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HABEAS RELIEF ABROAD: STARE DECISIS OR POLITICS AS USUAL?

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I. FACTS

Petitioners, two U.S. citizens who voluntarily traveled to Iraq, were captured and detained by the Multinational Force-Iraq (MNF-I)[1] for allegedly committing hostile and warlike acts.[2] While both Petitioners filed writs of habeas corpus in the District Court for the District of Columbia,[3] the first Petitioner, Shawqi Omar,[4] sought a preliminary injunction barring the MNF-I from transferring him to the custody of the Iraqi Government for prosecution.[5] The District Court for the District of Columbia granted the injunction and the Solicitor General appealed.[6] The Court of Appeals for the District of Columbia Circuit affirmed the injunction, and the U.S. Supreme Court granted certiorari.[7] The Court HELD that U.S. courts have habeas jurisdiction over U.S. citizens being held by the MNF-I,[8] but such

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1. Munaf v. Geren, 128 S. Ct. 2207, 2213 (2008). The MNF-I is "an international coalition force operating in Iraq composed of 26 different nations, including the United States. The force operates under the unified command of the U.S. military officers, at the request of the Iraqi government, and in accordance with the United Nations (U.N.) Security Council Resolutions." *Id.* One of the primary functions of the MNF-I is to act as a jailer for detainees who are pending prosecution in the Iraqi court system. *Id.*

2. *Id.* at 2214-15.

3. *Id.*

4. *Id.* Shawqi Omar, an American-Jordanian citizen, traveled to Iraq in 2002. *Id.* at 2214. The MNF-I, in a raid of Omar's Baghdad home, discovered that Omar was harboring insurgents. *Id.* Omar was believed to be aiding Al Qaeda, coordinating kidnapping activities against the American forces, and training Jordanian fighters in his home. *Id.*

5. *Id.* at 2215.

6. *Id.* The Court dismissed the writ of habeas corpus as to the second Petitioner, Mohammad Munaf, for lack of jurisdiction. *Id.* at 2215-16. The Court reasoned that Omar's case was distinguishable from Munaf's, since Omar had yet to be convicted by the Central Criminal Court of Iraq (CCCI). *Id.* at 2216.

7. *Id.*

8. *Id.* at 2218.

jurisdiction may not be exercised to enjoin a sovereign government from prosecuting an individual detained within that sovereign's territory.[9]

II. HISTORY

In *Neely v. Henkel*, a U.S. citizen was arrested and detained in the United States for embezzlement[10] committed in Cuba and in violation of Cuban law.[11] The petitioner filed a writ of habeas corpus, stating that prosecution in Cuba would deny him constitutional rights otherwise bestowed under U.S. law.[12] Rejecting petitioner's claim, the Court stated that constitutional "provisions have no relation to crimes committed without the jurisdiction of the United States against the law of a foreign country."[13] The Court reached the conclusion that petitioner did not present a claim upon which habeas relief could be granted and accordingly transferred custody of the accused to the Cuban Government.[14]

In another landmark case, *Hirota v. MacArthur*, Japanese citizens filed writs of habeas corpus to the U.S. Supreme Court.[15] The petitioners, who were not U.S. citizens, were detained and convicted by the International Military Tribunal in Japan.[16] Despite having grounds to deny certiorari,[17]

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9. *Id.* at 2220. First Petitioner, Shawqi Omar, was granted an injunction on his proposed custody transfer by the district court, which was subsequently affirmed by the court of appeals. *Id.* at 2219. Yet the Supreme Court vacated the injunction and relegated the lower courts' decisions to abuse of discretion. *Id.* The abuse of discretion was the result of a failure to consider prudential concerns, issues of comity, and foreign relations. *Id.* at 2220.

10. Neely v. Henkel, 180 U.S. 109, 113 (1901). Petitioner was in violation of the "Penal Code of the said island of Cuba, that is to say, a crime within the meaning of the said act of Congress approved June 6th, 1900, as aforesaid, relating to the 'embezzlement or criminal malversation of the public funds committed by public officers, employees, or depositaries.'" *Id.* Allegedly, the petitioner "unlawfully and feloniously . . . embezzle[d] from the public funds of the said island of Cuba the sum of $10,000 and more . . . under his control in his capacity as such public employee and finance agent." *Id.*

11. *Id.* The United States intended to extradite petitioner to Cuba for prosecution of the crime of embezzlement. *Id.* It is interesting that the instant Court uses *Neely* as support, since *Neely* involved the presence of an extradition treaty.

12. *Id.* at 114.

13. *Id.* at 122. The Court added that "[w]hen an American citizen commits a crime in a foreign country, he 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." *Id.* at 123.

14. *Id.* at 125.

15. Hirota v. MacArthur, 338 U.S. 197, 198 (1948). All petitioners were residents and citizens of Japan. *Id.* Two of the petitioners faced death sentences while the remaining petitioners were sentenced to terms of imprisonment. *Id.*

16. *Id.*

17. *See id.* at 2218 (citing Johnson v. Eientrager, 339 U.S. 763, 781 (1950); Rasul v. Bush,

the Court accepted petitioners' case to address a foreign policy concern. The issue addressed was whether the International Military Tribunal acted under the power or authority of the United States.[18] The Court held that the International Military Tribunal was a foreign military tribunal.[19] The Court's holding ignored that the United States, among other nations, occupied Japan and that the International Military Tribunal operated under the direction of a U.S. General.[20] Therefore, the Court denied petitioners' claim, finding no jurisdictional predicate.[21]

Finally, in *Wilson v. Girard*, the Japanese Government indicted a member of the U.S. Army stationed in Japan for the death of a civilian.[22] Upon receiving notice that the U.S. Government intended to transfer the petitioner's custody to the Japanese Government, the petitioner filed a writ of habeas corpus and sought a preliminary injunction in the District Court for the District of Columbia.[23] The District Court granted the injunction against the custody transfer and the U.S. Supreme Court granted certiorari.[24] The Court vacated the injunction on grounds that the Japanese Government had exclusive jurisdiction.[25] Equivocating, the Court noted that the Japanese had ceded jurisdiction to the United States through the

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542 U.S. 466, 486 (2004) (Kennedy, J., concurring) for the proposition that non-citizen status of the petitioners alone would have been dispositive on jurisdiction.).

18. *Hirota,* 338 U.S. at 198; *Munaf,* 128 S. Ct. at 2218; 28 U.S.C. § 2241(c)(1)(2000). Specifically, the habeas statute provides that "[t]he writ of habeas corpus shall not extend to a prisoner unless—(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof." 28 U.S.C. § 2241(c)(1) (2000). The federal courts derive their habeas jurisdiction from title 28 U.S. code section 2241(c)(1), when an individual is held "in custody under or by the color of the authority of the United States." *Id.*

19. *Hirota*, 338 U.S. at 198. The Court concluded that General McArthur was appointed by the allied forces and therefore answered to a foreign chain of command. *See Munaf*, 128 S. Ct. at 2217. The Court denied the fact that a U.S. General may at times take orders from the U.S. president, or the Department of Defense as the MNF-I does.

20. *Munaf*, 128 S. Ct. at 2217. However, one may argue that because Japan was occupied by the United States and that a U.S. General led the International Military Tribunal, a U.S. chain of command was present. The Court's denial of this possibility in both *Hirota* and *Munaf* is noteworthy.

21. *Hirota*, 338 U.S. at 198.

22. Wilson v. Girard, 354 U.S. 524, 525-26 (1957). "Girard, a Specialist Third Class in the U.S. Army, was engaged on January 30, 1957, with members of his cavalry regiment in a small unit exercise at Camp Weir range area, Japan." *Id.* During routine activities and while Japanese civilians were present, Girard "placed an expended 30-caliber cartridge case in the grenade launcher and projected it by firing a blank. The expended cartridge case penetrated the back of a Japanese woman, causing her death." *Id.* at 526.

23. *Id.*

24. *Id.*

25. *Id.* at 529-30.

Status of Forces Agreement[26] but that ultimately the United States, acting through the Executive and Legislative Branches could waive its right to jurisdiction over the matter.[27]

As *Neely, Hirota*, and *Wilson* make clear, the Court's decisions on foreign habeas relief reflect the degree of U.S. involvement in the affairs of the prosecuting foreign government. Further, the Court has demonstrated a reluctance to hold that jurisdiction exists for foreign habeas petitions. Accordingly, the Court has lacked the power to enjoin the transfer of petitioners from the detaining organization to the foreign sovereign government.

III. INSTANT CASE

In the instant case, the Supreme Court declined to apply its holding in *Hirota*.[28] Instead, the Court held that U.S. courts have jurisdiction over foreign habeas petitions, marking a departure from former decisions.[29] Ironically and despite having the jurisdictional predicate to hear the habeas petition, the Court held that it would not exercise its power to enjoin the transfer of the Petitioners to the Iraqi Government.[30]

In determining the first issue, whether the Court had jurisdiction over the Petitioners' habeas claims, the Court heard arguments from the Solicitor General.[31] Relying heavily on *Hirota*, where no jurisdiction was found, the Solicitor General analogized the MNF-I to the International Military Tribunal.[32] Rejecting the Solicitor General's argument, the Court distinguished *Hirota* on grounds that the MNF-I in the instant case complies with orders issued from the Pentagon and the U.S. President, whereas the International Military Tribunal in *Hirota*, although led by a U.S. General, did not follow a U.S. chain of command.[33] Accordingly, the

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26. *Id.* (citing Status of Forces Agreement, U.S.-J.P., Feb. 28, 1952, 3 U.S.T. 3341 (stating that the United States would have jurisdiction over offenses committed in Japan by members of the U.S. Armed Forces)).

27. *Id.* The Court in essence relegated its decision to a political question by punting the ultimate decision of waiving jurisdiction to the executive and legislative branches.

28. Munaf v. Green, 128 S. Ct. 2207, 2218 (2008).

29. *Id.*

30. *Id.* at 2220.

31. *Id.* at 2216.

32. *Id.* The argument followed that the federal courts did not have jurisdiction since the MNF-I was comprised of many nations and was a matter of international law not within the scope of the habeas statute. *Id.*

33. *Id.* at 2217-18. The Court also added that the Petitioners were American citizens, while the petitioners in *Hirota* were Japanese nationals. *Id.*

Court held that Petitioners were U.S. citizens being detained abroad by a U.S. chain of command, thus fitting squarely within the bounds of habeas jurisdiction.[34]

In deciding the second issue, whether habeas jurisdiction could be exercised to enjoin the transfer of Petitioners to Iraqi custody,[35] the Court relied exclusively on the prudential concerns of sovereignty and foreign relations.[36] The Court expressed that the instant case "implicate[d] sensitive foreign policy issues in the context of ongoing military operations."[37] The Court held that to enjoin the transfer of Petitioners from the MNF-I to Iraqi custody would impinge on Iraq's fundamental right to maintain its own criminal justice system.[38]

IV. ANALYSIS

In the instant case, the Court expanded its power by holding that jurisdiction existed for foreign habeas petitions.[39] Yet the Court did not exercise its newfound power to enjoin the transfer of Petitioners to the Iraqi Government. The paradoxical decision of the Court to grant itself power that it ultimately declined to use seems inexplicable. However, a closer inspection of the political environment in the precedent and instant cases may explain why the Court did not grant an injunction on transfer despite having the authority to do so.

Replete in the instant opinion, the Court expressed the foreign policy concern that Iraq must be ultimately responsible for its own sovereign affairs.[40] It is difficult to overlook a striking resemblance between the

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34. *Id.*

35. *Id.* at 2218.

36. *Id.* at 2220-22. Repeatedly, the Court invoked a policy concern dating back to Chief Justice Marshall, that sovereigns have a fundamental right to prosecute individuals violating sovereign law within their territorial limits. *Id.* at 2221-22. The Court quoted Chief Justice Marshall's statement two centuries ago that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute." *Id.* at 2221 (citations omitted).

37. *Id.* at 2220.

38. *Id.* at 2221-22.

39. *Id.* The Court held that habeas jurisdiction exists in the instant case because of the Multinational Force–Iraq was governed by a U.S. chain of command, unlike the International Military Tribunal in *Hirota* that answered to a coalitional chain of command. *Id.* at 2217-18. Although, it is interesting that "Multinational" and "International" are synonymous. Further, the Court's denial that a U.S. General may at times take orders from the Pentagon is also indicative of an elaborate effort by the Court to create a distinction where one may not exist.

40. *See id.* at 2222-23. The Court characterizes Iraq as "a nation state [that] reigns sovereign." *Munaf*, 128 S. Ct. at 2222. The Court adds that the "Iraqi Government is ultimately responsible" for its sovereign affairs. *Id.* at 2223. The Court warned that "release would

Court's reasoning and the very popular sentiment shared by critics of the current war in Iraq, namely, a need to pull out of the war and return Iraq to an independent nation-state.[41] Furthermore, the foreign policy concerns are not novel, rather they are identical to concerns expressed in the precedent cases of decades past.[42]

The *Neely* opinion reveals an eerily similar political context, describing Cuba as being

> [U]nder a military governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the island by troops of the United States was the necessary result of the war.[43]

The opinion describes a Cuba that has been newly liberated from Spain as a result of U.S. intervention.[44] After multiple references to the need for Cuba to form a "government of their own,"[45] the Court held that custody of the petitioner would be transferred from the United States to Cuba for prosecution.[46]

In *Hirota*,[47] the Court faced a similar political climate involving the

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impermissibly interfere with Iraq's exclusive jurisdiction." *Id.* at 2223 (citations omitted). Throughout the opinion, the Court addresses the need for Iraq to be independent and self-sustaining. *See id.* at 2222-23.

41. *Id.* At a time when the temperature of the body politic is rising for a change toward an isolationist foreign policy, the Supreme Court has responded in the instant decision offering epithets empowering an autonomous Iraq, leaving one to wonder whether the Court is saying that the United States ought to leave Iraq to the Iraqis. If the issue of custody transfer were a matter of first impression, it would be more difficult to deduce that the Court is reacting to the political frenzy of the War in Iraq and the imminent presidential election. *See generally*, Madeleine K. Albright, Speech, *Remarks Based on New Book Memo to the President Elect: How We Can Remove American's Reputation & Leadership*, 20 FLA. J. INT'L L. 1, 5-6 (2008) (discussing Iraq within the context of the 2008 Presidential election).

42. The instant decision with respect to transfer is consonant with the results of *Hirota, Neely,* and *Wilson*, in which the Court did not interfere with the custody transfer of habeas petitioners to a foreign sovereign. The consistency would indicate that the instant decision is not a political stance but an adherence to stare decisis. Yet, closer inspection of the political climate of the precedent cases have much in common with the political climate of the instant decision.

43. Neely v. Henkel, 180 U.S. 109, 120 (1901).

44. *Id.*

45. *Id.*

46. *Id.* at 125.

47. Hirota v. MacArthur, 338 U.S. 197, 198 (1948). Since citizenship can often be decisive of habeas jurisdiction and the petitioners in *Hirota* were not American citizens, it is noteworthy that

Allied occupation of Japan. The Court stated in a very brief opinion that "[t]he United States and other allied countries conquered and now *occupy* and *control* Japan."[48] The Court again allowed custody transfer from the U.S.-led International Military Tribunal to the Japanese Government.[49] Similarly, in *Wilson* the Court noted the political climate of the time, stating that "United States troops are stationed in many countries as part or [sic] our own national defense and to help *strengthen the Free World* struggle against Communist imperialism."[50]

It is telling that the instant case and the precedent cases[51] all involve similar causes of action, similar holdings in favor of custody transfer,[52] and similar political environments. It is quite possible that the overlap is not solely stare decisis at its best. Rather, it could be a repeating political response by the Court that resurfaces during periods of direct U.S. political intervention in the affairs of foreign governments.

V. CONCLUSION

The Court strayed from precedent when it held that U.S. Courts have habeas jurisdiction over the Petitioners in the instant case.[53] By holding that jurisdiction exists, but choosing not to exercise it,[54] the Court now leaves room to hear similar habeas cases in a different political environment. Perhaps future habeas corpus cases will yield different outcomes. The Constitution guarantees that the "privilege of the writ of habeas corpus shall not be suspended, unless [] in cases of rebellion or

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the Court chose to speak on the issue of custody transfer.

48. *Id.* (emphasis added).

49. *Id.*

50. Wilson v. Girard, 354 U.S. 524, 548 (1957) (emphasis added). Stationing troops in a foreign country for the sake of "strengthen[ing] the Free World struggle against Communist imperialism" bears a remarkable likeness to the present U.S. policy of protecting the free world in the struggle against terrorism. *Id.*

51. *Neely*, 180 U.S. at 122; *Hirota*, 338 U.S. at 198; *Wilson*, 354 U.S. at 548.

52. *Wilson*, 354 U.S. at 548 (holding that the United States may waive jurisdiction over the prosecution of a member of the U.S. Army for a crime committed on Japanese soil, resulting in the transfer of custody of the accused from the U.S. Government to the Japanese Government); *Hirota*, 338 U.S. at 198 (holding that the U.S. courts do not have jurisdiction over the International Military Tribunal, resulting in the transfer of custody of the accused from the United States to the Japanese Government); *Neely*, 180 U.S. at 125 (holding that the extradition to Cuba was proper where a U.S. citizen stood accused of committing embezzlement in Cuba).

53. Munaf v. Geren, 128 S. Ct. 2207, 2218 (2008).

54. *Id.* at 2220.

invasion."[55] Yet, it seems that the U.S. Supreme Court has rewritten the blueprint of the U.S. government to add another exception, "or in times of ideological war, be it Imperialism, Communism, or Terrorism."

55. U.S. CONST. art. I, § 9.