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International Decision: Munaf v. Geren

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Jurisdiction of U.S. courts to hear claims regarding detention in Iraq—reach of habeas corpus—exclusive sovereign jurisdiction over crimes within territory—assessing concerns of torture

MUNAF V. GEREN, 128 S.Ct. 2207.

United States Supreme Court, June 12, 2008.

In *Munaf v. Geren*,[1] a unanimous Supreme Court held that the federal courts have jurisdiction under the habeas corpus statute to hear claims brought by American citizens held overseas by American forces "operating subject to an American chain of command, even when those forces are acting as a part of multilateral coalition."[2] In a defeat for the petitioners, however, the Court held that where petitioners are being held in another sovereign's territory for crimes allegedly committed in that territory, federal courts should not interfere by enjoining their transfer to that sovereign. The Court further held that concerns of torture after transfer did not change the result and that such concerns are best assessed and handled by the political branches.

Munaf decided two consolidated cases, *Munaf v. Geren* and *Geren v. Omar*,[3] involving American citizens who had traveled to Iraq and been detained there by American forces. Shawqi Omar, an American citizen born in Kuwait, traveled to Iraq in 2002. In October 2004, American forces, operating under United Nations mandate as part of Mulitinational Forces—Iraq (MNF—I) raided Omar's Baghdad home and took Omar into custody. Based on evidence collected as a

[1] 128 S.Ct. 2207 (2008).

[2] *Munaf*, 128 S.Ct. at 2213.

[3] *See* Munaf v. Harvey, 456 F. Supp. 2d 115 (D.D.C. 2006), *aff'd sub nom.* Munaf v. Geren, 482 F.3d 582 (D.C. Cir. 2007); Omar v. Harvey, 416 F. Supp. 2d 19 (D.D.C. 2006), *aff'd* 479 F.3d 1 (D.C. Cir. 2007).

result of the raid, it was determined that Omar posed a threat to Iraqi security.[4]

Omar's wife and son filed a petition for a writ of habeas corpus on Omar's behalf in the District Court for the District of Columbia. When informed in February 2006 that Omar was to be referred to the Central Criminal Court of Iraq (CCCI), they successfully sought a preliminary injunction from the district court barring his transfer. The Court of Appeals for the District of Columbia affirmed the district court's jurisdiction over Omar's petition and construed the injunction to prohibit transferring him to Iraqi custody, presenting him to the Iraqi Courts, or sharing details with the Iraqi Government concerning his possible release.[5]

Mohammed Munaf is a citizen of both Iraq and the United States who returned to Iraq in March 2005 to serve as a translator for a group of Romanian journalists.[6] Soon after their arrival in Iraq, the group was kidnapped. When the group was released, American forces, again operating as part of MNF—I, took Munaf into custody, suspecting that he had been involved in the kidnapping. Munaf was designated a "security internee," and the MNF—I referred his case to the CCCI. Based in part on a confession that he later recanted, the CCCI found him guilty of kidnapping and sentenced him to death. On appeal, however, the Iraqi Court of Cassation vacated the conviction and remanded Munaf's cases for further investigation, ordering that he "'remain in custody pending the outcome' of further criminal proceedings."[7]

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[4] *Munaf*, 128 S.Ct. at 2214; Brief for the Habeas Petitioners at 3, *Munaf v. Geren*, Nos. 06–1666 and 07–394 (Sup. Ct. June 12, 2008) at < http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-394_PetitionerHabeas.pdf>.

[5] *Id*. at 2215.

[6] *Id*. Munaf had originally settled in Romania. *See* Brief for Petitioner, *supra* note 4, at 9-10.

[7] *Munaf*, 128 S.Ct. at 2215.

Prior to his trial, Munaf's sister filed a petition for a writ of habeas corpus on his behalf in the District Court for the District of Columbia and sought a temporary restraining order to bar his transfer to Iraqi custody. In October 2006, after Munaf's conviction and sentence by the CCCI, the district court dismissed the case for lack of subject matter jurisdiction and rejected the request for a temporary restraining order as moot. The Court of Appeals for the District of Columbia affirmed the dismissal, distinguishing Munaf's case from Omar's (which the Court of Appeals had already decided) on the basis of Munaf's actual conviction by a foreign tribunal.[8]

Central to both Court of Appeals decisions was a key post-World War II precedent and the nature of the American forces operating in Iraq. In *Hirota v. MacArthur*, 338 U.S. 197 (1948), the U.S. Supreme Court was faced with a petition for habeas corpus brought directly to the Court by Japanese citizens convicted and sentenced by the International Military Tribunal for the Far East ("IMTFE"). In a three paragraph per curiam opinion, the Court denied the petition, explaining that "[t]he petitioners, all residents and citizens of Japan, are being held in custody pursuant to the judgments of a military tribunal in Japan," that the Court was "satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States," and that "[u]nder the foregoing circumstances, the courts of the United States have no power or authority to review, to affirm, set aside, or annul the judgments and sentences imposed on these petitioners."[9]

Opposing Omar's and Munaf's petitions, the U.S. Government ("the Government") argued that as in *Hirota*, Omar and Munaf were being held not by the United States but by a multinational force and that *Hirota* thus precluded jurisdiction.[10] American forces in Iraq

[8] *Id*. at 2215-16.

[9] Hirota v. MacArthur, 338 U.S. 197, 197-198 (1948).

[10] *Munaf*, 128 S.Ct. at 2214-16.

operate as part of MNF—I, a coalition of 26 states, under a United Nations mandate and at the request of the Iraqi Government. Along with fighting insurgents and training Iraqi security forces, MNF—I detains individuals accused of violating Iraqi law who are awaiting criminal proceedings and dispositions in Iraqi courts. An American military unit under the command of American military officers administers such detentions, including those at Camp Cropper, where both Omar and Munaf have been held.[11] The Government argued that this arrangement put Omar's and Munaf's petitions squarely within the circumstances of *Hirota*.

In *Omar v. Harvey*, the Court of Appeals rejected this analogy, observing that *Hirota*'s holding was specifically confined to its circumstances. Although noting that American citizenship differentiated Omar from the *Hirota* petitioners, the Court of Appeals focused on what it saw as the key difference—the fact that unlike the petitioners in *Hirota*, Omar had not yet been convicted by a foreign tribunal. The *Hirota* "Court's primary concern was that the petitions represented a collateral attack on the final judgment of an international tribunal," and it was the Court's lack of authority "to review, to affirm, set aside, or annul the judgments and sentences" of that tribunal that barred it from taking jurisdiction.[12] Munaf's petition was a different story. A second panel of the D.C. Circuit observed that Munaf had been convicted and sentenced by a foreign tribunal, the CCCI. His case was thus distinguishable from Omar's and controlled by the *Hirota* holding. As a result the Appeals Court found jurisdiction over his habeas petition barred.[13] The Supreme Court granted certiorari in both cases and consolidated them.

Chief Justice John Roberts, writing for the Court, made quick work of the jurisdictional

[11] *Id*. at 2213-14.

[12] Omar v. Harvey, 479 F.3d 1, 7-8 (D.C. Cir. 2007).

[13] Munaf v. Geren, 482 F.3d 582 (D.C. Cir. 2007).

question, finding the precise language of the habeas statute and the Government's concessions about the nature of U.S. military involvement in MNF—I dispositive in establishing jurisdiction. The habeas statute grants jurisdiction to the federal district courts to consider petitions brought by any person held "in custody under or by color of the authority of the United States."[14] Key here, Chief Justice Roberts explained, is "[t]he disjunctive 'or'," which "makes clear that actual custody by the United States suffices for jurisdiction, even if that custody could be viewed as 'under ... color of' another authority, such as the MNF—I."[15]

Based on the Government's concessions, the Court found that Omar and Munaf were clearly within the "actual custody" of the United States. As the Chief Justice recounted, "the United States acknowledges that Omar and Munaf are … held overseas in the immediate 'physical custody' of American soldiers who answer only to an American chain of command," and that "the MNF—I itself operates subject to a unified American command."[16] The Government has furthermore, "never argued that it lacks the authority to release Munaf or Omar, or that it requires the consent of other countries to do so."[17]

Nor did the Court see anything in *Hirota* that would suggest a different result or strip the courts of jurisdiction that the statute would otherwise provide. The Government had argued that the *Hirota* petitioners had also been in "actual custody" of U.S. General Douglas MacArthur and the United States Eighth Army, but that the Court found the tribunal's multinational status

[14] *Munaf*, 128 S.Ct. at 2217 (quoting 28 U.S.C. §2241(c)(1)).

[15] *Id*.

[16] *Id*. at 2216.

[17] *Id*.

determinative in barring jurisdiction.[18] Chief Justice Roberts observed, however, that these facts were contested in *Hirota* and were not among the circumstances relied on by the Court. The per curiam opinion mentioned only that the IMTFE was a "foreign tribunal," and "the Solicitor General expressly contended [in *Hirota*] that General MacArthur, as pertinent, was not subject to United States authority."[19] *Hirota* thus said little about situations such as Omar's and Munaf's where the Government had conceded practical authority over the two men.

The Chief Justice noted, however, that even if the Government were correct in analogizing the international authority at issue in the two cases, the cases also differ with respect to Omar's and Munaf's status as American citizens. The foreign citizenship of the petitioners was one of the "circumstances" noted by the *Hirota* court, and caselaw suggests that habeas jurisdiction might turn on the citizenship of the petitioner.[20]

Jurisdiction over Omar's and Munaf's petitions, however, does not grant the courts authority to block Omar's and Munaf's transfer to Iraqi authorities. Continuing on to consider the actual merits of the case,[21] the Court found that where, as here, petitioners had voluntarily traveled to another sovereign state, were alleged to have committed serious crimes there, and

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[18] *Id*. at 2217.

[19] *Id*. For more on the *Hirota* decision, *see* Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 GEO. L.J. 1497, 1499-1502, 1505-18 (2007).

[20] *Munaf*, 128 S.Ct. at 2218.

[21] Before moving on to the merits, the Court held that the district court in Omar had abused its discretion in granting a preliminary injunction without considering the likelihood of Omar's success on the merits. *Id*. at 2219. As a result, had the Court not gone on to reach the merits, the rulings in both cases would have been vacated and remanded. *Id*.

were being held in that state's territory, it would be inappropriate for an American habeas court to interfere with their prosecution by that state. Comity concerns, observed the Court, can require a court to abstain from exercising its habeas corpus power, and "Iraq has a sovereign right to prosecute Omar and Munaf for crimes committed on its soil."[22] Just as American courts will refuse to scrutinize a foreign judgment out of concern for "'comity and respect for foreign sovereigns,'"[23] so too should courts refrain from interfering with ongoing foreign prosecutions.

In this case, this principle precludes courts not only from barring Omar's and Munaf's transfer, but also from granting their release. As the Court explained, American forces are holding Omar and Munaf at the Iraqi government's behest and pursuant to a U.N. mandate to contribute to Iraqi security. American forces "function[], in essence, as [the Iraqi Government's] jailor"; "MNF—I detention is an integral part of the Iraqi system of criminal justice."[24] Any order of release by an American court would thus interfere with Iraqi criminal proceedings.

Moreover, explained the Court, this principle bars intervening even where citizens may be subjected to criminal process that falls short of the rights granted by the U.S. Constitution. "'When 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.'"[25] "Habeas is not a means of compelling the United States to harbor fugitives from the criminal justice system of a sovereign with the undoubted authority to prosecute them."[26]

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[22] *Id*. at 2221.

[23] *Id*. at 2224 (quoting *Omar v. Harvey*, 479 F. 3d at 17 (Brown, J., dissenting in part)).

[24] *Id*. at 2223, 2224.

[25] *Munaf*, 128 S.Ct. at 2222 (quoting Neely v. Henkel, 180 U. S. 109, 23 (1901)).

[26] *Id*. at 2223.

Omar's and Munaf's fears of torture in Iraqi custody, although of "serious concern," did not change the result. Concerns about possible torture involve sensitive foreign policy issues, the Court explained, and are properly dealt with by the political branches. Here, "the Solicitor General states that it is the policy of the United States *not* to transfer an individual in circumstances where torture is likely to result," and "the State Department has determined that [Iraq's] Justice Ministry—the department that would have authority over Munaf and Omar—as well as its prison and detention facilities have "'generally met internationally accepted standards for basic prisoner needs.'"[27] "[T]his is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway,"[28] and the courts should not "second-guess" the judgments of the political branches.[29]

Finding the issue insufficiently argued, the Court declined to consider more specific claims for relief under the Foreign Affairs Reform and Restructuring Act of 1998 (FARR Act) and its prohibition on transfers where torture may result.[30] Chief Justice Roberts noted in a footnote though that questions remain whether the FARR Act is applicable outside the immigration context and whether the Act's prohibition on "returning" a detainee to a country would apply where the detainee is already in that country, albeit in U.S. custody.[31]

Justice Souter added a concurrence, joined by Justices Ginsburg and Breyer. Justice

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[27] *Id*. at 2226.

[28] *Id*.

[29] *Id*.

[30] *Munaf*, 128 S.Ct. at 2226. The FARR Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998), implements provisions of the Convention Against Torture into American law.

[31] *Id*. at 2226 n.6.

Souter emphasized the importance of the case's particular circumstances to the denial of relief.[32] Further, this decision did not foreclose relief where the Executive had determined that torture was likely nor where "the probability of torture is well-documented, even if the Executive fails to acknowledge it."[33] In those cases, Justice Souter observed, "it would be in order to ask whether substantive due process bars the Government from consigning its own people to torture."[34]

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At first glance, the decision in *Munaf* seems quite narrow, a decision easily circumscribed to the unique facts of the case. The Court discusses only the habeas statute (rather than the scope of Constitutional habeas corpus), and Chief Justice Roberts confines his finding of jurisdiction to situations involving American citizens held by forces answering exclusively to an American chain of command. Notably, the Government's concessions regarding the nature of MNF—I forces, their place within the chain of command, and their exclusive control over Munaf and Omar, seem central to the Court's quick finding of jurisdiction. Those concessions play a key role in distinguishing *Hirota*, and Chief Justice Roberts at least implies that *Munaf* might have been more difficult had those issues been contested here.

The Court's denial of relief is equally constrained by the facts. The Court emphasizes that Munaf and Omar traveled voluntarily to Iraq, that they are accused of committing crimes in Iraq in violation of Iraqi law, and that both are awaiting Iraqi criminal process.[35] The Court also emphasizes the unique mandate under which they are being held: American forces are acting in

[32] *Id.* at 2228 (Souter, J. concurring).

[33] *Id*.

[34] *Id*.

[35] *Id*. at 20.

support of the Iraqi criminal justice system, are serving as Iraq's de facto jailors, and are holding Munaf and Omar at the "behest of the Iraqi Government."[36] It narrowly construes the threat of torture, finding that "this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him," and declines to consider potential FARR Act claims. The Court even "express[es] no opinion on whether Munaf and Omar may be permitted to amend their respective pleadings to raise such a claim on demand."[37]

With such carefully circumscribed facts, *Munaf* may look much like the case it seeks to distinguish, *Hirota*—a case defined and confined by its unique circumstances. Announced the same day as the Court's blockbuster *Boumediene* decision,[38] *Munaf*, like *Hirota*, might seem destined to be forgotten. But at second glance, *Munaf* reveals a bevy of surprises, implications, and open-questions. The Court's decision is actually considerably broader than it might have been. The Court could have differentiated *Hirota* and found jurisdiction based solely on Omar's and Munaf's American citizenship. Instead, the Court relies mainly on the open-ended language of the habeas statute and the petitioners' presence within the "actual custody" of the United States. Citizenship is mentioned almost as an afterthought, another way to distinguish *Hirota*.

The resulting jurisdictional test the Court adopts thus seems notably functionalist: The courts have jurisdiction over a petitioner "when the United States official charged with his

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[36] *Id*.

[37] *Munaf*, 128 S.Ct. at 2226 n.6. Still open following the decision is whether *Hirota* would preclude jurisdiction after a conviction by a "foreign tribunal." The Court sidestepped the issue after Munaf's conviction was thrown out, but Omar and Munaf may in time be convicted.

[38] Boumediene v. Bush, 128 S.Ct. 2229 (2008).

detention has 'the power to produce' him."[39] Such a functional test for the habeas statute echoes *Boumediene*'s constitutional test of "plenary control" or "practical sovereignty."[40] It also suggests a wider range of situations in which habeas may be available. *Munaf* does not foreclose, for example, statutory habeas jurisdiction over non-citizen detainees held by American forces at Bagram airbase in Afghanistan. On the contrary, to the extent to which detainees there are not held at the behest of Afghanistan or on behalf of its criminal justice system, *Munaf* suggests that release may be an available remedy should their petitions be granted. *Munaf* also seems to lower one hurdle to finding *constitutional* habeas jurisdiction over Bagram detainees. In *Boumediene*, the Court suggested that even where a facility was sufficiently within the plenary control of the United States, habeas might nonetheless be inappropriate "if the detention facility were located in an active theater of war."[41] The Court's willingness to extend habeas to Camp Cropper in Iraq suggests a narrow view of "active theater of war" that might not include Bagram.

The Court's functional test also suggests the possible availability of habeas relief in some situations of "extraordinary rendition." In *Abu Ali v. Ashcroft*, a District of Columbia District Court found custody and thus habeas jurisdiction where the petitioner alleged that Saudi Arabian

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[39] *Munaf*, 128 S.Ct. at 2217 (quoting Wales v. Whitney, 114 U. S. 564, 574 (1885)). This test may reflect concerns that the U.N. mandates and multinational coalitions under which American forces increasingly operate—in Iraq, the Balkans, or Afghanistan—could become legal fictions insulating all detentions abroad from judicial review. Similar issues were raised regarding the United Kingdom's involvement in MNF—I in *R (Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL 58, [2008] 2 WLR 31.

[40] *Boumediene*, 128 S.Ct. at 2252.

[41] *Boumediene*, 128 S.Ct. at 2262.

authorities were holding and interrogating him at the direction of U.S. officials and on behalf of the United States.[42] *Munaf* 's functional test for custody may open the door to similar petitions.[43]

The breadth of the Court's test for habeas jurisdiction is countered, however, by an equally broad denial of relief. The Court's decision to reach the merits of the petitions is the opinion's most surprising element and seems calculated to temper the effects of its grant of jurisdiction in *Boumediene* as well as in *Munaf*. *Munaf*'s clear bifurcation of jurisdiction and the availability of relief and its decision that, here, neither release nor barring transfer would be appropriate, underscores the point that finding habeas jurisdiction does not guarantee that relief will be available. Detainees, whether at Guantanamo or in Iraq, may have access to American courts, but relief can be limited by the exigencies of national security and foreign affairs.

The Court's consideration of Omar's and Munaf's fears of torture may have the broadest implications. The Court granted remarkable deference to the Executive in assessing the likelihood of torture in other states and in determining the proper response.[44] The Court suggested that such decisions are best made by the political branches and left little room to

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[42] 350 F.Supp.2d 28 (D.D.C. 2004). The case was dismissed after he was transferred to the United States for trial. Abu Ali v. Gonzales, 387 F. Supp. 2d 16, 20 (D.D.C. 2005); *see also* Vladeck, *supra* note 19, at 1532-34.

[43] Of course, the actual custody in *Munaf* was much more obvious, with Americans subject to the chain of command as immediate custodian. Moreover, claims like Abu Ali's may be seriously diminished by *Munaf*'s decision on the merits. *See infra* note 44-48 and accompanying text.

[44] This deference is a stark contrast with the position of European Court of Human Rights, which recently reaffirmed its own *obligation* to review diplomatic assurances regarding torture. *See* Saadi v. Italy, App. 37201/06 Eur. Ct. H.R. (2008), para. 148.

second guess those assessments. Justice Souter's concurrence does suggest some role for judicial review of executive decisions where "the probability of torture is well-documented," but his apparent rejection of the evidence of torture in Iraq that was presented to the Court (which included the State Department's own Iraq Country Report),[45] suggest that this role is very limited. With the possible exception of a case like *Abu Ali*,[46] where the United States is alleged to be directing interrogations, it is thus hard to imagine much role for the courts in reviewing potential claims of extraordinary rendition.[47] The Court does also leave open the possibility that Omar and Munaf may have FARR Act claims, but Chief Justice Robert's footnote expresses considerable skepticism about the act's applicability to their cases. It also questions whether the act prevents transfer to states that might torture in any context other than immigration, an issue sure to be raised by Government efforts to return Guantanamo detainees to their home states.[48]

Munaf may have been an easy case for the unanimous Court, but it seems to guarantee

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[45] *See, e.g*, Brief of Amici Curiae Non-Governmental Organizations at 6, *Munaf v. Geren*, Nos. 06–1666 and 07–394 (Sup. Ct. June 12, 2008) at <http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-394_OmarMunafAmCuNonGovtlOrgs.pdf>.

[46] 350 F.Supp.2d 28 (D.D.C. 2004); *see supra* notes 42-43 and accompanying text.

[47] The implications of the Court's deference to the Executive could even broader, bleeding over into other contexts, including extradition, *see In re* Extradition of Bilanovic, No. 1:08-MJ-74, 2008 WL 5111846, at *12 (W.D. Mich. Dec. 3, 2008) (citing *Munaf* in support of rule of non-inquiry), and removal, *see* Khouzam v. Attorney General of U.S., No. 07-2926, 08-1094, 2008 WL 5101940, at *15 (3d Cir. Dec. 5, 2008) (discussing *Munaf* but rejecting its applicability).

[48] *See, e.g.*, Belbacha v. Bush, 520 F.3d 452 (D.C. Cir. 2008).

harder cases going forward. The decision's two halves point in opposite directions, suggesting both an emboldened Court, ready to review Executive actions and a modest Court, cautious in second-guessing national security decisions. *Munaf*, much like *Hirota*, may remain a puzzle.

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