidence that an Iraqi judicial proceeding has begun. *Id.*¹⁰

In sum, the District Court’s limited preliminary injunction merely prevents Mr. Omar’s transfer to Iraq from U.S. custody pending adjudication of his habeas petition. J.A. 175. The injunction preserves a fundamental protection granted to all American citizens, and should be affirmed.

¹⁰ And tellingly, respondents omit any mention of the “act of state” doctrine, which also “arises out of the ... separation of powers,” and gives doctrinal form to judicial deference to executive assessment of foreign states’ acts. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964). As respondents implicitly concede, the act of state doctrine has no application here because no foreign state is being encroached upon.

C. Transfer and Release Are Legally and Factually Distinct.

Finally, respondents erroneously suggest that the District Court “exceeded its legal authority . . . and principles of habeas corpus” by enjoining a transfer that would result in Mr. Omar’s no longer being in American custody: Transfer to Iraqi custody, respondents propose, is the factual and legal analog of release. Resp’ts’ Br. 56-59.

As an initial matter, respondents rely on cases holding that a pretrial detainee’s criminal conviction moots his habeas petition challenging that detention. Resp’ts’ Br. 56 (citing cases). In those cases, the habeas petitions became moot precisely because a federal court fully reviewed and decided the underlying claim of illegal detention. *See, e.g., Fassler v. United States*, 858 F.2d 1016, 1018 (5th Cir. 1988) (“Because [petitioner] is now legally in federal custody . . . his request for release from pretrial confinement is moot.”). Here, there has been *no* adjudication of the lawfulness of Petitioner’s detention by the U.S.

More importantly, the District Court did not “artificially prolong” Mr. Omar’s detention by preventing his middle-of-the-night transfer to Iraq. Resp’ts’ Br. 57. Respondents conflate two concepts that are fundamentally distinct in fact and in law: release to freedom, and transfer to another custodian for continued detention and torture. Certainly, no district court or would enjoin a habeas petitioner’s *release* from prison to freedom. It may, conversely, enjoin a prisoner’s

illegal transfer to another custodian, including a foreign government. For centuries, habeas has been used to bar transfers in aid of the court's jurisdiction. *See, e.g.*, Habeas Corpus Act of 1679, 31 Car. 2, cl.2, § 12 (outlawing transfer of prisoners beyond court's jurisdiction to evade habeas review).

To be sure, it remains the case that Iraqi authorities could arrest and detain Mr. Omar for criminal prosecution if the U.S. releases him and he remains in Iraq. Resp'ts' Br. 58. This possibility of future detention by another sovereign is inevitable in many habeas proceedings. But that question is not properly before this Court. Whether any further relief is appropriate and, if so, the form of that relief, must be addressed in the first instance by the District Court, which has broad equitable powers to "hear and determine the facts, and dispose of the matter as law and justice require." 28 U.S.C. § 2243; *see also Carafas v. LaVallee*, 391 U.S. 234, 239 (1968) ("[section 2243] is broad with respect to the relief that may be granted"); *Cunningham*, 371 U.S. at 243 (broad scope of writ "to achieve its grand purpose – the protection of individuals against . . . wrongful restraints upon their liberty").

The law is not blind to the common-sense distinction between transfer to torture and a door to freedom: "[E]ven a dog distinguishes between being stumbled over and being kicked." O.W. Holmes, *The Common Law* 3 (1881). Respondents cannot leverage a potential transfer to Iraqi custody to strip the

District Court of jurisdiction to review the legality of Mr. Omar’s nineteen-month detention

IV. THE POLITICAL QUESTION DOCTRINE DOES NOT STRIP FEDERAL COURTS OF HABEAS JURISDICTION.

Lacking support in precedent, respondents contend that the “political question” doctrine bars review. Resp’ts’ Br. 41-55. Their political question argument, though, largely repeats their mistaken precedent-based separation-of-powers contentions. *Cf. Baker v. Carr*, 369 U.S. 186, 210 (1962) (political questions are “primarily a function of the separation of powers”); *Abu Ali*, 350 F. Supp 2d at 64 (“The [political question] argument respondents raise is essentially the same as their separation of powers argument, and it is met with the same answer.”). Indeed, there has never been a case in which a federal court has ranked the lawfulness of executive detention of a U.S. citizen as anything other than a judicial question.

This Court 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 v. McNamara*, 445 F.3d 427, 435 (D.C. Cir. 2006) (quoting *CUCLN*, 859 F.2d at 935);¹¹ 13A Charles Wright et al., *Federal*

¹¹ Respondents rely heavily on *Bancoult* – but omit this directly relevant statement.

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.”); *Abu Ali*, 350 F. Supp 2d at 64 (same). When respondents seek radical restructuring of the separation of powers, courts “have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.” *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

Moreover, the Court in *Hamdi* rejected exactly the same separation-of-powers argument respondents make here based on military and foreign affairs powers. Resp’ts’ Br. 33, 41-50. The *Hamdi* Court “necessarily 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 op.):

[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.” *Id.*; accord *Mistretta v. United States*, 488 U.S. 361, 380 (1989).

There are three further reasons the “political question” doctrine does not bar habeas review here. *First*, fundamental separation of powers principles commit to Congress – not the executive or the U.N. – the authority to decide when exigencies warrant detention without speedy judicial review. *Second*, respondents’ political question arguments largely rest on facts Mr. Omar sharply contests and that cannot be accepted for purposes of respondents’ motion to dismiss. *See Sinclair*, 711 F.2d at 293. *Finally*, this case, like any habeas action that tests the legality and factual basis of detention, does not lack judicially manageable standards.

A. The Separation of Powers Compels Judicial Review of Unilateral Executive Detention.

Separation of powers principles prohibit the executive from usurping a unilateral detention power. The Founders spied “the very definition of tyranny” in the “accumulation of all powers, legislative, executive, and judiciary, in the same hands.” *The Federalist, supra*, at 301. Thus, they included the Suspension Clause in the Constitution to ensure that the executive never wielded detention power

unchecked by either Congress or the courts. *See Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946) (“Courts and their procedural safeguards are indispensable to our system of government.”).¹²

Respondents’ position impermissibly “serves ... to *condense* power into a single branch of government.” *Hamdi*, 542 U.S. at 536 (plurality op.). But “unless 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.” *Id.*; *accord id.* at 545 (opinion of Souter, J.); *id.* at 562 (Scalia, J., dissenting); *Rasul*, 542 U.S. at 485 (“[If Congress does not suspend the Writ,] the 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.”); *Ex parte Yamashita*, 327 U.S. 1, 9 (1946) (noting that “the Executive branch of the government could not ... withdraw from the courts

¹² A plurality in *Hamdi* reasoned that statutory authorization existed to detain a person allegedly captured *on the battlefield*. *See* 542 U.S. at 517 (O’Connor, J., plurality op.); *cf.* 18 U.S.C. § 4001(a) (stating that “except pursuant to an Act of Congress,” citizen detention is not permitted). Any detention power granted by an Authorization for the Use of Military Force does not extend to the arrest of citizens *in their homes*. *See, e.g., Milligan*. 71 U.S. 2, 107 (1866) (noting that Milligan was arrested at home). In any event, this question of statutory authorization is one for the District Court to resolve on remand, along with the alleged factual basis for Mr. Omar’s detention. *Hamdi*, 542 U.S. at 533 (plurality op.) (right to meaningful notice of the government’s factual allegation and a fair opportunity to rebut them).

the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.”).¹³

Here, this concern is sharpened by the Founders’ “general mistrust of military power.” *Hamdi*, 542 U.S. at 568 (Scalia, J., dissenting); *Ex parte Milligan*, 71 U.S. 2, 124 (1866) (“Martial law ... effectually renders the ‘military independent of and superior to the civil power’—the attempt to do which by the King of Great Britain was deemed by our fathers such an offense....”).

Certainly, the executive branch find no authorization to suspend the Writ in multinational or international consent. *See* Resp’ts’ Br. 30-32. While respondents do not argue that either the United Nations or the multinational force *has* suspended the Writ, therein lies the *de facto* nub of their argument. This argument, which dare not even speak its name, would run afoul of the well-settled principle that no international agreement can abrogate a constitutional provision. *See Reid*, 354 U.S. at 16 (plurality opinion) (“There is nothing in [the Supremacy Clause] which intimates that that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution.”); *Geofroy*, 133 U.S. at 267 (rejecting the idea that a treaty can “authorize what the Constitution forbids”); *supra* at 43. Federal officers find no shield from judicial scrutiny in international

¹³ Respondents proffer a “compelling interest in the functioning of Iraqi institutions” as justification for suspending the Great Writ. Resp’ts’ Br. 47. But the availability of habeas corpus does not turn on a balancing of executive interests.

authorization or multinationalism when they detain an American citizen without lawful process no more than they can hide behind the expedient of moving a prisoner offshore – an evasion *Hamdi* rejected, *see* 542 U.S. at 524 (plurality op.).¹⁴

Nor does the fact that respondents act under international or multinational auspices enhance their authority to suspend the Writ. On the contrary, a former Justice Department official explained, such arguments do violence to the Constitution:

[T]he Constitution nowhere permits the President, the treaty makers, or Congress to delegate federal power completely outside of the national government.... This law of conservation of federal government prevents the national government, as a whole, from concealing or confusing the lines of government authority and responsibility. When only US officers exercise federal

¹⁴ Respondents cite two cases from other circuits in which courts denied habeas relief to individuals detained based on convictions in Mexico and Barbados. *See* Resp'ts' Br. 29-30 (citing *Bishop v. Reno*, 210 F.3d 1295 (11th Cir. 2000), and *Pfeifer v. U.S. Bureau of Prisons*, 615 F.2d 873 (9th Cir. 1980)). *Bishop* and *Pfeifer* involved persons tried and sentenced for criminal offenses in another country. Under treaties and implementing legislation, both detainees were brought to the United States. In both cases, the detainee received a U.S. court hearing in which they voluntarily waived the right to challenge their sentences. Courts upheld this consensual arrangement, which had been conducted pursuant to a carefully negotiated treaty and under the close supervision of the federal judiciary. *See Bishop*, 210 F.3d at 1296-97; *Pfeifer*, 615 F.2d at 877. In both cases, the court examined closely the facts of the case, and in *Pfeifer*, closely looked at the factual question whether the consent was voluntary. *Id.* These cases confirm the existence of jurisdiction over interstate prisoner transfers, and the need for statutory authorization for detention. They hence undermine, rather than aid, respondents' position.

power under federal law, the people may hold the actions of the government accountable.

John Yoo, *UN Wars, US War Powers*, 1 Chi. J. Int'l L. 355, 367 (2000).

Respondents' argument would also extend into the United States an "unchecked system of detention" that the *Hamdi* Court rejected. 542 U.S. at 530 (plurality op.). Its practical consequence would be that the executive could detain American civilians in the homeland without any judicial review simply by citing an international or multilateral instrument as justification. As Justice Douglas warned in *Hirota*:

Such a holding would have grave and alarming consequences. Today Japanese war lords appeal to the Court for application of American standards of justice. Tomorrow or the next year an American citizen may stand in Germany or Japan condemned by a military court or commission. If no United States court can inquire into the lawfulness his detention, the military have acquired, contrary to our traditions ... a new and alarming hold on us.

Hirota, 338 U.S. at 201-02 (Douglas, J., concurring) (citation and footnote omitted).

B. Respondents' Political Question Argument Is a Naked Attempt at Bootstrapping Contested Facts Beyond Review.

Respondents' political question argument rests in large part on untested allegations that Mr. Omar denies and seeks to test in federal court. Resp'ts' Br. 45-47. As an initial matter, the posture of this appeal – on respondent's motion to

dismiss for lack of subject matter jurisdiction – means the Court must take as true petitioners’ factual contentions. *See Sinclair*, 711 F.2d at 293.

Due process, moreover, consists of the right to test the legal and factual grounds for detention before an independent magistrate. *See Hamdi*, 542 U.S. at 554-55 (Scalia, J., dissenting); *supra* at 13-15. *Hamdi* reaffirmed an American citizen’s right to independent judicial assessment of the facts, a right respondents seek to nullify.

The sole undisputed evidence here is that Mr. Omar was arrested at his home in Baghdad and has been held without access to a lawyer or an Article III tribunal for more than nineteen months. *See* J.A. 137-39; *supra* at 2-3. “An assertion that one *resided* in a country in which combat operations are taking place is not a concession that one was *captured* in a zone of active combat operations in a foreign theater of war.” *Hamdi*, 542 U.S. at 527 (plurality op.) (emphases in original and citation omitted); *accord Milligan*, 71 U.S. at 107, 122. Respondents’ remaining evidence rests on multiple hearsay, allegedly extracted from Jordanian militants or sheer hearsay statements bare of attribution. J.A. 138. Long-established evidentiary and due process principles demand heavy skepticism of such untested hearsay, especially from alleged coconspirators. *See Crawford v. Washington*, 541 U.S. 36, 42-53 (2004) (explaining unreliability of untested

testimonial hearsay); *Lee v. Illinois*, 476 U.S. 530, 541, 543 (1986) (treating alleged “accomplices’ confessions” as “presumptively unreliable”).

Respondents cannot bootstrap sharply contested facts into a legal basis for denying judicial scrutiny of those same facts. To do so would “turn our system of checks and balances on its head.” *Hamdi*, 542 U.S. at 536 (plurality op.) A citizen’s Due Process rights are “unaltered by the allegations surrounding the particular detainee or the organizations with which he is alleged to be associated.” *Id.* at 531; *see also Milligan*, 71 U.S. at 119 (“[I]t is the birthright of every American citizen when charged with crime, to be tried and punished according to law.”).

Further, when government accuses a citizen of the gravest of offenses, thereby seeking to deprive him of liberty, the Constitution demands extra proof beyond the “reasonable doubt” standard for criminal guilt. *See* U.S. Const. art III, § 3, cl. 2.

C. Respondents’ Political Question Arguments Do Not Strip This Court of Jurisdiction.

Respondents’ remaining arguments cannot displace the habeas corpus jurisdiction that the District Court properly possesses. First, respondents’ proposition that there is a “lack of judicially discoverable and manageable standards” is belied by the long history of federal court review of executive detention and transfer decisions. Indeed, when the Supreme Court decided *Hamdi*,

it had considered the judicially manageable standards doctrine but two months previously. *See Veith v. Jubelirer*, 541 U.S. 267, 278-81 (2004) (Scalia, J., plurality op.). It beggars belief to suggest that the Court in *Hamdi* simply forgot the doctrine just applied in *Veith*, and that this Court should rectify the Supreme Court's "error."

Finally, "the assertions by [respondents] that this habeas petition will impugn and embarrass [other countries] seem overstated and something of a red herring." *Abu Ali*, 350 F. Supp. 2d at 59-60. Executive power in foreign affairs, moreover, has never been extended to allow indefinite detention without judicial process. *See Bancoult*, 445 F.3d at 435.

CONCLUSION

For the foregoing reasons, the preliminary injunction issued by the District Court should be affirmed, and the case remanded to the District Court for a hearing on the merits of Mr. Omar's habeas petition.

Respectfully submitted,

Susan L. Burke (D.C. Cir. Bar No. 41659)

Heather L. Allred

BURKE PYLE LLC

4112 Station Street

Philadelphia, PA 19127

Telephone: (215) 487-6590

Facsimile: (215) 482-0874

Joseph Margulies (D.C. Cir. Bar. No. 48487)

MACARTHUR JUSTICE CENTER, UNIVERSITY OF
CHICAGO LAW SCHOOL

1111 East 60th Street

Chicago, IL 60637

Telephone: (773) 702-9560

Facsimile: (773) 702-0771

Aziz Z. Huq

Jonathan Hafetz (D.C. Cir. Bar No. 49761)

BRENNAN CENTER FOR JUSTICE, NEW YORK
UNIVERSITY SCHOOL OF LAW

161 Avenue of the Americas, 12th Floor

New York, NY 10013

Telephone: (212) 998-6730

Facsimile: (212) 995-4550

Counsel for Petitioners-Appellees

Dated: June 23, 2006

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 this brief contains 13, 903 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.

Susan L. Burke

CERTIFICATE OF SERVICE

I, William T. O'Neil, hereby certify that on June 23, 2006, I caused to be served two true and correct copies of the foregoing Brief for Appellees by hand delivery upon the following individual at the address indicated:

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

William T. O'Neil