

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

MOHAMMAD MUNAF,
MAISOON MOHAMMED, as Next Friend
of Mohammad Munaf,
Petitioners-Appellants,
v.

FRANCIS J. HARVEY, Secretary
of the U.S. Army, *et al.*,
Respondents-Appellees.

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

BRIEF FOR THE APPELLEES

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**CERTIFICATION OF COUNSEL AS TO
PARTIES, RULINGS, AND RELATED CASES**

A. Parties And Amici:

Petitioners-Appellants are Mohammad Munaf and Maisoon Mohammed, Munaf's sister and "next friend."

Respondents-Appellees are Secretary of the Army Francis J. Harvey; Maj. Gen. John D. Gardner; and Lt. Col. Quentin K. Crank.*

B. Rulings Under Review:

Petitioners seek review of the order dismissing their habeas petition for lack of subject matter jurisdiction, entered on October 19, 2006, by Judge Royce C. Lamberth, United States District Court for the District of Columbia, in Civ. No. 06-1455 (RCL). The district court's opinion is published at __ F. Supp. 2d __, 2006 WL 2971926 (D.D.C. Oct. 19, 2006).

* Applicant's habeas petition named as respondents Francis Harvey, as Secretary of the Army; Maj. Gen. William H. Brandenburg, as Deputy Commanding General of Detainee Operations; and Lt. Col. William Steele, as applicant's immediate custodian. However, Maj. Gen. John D. Gardner is the current Deputy Commanding General of Detainee Operations, and applicant's current immediate custodian is Lt. Col. Quentin K. Crank. Accordingly, Maj. Gen. Gardner and Lt. Col. Crank should be substituted as respondents. See Fed. R. App. P. 43(c)(2).

C. Related Cases:

This case has not previously been before this Court. *Omar v. Harvey*, 416 F. Supp. 2d 19 (D.D.C. 2006), appeal pending, No. 06-5126 (D.C. Cir.), raises similar issues to those presented in this appeal.

Respectfully submitted,

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December 22, 2006

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

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GLOSSARY

MNF-I

Multinational Force-Iraq

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

No. 06-5324

MOHAMMAD MUNAF,
MAISOON MOHAMMED, as Next Friend
of Mohammad Munaf,
Petitioners-Appellants,
v.

FRANCIS J. HARVEY, Secretary
of the U.S. Army, *et al.*,
Respondents-Appellees.

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

BRIEF FOR THE APPELLEES

JURISDICTIONAL STATEMENT

Petitioners filed this action in the district court as a petition for a writ of habeas corpus, asserting jurisdiction under 28 U.S.C. §§ 2241, 2242, 2243; U.S. Constitution Article I, § 9, cl. 2, Article III, the Due Process Clause of the Fifth Amendment; and 28 U.S.C. §§ 1331, 1651, 2201, and 2202. JA 9. On October 19, 2006, the district court dismissed the petition for lack of subject matter jurisdiction. *Id.* at 57. The

same day, petitioners filed a notice of appeal, which was timely under Federal Rule of Appellate Procedure 4(a)(1). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Mohammad Munaf is a dual Iraqi-United States national who has been tried and convicted by an Iraqi court of participation in a kidnapping-for-hire scheme in Iraq. During the pendency of the Iraqi government's criminal proceedings, Munaf is being held by United States military personnel who are serving as part of a multinational force acting under the authority of the United Nations Security Council and at the request of the Iraqi government. The question presented is whether the district court correctly ruled that it lacked jurisdiction over Munaf's habeas action challenging his detention by the multinational force and seeking an injunction barring his transfer to Iraqi authorities upon completion of the Iraqi criminal proceedings.

STATEMENT OF THE FACTS AND OF THE CASE

I. The United Nations Mandate and Role of the Multinational Force–Iraq

A. The Multinational Force–Iraq (MNF–I) is an internationally organized entity consisting of forces from approximately 27 nations, including the United States. JA 21. The MNF–I operates in Iraq at the request of the Iraqi government and under a U.N. Security Council mandate authorizing it “to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the

letters annexed to this resolution expressing, *inter alia*, the Iraqi request for the continued presence of the multinational force and setting out its tasks.”¹ JA 30 (U.N. Security Council Res. 1546 (June 8, 2004)). As the letters annexed to U.N. Security Council Resolution 1546 make clear, the MNF–I, acting “under unified command,” is charged with, among other tasks, deterring and preventing terrorism, and detaining individuals where necessary for imperative reasons of security. *Id.* at 36–37. Although the United States is a leading participant in the MNF–I, and the multinational force operates under the “unified command” of high-ranking United States military officers, the multinational force is legally distinct from the United States and includes high-ranking officers from other nations (for example, the second in command, Lt. Gen. G.C.M. Lamb, is a British officer).

Under the authority of the U.N. Security Council Resolution, the government of Iraq and the MNF–I agreed that the latter would maintain physical custody of defendants during criminal prosecutions in Iraqi courts under Iraqi law, because many Iraqi prison facilities have been damaged or destroyed. JA 21, 25, 59. The MNF–I holds these individuals as security internees during Iraqi criminal proceedings, in

¹ This authority is subject to periodic review and reconsideration. The Security Council extended MNF–I’s mandate through December 2006, *see* JA 38–43 (U.N. Security Council Res. 1637 (Nov. 11, 2005)), and recently did so again through December 2007, *see* U.N. Security Council Res. 1723 (Nov. 28, 2006), *available at* http://www.un.org/Docs/sc/unsc_resolutions06.htm.

accordance with the Security Council resolution and at the request of the Iraqi government. *Id.* at 25. Thus, although the MNF–I maintains physical custody over criminal defendants, they are detained under the authority of the Iraqi government (which is prosecuting them under Iraqi law), and pursuant to the MNF–I’s United Nations mandate. *Id.* at 25.

B. Iraq has established a Central Criminal Court of Iraq as a court of nationwide jurisdiction. JA 22. The Central Criminal Court is an Iraqi court under Iraqi governance, staffed by Iraqi judges who apply Iraqi law. *Ibid.* The court operates under a modified continental or inquisitorial model, rather than under the Anglo-American adversarial model. *Ibid.* Thus, the Central Criminal Court is divided into two chambers: an investigative court and a felony trial court. *Ibid.* The investigative court conducts an investigative hearing to determine whether there is sufficient evidence to warrant a criminal trial. *Ibid.* Witnesses present sworn testimony, and the investigative judge may question them. *Ibid.* After evidence is presented, the investigative judge questions the defendant, who has a right not to respond. *Ibid.* If the investigative court determines that there is sufficient evidence to proceed, it forwards a report to the trial court and recommends charges. *Ibid.*

The trial court sits in panels of three judges, who review the evidence submitted by the investigative court and may take additional evidence in formal proceedings.

JA 23. At the conclusion of the trial, the panel enters a verdict. *Ibid.* If the panel convicts the defendant, it imposes a sentence as prescribed by Iraqi law. *Ibid.*

In both investigative and trial proceedings, a defendant is entitled to court-appointed counsel, or may be represented by counsel of his choosing. JA 23. In both settings, a defendant has a right to submit evidence and call supporting witnesses. *Id.* at 51. If a defendant is convicted and sentenced to death, his case is automatically appealed to the Iraqi Court of Cassation. *Id.* at 54.

II. Munaf's Voluntary Presence in Iraq and His Iraqi Criminal Conviction

A. In March 2005, Munaf voluntarily traveled with several Romanian journalists to Iraq. JA 12. Ostensibly, Munaf was to serve as the journalists' translator and guide. *Ibid.* Shortly after their arrival in Iraq, the group was kidnapped and held captive for over two months. *Ibid.* In May 2005, MNF-I troops freed the captives during a raid. *Id.* at 21. After the rescue, the MNF-I troops detained Munaf because they suspected his involvement in the kidnapping. *Ibid.*

In July 2005, a panel of three MNF-I officers conducted a comprehensive review of Munaf's status and detention. JA 21. They considered the circumstances surrounding Munaf's capture, interviewed witnesses, and considered available intelligence information. *Ibid.* Munaf was present at the hearing, had an opportunity to hear the basis of his detention, to make a statement, and to call immediately

available witnesses. *Ibid.* The panel determined that Munaf was a security interneer who should continue to be detained for imperative reasons of security, in accordance with MNF–I’s United Nations mandate. *Ibid.* MNF–I subsequently referred Munaf’s case to the Central Criminal Court for investigation and possible trial. *Id.* at 22.

Munaf admitted on camera, in writing, and in front of the Iraqi investigative court that he participated as an accomplice in the kidnapping-for-profit of the Romanian journalists. JA 23–24. Munaf also appeared as a witness against his accomplices (*id.* at 25), who include his brother-in-law (*id.* at 23). In those hearings, Munaf identified the other kidnappers and admitted his role in the scheme. *Id.* at 25. Munaf was represented by counsel of his choice at the hearings, and was afforded the opportunity to present evidence and call witnesses. *Id.* at 51. The Iraqi investigative court determined that there was sufficient evidence to proceed, and it referred the case to the trial court. *Id.* at 25.

B. A United States military officer, who is a member of the MNF–I, appeared in the trial court at the request of the Romanian government to make a formal complaint against Munaf and his codefendants, as is customary under the inquisitorial system. JA 52. Weeks before he made the complaint, the officer filed with the trial court a formal letter from the Romanian Embassy authorizing him to make the complaint on Romania’s behalf. *Ibid.*

During the trial, Munaf and his codefendants recanted the confessions they had made in the investigative court, alleging that Iraqis or Romanians had forced them to confess. JA 52. Although Munaf has been in MNF–I custody since his capture, neither Munaf nor any of the other defendants alleged that MNF–I had coerced their confessions. *Id.* at 41, 52.

At his trial in the Central Criminal Court, Munaf and his attorneys were again given the opportunity to present evidence and call witnesses. JA 51. The trial court considered the evidence gathered by the investigative court and took additional statements from the defendants. *Id.* at 52. It heard argument from the Iraqi prosecutor and from multiple defense attorneys. *Id.* at 53. After deliberating, the trial court found Munaf and his five codefendants guilty of kidnapping, and sentenced them to death. *Id.* at 51. Such a sentence causes an automatic appeal to the Iraqi Court of Cassation. *Id.* at 54. That appeal is pending. MNF–I will continue to hold Munaf on behalf of the Iraqi government pending the resolution of his appeal in Iraq.

III. Munaf's Next-Friend Habeas Petition in the United States Courts

A. Munaf, through his sister as next-friend, filed this habeas action seeking his release from the custody of the multinational force in Iraq and an order barring his transfer to Iraqi custody. JA 61. After briefing and argument, the district court dismissed Munaf's petition for lack of subject matter jurisdiction. *Id.* at 58, 85.

The district court explained that custody is a critical factor in establishing jurisdiction under 28 U.S.C. § 2241(c) because “[t]he writ of habeas corpus does not act upon the petitioner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody.” JA 66 (quoting *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 494–95 (1973)). Thus, “if the petitioner is in custody under some authority other than the United States, there is no habeas jurisdiction,” because the court cannot compel a non-U.S. entity to release the petitioner. *Id.* at 67.

The district court determined it lacked jurisdiction because Munaf is not being held “under or by color of the authority of the United States,” or in violation of the laws of the United States. JA 68. Munaf alleged that he is “detained by U.S. officials” and that he is “in U.S. custody.” *Id.* at 10, 12. But the district court found that Munaf is instead “in the [physical] custody of coalition troops operating under the aegis of MNF–I, who derive their authority from the United Nations and the MNF–I member nations acting jointly.” *Id.* at 68. In addition, the district court concluded that Munaf is in the “constructive custody of the Republic of Iraq, which is seized of jurisdiction in the criminal case against him.” *Ibid.*

With regard to Iraq as the custodian, the district court held that “the writ of habeas corpus will not reach a foreign sovereign.” JA 68. The district court further held that, under governing precedent from this Court and the Supreme Court, “[i]t

does not change the outcome to point out that Munaf is in the physical custody of U.S. troops in their capacity as participants in MNF–I.” *Id.* at 69.

The district court determined that this result is compelled by the Supreme Court’s holding in *Hirota v. General of the Army MacArthur*, 338 U.S. 197 (1948) (per curiam). There, Japanese citizens filed motions in the Supreme Court for leave to file habeas petitions challenging their sentences by a military tribunal in Japan. 338 U.S. at 198. As the district court here noted, “American military personnel participated in the tribunal, and the petitioners were in the physical custody of U.S. troops.” JA 69. In his capacity as Supreme Commander for the Allied Powers, United States General Douglas MacArthur established the tribunal “as the agent of the Allied Powers.” *Id.* at 70 (quoting *Hirota*, 338 U.S. at 198). The Supreme Court denied the petitioners’ motions because “the authority under which the tribunal acted * * * emanated from the multinational Allies and not the United States in its independent capacity.” *Ibid.* Accordingly, the district court explained, the tribunal in *Hirota* was “not a tribunal of the United States” and the prisoners were not in the custody of the United States. *Ibid.* (quoting *Hirota*, 338 U.S. at 198).

The district court further noted that this Court had followed *Hirota* in denying the habeas petitions of German citizens challenging their convictions by an Allied

military tribunal. JA 70 (citing *Flick v. Johnson*, 174 F.2d 983, 985 (D.C. Cir. 1949) (“If [the tribunal] was an international tribunal, that ends the matter.”)).

The district court rejected Munaf’s attempt to distinguish *Hirota* and *Flick* on the ground that neither case involved a detained United States citizen. The court explained that nothing in either ruling turned on the citizenship of the party seeking the writ. Rather, the court reasoned, the source of authority underlying the custodian’s right to detain the prisoner was the critical consideration. And, the court continued, when a custodian acts under the authority of a foreign government or a multinational body, there is no habeas jurisdiction. JA 71–73.

The district court also rejected Munaf’s contention that the United States had merely used the MNF–I as an intermediary to carry out its wishes. Noting that the constitutional separation of powers limits a court’s ability to inquire into the Executive’s exercise of its constitutional foreign affairs and war powers, the district court found that Munaf “offers little real evidence that the United States is using MNF–I as an ‘intermediary to detain the citizen.’” JA 77. The court concluded that, because Munaf did not demonstrate that the MNF–I is “a mere sham by which the United States seeks to avoid constitutional accountability,” he failed to establish that he is actually in the custody of the United States, in violation of the laws of the

United States. *Id.* at 80. Accordingly, the district court determined that it lacked jurisdiction, and it dismissed Munaf's petition. *Id.* at 82.

B. Munaf appealed, and sought an emergency motion for injunctive relief to bar his transfer to Iraqi authorities pending his appeal to this Court. A panel of this Court denied Munaf's motion, over one judge's dissent, but entered an administrative injunction to allow Munaf to seek further relief. Order, No. 06-5324 (Oct. 27, 2006) (*per curiam*). The Supreme Court denied Munaf's application for an injunction pending appeal. No. 06A471 (Nov. 13, 2006). On December 15, 2006, this Court, acting en banc, granted Munaf an injunction pending appeal.

SUMMARY OF THE ARGUMENT

The district court properly dismissed this habeas action for lack of jurisdiction.

1. In *Hirota v. General of the Army MacArthur*, the Supreme Court held that the United States courts lack the power to review the detention of individuals held pursuant to international authority, even when they are physically in the custody of United States military personnel. This Court recognized and applied the rule of *Hirota* in *Flick v. Johnson*. Munaf is detained by United States military personnel in Iraq acting as part of a multinational force under the authority of a U.N. Security Council resolution and at the request of the Iraqi government. *Hirota* and *Flick* therefore compel the conclusion that the United States courts lack jurisdiction over this action.

Munaf's attempts to circumvent *Hirota* and *Flick* are unavailing. First, Munaf points out that he is a United States citizen, while the petitioner in *Hirota* was not. But citizenship, in itself, does not create jurisdiction when a United States national is held abroad under international authority. If it did, United States courts could recognize habeas challenges brought by United States citizens to their criminal convictions in foreign countries, but it is beyond dispute that such jurisdiction is lacking. Munaf fails to cite a single case in which the Supreme Court has entertained the habeas claims of a prisoner — citizen or not— held abroad under international authority.

Second, Munaf emphasizes that he is being physically held by United States military officials in Iraq, acting as part of the multinational force. But the prisoners in *Hirota* and *Flick* were held by United States military personnel as well, acting under international authority. The cases on which Munaf relies are clearly inapposite: Each involved prisoners who were held solely under *United States* authority. The fact that the multinational force detaining Munaf is commanded by a member of the United States Army is also immaterial. The Security Council resolution authorizing the multinational force directed that the force would be “under unified command.” And the authority to detain Munaf stems from that resolution, not United States law.

Moreover, the allied force in *Hirota* was commanded by an American general as well, who remained under the United States chain of command to the President.

Third, Munaf argues that this Court need not heed *Hirota* because it rests on legal principles that the Supreme Court has since abandoned. That argument is fundamentally flawed because, as the Supreme Court has stressed, the lower courts are not at liberty to piece together arguments as to why a Supreme Court decision should not be followed, and the Supreme Court itself has never questioned, much less overruled, *Hirota*. Therefore, *Hirota*, not to mention *Flick*, remains binding precedent. In any event, no development in the Supreme Court's case law since *Hirota* calls into question the rule that United States courts lack the authority to review the detention of prisoners held abroad pursuant to international authority.

2. Even apart from *Hirota* and *Flick*, the Court should affirm the dismissal of Munaf's petition because it presents a non-justiciable political question, and exercise of habeas jurisdiction here would offend the separation of powers. Munaf voluntarily traveled to an active combat zone in Iraq and committed criminal offenses there. If Munaf should not be detained in Baghdad by United States troops in their role as part of the MNF-I, or should not be transferred at the appropriate time to Iraqi authorities, those are decisions to be made by the Executive Branch, based on military and foreign policy determinations that would be heavily influenced by the judgments

of United States officials on the ground in Iraq in the midst of the war there. Respondents are not aware of any judicial decision overriding the military's determination as to how to deal with an individual captured in an active combat zone abroad who is determined to pose a security threat to United States forces and local authorities and residents alike.

In such circumstances, the various factors described by the Supreme Court in *Baker v. Carr* to identify non-justiciable political questions all compel dismissal here. First, the Constitution commits the foreign affairs and war powers to the political branches, and adjudication here would require the courts to seriously interfere with the Executive's exercise of those powers. The Executive Branch's determination to permit United States military personnel to participate in the MNF-I and detain individuals whose criminal cases are pending in the Iraqi courts is a discretionary decision concerning how best to pursue the Nation's military objectives. It is also a foreign policy decision to support the development of the Iraqi judicial system.

Second, there are no judicially discoverable and manageable standards for evaluating the propriety of Munaf's detention. Under longstanding precedent from this Court and the Supreme Court, while a court may determine whether a treaty authorizes the Executive to detain a fugitive in the United States on behalf of a foreign sovereign, the Constitution does not provide standards for evaluating the

propriety of the detention or subsequent surrender for criminal prosecution in the foreign state. Here, Munaf is detained pursuant to international authority, not a treaty. And there are no judicially discoverable or manageable standards for evaluating the propriety of detention or transfer under that authority. Since neither international authority nor the Constitution provides standards by which a court may evaluate Munaf's detention, his petition is not justiciable.

The third and fourth *Baker* factors are present too because, in the absence of legal standards, a court would be forced to pass judgment on a policy-based decision of the Executive. That would require a nonjudicial policy determination, and would exhibit a lack of respect due a coordinate branch of government. And the remaining two *Baker* factors are implicated as well. The Executive Branch determined that assisting the Iraqi government by holding defendants during the course of criminal proceedings is essential to help support the new Iraqi judicial system while Iraq rebuilds its infrastructure and central institutions. In light of that determination, made in the course of ongoing combat operations, there is an unusual need for adherence to a political decision already made. In addition, any decision that conflicts with that commitment would result in multifarious pronouncements by various branches of government on a single, vital question. Because Munaf's claims cannot be disentangled from these political questions, his petition is not justiciable.

3. Finally, exercise of habeas jurisdiction in this case is barred by principles of international comity. Munaf's petition seeks to enjoin respondents from turning him over to the custody of the Iraqi government and to order respondents to return him to the United States. That is not the sort of relief available under the habeas doctrine. And such relief would interfere with Iraq's ongoing adjudication of criminal proceedings against one of its own nationals who has been convicted of committing a crime within Iraq, after voluntarily entering that country. The Iraqi court's conviction is a foreign judicial determination entitled to respect. Any order by a United States court that interferes with Munaf's continued detention while his Iraqi criminal appeal is pending, or that prohibits his transfer to Iraqi custody after his appeal (should that be unsuccessful), would impermissibly interfere with the sovereign acts of a foreign nation. Indeed, in analogous circumstances, this Court in *Holmes v. Laird* affirmed the dismissal of an action seeking to bar the transfer of a United States serviceman *in the United States* to Germany to answer for criminal offenses committed in Germany. *Holmes* is controlling here.

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal for lack of subject matter jurisdiction. *Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 183 (D.C. Cir. 2006).

ARGUMENT

Munaf voluntarily traveled to an active theater of combat in Iraq and engaged in criminal conduct there. He was captured and is being detained by a multinational force in Iraq acting under international authority, which, in accordance with its United Nations mandate, determined that Munaf poses a security threat and should be detained while criminal proceedings commenced against him by the government of Iraq are completed. The district court properly held that it lacked jurisdiction to entertain a habeas petition filed on Munaf's behalf seeking his release from his current custody by the multinational force in Iraq and barring his transfer to Iraqi authorities. Indeed, as explained below, exercising jurisdiction over the extraordinary habeas petition in this case would directly contradict settled principles governing the jurisdiction of the United States courts, the separation of powers between the judicial and political branches, and the sovereign interests of foreign nations to prosecute and punish individuals for criminal offenses committed within their own borders.

- I. The District Court Lacked Jurisdiction under Binding Supreme Court and Circuit Precedent.**
 - A. Courts of the United States Lack Jurisdiction over the Habeas Claims of Individuals Held under International Authority.**

Controlling authority — from both the Supreme Court and this Court — compels the conclusion that the district court lacked jurisdiction over Munaf's habeas

petition. As the district court correctly held, the central requirement for habeas jurisdiction is that the custodian be “subject to the jurisdiction of the District Court.” JA 66 (quoting *United States ex rel. Keefe v. Dulles*, 222 F.2d 390, 392 (D.C. Cir. 1954)). And under the Supreme Court’s decision in *Hirota* and this Court’s decision in *Flick*, jurisdiction over the custodian turns on whether he holds the prisoner under the laws of the United States or, instead, under international authority.

In *Hirota*, the Supreme Court considered a motion for leave to file a habeas petition on behalf of several Japanese citizens in the custody of United States military personnel in Japan, acting as part of the Allied Powers. See *Hirota*, 338 U.S. at 199 (Douglas, J., concurring). The prisoners named as respondents General MacArthur, the Supreme Commander for the Allied Powers; the Commanding General of the United States Eighth Army (the prisoners’ immediate custodian); and other high-ranking United States military officials. *Ibid.* The prisoners had been convicted of war crimes and were in custody pending imposition of their sentences. They had been convicted by the International Military Tribunal for the Far East, a tribunal established by General MacArthur, acting “as an agent of the Allied powers.” *Id.* at 198.

The Supreme Court held that “the courts of the United States have no power” to consider the prisoners’ habeas petition. *Id.* at 198. Noting that the prisoners “are

being held in custody pursuant to the judgments of a military tribunal in Japan,” the Supreme Court explained that it had no authority to “review, to affirm, to set aside or annul the judgments and sentences imposed” because “the tribunal sentencing these petitioners is not a tribunal of the United States.” *Ibid.* Thus, because the prisoners were not held pursuant to the laws of the United States, the Supreme Court held that the prisoners could not seek habeas relief in any United States court, even though the tribunal was established by General MacArthur, who was indisputably an officer in the United States Army subject to the direction of the President, and even though the petitioners were in the physical custody of the United States Army. *Ibid.*²

Following *Hirota*, this Court itself reaffirmed that “no court of this country” has authority to exercise habeas jurisdiction over the claims of a petitioner held abroad under international authority, even if the petitioner is held by United States military personnel. *Flick*, 174 F.2d at 984. In *Flick*, this Court affirmed a district court’s dismissal, for lack of jurisdiction, of a German citizen’s habeas petition. *Flick* was a German citizen, convicted of war crimes in Germany. *See id.* at 985. He was “serving

² Indeed, in his concurring opinion, Justice Douglas stressed that, among other things, the prisoners were “under the custody of” an American General (the Commanding General of the Eighth Army) who held them pursuant to orders of General MacArthur (338 U.S. at 199); that “the tribunal [that convicted the prisoners] is dominated by American influence” (*id.* at 207); and that “the chain of command from the United States to the Supreme Commander [MacArthur] is unbroken” (*ibid.*).

a sentence of imprisonment imposed by [a military tribunal] sitting in” the “American Zone of Occupation” in post-war Germany. *Id.* at 983. “American Army forces” were his jailers, and Flick named as respondents the Secretary of Defense and other high-ranking United States military officials. *Ibid.* Because Flick was being held pursuant to a sentence imposed by the military tribunal, this Court explained, the determinative question was whether “the court which tried and sentenced Flick [was] a tribunal of the United States.” *Id.* at 984 (citing *Hirota*). Accordingly, the Court “inquire[d] into the origin of the Flick tribunal and the source of its power and jurisdiction to determine whether it was a court of the United States.” *Ibid.*

Even though that tribunal had been established by the American “Zone Commander,” who appointed its members (*id.* at 985), and who was himself a General in the United States Army (*ibid.*), this Court determined that the tribunal “was, in all essential respects, an international court” (*ibid.*): the tribunal’s “power and jurisdiction arose out of the joint sovereignty of the Four victorious Powers” (*ibid.*), and not United States law. The Allied Powers established a “Control Council,” which enacted a law “for the prosecution of war crimes.” *Ibid.* That law “vested in the Commander for the American Zone the authority to determine and designate, for his zone, the tribunal by which accused persons should be tried.” *Ibid.* Because the court that convicted Flick “was not a tribunal of the United States, its actions cannot be

reviewed by any court of this country.” *Ibid.* Because the tribunal had been established under international authority, “that ends the matter,” despite the fact that Flick was serving his sentence in the custody of the United States Army. *Ibid.* Accordingly, the Court affirmed the district court’s determination that it lacked jurisdiction to review the legality of Flick’s detention. *Id.* at 986.

As the district court held, *Hirota* and *Flick* govern here. Munaf is in custody in Iraq under international authority, not under the laws of the United States. The MNF–I is composed of personnel from approximately 27 nations, including the United States, and operates under a United Nations Security Council mandate and at the request of the Iraqi government. JA 21, 27–43. U.N. Security Council Resolution 1546 authorizes MNF–I personnel to “intern[individuals within Iraq] where this is necessary for imperative reasons of security.” *Id.* at 37. Exercising that authority, MNF–I agreed with the Iraqi government that the former would maintain physical custody of defendants while their cases are adjudicated in the Iraqi criminal justice system. *Id.* at 25–26. And Munaf is currently held under that authority pursuant to the determination of a three-member MNF–I tribunal that he should be detained for imperative reasons of security, in accordance with MNF–I’s United Nations mandate. *Id.* 21–22, 25–26; *see supra* at 5–6. Consequently, the district court properly determined it lacked jurisdiction over Munaf’s habeas petition. *Id.* at 69.

B. Munaf's Arguments to the Contrary Are Mistaken.

Munaf attempts to distinguish this controlling precedent in three principal respects. First, he points out that the petitioners in *Hirota* were “admitted enemy alien[s]” while he is a United States citizen. Munaf Br. 25. Second, he emphasizes that he is in the physical custody of United States military personnel. *Id.* at 17–23. And third, he contends that the decision in *Hirota* turned on legal principles that the Supreme Court has since abandoned. *Id.* at 25–26. Each argument is unavailing.

1. Citizenship Is Not a Basis for Habeas Jurisdiction When a Prisoner Is Held Abroad under International Authority.

Munaf argues that the fact that he is a United States citizen itself is sufficient to confer jurisdiction over a habeas action filed on his behalf, even where, as here, he is being held under international authority. That claim is incorrect. If citizenship were a font of jurisdiction regardless of the circumstances of detention, then United States courts would be open to the claims of United States citizens being held under the authority of *any* tribunal or sovereign, whether American or foreign. But it is well-settled that federal courts may not entertain claims of United States citizens being held by foreign sovereigns. For example, in *Keefe v. Dulles*, this Court affirmed the dismissal, for lack of jurisdiction, of the habeas petition of an American soldier stationed overseas who was being held on charges brought by French authorities,

despite claims that the United States Secretaries of State, Defense, and the Army had conspired to deprive the soldier of his rights in connection with his incarceration in a French prison. 222 F.2d at 391–92; *see also Holmes v. Laird*, 459 F.2d 1211, 1212 (D.C. Cir. 1972) (refusing to enjoin transfer of United States citizen to Germany to serve sentence for criminal conviction in Germany). Indeed, courts have refused to entertain challenges by United States citizens to foreign convictions even when the citizen is serving the foreign-imposed sentence in the United States. *See, e.g., Bishop v. Reno*, 210 F.3d 1295, 1300 (11th Cir. 2000).

In *Johnson v. Eisentrager*, the Supreme Court observed that citizenship is “a head of jurisdiction.” 339 U.S. 763, 769 (1950). But that statement was made in the context of a case in which the petitioners (who were not United States citizens) were indisputably being held under the sole authority of the United States. Indeed, the Court went out of its way to note at the outset of its opinion that “[t]he proceeding [pursuant to which the habeas petitioners were detained] was conducted wholly under American auspices and involved no international participation.” *Id.* at 766. Nothing in *Eisentrager* suggests that citizenship could confer jurisdiction where, as here, an individual is being detained abroad under international authority, and *Munaf* has not cited a single case in which the Supreme Court has entertained the habeas claims of

a prisoner (whether a United States citizen or not) held abroad by United States personnel under international authority.

To be sure, as the dissenters in *Rasul v. Bush*, pointed out, citizenship may provide a basis for exercising habeas jurisdiction, even where the detention is abroad, when the individual is being held under United States law. 542 U.S. 466, 501–02 (2004) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting). But citizenship, in itself, is not a font of habeas jurisdiction when an individual is being detained under international authority. Moreover, as the majority stated in *Rasul*, the habeas statute itself “draws no distinction between Americans and aliens held in federal custody” (542 U.S. at 481), and it certainly draws no distinction between citizens and aliens when it comes to individuals held under international authority.

Accordingly, there is no question that, despite his United States citizenship, United States courts would lack jurisdiction to entertain a habeas petition filed by Munaf if he were in Iraqi custody pursuant to his criminal conviction for conduct in Iraq. The result is no different where, as here, United States forces are simply holding Munaf during the Iraqi criminal proceedings against him as part of a multinational force acting under international authority and at the request of the Iraqi government.

2. There Is No Habeas Jurisdiction over the Claims of a Prisoner Detained Abroad by United States Military Personnel Acting under International Authority.

Munaf also contends that courts of the United States always have jurisdiction to review the habeas claims of United States citizens held abroad “in the custody of U.S. jailers.” Munaf Br. 12–13. This claim is simply a variation of his argument that citizenship alone confers habeas jurisdiction in this case, because, as discussed (*see supra* at 18–21), the prisoners in both *Hirota* and *Flick* were in the immediate custody of United States forces as well (acting under international authority). In any event, the cases on which Munaf relies are plainly inapposite: Each involved prisoners who were admittedly held under the sole authority of *the United States*.

In *Madsen v. Kinsella*, the Supreme Court considered the claims of a prisoner held at the “Federal Reformatory for Women in West Virginia” (343 U.S. 341, 342 (1952)) after having been convicted by a court of the “United States Courts of the Allied High Commission for Germany” (*ibid.*), which were “at the time of the trial of petitioner’s case, tribunals in the nature of military commissions conforming to the Constitution and laws of the United States” (*id.* at 356). The federal courts had jurisdiction over Madsen’s petition because it involved a detention under the authority of a tribunal established under United States law.

Munaf asserts that the court in *Madsen* was an international tribunal and not a court established under the laws of the United States. Munaf Br. 13 n.1. That is incorrect. In contrast to the tribunal at issue in *Flick*, which was established under the authority of the Allied Powers to prosecute war crimes in Germany (see 174 F.2d at 985), the court that tried Madsen was established under United States authority to prosecute crimes unrelated to the war that took place in the American Zone during the occupation of Germany. See *Madsen*, 343 U.S. at 357 (“[The United States Courts of the Allied High Commission] derived their authority from the President as occupation courts, or tribunals in the nature of military commissions, in areas still occupied by United States troops.”); see *id.* at 371 (Black, J., dissenting) (“Executive officers acting under presidential authority created the system of courts that tried [Madsen], promulgated the edicts she was convicted of violating, and appointed the judges who took away her liberty.”).

Indeed, in *Flick*, this Court expressly recognized that individuals, like Madsen, “serving sentences of a United States Military Commission, and thus in custody under or by color of the authority of the United States, may sue for the writ in the District of Columbia, naming as respondents officials at the seat of Government, through whose direction the actual jailer may be required to act.” 174 F.2d at 983–84. Nevertheless, this Court held that the courts of the United States lack jurisdiction

over Flick’s habeas petition, because he was detained under the authority of a tribunal established under international, rather than United States, authority. *Id.* at 985. Because Munaf is being detained under international authority — and, in particular, pursuant to a determination made by an MNF–I tribunal acting under international authority (*see supra* at 5–6) — *Flick*, and not *Madsen*, governs.

Munaf’s reliance on *Burns* and *Toth* is similarly misplaced. Munaf Br. 14. Those cases involved petitioners who were tried by United States courts-martial, convicted of violating United States military law, and held solely under that United States authority. *See Burns v. Wilson*, 346 U.S. 137, 138 (1953); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13 & n.2 (1955). *Hamdi* is likewise inapposite. The petitioner in *Hamdi* was held in the United States under United States law. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004) (plurality op.) (“[W]e agree with the Government’s alternative position, that Congress has in fact authorized Hamdi’s detention, through the [Authorization for Use of Military Force].”). Moreover, *Hamdi* challenged his detention in the United States; unlike Munaf, he was not subject to prosecution by a foreign sovereign for offenses committed in another land and therefore did not seek to enjoin any transfer to a foreign sovereign. Because these cases involve prisoners detained solely under United States authority, it is no surprise that the Supreme Court recognized habeas jurisdiction over the prisoners’ claims.

Munaf relies heavily on the fact that United States military personnel are in command of the MNF–I. Munaf Br. 17–23. But, as discussed above, that was equally true in *Hirota*, where the Supreme Commander of the Allied Forces was an American General who ultimately answered only to the President of the United States. Just as in *Hirota*, the fact that United States military personnel have top command of the multinational force (the second in command is a British officer) does not in any way detract from the facts that the MNF–I is authorized by, and acts under, international authority, and that Munaf is being held pursuant to that international authority.

As we have explained, what is determinative under *Hirota* and *Flick* is not whether the immediate custodian is an officer of the United States military, but whether the authority to detain stems from United States or international authority. 338 U.S. at 198. Here, MNF–I’s authority to detain Munaf is derived from U.N. Security Council Resolution 1546 (and related resolutions), the agreement between the government of Iraq and MNF–I, and the determination of the MNF–I panel that Munaf is a security internee subject to detention under that authority. Munaf’s conviction by an Iraqi court for kidnapping provides an additional basis to detain Munaf under MNF–I’s international authority because it confirms the security threat that Munaf poses to Iraq. In *Hirota*, the Supreme Court held that “the courts of the United States” lacked habeas jurisdiction, despite the facts that the tribunals

authorizing the prisoners' detention were established by General MacArthur (338 U.S. at 198), and that "the chain of command from the United States to the Supreme Commander [*i.e.*, MacArthur] [was] unbroken" (*id.* at 207 (Douglas, J., concurring)). Just as General MacArthur's status as a United States officer did not confer jurisdiction to review a prisoner's detention under international authority in *Hirota*, the fact that an American General commands MNF–I does not confer jurisdiction to review Munaf's detention pursuant to international authority.

Munaf points to a statement in Secretary of State Powell's letter, which was incorporated by reference into U.N. Security Council Resolution 1546 (*see* JA 30), that the multinational force must "function under a framework that affords the force and its personnel the status that they need to accomplish their mission, and in which contributing states have responsibility for exercising jurisdiction over their personnel." Munaf Br. 20–21 (quoting JA 37) (emphasis omitted). Munaf appears to suggest that this language, by its terms, permits the courts of the United States to exercise jurisdiction over claims such as his. That suggestion is mistaken.

Munaf, of course, is not part of the United States forces contributing to the MNF–I or "their personnel." Furthermore, immediately after the language Munaf quotes, Secretary Powell's letter states that "[t]he existing framework governing these matters is sufficient for these purposes." JA 37. The "existing framework" to which

Secretary Powell referred includes the status protections set forth in Coalition Provisional Authority Order No. 17. That order made MNF–I troops “immune from any form of arrest or detention other than by persons acting on behalf of their Parent States” and subjected them to the “exclusive jurisdiction of their Parent States.” Coalition Provision Authority Order No. 17, Sec. 2, ¶ 4 (June 26, 2003).³

This reservation of jurisdiction for participating states over their own personnel contributing to the multinational force is akin to status-of-forces agreements, which define the respective criminal jurisdictions of the sending and receiving states over the military personnel of the sending state. *See, e.g., Holmes*, 459 F.2d at 1212 (NATO status-of-forces agreement provisions “are designed to avoid jurisdictional clashes when military personnel of one country — the ‘sending State’ — are assigned to peacetime duty within the borders of another — the ‘receiving State’”). In some cases, a status-of-forces agreement requires the sending state to turn its personnel over for trial in the courts of the receiving state. *See, e.g., id.* at 1219. Other status-of-forces agreements give the sending state’s personnel immunity from the jurisdiction

³ Order 17 was revised in June 2004. A copy of the revised order is available at http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf. For the convenience of the Court and opposing counsel, we have included the original Order 17 in an addendum to this brief.

of the receiving state's courts in a manner similar to Order No. 17.⁴ See, e.g., *Reid v. Covert*, 354 U.S. 1, 15 (1957) (plurality op.). Agreements of this sort do not provide prisoners detained by a sending state's forces an individual right to challenge the legality of their detention in the sending state's courts, nor do U.N. Security Council Resolution 1546 or Order No. 17. Instead, agreements of this sort simply permit a sending state to apply its own laws to its own personnel. That is of no assistance to Munaf, who is being held by MNF-I forces under international authority.

3. *Hirota* Remains Binding Precedent.

Munaf argues that this Court need not give effect to *Hirota* on the theory that the decision was based on a legal premise the Supreme Court has subsequently rejected. Munaf Br. 27. In other words, Munaf effectively asks this Court to declare that *Hirota* is no longer good law. That argument should be rejected because the Supreme Court has never questioned the validity of *Hirota*, much less overruled it, and *Hirota* therefore remains controlling. As this Court has recognized, the Supreme Court has recently admonished that the lower courts must "follow the case which

⁴ For this reason, Munaf is correct to say that "U.S. soldiers in MNF-I are answerable only to U.S. authority." Munaf Br. 21 n.5 (emphasis added). But the fact that United States military personnel participating in the MNF-I are immune under this agreement from Iraqi judicial process does not address the question whether a security internee may challenge the validity of his detention in a United States court and, more to the point, does not alter the fact that security internees like Munaf are held by MNF-I under international authority and not laws of the United States.

directly controls, leaving to this Court the prerogative of overruling its own decisions.” *Agostini v. Felton*, 521 U.S. 203, 237 (1997); see *Sierra Club v. EPA*, 322 F.3d 718, 725 (D.C. Cir. 2003).

In any event, even if this Court were at liberty to cast aside Supreme Court precedent, Munaf’s revisionist argument that *Hirota* has been undermined by the Supreme Court’s subsequent precedents is without merit. Shortly before the Supreme Court decided *Hirota*, it had held in *Ahrens v. Clark* that a federal district court lacks jurisdiction to issue a writ of habeas corpus unless the prisoner seeking the writ is physically within the territorial jurisdiction of that court. 335 U.S. 188, 192–93 (1948). Munaf contends that *Ahrens* controlled the Supreme Court’s decision in *Hirota*. He argues that, because the *Hirota* prisoners were held in Japan, they were not within the jurisdiction of any district court and so, under *Ahrens*, they could not file their petitions in such a court. He further argues that, because no lower court could review the petitions, the Supreme Court lacked appellate jurisdiction over the claims, and that, because the claims did not come within the Court’s limited original jurisdiction, “the Court had no choice but to rule as it did.” Munaf Br. 29.

Under this reading of *Hirota*, the Supreme Court’s statement that no court in the United States had jurisdiction to hear the prisoners’ claims is mere “dicta.” *Id.* at 30. As Munaf completes this story, the Supreme Court later abandoned the rule in

Ahrens, requiring as a condition for district court habeas review only that the prisoner’s custodian be located within a district court’s jurisdiction. *Id.* at 31 (citing, among other cases, *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973)). Thus, Munaf concludes, *Hirota*’s dicta “has not survived.” *Id.* at 30.

Munaf’s argument finds no support in *Hirota* itself. Nowhere in the controlling opinion did the Supreme Court mention *Ahrens* — which was decided the year before *Hirota* — or suggest that its decision turned on the details of the Court’s original and appellate jurisdiction. The omission of any reference to *Ahrens* is made even more significant by the fact that Justice Douglas referred to the decision in his concurring opinion. 338 U.S. at 201–202. Rather, the *Hirota* Court emphasized the fact that the prisoners were detained under international authority, and did not even mention that the prisoners were being detained outside the United States. *See id.* at 198.

More fundamentally, *Ahrens* expressly left open the question of whether any court could hear the habeas petition of “a person confined in an area not subject to the jurisdiction of any district court.” 335 U.S. at 192 n.4. Thus, the question presented in *Hirota* was not controlled by *Ahrens*, as Justice Douglas — the author of *Ahrens* — observed in his concurring opinion in *Hirota*. 338 U.S. at 200. Indeed, Justice Douglas wrote a concurring opinion precisely because he disagreed with the majority’s “holding” that “no United States court can inquire into the lawfulness” of

the detention of a United States citizen held abroad by the United States military under the authority of an international tribunal. *Id.* at 201–02.

This Court similarly recognized that *Ahrens* left open the question whether any court could hear the habeas petition of a prisoner outside the jurisdiction of any district court. *Flick*, 174 F.2d at 983. And in *Flick*, this Court also recognized that *Hirota* resolved that question for individuals held abroad pursuant to international authority. *Id.* at 984. Moreover, the fact that this Court applied *Hirota* in *Flick* establishes that this Court has already rejected Munaf’s novel theory that *Hirota* expressed only a limitation on the Supreme Court’s original jurisdiction.

Munaf is therefore mistaken in suggesting that *Hirota* was based on a legal premise the Supreme Court has abandoned. Rather, *Hirota*, not to mention *Flick*, remains binding precedent which requires the dismissal of a habeas petition, such as Munaf’s, filed on behalf of an individual held abroad under international authority.

II. Munaf’s Claims Present Non-Justiciable Political Questions, and the District Court’s Exercise of Habeas Jurisdiction Would Offend the Separation of Powers.

In the alternative, the Court may affirm the dismissal of Munaf’s petition because it presents a non-justiciable political question.⁵ The political question

⁵ This Court may affirm the district court’s judgment on any basis supported by the record. *Carney v. Am. University*, 151 F.3d 1090, 1096 (D.C. Cir. 1998).

doctrine is a product of the constitutional separation of powers. *Baker v. Carr*, 369 U.S. 186, 210 (1962). As this Court has recently explained, “courts lack jurisdiction over political decisions that are by their nature committed to the political branches to the exclusion of the judiciary.” *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1768 (2006) (quotation marks omitted). When a case presents a political question, a court must dismiss it for lack of subject matter jurisdiction. *Id.* at 201. That is so even in habeas cases. *United States ex rel. New v. Rumsfeld*, 448 F.3d 403, 406, 411 (D.C. Cir. 2006).

The Supreme Court has identified six factors, any one of which requires dismissal on political question grounds:

a [1] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment of multifarious pronouncements by various departments on one question.

Schneider, 412 F.3d at 194 (quoting *Baker*, 369 U.S. at 217). In this case, all six *Baker* factors are present, making clear that Munaf’s claims are nonjusticiable.

A. The Constitution Commits the Foreign Affairs and War Powers to the Political Branches.

Adjudication of Munaf's habeas petition would require the courts to interfere with the foreign affairs and war powers that the Constitution vests in the Executive Branch. This Court has observed that Article II of the Constitution "provides allocation of foreign relations and national security powers to the President, the unitary chief executive." *Schneider*, 412 F.3d at 194. And the Supreme Court has repeatedly emphasized that, under our Constitution, the Executive Branch exercises the "vast share of responsibility for the conduct of our foreign relations." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003). Moreover, because the President is the "Commander in Chief of the Army and Navy of the United States" (U.S. Const. Art. II, § 2), "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs" (*Dep't of the Navy v. Egan*, 414 U.S. 518, 530 (1988)). These considerations are particularly strong when they involve the Executive Branch's discretionary military and foreign policy decisions concerning persons and events wholly outside the United States, "on the far side of the world." *Bancoult v. McNamara*, 445 F.3d 427, 429 (D.C. Cir. 2006); *see id.* at 436.

The Executive Branch determined that the United States military should participate in MNF-I "under unified command" in order to "contribute to the maintenance of security in Iraq, including by preventing and deterring terrorism and

protecting the territory of Iraq.” JA 36. As part of its commitment, the Executive Branch agreed that MNF–I forces could “intern[individuals within Iraq] where this is necessary for imperative reasons of security.” *Id.* at 37. In furtherance of that commitment, and under the authority of the U.N. Security Council Resolutions, the MNF–I agreed with the government of Iraq that the MNF–I would maintain physical custody of defendants being prosecuted in the Iraqi criminal justice system until the defendants’ cases are fully resolved. *Id.* at 25–26. It is under this international agreement and international authority that United States military personnel, acting as part of the MNF–I, are detaining Munaf.

Munaf voluntarily chose to enter an active war zone, and to commit a criminal act that contributes to the destabilization of Iraq, where United States and allied forces are engaged in ongoing combat operations. The Executive Branch’s determination to permit United States military personnel to participate in the MNF–I and detain individuals such as Munaf in an effort to promote security and stability in Iraq is a discretionary decision concerning how best to pursue the Nation’s military and foreign policy objectives. As such, it is a matter entrusted solely to the Executive. *See, e.g., Hamdi*, 542 U.S. at 531 (plurality opinion) (“Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.”);

Curran v. Laird, 420 F.2d 122, 130 (D.C. Cir. 1969) (en banc) (“It is — and must be — true that the Executive should be accorded wide and normally unassailable discretion with respect to the conduct of the national defense and the prosecution of national objectives through military means.”).

The exercise of habeas jurisdiction in this case would also interfere with the Executive Branch’s international commitments and its ability to carry out its foreign policy objectives. It would interfere with the Executive’s authority to direct the manner in which the United States military participates in a United Nations operation. And it would undermine the Executive Branch’s determination to support the newly developing Iraqi justice system through participation in MNF–I, by detaining defendants during the pendency of their Iraqi criminal proceedings. For the district court to adjudicate Munaf’s claims, it would have to sit in judgment of that foreign policy decision. Nor can Munaf argue “that the manner in which the policy decision was implemented is distinct from the policy itself, and is thus reviewable.” *Bancoult*, 445 F.3d at 436. Just as in *Bancoult*, “the policy and its implementation constitute a sort of Möbius strip that we cannot sever without impermissibly impugning past policy and promising future remedies that will remain beyond our ken.” *Ibid.* For that reason, “the courts may not bind the executive’s hands on

matters such as these, whether directly — by restricting what may be done — or indirectly — by restricting how the executive may do it.”⁶ *Ibid.*

Adjudicating Munaf’s habeas action would require the courts to second-guess the exercise of powers textually committed to the Executive Branch by the Constitution. For that reason alone, Munaf’s claims present nonjusticiable political questions.

B. There Are No Judicially Discoverable and Manageable Standards for Evaluating Executive Detention, Authorized by International Authority, Related to Criminal Prosecution by a Foreign Sovereign for Crimes Committed within the Foreign State.

Munaf’s petition presents a political question for the additional and independent reason that there are no judicially discoverable and manageable standards for evaluating his detention.

When a statute, treaty, or international agreement authorizes the Executive Branch to turn over a fugitive to a foreign sovereign to stand trial for a crime allegedly committed in that country, the Executive Branch’s decision is not subject to judicial

⁶ To be sure, the Court in *Bancoult* stated that “the presence of constitutionally-protected liberties could require us to address limits on the foreign policy and national security powers assigned to the political branches.” 445 F.3d at 436. However, the detention of a United States citizen under international authority in connection with criminal prosecution by a foreign sovereign does not implicate any constitutionally protected liberties, as we next explain.

review. In the extradition context, for example, courts have recognized that the Constitution requires “split responsibilities” between the courts and the Executive Branch. *United States v. Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997). Thus, the extradition statute limits judicial inquiry “to a narrow set of issues concerning the existence of a treaty, the offense charged, and the quantum of evidence offered.” *Ibid.*; see 18 U.S.C. § 3184. “The larger assessment of extradition and its consequences is committed to the Secretary of State,” because these issues “implicate questions of foreign policy, which are better answered by the executive branch.” *Kin-Hong*, 110 F.3d at 110. This division of responsibilities is required as a matter of institutional competence and constitutional separation of powers. *Ibid.*; see *Matter of Requested Extradition of Smyth*, 61 F.3d 711, 714 (9th Cir. 1995) (“[C]ourts are ill-equipped as institutions and ill-advised as a matter of separation of powers and foreign relations policy to make inquiries into and pronouncements about the workings of foreign countries’ justice systems.”).

Because courts in the extradition context must ensure that “judicial inquiry does not unnecessarily impinge upon executive prerogative and expertise,” they have repeatedly applied a “rule of non-inquiry.” *Kin-Hong*, 110 F.3d at 110. Under that doctrine, “courts in this country refrain from examining the penal systems of requesting nations, leaving to the Secretary of State determinations of whether the

defendant is likely to be treated humanely.” *Lopez-Smith v. Hood*, 121 F.3d 1322, 1327 (9th Cir. 1997). Thus, for example, courts will not consider evidence regarding the requesting country’s “law enforcement procedures and its treatment of prisoners”; such evidence is irrelevant and improper in a challenge to extradition in a United States court. *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990). Instead, “it is the role of the Secretary of State, not the courts, to determine whether extradition should be denied on humanitarian grounds or on account of the treatment that the fugitive is likely to receive upon his return to the requesting state.” *Ntakirutimana v. Reno*, 184 F.3d 419, 430 (5th Cir. 1999). The appropriate role of the courts is even more limited here than in the extradition context because the habeas petitioner in this case went to Iraq, engaged in criminal conduct there, and *remains* there. In other words, this case does not involve an “extradition” at all.

This Court recognized these constitutionally-based limitations on judicial authority in analogous circumstances in *Holmes v. Laird*. There, this Court considered whether a district court could entertain claims of United States citizens who, while stationed as soldiers in Germany, had been convicted by a German court of attempted rape. 459 F.2d at 1214. The soldiers were detained in Germany by the United States Army during the criminal proceedings. *Ibid.* After they were convicted, but before their convictions became final, the soldiers fled to the United States. *Ibid.* They

surrendered to Army custody, and filed suit in district court, seeking to enjoin the Executive from returning them to Germany to serve their sentences. *Ibid.* The district court held that it “was beyond the power of the judiciary” to grant such relief. *Id.* at 1215. This Court affirmed, holding that “the contemplated surrender of [the soldiers] to [Germany] is a matter beyond the purview of this court.” *Id.* at 1225.

The Court explained that matters such as those at issue “vitaly and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations * * * are so exclusively entrusted to the political branches of the government as to be largely immune from judicial inquiry or interference.” *Id.* at 1215 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952)). The Court stressed that the “starting point is a basic fact and an elementary proposition”: “All essential elements of the crimes in question were committed within the territory of [Germany]. From that it follows that, save only as modified by some other agreed-to alignment, West Germany’s power to try and convict for those offenses was complete.” *Id.* at 1216. Moreover, the Court, quoting the Supreme Court’s decision in *Neely*, emphasized that “citizenship does not give [an individual] immunity to commit crimes in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled.” *Id.* at 1218 (quoting *Neely v. Henkel*, 180 U.S. 109, 123 (1901)).

This Court rejected the soldiers' argument that their surrender would violate their constitutional rights, because their German trials were unfair. *Id.* at 1216. The Court explained that "the contemplated surrender is the precise response required of the United States by its treaty commitments to the Federal Republic." *Id.* at 1218. In addition, the Court held that the Constitution did not "negate" the Executive's discretion in carrying out its international commitments with Germany governing such matters. *Id.* at 1218. The Court pointed to the Supreme Court's decision in *Neely*, where the Supreme Court had held that the guarantees of the United States Constitution "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." 180 U.S. at 122; *see Holmes*, 459 F.2d at 1219. Accordingly, the Court rejected the argument that the Constitution limited the Executive's discretion to surrender the soldiers. *Ibid.*

Holmes involved the extradition to Germany of American servicemen, being held by the military in the United States, to answer for a German conviction, and in *Holmes*, there was a treaty governing such extradition matters. This case, by contrast, presents the unique situation in which the military is detaining a United States citizen — convicted by a foreign sovereign of committing a crime in its territory — in the very foreign country in which the crime occurred, and it accordingly does not present

an extradition question.⁷ Moreover, Munaf is not detained pursuant to any statute, treaty, or law of the United States. Rather, he is detained under the authority of the U.N. Security Council resolutions authorizing the MNF–I to hold individuals in Iraq as security internees. Thus, there is no applicable United States law for a court to interpret. For that reason, this case does not present *any* issues that are appropriate for judicial resolution.

Indeed, several circumstances present in this case render Munaf’s habeas petition and request for an injunction barring his surrender to Iraqi authorities to answer for criminal conduct committed in Iraq even more “beyond the purview of this court” than the prisoners’ attempt to block their transfer to Germany in *Holmes*. 459 F.2d at 1225. First, unlike the soldiers in *Holmes* who were stationed in Germany

⁷ Because Munaf was captured in Iraq — where he voluntarily went — and remains in Iraq, this case does not involve an extradition. Indeed, turning over to a foreign government an individual, convicted of criminal offenses within the foreign sovereign’s own territory, who remains present in that foreign country is fundamentally different from the extradition of those, like the plaintiffs in *Holmes*, who are present in the United States and seek to prevent their transfer to a foreign country. See *Wilson v. Girard*, 354 U.S. 524, 529 (1957) (“A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction.”); *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (“The jurisdiction of the nation within its own territory is necessarily exclusive and absolute”); *Holmes*, 459 F.2d at 1216 (“[H]ad appellants been present in West Germany as militarily-unattached civilians, and exercise of West German criminal jurisdiction over them would indubitably have been appropriate”).

when they committed criminal offenses there, Munaf *voluntarily* traveled to Iraq. See *id.* at 1223 (distinguishing situation “where the accused did not tread on foreign soil by choice, but rather in consequence of military assignment”). Second, unlike the soldiers in *Holmes* who were present in the United States when they filed suit, Munaf remains in Iraq. And third, unlike the soldiers in Iraq who were being held by the United States military acting under United States law, Munaf is being held by a multinational force acting under international authority. Each of these factors heightens the foreign affairs implications of exercising jurisdiction over this action.

Munaf does not here challenge the MNF–I’s authority under the U.N. Security Council resolutions. But even had he done so, there are no judicially discoverable or manageable standards under which a court could evaluate that authority, for it is clear that the scope of authority created by these resolutions presents a delicate question of foreign policy. See JA 35 (U.N. Security Council Res. 1546, annex) (describing MNF–I security policies as involving “sensitive issues for a number of sovereign governments, including Iraq and the United States”). And for that reason, they are plainly not suited for judicial review. See, e.g., *Ntakirutimana*, 184 F.3d at 430 (scope of authority under United Nations instruments not subject to habeas review). Because the Constitution imposes no limits on the Executive Branch’s decision to detain Munaf on behalf of Iraq pending resolution of his Iraqi criminal proceedings,

and because no United State court may properly review the scope of the MNF–I’s authority, Munaf’s petition presents a nonjusticiable political question.

C. Adjudication Here Would Require Nonjudicial Policy Determinations and Would Exhibit Lack of Respect Due a Coordinate Branch of Government.

The third and fourth *Baker* factors are also present in this case. There is no legal standard for evaluating the propriety of United States military participation in the MNF–I’s agreement to hold criminal defendants in Iraq while their cases are pending in Iraqi courts. For that reason, should a court adjudicate Munaf’s claims, it “would be forced to pass judgment on the policy-based decision of the executive.” *Schneider*, 412 F.3d at 197. And because such an inquiry would second guess the Executive Branch’s determination of how best to utilize United States soldiers in a combat zone, adjudication would exhibit a lack of respect due a coordinate branch. *See Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (as Commander in Chief of the nation’s military forces, President may “employ them in the manner he may deem most effectual”).

D. There Is Also Here an Unusual Need for Unquestioning Adherence to a Political Decision Already Made, and Adjudication Could Lead to an Embarrassment of Multifarious Pronouncements.

The remaining two *Baker* factors are present here, as well. As we have explained, the Executive Branch determined that assisting the Iraqi government by

holding defendants during the course of criminal proceedings is essential to help support the new Iraqi judicial system while Iraq rebuilds its infrastructure and central institutions. In light of that determination, made in the course of an ongoing war, there is an unusual need for unquestioning adherence to a political decision already made. See *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 390 (3d Cir. 2006) (fifth *Baker* factor implicated in cases “cases of an ‘emergency[] nature’ that require ‘finality in the political determination’” (quoting *Baker*, 369 U.S. at 213–14)).

Moreover, the Executive Branch has made a commitment to Iraq (and to the other nations participating in the MNF–I) that its military personnel will participate in the MNF–I’s detention of criminal defendants until their Iraqi judicial proceedings are concluded. Granting Munaf any of the relief he seeks would undermine that commitment and send mixed messages to the Iraqi government and our coalition partners in Iraq. See *Kadic v. Karadžić*, 70 F.3d 232, 249 (2d Cir.1995) (sixth *Baker* factor relevant when “judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests”). Here, as in the extradition context, “it is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation.” *Ahmad*, 910 F.2d at 1066.

* * *

“To find a political question, [a court] need only conclude that one factor is present, not all.” *Schneider*, 412 F.3d at 194. In this case, it is not surprising that multiple *Baker* factors are present, since Munaf’s petition implicates sensitive national security and foreign relations concerns. “[N]ational security and foreign relations” are “the quintessential sources of political questions,” because “the fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power.” *Bancoult*, 445 F.3d at 433 (quotation and alteration marks omitted); accord *People’s Mojahedin Org. of Iran v. Dep’t of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (national security determinations by the Executive Branch are not subject to judicial review). Because Munaf’s claims cannot be disentangled from those political questions, Munaf’s petition is not justiciable.

III. Munaf’s Claims are Not Justiciable Because the District Court’s Exercise of Habeas Jurisdiction Would Offend International Comity.

This action also should be dismissed because it is tantamount to a collateral attack on Munaf’s Iraqi conviction for participation in the kidnapping-for-hire scheme and seeks relief (an injunction preventing his release) that not only is unavailable in habeas corpus but that is inconsistent with the overriding principles of international comity recognized by the Supreme Court in *Neely* and this Court in *Holmes*.

Although Munaf contends that he is not collaterally attacking his Iraqi criminal proceedings (Munaf Br. 34), that claim is inconsistent with the record. After the Central Criminal Court convicted him, Munaf filed with the United States district court a supplemental memorandum arguing that he had been convicted and sentenced “by an Iraqi court operating under glaring procedural deficiencies and the direct manipulation of U.S. military personnel.” Docket No. 21-1 at 1 (Oct. 13, 2006). Based on these alleged deficiencies, Munaf argued that it was the district court’s “unflagging obligation to ensure that an American citizen’s detention by his own government and transfer to a foreign power comports with fundamental constitutional guarantees.” *Ibid.*; *see id.* at 3 (“The proceeding’s gross procedural deficiencies and manipulation by U.S. military officials highlights the vital importance of this Court’s habeas corpus review.”), *id.* at 5 (arguing that Munaf’s “chances of success on the merits are even greater now,” after his conviction by the Central Criminal Court). Indeed, relying on extra-record material, Munaf’s opening brief continues to attempt to call into question whether the United States military official who appeared on behalf of Romania in Munaf’s criminal proceedings had authority to represent Romania. Munaf Br. 6 (citing JA 85).

Respondents strenuously deny that any member of the MNF–I improperly interfered with Munaf’s criminal proceedings or that the proceedings were

inconsistent with Central Criminal Court practice. See JA 52–54. But, in any event, an American citizen may not collaterally attack in a United States court his criminal conviction in a foreign court based on allegations that the foreign proceedings lacked the protections required by the United States Constitution. He may not do so directly by challenging in a United States court his imprisonment by a foreign government for a criminal conviction and, as this Court’s decision in *Holmes* underscores, he may not do so indirectly by claiming that a United States court should bar his transfer to a foreign sovereign to answer for criminal conduct committed within the foreign sovereign’s territory.

As discussed, in *Holmes*, this Court held that the United States courts lacked the authority to bar the transfer of American serviceman to Germany to serve criminal sentences imposed by the German courts for crimes committed in Germany, even though the serviceman complained that the surrender would “infringe rights secured to them by the Constitution” because “their West German trial was unfair.” 459 F.2d at 1217. In doing so, the Court relied on the Supreme Court’s decision in *Neely*, where the Court held that an American citizen “cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.” 180 U.S. at 123. Thus, the

procedural deficiencies Munaf alleges in his Iraqi criminal trial are not cognizable under habeas doctrines, and are irrelevant to this appeal.

Despite Munaf's statement that he is no longer directly challenging his conviction by the Central Criminal Court in these proceedings, Munaf is unmistakably trying to use his habeas petition to evade the jurisdiction of that court and to prevent his sentence from being carried out. Munaf's petition seeks not only his release, but also asks the United States courts to direct respondents to physically "bring Mr. Munaf before a court of competent jurisdiction in the U.S. * * * to produce Mr. Munaf in person for the hearing," and to "[i]ssue an injunction prohibiting the U.S. from transferring Mr. Munaf to the legal or physical custody of another sovereign." JA 18–19 (Munaf Pet. ¶¶ D–F). In that regard, Munaf's action is no different from the one in *Holmes*, which, "in substance was for an injunction restraining the American military from surrendering [the soldiers] to [Germany]" to serve their sentences for crimes committed there. 459 F.2d at 1214. And that kind of action is no less "beyond the purview of this court" here than it was in *Holmes*. *Id.* at 1225. Indeed, as discussed above, several factors present in this case would make exercising jurisdiction over Munaf's action even more untenable than in *Holmes*.

More fundamentally, an injunction prohibiting respondents from turning Munaf over to the Iraqi government is not the sort of relief that is available under habeas

procedures. The “core” relief afforded by the writ of habeas corpus is “immediate release or a shorter period of confinement.” *Wilkinson v. Dotson*, 544 U.S. 74, 79, 80 (2005) (quotation marks omitted); *id.* at 86 (Scalia, J., concurring) (“It is one thing to say that permissible habeas relief, as our cases interpret the statute, includes ordering a quantum change in the level of custody, such as release from incarceration to parole. It is quite another to say that the habeas statute authorizes federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody.” (quotation marks and citation omitted)). If MNF–I turns Munaf over to the Iraqi authorities, he will be released from MNF–I custody, which is all the relief he could obtain under the writ. Because the injunction Munaf seeks would prevent respondents from affording him all the relief he could receive in habeas, the injunction would offend Article III by artificially prolonging judicial proceedings in the absence of a legally cognizable case or controversy. *Cf. Spencer v. Kemna*, 523 U.S. 1, 7-8 (1998) (habeas challenge to parole violation moot once prisoner released).⁸

⁸ In some contexts, the Supreme Court has recognized a continuing case or controversy after a prisoner’s release where there are continuing “collateral consequences” of the convict’s allegedly wrongful conviction. *See Spencer*, 523 U.S. at 7-8. But, here, Munaf has been convicted by an Iraqi court under Iraqi law for an offense committed in Iraq. He plainly cannot use the habeas statute to challenge his Iraqi conviction in a court of the United States. *See Neely*, 180 U.S. at 123. And, in any event, Munaf has now disavowed any challenge to his conviction. Munaf Br. 34.

Munaf's request that the court order respondents to produce him in person for a hearing is equally beyond the scope of habeas review. Since the writ of habeas corpus acts on the prisoner's jailer (*see Braden*, 410 U.S. at 494–95), the prisoner's physical presence before the court is not a precondition to habeas review, and in practice the prisoner's physical presence before the court is rarely required. Indeed, the habeas statute is explicit that the person being detained need not be present for the habeas proceedings if, as here, the petition presents only legal issues. 28 U.S.C. § 2243. Munaf contends that material facts concerning the district court's jurisdiction are disputed "to the extent Respondents challenge the factual assertions made by their officers" concerning the role the United States military plays in the MNF–I. Munaf Br. 36; *see id.* at 17–23. But respondents do not challenge the fact that United States military personnel serving in the MNF–I operate within the United States chain of command or the fact that the MNF–I is commanded by a United States military officer. Rather, those facts are not material to the jurisdictional inquiry, as we have explained. Instead, what is critical under *Hirota* and *Flick* is the fact that Munaf's detention is under international authority. Because there are no disputed *material* facts relevant to Munaf's detention, there is no requirement that Munaf be brought to the court.

Moreover, it is clear that Munaf may not use habeas procedure to evade the jurisdiction of the Iraqi courts. Munaf voluntarily entered Iraq, committed a crime there, and has been convicted by an Iraqi court. The writ of habeas corpus does not afford safe passage to individuals, including citizens, who voluntarily go to foreign lands and commit criminal offenses. See *Neely*, 180 U.S. at 123 (“[C]itizenship does not give [Americans] an immunity to commit crime in other countries.”); see also *Holmes*, 459 F.2d at 1216 (noting that “had appellants been present in West Germany as militarily-unattached civilians, an exercise of West German criminal jurisdiction over them would indubitably have been appropriate”).

More critically, an injunction would interfere with Iraq’s ongoing adjudication of criminal proceedings against one of its own nationals, convicted of committing a crime within Iraqi territory.⁹ “[U]nder the principles of international law each nation has jurisdiction of the offenses committed within its own territory.” *Kinsella v. Krueger*, 351 U.S. 470, 479 (1956) (citing *Schooner Exchange, v. McFaddon*, 11 U.S. (7

⁹ Munaf asserts that respondents’ description of him as a dual Iraqi-United States national is somehow meant to cast “insidious aspersion” on him or “dilute the protection of citizenship.” Munaf Br. 27 n.8. That is incorrect. Munaf’s dual citizenship is relevant because a foreign state obviously has a vital interest in exercising jurisdiction within its own territory by applying its criminal laws to actions committed by one of its nationals within its borders. Thus, regardless of his American citizenship, Munaf’s Iraqi citizenship increases the sovereign interest of the government of Iraq in bringing him to justice for crimes committed there.

Cranch) 116 (1812)). Here, an Iraqi court has convicted Munaf of a serious crime. That foreign judicial determination is entitled to respect. See *Neely*, 180 U.S. at 123. Consequently, an exercise of habeas jurisdiction in this case would be inconsistent with “international comity [and the] respect for the sovereignty of foreign nations on their own territory.” *W.S. Kirkpatrick & Co., Inc. v. Env'tl. Tectonics Corp.*, 493 U.S. 400, 404 (1990); see also *Ahmad*, 910 F.2d at 1067 (“The interests of international comity are ill-served by requiring a foreign nation * * * to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced.”).

Any relief that interferes with MNF–I’s continued detention of Munaf while his criminal appeal is pending, or that would require United States troops to interfere with Iraq’s ability to arrest someone who committed crimes in Iraq and is still physically in Iraq, would be unparalleled and an unjustified violation of international comity. *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1213 (D.C. Cir. 1989) (“The fact that the injunction operates only against the parties, and not directly against the foreign court, does not eliminate the need for due regard to principles of international comity because such an order effectively restricts the jurisdiction of the court of a foreign sovereign.” (citations omitted)). That fact that any relief available to Munaf

under a habeas petition would impermissibly offend principles of international comity provides an additional basis for affirming the dismissal of this action.¹⁰

¹⁰ This case differs from *Omar v. Harvey*, No. 06-5126 (argued Sept. 11, 2006), which presents the same threshold jurisdictional question, in that Munaf has been convicted by the Iraqi courts. The district court in *Omar* issued an unprecedented injunction which, in effect, prevented the Iraqi criminal court from investigating and prosecuting Omar, a United States-Jordanian citizen, captured in Iraq for insurgent activities in Iraq, including aiding in the planning and execution of kidnappings in Iraq, and held by the multinational force in Iraq under the same international authority as Munaf. Nevertheless, if, as the Court should conclude for the reasons discussed above, the United States courts lack jurisdiction over an action seeking to enjoin the transfer of an individual who is being held by a multinational force acting under international authority to the local sovereign to answer for a criminal conviction there, then surely a court may not “create” jurisdiction simply by taking the unprecedented and extraordinarily intrusive step of effectively enjoining a foreign sovereign from going forward with a criminal case against the individual altogether. Accordingly, although this case differs from *Omar* in that Munaf has been convicted by the Iraqi courts, jurisdiction is equally lacking in *Omar* as in this case.

CONCLUSION

For the foregoing reasons, the Court should affirm the dismissal of Munaf's habeas petition.

Respectfully submitted,

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DECEMBER 22, 2006

ADDENDUM

Coalition Provision Authority Order No. 17 (June 26, 2003) A1

COALITION PROVISIONAL AUTHORITY ORDER NUMBER 17

STATUS OF THE COALITION, FOREIGN LIAISON MISSIONS, THEIR PERSONNEL AND CONTRACTORS

Pursuant to my authority as head of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

Recalling that under international law occupying powers, including their forces, personnel, property and equipment, funds and assets, are not subject to the laws or jurisdiction of the occupied territory,

Conscious that states are contributing personnel, equipment and other resources to the Coalition in order to contribute to the security and stability that will enable the relief, recovery and development of Iraq,

Noting that states are sending Foreign Liaison Mission Personnel to Iraq,

Conscious of the need to establish and confirm the status of such Coalition and Foreign Liaison Mission Personnel in respect of the CPA and the local courts,

I hereby promulgate the following:

Section 1 Definitions

- 1) "Coalition Personnel" means all non-Iraqi military and civilian personnel assigned to or under the command of the Commander, Coalition Forces, or all forces employed by a Coalition State including attached civilians, as well as all non-Iraqi military and civilian personnel assigned to, or under the direction or control of the Administrator of the CPA.
- 2) "Foreign Liaison Mission Personnel" means those individuals who have been issued Foreign Liaison Mission personnel identification cards by the Iraqi Ministry of Foreign Affairs under the supervision of the CPA.
- 3) "Legal Process" means any arrest, detention or legal proceedings in the Iraqi courts or other Iraqi bodies, whether criminal, civil, administrative or other in nature.
- 4) "Parent State" means the state providing Coalition Personnel as part of the Coalition in Iraq or the state providing Foreign Liaison Mission Personnel.
- 5) "Coalition contractors" means non-Iraqi business entities or individuals not normally resident in Iraq supplying goods and/or services to or on behalf of the Coalition Forces or the CPA under contractual arrangements.

- 6) "Coalition sub-contractors" means non-Iraqi business entities or individuals not normally resident in Iraq supplying goods and/or services to or on behalf of Coalition contractors and in respect of Coalition or CPA activities under contractual arrangements

Section 2
Coalition and Foreign Liaison Mission Personnel

- 1) CPA, Coalition Forces and Foreign Liaison Mission, their property, funds and assets of shall be immune from Iraqi Legal Process.
- 2) All Coalition personnel and Foreign Liaison Mission personnel shall respect the Iraqi laws applicable to those Coalition personnel and Foreign Liaison Mission personnel in the territory of Iraq and the Regulations, Orders, Memoranda and Public Notices issued by the Administrator of the CPA.
- 3) Foreign Liaison Mission personnel shall be immune from Legal Process.
- 4) All Coalition personnel shall be subject to the exclusive jurisdiction of their Parent States and, they shall be immune from local criminal, civil, and administrative jurisdiction and from any form of arrest or detention other than by persons acting on behalf of their Parent States, except that nothing in this provision shall prevent Coalition Forces personnel from preventing acts of serious misconduct by Coalition personnel, or otherwise temporarily detaining Coalition personnel who pose a risk of injury to themselves or others, pending expeditious turnover to the appropriate authorities of the Parent State. In all such circumstances the national contingent commander of the detained person shall be notified immediately.
- 5) In respect of those Coalition personnel who commit an act or acts in Iraq for which there are no criminal sanctions in the Parent State, the CPA may request from the Parent State waiver of jurisdiction to try such act or acts under Iraqi law. In such cases, no Legal Process shall be commenced without the written permission of the Administrator of the CPA.

Section 3
Contractors

- 1) Coalition contractors and their sub-contractors as well as their employees not normally resident in Iraq, shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their contracts in relation to the Coalition Forces or the CPA. Coalition contractors and sub-contractors other than contractors and sub-contractors normally resident in Iraq shall not be subject to Iraqi laws or regulations with respect to licensing and registration of employees, businesses and corporations in relation to such contracts.
- 2) Coalition contractors and their sub-contractors as well as their employees not normally resident in Iraq, shall be immune from Iraqi Legal Process with respect to acts performed by them within their official activities pursuant to the terms and conditions of a contract between a contractor and Coalition Forces or the CPA and any sub-contract thereto.

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- 3) In respect of acts or omissions of Coalition contractors and sub-contractors as well as their employees not normally resident in Iraq, which are not performed by them in the course of their official activities pursuant to the terms and conditions of a contract between them and the Coalition or the CPA, no Iraqi or CPA Legal Process shall be commenced without the written permission of the Administrator of the CPA.

Section 4 **Duration of Immunity From Legal Process**

The immunity from Legal Process provided by the present Order to Coalition personnel and Foreign Liaison Mission personnel as well as Coalition contractors, sub-contractors and their employees not normally resident in Iraq operates only in respect to acts or omissions by them during the period of authority of the CPA.

Section 5 **Waiver of Legal Immunity and Jurisdiction**

- 1) The immunity from Legal Process of Coalition personnel, Foreign Liaison Mission personnel, Coalition contractors and their sub-contractors as well as their employees not normally resident in Iraq is not for the benefit of the individuals concerned and may be waived by the Parent State.
- 2) Requests to waive jurisdiction over Coalition personnel or Foreign Liaison Mission personnel shall be referred to the respective Parent State.
- 3) Requests to waive the immunities with respect to Coalition contractors and sub-contractors and their employees not normally resident in Iraq as set forth in Section 3 of this Order shall be referred to the respective Parent State with which the contractor has contracted.

Section 6 **Claims**

- 1) Third party claims including those for property loss or damage and for personal injury, illness or death or in respect of any other matter arising from or attributed to Coalition personnel or any persons employed by them, whether normally resident in Iraq or not and that do not arise in connection with military combat operations, shall be submitted and dealt with by the Parent State whose Coalition personnel, property, activities or other assets are alleged to have caused the claimed damage, in a manner consistent with the national laws of the Parent State.

- 2) Third party claims for property loss or damage and for personal injury, illness or death or in respect of any other matter arising from or attributed to Foreign Liaison Mission personnel shall be submitted and dealt with by the Parent State whose Foreign Liaison Mission personnel, property, activities or other assets are alleged to have caused the claimed damage, in a manner consistent with the national laws of the Parent State.

Section 7
Entry Into Force

This Order shall enter into force on the date of signature.

Handwritten signature in blue ink, appearing to read "L. Paul Bremer", followed by the date "6/27/03".

L Paul Bremer, Administrator
Coalition Provisional Authority

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief uses proportionately spaced font and contains 13,416 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Lewis S. Yelin
Attorney for Appellees

Date: December 22, 2006

CERTIFICATE OF SERVICE

I certify that on this 22d day of December, 2006, I caused the foregoing Brief for the Appellee to be filed with the Court and served on counsel by causing an original and fourteen copies to be HAND DELIVERED to:

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and (by agreement) by causing a copy to be delivered by e-mail, followed by two copies by DELIVERY SERVICE to be delivered on December 26, 2006, to:

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