

1 JOSEPH MARGULIES, ESQ., Chicago, Ill.; on behalf of
2 Munaf, et al. and Omar, et al.

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1 P R O C E E D I N G S

2 (10:14 a.m.)

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

7 Mr. Garre.

8 ORAL ARGUMENT OF GREGORY G. GARRE

9 ON BEHALF OF PETE GEREN,

10 SECRETARY OF THE ARMY, ET AL.

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

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

1 Iraq.

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

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

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

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

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

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

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

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

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

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

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

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

8 MR. GARRE: If I can make --

9 JUSTICE SOUTER: Go ahead.

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

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

23 MR. GARRE: There has been a subsequent
24 resolution. It's Resolution 1790, and that resolution
25 is set to expire this December. And the -- the

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

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

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

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

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

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

25 MR. GARRE: Well, again, I think that Hirota

1 -- the amount of influence that the United States forces
2 have over the international force isn't a basis for
3 distinguishing Hirota.

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

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

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

1 individuals.

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

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

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

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

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

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

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

1 is an Iraqi legal system, that that system is capable of
2 processing these cases and hearing from these
3 individuals, and is capable of granting relief where
4 appropriate action isn't taken.

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

10 JUSTICE STEVENS: If it's in the materials,
11 then perhaps I should have known, but did the -- I take
12 it Munaf was present and was represented by counsel?

13 MR. GARRE: Yes, both.

14 JUSTICE STEVENS: But how did that work?
15 Was he present in American custody and then he goes to
16 the Iraqi court?

17 MR. GARRE: The individuals are detained by
18 the Multinational Force while there are proceedings
19 before the Iraqi court --

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

23 MR. GARRE: Yes. In Mr. Munaf's case, there
24 were four investigative hearings and a trial, after
25 which he was convicted.

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

9 JUSTICE GINSBURG: There are --

10 MR. GARRE: And, again --

11 JUSTICE GINSBURG: There are in the U.S.
12 custody a number of non-citizens. Is that -- how many
13 people are being held in the custody of
14 the Multinational Force that the United States controls?

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

25 And if I could turn to the second question,

1 because we think that there is --

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

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

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

24 JUSTICE BREYER: Yes. So we're not -- we're
25 not -- I take its you say that, as a practical matter

1 and as a matter of the chain of command, it runs through
2 American officers to American commanders to the
3 Secretary of Defense to the President of the United
4 States. There is no disagreement about that, or is
5 there?

6 MR. GARRE: There is not, Justice Breyer.
7 An American --

8 JUSTICE BREYER: There is not.

9 MR. GARRE: -- official has the supreme
10 command --

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

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

20 JUSTICE BREYER: Yes, yes.

21 MR. GARRE: -- in Hirota.

22 JUSTICE BREYER: The same was true. It was
23 General MacArthur.

24 MR. GARRE: That's correct. And ultimately
25 the key point, we think, is that those forces were

1 acting under international mandate. The Far Eastern
2 Commission in Hirota ultimately had say over what the
3 force could do --

4 JUSTICE BREYER: Well --

5 MR. GARRE: -- whereas the United Nations
6 here ultimately has.

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

10 MR. GARRE: Well, I think that that's true,
11 but the point I wanted to make is that the United
12 Nations today could repeal the resolutions authorizing
13 this international force and the specific mission.

14 JUSTICE BREYER: And if that happened, these
15 people would be released?

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

21 JUSTICE BREYER: But the relevance of that
22 is General MacArthur was an agent of several allied
23 powers.

24 MR. GARRE: As is, in our view, General
25 Petraeus. He is sharing now the authority --

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

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

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

20 MR. GARRE: It did. And if I could turn now
21 to the second issue, because we do think there is a --

22 JUSTICE STEVENS: May I ask just one
23 question. Would your argument be the same if the place
24 of detention was in the United States?

25 MR. GARRE: Analytically, it would be the

1 same, Justice Stevens. As a practical matter, United
2 States forces don't act under international authority;
3 and, thank goodness, Multinational Forces don't act in
4 the United States.

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

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

15 MR. GARRE: Absolutely. In Iraq it's
16 undisputed that if the Multinational Force were to
17 release them, the Iraqi authorities could arrest them,
18 take them into their custody. The injunction that we
19 face today is one preventing the Iraqi courts from going
20 forward with any proceedings against Mr. Omar,
21 preventing the Multinational Force from sharing
22 information with Iraqi authorities about the
23 circumstances of his release, and directly preventing
24 the Multinational Force from transferring these
25 individuals to Iraqi custody if they are convicted.

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

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

18 CHIEF JUSTICE ROBERTS: Is there a limit to
19 your proposition? In other words, let's stipulate that
20 the individuals are going to be released in a situation
21 where you know that they won't receive anything
22 resembling due process and will be subject to abuse.
23 What happens in that case?

24 MR. GARRE: I think we would maintain that
25 American citizens, when they go abroad, they have to

1 take what they get. I think there is some suggestion --

2 JUSTICE STEVENS: Well, could they be
3 released to a lynch mob?

4 MR. GARRE: What -- I think what this Court
5 said in Neely versus Henkel -- and I'm quoting from page
6 122, and I think it partially answers your question,
7 Justice Kennedy: "The Suspension Clause has no relation
8 to crimes committed without the jurisdiction of the
9 United States and against the laws of a foreign
10 country."

11 If this Court thinks that it would be
12 different if there were no system of fairness or
13 process, then it could reserve that question for another
14 case.

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

21 MR. GARRE: No. And here, Justice Kennedy,
22 the Iraqi courts are functioning under principles that
23 require fundamental standards and --

24 JUSTICE KENNEDY: Of course, this is just a
25 hypothetical question.

1 MR. GARRE: Right.

2 JUSTICE KENNEDY: Of course.

3 MR. GARRE: Right.

4 CHIEF JUSTICE ROBERTS: And do you agree
5 that -- do you concede that habeas is concerned with the
6 safety of the individual as opposed to his custody?

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

14 I think that the closest analog of this
15 Court's cases to this situation is perhaps Wilson versus
16 Girard, where you had an American serviceman stationed
17 in Japan who committed alleged offenses in Japan, and
18 the Japanese authorities made a request that they take
19 jurisdiction of that person to prosecute him for
20 offenses in Japan, and this Court considered the
21 question. There was an injunction against the transfer
22 of that individual to Japanese authorities. This Court
23 set the injunction aside because it found no affirmative
24 bar on the exercise of that discretion, recognizing the
25 sovereign right and jurisdiction of the Government of

1 Japan to prosecute individuals, including American --

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

7 You know the brief that was filed on behalf
8 of the NGOs where there is a quotation from Iraq's
9 deputy justice minister: "We cannot control the
10 prisons. It's as simple as that. Our jails are
11 infiltrated by the militias from top to bottom, from
12 Gaza to Baghdad."

13 MR. GARRE: Let me make a practical and a
14 legal point on that, Justice Ginsburg. First, as a
15 practical matter, it is important to keep in mind that
16 reports of torture and abuses in the Iraqi system all
17 deal with the Ministry of the Interior and the Ministry
18 of Defense. We point that out --

19 JUSTICE GINSBURG: This is a quotation from
20 the deputy justice minister.

21 MR. GARRE: And I don't believe he was
22 pointing to any reports of systematic abuses within the
23 department, the Ministry of Justice. And that's what
24 our -- our own State Department concluded in its most
25 recent reports on this. And if you look at all the

1 reports, including the most recent report that came out
2 a couple weeks ago from the United Nations Assistance
3 Mission in Iraq, they point to alleged abuses within the
4 Ministry of Interior and Defense. These individuals
5 would be going to the justice system. We don't have
6 reports of systematic --

7 JUSTICE SOUTER: Doesn't that -- doesn't
8 that issue that you raise at least deserve litigation
9 before the court?

10 MR. GARRE: No, and that was the legal point
11 that I was going to make. Even in the extradition
12 context, where everyone agrees that there would be
13 habeas jurisdiction to review a transfer for some
14 reason, the courts have not entertained allegations of
15 torture, recognizing that those considerations are
16 uniquely for the executive, except when --

17 JUSTICE SOUTER: Why shouldn't they? I
18 mean, if a -- if a court may consider the imminence of
19 lynch-mob action either sanctioned by the requesting
20 government or tolerated by it, why cannot the same point
21 be made about a claim of torture if there is at least
22 enough color in the claim to say there's something to
23 inquire into?

24 MR. GARRE: I think because for centuries,
25 Justice Souter, the courts have recognized that these

1 are matters for the executive to assess, because --

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

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

8 JUSTICE SCALIA: A lynch mob doesn't require
9 investigation by American courts of the internal
10 workings of a foreign government.

11 MR. GARRE: Well, that's true,
12 Justice Scalia.

13 JUSTICE SCALIA: No, but I think it would be
14 quite extraordinary to investigate the Government of
15 Iraq. That's a matter that the executive can take into
16 account.

17 MR. GARRE: That's --

18 JUSTICE SCALIA: But It would be a strange
19 thing for an American court to do.

20 MR. GARRE: That's what the district court,
21 the court of appeals, and maybe this Court would have to
22 do if it were going to entertain allegations of --

23 JUSTICE ALITO: In answer to a previous
24 question, I understood you to say that if the
25 individuals here were tried by an Iraqi tribunal they

1 would remain in the custody of the Multinational Force
2 during the course of the trial. Is that correct? Does
3 that mean that they would simply be transported to court
4 and then brought back to the custody where they are at
5 the present time during the course of those proceedings?

6 MR. GARRE: That's right, and General Garner
7 explained that on page 48 of the appendix.

8 The other thing I want to make on torture --

9 JUSTICE ALITO: Well, just to follow up on
10 that, at what point during that, during the trial, would
11 there be any potential for torture by Iraqi authorities.

12 MR. GARRE: There would be none,
13 Justice Alito. And these individuals are represented by
14 Iraqi counsel, by American counsel. They have access to
15 Iraqi ombudsmen. They can make reports. They can make
16 reports, as some detainees have, to the Iraqi
17 investigative judges of alleged mistreatment; not
18 torture, but Iraqi investigative judges have directed
19 that mistreatment not occur.

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

24 MR. GARRE: It's not the situation that the
25 NGO brief described, because all of those reports are

1 focused on Ministry of Interior and Defense, where these
2 individuals are not going to -- U.S. court, even in the
3 extradition context, don't review these allegations --

4 JUSTICE SOUTER: Well, I guess that just
5 gets me back to my earlier question. Isn't that
6 something that ought to be explored as an evidentiary
7 matter in determining whether there should be a
8 permanent injunction?

9 MR. GARRE: I don't think so. Respect for
10 the prerogative of the executive in making its
11 determinations, respect for the sovereignty of the Iraqi
12 courts. You have a habeas court having discovery and
13 who knows what types of proceedings as to what is going
14 on in Iraqi's criminal justice system. I think this
15 Court would give respect to the justice systems of other
16 sovereign nations. This is a system which, as we say in
17 our brief, is founded on principles of fairness.

18 If I could reserve the balance of my time.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 Mr. Garre.

21 Mr. Margulies?

22 ORAL ARGUMENT OF JOSEPH MARGULIES

23 ON BEHALF OF MUNAF, ET AL.

24 AND OMAR, ET AL.

25 MR. MARGULIES: Mr. Chief Justice, and may

1 it please the Court:

2 To resolve any confusion about the habeas
3 Petitioners' claims, I'd like to focus on two points
4 this morning. The first is we believe the
5 jurisdictional question is governed by the following
6 rule: When a United States citizen is detained abroad
7 by United States military officials who have effective
8 authority and control over his continued detention, as
9 Mr. Garre concedes is the case today, the United States
10 district court has jurisdiction over that citizen's
11 habeas petition.

12 CHIEF JUSTICE ROBERTS: Did General
13 MacArthur have effective jurisdiction and control in
14 Japan?

15 MR. MARGULIES: Frankly, Your Honor, the
16 record in that regard is unclear. As we point out in
17 our, brief, Solicitor General Pearlman argued precisely
18 the opposite. But let us concede for the moment that he
19 would, that Justice Douglas had the better of that
20 position, which the Court in Hirota did not resolve.

21 Our position, Your Honor, is that it is
22 irrelevant to this question, because the problems that
23 doomed the habeas applications in Hirota had nothing to
24 do with MacArthur's status in the chain of command. The
25 problems with Hirota were these:

1 Nothing in General MacArthur's status as an
2 American officer would have transformed those
3 petitioners from enemy aliens to American citizens.
4 Nothing in General MacArthur's status would have
5 transformed their complaint as something other than an
6 attack on the judgment and sentences of an international
7 tribunal imposed upon them. That, in fact, is exactly
8 what the Court said in its nine sentences in Hirota,
9 that it was an attack on the judgment and sentences
10 imposed upon them by an international tribunal.

11 And lastly, vis a vis the narrow question
12 before the Court in Hirota, nothing in General
13 MacArthur's status would have made this anything other
14 than an improper attempt to invoke the original and
15 appellate jurisdiction of this Court.

16 JUSTICE STEVENS: Does your case -- does
17 your case depend entirely on the fact that these are
18 American citizens?

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

21 JUSTICE STEVENS: If they were not American
22 citizens, would there be jurisdiction?

23 MR. MARGULIES: We believe there would be
24 jurisdiction, Your Honor, but no basis to proceed --

25 JUSTICE STEVENS: So then citizenship is

1 irrelevant on the jurisdictional issue?

2 MR. MARGULIES: Only vis a vis jurisdiction,
3 Your Honor, but I would stress we disagree very
4 vigorously with Mister -- with the government that if
5 jurisdiction were to extend here to foreign nationals, a
6 position on which we take no issue -- that it would
7 be --

8 JUSTICE STEVENS: I don't know how you can
9 avoid taking that question. That what bothers me. How
10 can you avoid addressing that question?

11 MR. MARGULIES: Frankly, Your Honor, we are
12 inclined to agree with Justice Scalia's position in --
13 my interpretation of the habeas statute accords with
14 Justice Scalia's view of the interpretation of the
15 statute giving a right to citizens --

16 JUSTICE STEVENS: Are you aware of any cases
17 in which we have held that habeas jurisdiction is
18 available to a citizen where it would be not available
19 to a non-citizen?

20 MR. MARGULIES: No, Your Honor.

21 And as I say, what we know from -- certainly
22 with made explicit in Eisentrager, where the Court
23 described citizenship as a head of jurisdiction and then
24 reaffirmed for people detained abroad, some detained
25 pursuant to international authority, like Toth v.

1 Quarles, Burns v. Wilson, Wilson v. Girard, Ex parte
2 Hayes, Gualiaro --

3 JUSTICE STEVENS: May I ask this second
4 question: Do you think the place of detention has any
5 relevance to the issue?

6 MR. MARGULIES: No, Your Honor. And one of
7 the worrisome positions --

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

11 MR. MARGULIES: We think that that question
12 is answered in Hamdi, Your Honor. We do not challenge
13 the zone of military discretion that exists at the
14 moment of capture.

15 JUSTICE STEVENS: But you say that does not
16 exist in Iraq today?

17 MR. MARGULIES: Oh, no, we do accept that it
18 exists in Iraq today, Your Honor. And we are not
19 challenging -- Your Honor, in this case we did not file
20 the habeas petition until Mr. Omar had been in custody
21 for -- in United States custody, for more than a year.
22 We did not file in Munaf until Mr. Munaf had been in
23 United States custody for more than a year.

24 JUSTICE STEVENS: But the place of detention
25 has always been Iraq?

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

2 JUSTICE STEVENS: The place of detention has
3 always been Iraq?

4 MR. MARGULIES: Yes, Your Honor. The United
5 States has made the decision to retain these people --
6 they have moved them around within Iraq, but they have
7 made the decision to keep them in Iraq.

8 JUSTICE STEVENS: Would the legal issue be
9 the same if there were violent ongoing hostilities in
10 Iraq?

11 MR. MARGULIES: Your Honor, we accept that
12 there are violent ongoing hostilities in Iraq, but the
13 United States government takes the position that the
14 Geneva Conventions, with which they are complying
15 here -- in this case the conflict is governed by Geneva
16 Convention 4 -- obligates the United States to move
17 prisoners to a safe location, and they have done that by
18 taking these prisoners to Camp Cropper. I have been to
19 Camp Cropper and I agree with the United States that
20 they are complying with the Geneva Conventions in that
21 regard.

22 And upon moving the Petitioners to Camp
23 Cropper, at that moment the case becomes functionally
24 litigable just as Hamdi would have been. That is, the
25 government will assemble its proof to defend the

1 detentions and present it in a district court. The only
2 difference is that Mr. Munaf and Mr. Omar won't appear
3 personally.

4 JUSTICE KENNEDY: But I really wanted to get
5 your answer to Justice Stevens's first question
6 straight. You think citizenship is not relevant?

7 MR. MARGULIES: Oh, no, Your Honor, I think
8 it's extraordinarily relevant, and I think that we
9 are entitled --

10 JUSTICE KENNEDY: But I thought you were not
11 basing your case on the citizenship?

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

14 JUSTICE KENNEDY: I might have --

15 MR. MARGULIES: -- but it is only one of the
16 grounds upon which we would distinguish this case from
17 Hirota.

18 JUSTICE GINSBURG: Let me ask you about
19 that, because if your basic point is that here is an
20 officer of the United States that has someone in
21 custody --

22 MR. MARGULIES: Yes.

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

25 MR. MARGULIES: Yes.

1 JUSTICE GINSBURG: -- that United States
2 official has to safeguard a citizen?

3 MR. MARGULIES: Yes.

4 JUSTICE GINSBURG: But can throw a
5 non-citizen into the lion's den? Is that the
6 instruction that the United States gives to its
7 officers, take care of our citizens, but the rest of the
8 world, we don't care?

9 MR. MARGULIES: Frankly, Your Honor, I do
10 not believe the United States makes that instruction to
11 its uniformed officers.

12 JUSTICE GINSBURG: But you're making this
13 distinction now. Justice Kennedy asked you does -- does
14 your case turn on citizenship, and you said citizenship
15 is very important.

16 MR. MARGULIES: Yes.

17 JUSTICE GINSBURG: There are thousands of
18 noncitizens that are being held in the very same
19 circumstance.

20 MR. MARGULIES: Your Honor, there are
21 important reasons embedded in the laws of war that
22 authorize the United States in this context to transfer
23 foreign nationals back -- in this case the overwhelming
24 number of which are Iraqis -- back to the custody of the
25 Iraqi government, that the laws of war do not allow

1 for -- with U.S. citizens. That is a distinction.

2 JUSTICE SCALIA: Mr. Margulies, the prologue
3 to the Constitution does say "to preserve the blessings
4 of liberty to ourselves and our posterity." There is
5 something to the notion, isn't there, that the
6 Constitution provides constitutional rights, including
7 the right to the writ of habeas corpus, to Americans or
8 to anyone who is in America; but to say that the whole
9 world has rights under the Constitution is extravagant.

10 MR. MARGULIES: I take no position on
11 whether it's extravagant, Your Honor, but I certainly
12 take the position that that's not what we argue. And
13 there are grounds -- there are grounds predicated on the
14 laws of war, on the terms of the extradition treaty, on
15 the possible application of the Fifth Amendment, that
16 simply make differentiation between citizens and
17 non-citizens.

18 CHIEF JUSTICE ROBERTS: So a habeas court
19 here has to look at all those different factors and come
20 to a determination of whether it has jurisdiction?
21 There's no bright line? It has to look at whether
22 hostilities have ceased or haven't ceased? It's got to
23 look at how far the prisoners have been removed from the
24 zone of hostility?

25 MR. GARRE: No. No, emphatically not, Your

1 Honor.

2 CHIEF JUSTICE ROBERTS: So what is the
3 bright line that determines whether there's habeas
4 jurisdiction or not?

5 MR. MARGULIES: Control. That is what
6 habeas turns on, Your Honor. And the bright-line test
7 that we propose, which is the one that has been followed
8 by this Court --

9 CHIEF JUSTICE ROBERTS: So the control in
10 the middle of a zone of hostilities of a foreign
11 national allows -- creates habeas jurisdiction? That's
12 your bright line?

13 MR. MARGULIES: No, I'm sorry, Your Honor.
14 What I mean to suggest, the rule that I propose -- the
15 rule that I propose is that when a U.S. citizen is
16 detained abroad by U.S. military officials who have
17 effective authority and control over his continued
18 detention, that citizen can invoke the jurisdiction of
19 the United States district court.

20 CHIEF JUSTICE ROBERTS: Well, then it's not
21 just control. It looks to citizenship, which brings up
22 the questions Justice Stevens was raising.

23 MR. MARGULIES: Yes, Your Honor, and I
24 apologize. What I said at the outset is that this is a
25 test which turns on the jurisdictional facts that I have

1 identified, which is when a citizen is detained by the
2 U.S. military abroad and the military has effective
3 control.

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

7 MR. MARGULIES: Toth v. Quarles, of course,
8 Your Honor, involved a person who was brought from the
9 United States to Korea when there was still hostilities
10 ongoing.

11 But Your Honor, again I would suggest that
12 what the Court will have to inquire into has been
13 addressed already by Hamdi, because we will not look at
14 the period of time --

15 JUSTICE STEVENS: It's a very different
16 place of detention.

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

20 JUSTICE ALITO: I still don't -- I don't
21 understand what you're saying about citizenship. You
22 said earlier it wasn't necessary, and it make as big
23 difference. There are thousands of non-U.S. citizens
24 being held Iraq. Your argument with respect to your
25 clients is that they have -- they can file habeas

1 petitions in the District of Columbia and they can't be
2 turned over except pursuant to the extradition treaty
3 between the United States and Iraq; is that correct?

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

6 JUSTICE ALITO: If I could just then finish
7 the question. Pursuant to the extradition treaty or
8 some other authorization; if citizenship isn't
9 important, then why can't all of those thousands of
10 non-citizens -- or can all of those thousands of
11 non-citizens -- who are being held in Iraq file habeas
12 petitions in the District of Columbia and argue that
13 they can't be turned over except pursuant to the
14 extradition treaty or some other authorization?

15 MR. MARGULIES: For several reasons, Your
16 Honor. First of all, as the Court knows, the habeas
17 statute itself has been amended in a way that excludes
18 access for foreign nationals outside the country. The
19 Court -- or rather Congress, very carefully did not
20 exclude it for U.S. citizens. Second, there may be
21 limitations on whether foreign nationals can invoke the
22 protections of the Fifth Amendment.

23 Third, as I pointed out, the extradition
24 treaty bars the transfer of citizens, but does not bar
25 the transfer of non-citizens. And fourth, the laws of

1 war allow the United States to transfer Iraqis, but
2 contemplate the continued application of extradition
3 principles that were in place prior to the start of the
4 conflict.

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

8 JUSTICE BREYER: But you have only the --
9 the citizenship to stop the floodgate. What I'm
10 wondering is -- when I read the briefs, I put in my mind
11 a spectrum and on one side is the military occupation of
12 Japan, where there is basically peace but it's a
13 military occupation. On the other side, it's a hot war
14 or a guerilla war where the U.S. forces are rounding up
15 troops, nightly perhaps, and rounding up guerillas. And
16 I had put this case quite close to the military
17 occupation in my mind because of the nature of these
18 particular individuals' offense and treatment. But was
19 I wrong to do that? Should I assimilate this case to
20 either a hot war or at least a guerilla warfare, where
21 troops are actively engaged in rounding up those who
22 want to shoot them?

23 MR. MARGULIES: You should definitely not
24 assimilate this case to the latter category, Your Honor.
25 That is not what this case is about. And let me turn

1 then --

2 JUSTICE SOUTER: In answering that question,
3 would you go back, please, and clarify something that
4 I'm not too clear on in your answers to comparable
5 questions from Justice Kennedy and Justice Stevens? And
6 that is, you say we do not claim that there would be
7 jurisdiction within the zone of hostilities. Is it your
8 point -- and you then go on to say, well, they've been
9 moved to this camp. Is your point the simple point that
10 the camp gets them out of the zone of hostilities? And
11 is that the reason that you answered Justice Breyer's
12 question by saying this is comparable to an occupation
13 rather than a war zone? Is that the simple point?

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

19 This is a person who has been moved from
20 that place, and the detention has been made, a decision
21 has been made to continue detention long after --

22 JUSTICE SOUTER: So you're saying within
23 what is technically a zone of hostility, there are
24 places, physical places, I take it, within which the
25 military has a degree of discretion; and that discretion

1 is what makes this situation comparable to an
2 occupation?

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

5 MR. MARGULIES: Your Honor, what we are
6 suggesting is that we recognize that there are
7 hostilities going on inside Iraq. But the United States
8 has made a decision to move the person, as required by
9 the Geneva Conventions, to a safe location.

10 JUSTICE STEVENS: So are you saying then
11 that the zone of hostilities does not include all of
12 Iraq?

13 MR. MARGULIES: Absolutely. That is --

14 JUSTICE STEVENS: So what if we thought
15 otherwise?

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

17 JUSTICE STEVENS: What if we thought
18 otherwise? What if we thought all -- all of Iraq is a
19 zone of hostilities? Would we have a different result?

20 MR. MARGULIES: We would not, Your Honor.
21 We would not have a different result either
22 jurisdictionally or on the merits. If the United States
23 Government has custody and control of a United States
24 citizen, there is habeas jurisdiction.

25 JUSTICE SOUTER: Then you've got to say that

1 there is habeas jurisdiction within the zone of
2 hostility. I thought you said the opposite.

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

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

10 MR. MARGULIES: Yes. It is abstention upon
11 --

12 CHIEF JUSTICE ROBERTS: So that's pretty far
13 removed from the bright line. I mean, now you've got to
14 decide whether it's in the zone of hostilities or not.
15 You've got to decide if this is within the time period
16 that the Court should not exercise jurisdiction or not.
17 And what's going to happen, of course, is that the
18 district court is going to look at this and say, I can't
19 decide all of that right away. Let's enter an
20 injunction, a preliminary injunction such as at issue
21 here, while I decide these questions. And that's going
22 to have the effect of intruding quite extensively on the
23 exercise of executive authority.

24 MR. MARGULIES: I -- we think not, Your
25 Honor.

1 First of all, it does not alter in the
2 slightest the jurisdictional rule. The jurisdictional
3 rule given to us by the habeas statute is still a
4 bright-line rule. There may be some cases where the
5 petitioner is asking to -- the Court to inquire into the
6 lawfulness of -- the two inquiries in this case, the --
7 both of them governed by the Due Process Clause -- the
8 lawfulness of the detention for security threats, and
9 the lawfulness of the proposed transfer. Those are two
10 different inquiries. Those are the two inquiries.

11 There may be some instance where that
12 request is made fairly shortly after the decision was
13 made to continue to detain.

14 JUSTICE SCALIA: Mr. Margulies, could I ask
15 a few questions about the Multinational Force involved
16 here? Do you acknowledge that in theory, at least, the
17 United States in its capacity here is subject to the
18 control of the United Nations?

19 MR. MARGULIES: No.

20 JUSTICE SCALIA: You do not?

21 MR. MARGULIES: We do not. It is
22 emphatically not the case. The resolutions which bring
23 the Multinational Force into existence say that it will
24 operate under the unified command of the United States
25 military, which is precisely the position that the

1 government pressed in its brief, on page 2 of its brief.
2 General Casey when he testified said that the MNF is a
3 subordinate command to the United States military.
4 There is nothing in the record which suggests that the
5 MNF could, if it wanted to, give an order that the
6 United States could not countermand. There is nothing
7 that gives this anything other than -- and we do not --
8 we do not denigrate or diminish the significance of any
9 other country's participation. But the buck stops with
10 the United States Government when it comes to these
11 detentions.

12 CHIEF JUSTICE ROBERTS: Let me try and move
13 you to the merits.

14 MR. MARGULIES: Please.

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

19 MR. MARGULIES: That is incorrect, Your
20 Honor, and let me make it clear. There is some question
21 that emerged in the earlier argument on the potential
22 equivalence between release and transfer. So let me
23 address that directly.

24 With respect to transfer -- again that's a
25 separate question from detention simpliciter -- with

1 respect to transfer, there are two questions: The
2 transfer will either be lawful or it will not; Iraq will
3 either want him or it will not.

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

8 JUSTICE GINSBURG: Well, but in the cases --

9 CHIEF JUSTICE ROBERTS: You don't want the
10 district court to say you win, you can be released
11 tomorrow at noon.

12 MR. MARGULIES: Yes, we do. In fact, Your
13 Honor --

14 CHIEF JUSTICE ROBERTS: Well, I thought you
15 wanted to block the transfer. I mean, the Iraqi
16 authorities can pick him up at the gate.

17 MR. MARGULIES: Your Honor, let's say we
18 had -- my understanding of the evidence in Munaf leads
19 me to believe that on remand this is where we -- this is
20 where the state of play will go: The transfer will be
21 unlawful, and the Iraqi government will not want him.

22 Transfer unlawful. Iraqi government won't
23 want him. He can be released to his home --

24 JUSTICE GINSBURG: But he -- he is still
25 within the Iraqi criminal justice system. He wasn't --

1 his case wasn't dismissed. It was sent back for further
2 investigation.

3 MR. MARGULIES: Correct.

4 JUSTICE GINSBURG: So what's happening in
5 his case is he's undergoing a criminal process in Iraq;
6 and we are holding him during that process. So if
7 you're not objecting to our holding him while the
8 process is going on, what is -- what is he seeking
9 through habeas?

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

15 MR. MARGULIES: Your Honor, his petition,
16 like Mr. Omar's petition, seeks his release. The only
17 complexity arises in one of the possible boxes; that is,
18 the Court concludes that the transfer is unlawful, but
19 there is no -- but the Iraqi government wants him. The
20 transfer is unlawful, but the Iraqi government wants
21 him.

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

24 JUSTICE GINSBURG: I don't get up to
25 transfer. This man is now under investigation in the

1 Iraqi system.

2 MR. MARGULIES: Yes.

3 JUSTICE GINSBURG: Now, we -- transfer isn't
4 an issue.

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

7 MR. MARGULIES: Your Honor, you are correct
8 that we do not object to the idea that, while the
9 district court is determining whether it is lawful to
10 detain a U.S. citizen in this circumstances or transfer
11 a U.S. citizen in those circumstances -- those two
12 inquiries -- it is okay to detain Mr. Munaf for the
13 benefit of the Iraqi government.

14 CHIEF JUSTICE ROBERTS: I thought the relief
15 that was awarded by the district court also enjoined
16 prosecution.

17 MR. MARGULIES: It does not, Your Honor, and
18 to the extent that the D.C. Circuit in Omar interprets
19 that, we do not -- we disavow that. There -- as the
20 court pointed out, the -- first of all, they can try a
21 prisoner in absentia. All we object to is that -- a
22 physical transfer of Mr. Omar or Mr. Munaf, while the
23 lawfulness of that transfer is being determined. And
24 that is all we sought.

25 JUSTICE BREYER: The question is, look,

1 suppose the government comes in tomorrow, or in the
2 district court, you're back there. And the government
3 says you want us to release him. At noon tomorrow, we
4 will take him to the front gate and release him. Do you
5 want us to do it? Yes or no?

6 MR. MARGULIES: Yes.

7 JUSTICE BREYER: Yes?

8 MR. MARGULIES: Yes.

9 JUSTICE BREYER: Okay.

10 CHIEF JUSTICE ROBERTS: You want -- I'm
11 sorry. I just want to make sure I understand. You want
12 the relief in both of these cases to be, okay, we will
13 release him tomorrow at noon? And by the way, we're
14 going to notify the Iraqi authorities because we think
15 we're releasing a dangerous criminal and want to make
16 sure they have the opportunity to do whatever they want?

17 MR. MARGULIES: There is -- there is no
18 question that we do not challenge any right of
19 sovereignty in Iraq to share information. The only
20 circumstance in which it potentially arises is one in
21 which release has the effect of being transfer and there
22 is a prior determination by a United States district
23 court that the transfer would be unlawful. So that --

24 JUSTICE KENNEDY: Well, why didn't you
25 answer Justice Breyer -- and we've interrupted you a

1 couple of times. You have the box. He's going to be
2 released. They want him. I don't see then why you
3 didn't answer Justice Breyer's question differently.

4 MR. MARGULIES: Because what I understood
5 the hypothetical to mean is that there had not been a
6 prior determination that the transfer would be unlawful.
7 In other words, if they just released him tomorrow --
8 they said, we have lost interest in him; we're releasing
9 him tomorrow -- there is no prior determination that the
10 transfer is unlawful.

11 JUSTICE KENNEDY: Well, what we're doing --

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

13 JUSTICE KENNEDY: What we're doing is we're
14 testing the authority and the propriety of the district
15 judge to proceed.

16 MR. MARGULIES: Yes.

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

21 MR. MARGULIES: No. Your Honor, if the
22 conclusion is that the transfer would be unlawful, then
23 you cannot release him in a way that effects the
24 transfer.

25 JUSTICE SCALIA: Who says? I mean, a

1 transfer is one thing and saying you're free to go and
2 the Iraqi government picks him up is something else.
3 Why -- why do you equate the two?

4 MR. MARGULIES: Because, Your Honor, we
5 think that the district court can order, under 28 U.S.C.
6 2243, as law and justice requires, a release -- or
7 rather, relief that gives effect to the contours of the
8 right.

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

10 MR. MARGULIES: Yes.

11 JUSTICE SCALIA: It can, but --

12 JUSTICE SOUTER: What --

13 JUSTICE KENNEDY: It seems to me that you're
14 begging -- you're begging a question -- you're inserting
15 a premise that we have to decide, whether the release is
16 unlawful. We're asking, that's part of the equation.
17 I'm the district judge. Can I say, I've looked at all
18 this, I want this prisoner released tomorrow morning;
19 and if the Iraqis pick him up, fine with me? Can I say
20 that?

21 MR. MARGULIES: Yes, you can.

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

25 JUSTICE SOUTER: All right. Let's get to

1 that. What manner? Tell me exactly what should such an
2 order would look like.

3 MR. MARGULIES: It -- we would ask the
4 district court to order precisely what the military
5 already does, which is to remove a person to a safe
6 place. When United States citizens are released from
7 Camp Cropper, they are brought from --

8 JUSTICE SOUTER: So Releasing at place A,
9 not place B.

10 MR. MARGULIES: That's correct.

11 JUSTICE SOUTER: Don't push him out the
12 gates; take him somewhere else, and then release him.
13 That's the order?

14 MR. MARGULIES: Yes.

15 JUSTICE SOUTER: Okay.

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

17 MR. MARGULIES: That's the --

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

20 MR. MARGULIES: They don't do that now, Your
21 Honor. When -- when United States citizens are released
22 from Iraq, what they do is they put them in a car out of
23 Camp Cropper, the same thing when I left Camp Cropper.
24 They put them in a car from Camp Cropper. They drive
25 them to the American --

1 CHIEF JUSTICE ROBERTS: Well, that's within
2 the executive's discretion. I want to know if you are
3 saying that the district court in this case can require
4 the custodian not simply to release the person, but to
5 release them somewhere else and to keep the point at
6 which they're going to release someone whose been
7 determined by the MNF-I tribunal to be a dangerous
8 criminal, to keep the point of his release secret from
9 the Iraqi government.

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

13 CHIEF JUSTICE ROBERTS: Okay. Now the
14 determination that the transfer would be unlawful, I --
15 again, I get back -- maybe I'm repeating myself. I have
16 always understood habeas to be concerned with custody,
17 rather than this broad range of determinations about
18 what's lawful and unlawful, other than as are necessary
19 to rule on the question of custody.

20 In other words, of course, if there's been a
21 Fourth Amendment violation, you bring a habeas action,
22 you determine whether the custody is lawful or not.
23 Here you want a determination whether the transfer is
24 unlawful or not.

25 MR. MARGULIES: Yes. Because the United

1 States Government simply lacks the power under the Due
2 Process Clause to surrender a citizen to the custody of
3 another sovereign. That -- it just lacks that power.

4 CHIEF JUSTICE ROBERTS: Whether it does or
5 does not, I just question whether habeas is an
6 appropriate remedy in that situation, again because it's
7 not concerned with the legality of transfer; it's
8 concerned with the legality of custody.

9 MR. MARGULIES: Habeas has long been used to
10 test the lawfulness, under the Fifth Amendment, of a
11 proposed transfer.

12 JUSTICE STEVENS: How can you say that the
13 United States lacks the power to transfer? Suppose this
14 fellow had been arrested in the street by a sergeant in
15 the Army and he says, what will I do with him? I'll
16 take him to the Iraqis and turn him over. Would that be
17 an illegal transfer?

18 MR. MARGULIES: It -- once the United States
19 has the authority to --

20 JUSTICE STEVENS: A sergeant caught this
21 guy, and he wants to turn him over to the Iraqis. Does
22 he -- is there some law that prevents him from doing
23 that?

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

1 JUSTICE STEVENS: That applies to the
2 sergeant in the city of --

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

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

9 MR. MARGULIES: Because we filed this
10 application more than a year after the United States
11 made a decision to continue the detention. Think about
12 it this way, Your Honor: If Hamdi -- exact same facts
13 -- had simply been kept in Afghanistan, instead of
14 brought to Charleston, South Carolina, we think there
15 still would have habeas jurisdiction. The court would
16 have undertaken the exact same inquiry.

17 CHIEF JUSTICE ROBERTS: So if you had filed
18 it -- if you had filed it six months rather than a year
19 after, would there be habeas jurisdiction.

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

21 CHIEF JUSTICE ROBERTS: You see where I'm
22 going. Three months?

23 MR. MARGULIES: There may be some cases that
24 become difficult, Your Honor. In this case, for
25 instance --

1 CHIEF JUSTICE ROBERTS: The bright line is
2 getting awfully fuzzy, as far as I'm concerned.

3 MR. MARGULIES: Your Honor, in this case --
4 in both cases, after two months they made the
5 determination to continue to hold them in the MNF-I
6 tribunals. So at the very least, at that point we're
7 covered.

8 JUSTICE KENNEDY: But it seems to me your
9 statement is wildly overbroad: That there is a
10 due-process restriction on release by the United States
11 Government to another sovereign?

12 MR. MARGULIES: Yes.

13 JUSTICE KENNEDY: If we have an undercover
14 agent in Japan who finds a drug dealer, he gives him to
15 the Japanese police.

16 MR. MARGULIES: Your Honor --

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

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

25 JUSTICE STEVENS: You're talking about a

1 transfer in what I assume you said was a zone of
2 hostilities.

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

4 JUSTICE STEVENS: I thought you were talking
5 about a transfer in an area that you say was engaged in
6 active hostilities.

7 MR. MARGULIES: Your Honor, we --

8 JUSTICE STEVENS: Does that affect the
9 decision at all?

10 MR. MARGULIES: It does not affect a
11 citizen's due-process entitlement. In the metes and
12 bounds, the way we would analyze it under Matthews
13 versus Aldridge, it may affect what inquiry the
14 government has to make in order to justify it. But it
15 does not affect the citizen's right, the citizen's
16 constitutional entitlement, to challenge the lawfulness
17 of a transfer at the hands of his government to another
18 sovereign.

19 JUSTICE KENNEDY: But you've just said that
20 it's unlawful. You said that an American law
21 enforcement officer working in another country who takes
22 custody of a wanted criminal cannot turn him over to the
23 government of that country. That's just got to be
24 wrong.

25 MR. MARGULIES: Your Honor, just to finish

1 the answer, the transfer may take place, but it may only
2 take place as authorized by law. That is, they have to
3 show a legal and factual basis. The legal basis is they
4 have to show a treaty or a statutory authority; and the
5 factual basis is they have to show that the person comes
6 within it.

7 So, of course, they can pass a person.
8 Those -- those transfers take place all the time, but it
9 must take place consistent with the requirements of the
10 law.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Mr. Margulies, let
13 me make sure there are no other questions.

14 JUSTICE BREYER: You need all that to win
15 this case. That is, as I started the case I thought
16 this involved an American being held by the military for
17 over a year pending the resolution of criminal charges
18 in Iraq, which are charges of kidnapping in respect to
19 which whatever hot war is going on over there has very
20 little to do with his being held.

21 MR. MARGULIES: Correct.

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

25 MR. MARGULIES: Your Honor, we -- all of

1 these other matters we do not need in order to prevail.
2 The district court, examining two claims under the
3 due-process clause, will examine whether there is legal
4 authority to detain a person, to detain these prisoners
5 as security internees or security threats. That is a
6 classic Hamdi inquiry. And they will examine under the
7 due-process clause whether it is lawful to transfer
8 them.

9 JUSTICE SCALIA: Well, why do you say it has
10 nothing to do with the war, then? They are holding them
11 as security detainees. Aren't they -- aren't they
12 worried that if they just let them go, they'll go right
13 back to killing Americans and Iraqis?

14 MR. MARGULIES: Your Honor, this is what
15 came up in Hamdi. In Hamdi, you had a conflict, boots
16 on the ground. They captured a United States citizen in
17 a battlefield situation. And this Court made a
18 decision, made a determination, that that person can
19 challenge the lawfulness of his -- of his detention.

20 JUSTICE SCALIA: I'm not arguing that. I'm
21 just questioning your statement that it's irrelevant
22 that this is occurring in a war zone. It is not at all
23 irrelevant.

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

1 MR. MARGULIES: Your Honor, we think that
2 point is answered by the suggestion in Hamdi that you
3 don't want to create a perverse incentive to keep people
4 there. They have made a decision to keep them there.
5 The inquiry that the district court will undertake is
6 the same in Hamdi as in this case. There is nothing
7 that -- there is nothing about that inquiry that is
8 altered by the United States' determination to move them
9 to a safe --

10 JUSTICE GINSBURG: One distinct difference
11 in Munaf's case: He is undergoing a criminal process in
12 Iraq, and Omar has also -- it is alleged that he has
13 committed offenses in Iraq.

14 Has no prosecution, no investigation been
15 started with respect to Omar?

16 MR. MARGULIES: That is correct, Your Honor.
17 What the district court did in its preliminary
18 injunction, the Rosetta Stone of the preliminary
19 injunction appears on page 143 of the joint appendix.

20 And there you have an e-mail from the United
21 States Government, from opposing counsel to us,
22 indicating to us on February 2, 2006, that a decision
23 had been made to refer Mr. Omar to proceedings in the
24 CCCI, but telling us in the second-to-the-last sentence
25 of that page that we would not receive notice of when

1 that referral took place.

2 And it pointedly -- they did not say that
3 Mr. Omar would remain in U.S. custody once the referral
4 took place.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Margulies.

7 MR. MARGULIES: Thank you, Your Honor.

8 CHIEF JUSTICE ROBERTS: Mr. Garre, seven
9 minutes.

10 JUSTICE SOUTER: Mr. Garre, would you
11 address this question at some point? Assuming -- assume
12 an officer in the national government arrests somebody
13 unlawfully in Portland, Oregon, and transfers the person
14 across the country to Portland, Maine. The person files
15 for habeas in the district court in Maine, and the
16 district court says: Yes, you are right. You are being
17 held unlawfully.

18 Does the court have the authority to tell
19 the United States to take him back to Portland, Oregon,
20 and then release him?

21 REBUTTAL ARGUMENT OF GREGORY GARRE

22 ON BEHALF OF PETE GEREN,

23 SECRETARY OF THE ARMY, ET AL.

24 MR. GARRE: I think this court confronted a
25 similar situation in the Padilla case a couple of years

1 ago. And what it -- it -- there was a habeas petition
2 filed in New York, and it -- the court held that that
3 habeas petition was improperly filed and a different
4 petition should be filed in South Carolina.

5 And it didn't get into the question of the
6 transfer. And we certainly -- we don't think that
7 transfer --

8 JUSTICE SOUTER: Do you have a position on
9 the answer to my question?

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

12 JUSTICE SOUTER: Yes.

13 MR. GARRE: I think the habeas court would
14 --

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

20 Does the habeas court have the authority to
21 do that?

22 MR. GARRE: I would say probably not,
23 Justice Souter. I mean there are transfers all the time
24 where habeas petitions are filed, and people are going
25 from State authority to Federal authority. And the rule

1 is that those transfers, of course, can take place. The
2 habeas proceedings can continue. The habeas has
3 traditionally been used to block transfers.

4 Here -- and I think it is important to focus
5 on the injunction that the court of appeals sustained.
6 It is an injunction against allowing the Iraqi
7 prosecutions to proceed because the court enjoined
8 American officials from presenting Mr. Omar to the Iraqi
9 courts. Now, Mr. Margulies said that they didn't enjoin
10 --

11 JUSTICE GINSBURG: I didn't see that in the
12 junction, itself. It just -- the injunction was very
13 spare.

14 MR. GARRE: What the injunction says -- and
15 it is on page 59a -- is that it bars -- of the petition
16 appendix in the Omar petition, the gray petition, and I
17 am quoting now: "Shall not remove the Petitioner from
18 the United States or MNF-I custody, or take any other
19 action inconsistent with this court's memorandum
20 opinion."

21 "Any other action inconsistent with this
22 court's memorandum opinion" is allowing the prosecution
23 to proceed, and the Court of Appeals makes this express
24 on page 25a of the petition appendix where the Court of
25 Appeals majority says, quote, "we agree with the dissent

1 that the injunction prohibits the military from
2 presenting Omar to the CCCI for trial."

3 Now, Mr. Margulies said that the proceedings
4 can go forward just without his client's presence,
5 but that --

6 JUSTICE GINSBURG: If one could go agree --
7 let's say one could agree that was overbroad. Does that
8 mean that the whole injunction falls? Let's say, take
9 two pieces out of it: No information sharing; that's
10 beyond the pale. And you can't make an order that a
11 foreign court shouldn't hear a case. Take those two
12 out.

13 MR. GARRE: That would be a vast improvement
14 over the injunction that was held by the court of
15 appeals.

16 JUSTICE GINSBURG: But how about the rest of
17 it?

18 MR. GARRE: And then you are dealt -- you
19 are left with the transfer, the injunction on the
20 transfer to the Iraqi authorities in the event that
21 Mr. Omar is convicted.

22 And on that, I confess to being not -- not
23 being entirely clear as to what my friend's position is.
24 He says that we can release him because, of course, that
25 is the office of the Writ of Habeas Corpus.

1 But then he goes on to say: But we can't
2 release him in a way that would affect a transfer. I'm
3 not sure what that means because I thought he also
4 said that we --

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

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

12 MR. GARRE: Just to underscore the affront
13 to the Iraqi sovereignty on this, his clients
14 acknowledge that they can be arrested by Iraqi officials
15 for crimes they allegedly committed in Iraq if they were
16 released. But the injunction that they're asking this
17 Court to sustain is an injunction that prevents the
18 Multi-National Force in Iraq from telling Iraqi
19 authorities: We are going to release these Petitioners
20 at 12:00 o'clock tomorrow. In effect, they're asking
21 for an eight-hour head start so that these individuals
22 whom the Multi-National Force has determined pose
23 threats to the security of Iraq, who Iraq has determined
24 pose threats to the security of Iraq, that an American
25 court is enjoining the Multi-National Force from

1 conveying that information to the Iraqi authorities so
2 that these individuals who went to Iraq voluntarily can
3 be held to account in the Iraqi system for crimes that
4 they committed.

5 JUSTICE SCALIA: Do you think an eight-hour
6 lead is enough? I don't know.

7 MR. GARRE: Well, I --

8 JUSTICE SCALIA: It would make a good movie.

9 MR. GARRE: Yes.

10 (Laughter.)

11 JUSTICE GINSBURG: So we have a basic
12 question: Is there habeas jurisdiction; and, as I
13 understand the posture of this case, the Federal courts
14 did not examine the merits of the habeas petition. They
15 were just hung up on the bare jurisdictional question.

16 MR. GARRE: That's true. But we think that
17 it is quite clear from this Court's decisions that if
18 they don't have the authority to enter the preliminary
19 injunctive relief that they did at the end of the day
20 they have no authority to enter it as a preliminary
21 matter.

22 I think on the jurisdictional point, the one
23 point I wanted to stress is that if this Court does find
24 jurisdiction we think it has to be because of a reading
25 of the habeas statute informed by the Constitution

1 that's limited to citizens. Extending jurisdiction to
2 everyone in Iraq would be an extraordinary expansion of
3 this Court's decision in Rasul. Just to be clear, Camp
4 Cropper in Iraq bears none of the characteristics of the
5 Guantanamo Bay that this Court discussed in its opinion
6 in Rasul and that Justice Kennedy emphasized in his
7 concurrence. So any jurisdictional ruling by this
8 Court, we would urge it to rule only to the
9 circumstances here of the fact of citizenship.

10 CHIEF JUSTICE ROBERTS: The the 20,000-plus
11 people being retained, are they all in connection with
12 security threats? Or do they involve what I guess we
13 could call common criminals?

14 MR. GARRE: I think there are both. This
15 have been 2,000 transfers of individuals from
16 Multinational Force to Iraqi custody, most in connection
17 with criminal proceedings. The other individuals are
18 held because they're a security threat. A lot of
19 individuals come in and out of detention.

20 Obviously the Multinational Force tries to
21 limit the detentions as much as possible. Here the
22 reason why these people have been subsidy contained so
23 long is because the American courts have stood in the
24 way of the Iraqi criminal proceedings where the Iraqi
25 courts have sought to bring justice to these people

1 under Iraqi law.

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

4 MR. GARRE: It's -- we don't take the
5 position this is like a battlefield situation. The
6 occupation --

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

9 MR. GARRE: Certainly there are active
10 hostilities in parts of Iraq.

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

12 MR. GARRE: Well, the occupation has ended.
13 I think there are active hostilities in part of it. We
14 have not argued that there is no habeas jurisdiction
15 because of the hostilities there. We've argued that
16 there is no habeas jurisdiction because they're being
17 held under --

18 JUSTICE STEVENS: That means you haven't
19 made your strongest argument.

20 MR. GARRE: Well, if the Court believes that
21 that's our strongest argument, certainly we don't have
22 any objection to having you address it.

23 (Laughter.)

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

1 MR. GARRE: That's jurisdictional.

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

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

12 JUSTICE BREYER: Okay, thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Mr. Garre.

15 The case is submitted.

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

18

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