2006 WL 1706559 (C.A.D.C.) (Appellate Brief)
United States Court of Appeals,
District of Columbia Circuit.

Sandra K. OMAR, et al., Petitioners-Appellees,
v.
Francis J. HARVEY, Secretary of the United States Army, et al., Respondents-Appellants.

No. 06-5126.
June 2, 2006.

On Appeal from the United States District Court for the District of Columbia
(Not Yet Scheduled for Oral Argument)

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CASES:

*1 STATEMENT OF JURISDICTION

Petitioners invoked the district court's jurisdiction under 28 U.S.C. §§ 2241(a), c(1) & (c)(3), 2242, and 2243. The United States District Court for the District of Columbia granted petitioners' ex parte motion for a temporary restraining order and, on February 13, 2006, issued a preliminary injunction barring the removal of the petitioner Shawqi Omar from the custody of the United States or of the Multinational Force - Iraq. JA 161.[2] Respondents filed a timely notice of appeal on April 14, 2006. JA 178-179; see Fed. R. App. P. 4(a). This Court has jurisdiction to review the grant of a preliminary injunction. 28 U.S.C. § 1292(a)(1).

*2 STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court had habeas jurisdiction over an action brought on behalf of a dual-citizen enemy combatant who was captured in Iraq and is being held in Iraq by United States military personnel as part of a multinational force operating at the request of the Government of Iraq under the authority of the United Nations Security Council.

2. Whether the district court had jurisdiction to enter an injunction overriding a decision by the multinational force and the United States military, acting under the auspices of that force, to permit the Government of Iraq to proceed with the investigation and prosecution of the enemy combatant for criminal offenses committed in Iraq.

3. Whether the district court exceeded its authority by enjoining respondents from permitting the Government of Iraq to proceed with the investigation and prosecution of petitioner for criminal offenses committed in Iraq purportedly in order to prevent the case from becoming "prematurely moot" (JA 175).

STATEMENT OF THE CASE

In October 2004, petitioner Shawqi Omar ("Omar"), a dual American-Jordanian citizen, was captured by U.S. military forces, operating under the auspices of the Multinational Force-Iraq (MNF-I), in Baghdad, Iraq, in a raid targeting associates of ***3** Abu Musab al Zarqawi, the recognized leader of al-Qaeda in Iraq. Omar has multiple direct ties to the al Zarqawi terrorist network and has aided the network in, *inter alia,* moving foreign fighters into Iraq and kidnaping foreign nationals in Iraq. The MNF-I convened a hearing consistent with Article V of the Third Geneva Convention of 1949 before a three-member panel, which determined, *inter alia,* that Omar is an enemy combatant in the war on terror. In August 2005, based on security considerations and as part of ongoing efforts to cooperate with and devolve authority to the Government of Iraq, it was determined that the Central Criminal Court of Iraq (CCCI) would investigate Omar for possible prosecution for criminal offenses committed in Iraq. Such CCCI proceedings are typical for foreign fighters captured by MNF-I in Iraq. JA 139.

In December 2005, one of Omar's wives and his eldest son brought this next-friend petition for a writ of habeas corpus in the United States District Court for the District of Columbia against the Secretary of the Army and two United States military officers. See JA 7. The petition alleged that Omar was being unlawfully held by U.S. military forces in Iraq, and sought his release from military custody and an injunction against his transfer to the Government of Iraq. Respondents moved to dismiss the petition, arguing that the district court lacked jurisdiction because Omar is in the custody of the MNF-I, and that the petition raised a non-justiciable political question ***4** because it asked the court to interfere with decisions by U.S. military officers in their dealings with the MNF-I and the Government of Iraq in the handling of a captured enemy combatant who has committed criminal offenses in Iraq.

On February 3, 2006, the district court granted petitioners' *ex parte* emergency motion for a temporary restraining order, which had alleged that Omar was in United States custody and faced imminent transfer to Iraqi authorities. After allowing briefing on the issues raised in the motion, the district court treated the motion as a request for a preliminary injunction, which it granted on February 13, 2006. JA 162-177 (published at *Omar v. Harvey,* 416 F. Supp. 2d 19, 21 & n.2 (D.D.C. 2006)). The district court's injunction bars respondents and a broad category of individuals associated with them from removing Omar "from United States or MNF-I custody," JA 161, and thus effectively bars the MNF-I from cooperating with the CCCI and precludes the CCCI from proceeding with the investigation and prosecution of Omar. On April 14, 2006, respondents filed a timely notice of appeal from that preliminary injunction. JA 178-179; see 28 U.S.C. § 1291(a)(1).

*5 STATEMENT OF THE FACTS

A. The Multinational Force - Iraq and the Government of Iraq

This appeal and the district court's habeas jurisdiction both concern the status of the United States armed forces currently operating in Iraq. The United States conducts military operations in Iraq as part of a multinational force - MNF-I - that operates in accordance with United Nations Security Council Resolutions 1546 (2004) and 1637 (2005) (reproduced at JA 142-157). The MNF-I consists of contingents from approximately 27 nations, including the United States.[1] JA 137. While the United States is the leading participant in the MNF-I, that international entity is legally distinct from the United States and its armed forces, and operates in accordance with the mandate of United Nations Security Council Resolutions issued at the request of the sovereign Government of Iraq. JA 137.

In particular, U.N. Security Council Resolution 1546 provides, in part, that "the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the ***6** letters annexed to this resolution expressing, *inter alia,* the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism ***." JA 145. As the letters annexed to Resolution 1546 make clear, the MNF-I is charged, *inter alia,* with engaging in combat operations against members of groups posing security threats to Iraq, and internment of such individuals where necessary for imperative reasons of security. See JA 151. In addition, at the request of the Government of Iraq, MNF-I forces maintain physical custody of detainees facing criminal investigation and prosecution in the Iraqi court system. JA 141.

In November 2005, the Security Council reaffirmed and extended Resolution 1546 by issuing Resolution 1637. See JA 152. At that time, the Security Council made clear that "the presence of the multinational force in Iraq is at the request of the Government of Iraq." JA 154. The mandate of that force was extended until December 31, 2006. JA 154.

B. The Capture and Detention of Omar

Omar is a dual American-Jordanian citizen, who was born in Kuwait and has been living in Iraq at different intervals since 2002. He has been under investigation by many foreign intelligence agencies, including Iraqi agencies. Omar was captured by MNF-I military personnel at his home in Baghdad on October 30, 2004, in a raid ***7** targeting associates of Abu Musab al Zarqawi, the leader of Al-Qaeda insurgency in Iraq. Zarqawi has committed numerous acts of terrorism and violence in Iraq, including killing civilians and taking hostages. JA 137 (Declaration of Major General John D. Gardner).

Omar had been captured while harboring in his home an Iraqi insurgent and four Jordanian foreign fighters, who had illegally entered Iraq from Jordan to carry out militant Jihad against American and Coalition Forces. The Iraqi insurgent captured with Omar also admitted to joining the insurgency for the purpose of militant Jihad and to attack Coalition Forces. JA 138.

Each of the five detainees captured with Omar has admitted that, while living in Omar's home in Baghdad, they carried out surveillance of potential kidnap victims and conducted weapons training in Fallujah. The four Jordanians stated that Omar directed and participated in the insurgent cell activities of selection and surveillance of potential kidnap targets. All five insurgents explained that Omar discussed his fluency in English, which allowed him to visit Baghdad hotels in order to entice foreigners to return to his home for the purpose of their kidnap and ransom. At the time of his capture, Omar had several weapons and Improvised Explosive Device-making materials in his home. JA 138.

***8** Omar has multiple ties to the Zarqawi terrorist insurgent network in Iraq, and is believed to have acted as Zarqawi's personal emissary to insurgent groups in several cities in Iraq. There is evidence that Omar provided aid to the Zarqawi network in Iraq, including such actions as: facilitating the network's connection to other terrorist groups, aiding the movement of foreign fighters into Iraq, and aiding in the planning and execution of kidnappings in Iraq. JA 138. There is also evidence of many private meetings between Omar and Zarqawi. JA 137-138.[2] Moreover, Omar is named in the same Jordanian indictment as Zarqawi for plotting a chemical weapons attack in Jordan. JA 137; Rana Husseini, Jordan Indicts Zarqawi, 12 Others In Terror Plot, *Jordan Times,* Oct. 18, 2004, *available at* http://www. jordanembassyus.org/ 10182004001.htm.

C. The MNF-I Tribunal and the Central Criminal Court of Iraq

Following his capture, in December of 2004, Omar appeared before a three-member panel of the MNF-I, consistent with the principles of Article V of the Geneva Convention, to determine his status as a combatant. That panel reviewed the facts ***9** and circumstances surrounding his capture by military forces, interviewed witnesses, and considered available intelligence information. JA 138-139.

Omar was present at the hearing and had the opportunity to hear the basis for his detention, to make a statement, and to call witnesses who were immediately available. The panel concluded that Omar: (1) did not satisfy the criteria for prisoner of war status under the Third Geneva Convention; (2) met the criteria for status as a security internee under the law of war; and (3) met the definition of an "enemy combatant" in the war on terrorism. JA 139.

Subsequently, in August 2005, the MNF-I determined that Omar's case would be appropriately handled in the Central Criminal Court of Iraq (CCCI). This determination was made, *inter alia,* based on security considerations and as part of ongoing efforts to cooperate and coordinate with the civilian authorities in Iraq to facilitate the Government of Iraq's ability to prosecute crimes committed within the sovereign territory of Iraq. This Iraqi civilian court is a national court of the Government of Iraq, and operates under Iraqi law. It is based in Baghdad, and comprises Iraqi judges in two chambers, an investigative court and a trial court. In the first, a judge presides over an investigative hearing to determine if there is a sufficient basis to refer the accused for trial. JA 139-140.

***10** An accused is entitled to counsel at the investigative hearing, and, if he has not retained counsel himself, the court will provide one. If the investigative judge concludes that there is an insufficient basis to refer the accused for trial, he orders release. If, however, the investigative judge concludes that a sufficient basis exists, he writes a report, which includes formal charges and is forwarded to a panel of trial judges. The trial court consists of panels of three judges with a presiding judge who conducts the trial proceedings. The accused is also entitled to counsel at the trial. JA 140-141.

Omar is currently in MNF-I custody, awaiting his appearance before the Iraqi criminal court for an investigative hearing. JA 139. For the benefit of the Iraqi court, the MNF-I maintains physical custody of detainees for the duration of all court proceedings. Detainees are transferred from MNF-I custody to the physical custody of Iraqi authorities if there is a conviction and sentence. JA 141. Such action is typical for foreign fighters captured in Iraq by the MNF-I for which credible evidence of criminal activities exists. JA 139.

D. The Habeas Proceedings

After the decision to refer Omar's case to the Iraqi court, one of his wives and his eldest son filed a next-friend habeas petition on his behalf in the district court. They asserted that Omar is being held in United States military custody in violation ***11** of various provisions of the United States Constitution, the laws of the United States, and obligations of international law. JA 7-24. The district court ordered respondents to show cause why the writ should not be issued. Shortly thereafter, petitioners filed an *ex parte* emergency motion for a temporary restraining order, alleging that Omar was in United States custody and faced imminent transfer to Iraqi authorities. The district court granted the *ex parte* motion and established an expedited briefing schedule regarding the propriety of the temporary restraining order. JA 62-64. The district court then treated petitioners' motion as a request for a preliminary injunction, which it granted. See JA 162-177.

In its opinion, the district court first stated "that the jurisdictional issues in the present case do not pose a fatal obstacle at this stage of the litigation." JA 172-173; see also JA 172 n. 12 (discussing jurisdictional discovery). The court rejected the Government's contention that the Supreme Court's precedent in *Hirota v. General of the Army MacArthur,* 338 U.S. 197, 198 (1948), controlled here. In that decision, the Supreme Court held that federal courts lacked habeas jurisdiction over individuals convicted in a multinational military court established by General Douglas MacArthur acting "as the agent of the Allied Powers" and detained in the custody of General MacArthur's subordinate in the United States Army. Because General MacArthur and his military subordinates were acting pursuant to their authority as ***12** part of a multinational force, their actions were not properly characterized as actions of the United States, even though General MacArthur and his subordinates were still subject to the same United States chain of command. *Ibid.* (Because "[t]he military tribunal sentencing these petitioners ha[d] been set up by General MacArthur as the agent of the Allied Powers," it was "not a tribunal of the United States," and "the courts of the United States ha[d] no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners.").

Despite the similarities with the structure of the MNF-I forces operating under the authority of the United Nations Security Council, the district court concluded that *Hirota* was not controlling here because: (1) the petitioners in *Hirota* were not United States citizens, while Omar is a dual citizen of the United States and Jordan; (2) "email" messages cast doubt on whether Omar is in the actual or constructive custody of the United States armed forces; and (3) "the *Hirota* case was decided prior to significant evolution of the Supreme Court's habeas jurisprudence." JA 168-171.

The district court also rejected the Government's contention that constitutional separation of powers principles deprived the court of jurisdiction to hear this case. Citing only a district court decision, the court here stated that such principles could not bar the ability to challenge detention. JA 173 (citing *Abu Ali v. Ashcroft,* 350 F. Supp. 2d 28, 57, 62 (D.D.C. 2004)). Then, relying on Justice Douglas' concurrence ***13** in *Hirota,* the district court stated that it was obligated to inquire "into the legality of American officials holding American citizens." JA 173.

The district court also discussed irreparable harm in terms of the possibility of a quick conviction by the Iraqi court and consequent transfer to Iraqi authorities, which could "prematurely moot" the case. JA 175. The court noted the Government's concern that an injunction would "interfere with the workings of MNF-I as well as the Iraqi government," but concluded "that the threat of tangible harm to the petitioner resulting from the court's failure to act outweighs any potential harm to the Executive's exercise of its war powers." JA 176.

The district court issued an injunction stating that: "the respondents, their agents, servants, employees, confederates, and any persons acting in concert or participation with them, or having actual or implicit knowledge of this Order by personal service or otherwise, shall not remove the petitioner from United States or MNF-I custody, or take any other action inconsistent with this court's memorandum opinion." JA 161.

SUMMARY OF ARGUMENT

The district court's injunction in this case is unprecedented. For the first time of which respondents are aware, a United States court has enjoined United States military and multinational forces engaged in ongoing combat operations in a foreign ***14** country from cooperating with local government authorities concerning the detention and prosecution of a captured enemy combatant for offenses committed in that country. There are several fundamental defects in the district court's injunction, any one of which would provide ample ground for reversal.

First, the district court has erroneously asserted jurisdiction over multinational forces acting in fulfillment of the authority and mandate provided by an international body - the United Nations Security Council - in direct contravention of the Supreme Court's decision in *Hirota v. General of the Army MacArthur,* 338 U.S. 197 (1948). Second, the district court has exercised jurisdiction in violation of constitutional separation of powers principles by effectively enjoining the military forces from cooperating with the Government of Iraq and thereby precluding that Government from prosecuting Omar for crimes committed on sovereign Iraqi territory, and by otherwise entertaining quintessentially political questions that threaten grave interference with sensitive and vital Executive functions in the areas of warmaking, national security, and foreign affairs. And third, the district court has done all of this under the guise of ensuring that the habeas action challenging Omar's detention by U.S. military forces does not become "prematurely moot" by his release from U.S. military custody and placement into custody by Iraqi authorities following a potential conviction and sentence by the Iraqi court. But release from U.S. military custody - ***15** and not an injunction *preventing* such release - is precisely the relief available to Omar through the writ of habeas corpus, and Article III of the Constitution does not permit a court to preserve artificially a "case or controversy" by enjoining a party from providing the very relief sought in an action. For these reasons, the district court's injunction should be reversed and the case remanded with instructions to dismiss the petition for a writ of habeas corpus.

A. The district court lacked jurisdiction over this case under *Hirota v. General of the Army MacArthur,* 338 U.S. 197 (1948). In *Hirota,* the Supreme Court held, because the petitioners' sentences had been imposed by an international tribunal, there was no habeas jurisdiction over a petition filed by Japanese prisoners held by (and some of whom were about to be executed by) United States military officers under a direct chain of command from the United States. The Court adhered to this view despite the facts that the international tribunal had been established by General Douglas MacArthur in his role as Supreme Commander of the Allied Powers, General MacArthur had denied petitioners' appeals from that tribunal, and General MacArthur reported to the President of the United States and the Joint Chiefs of Staff.

Here, the relationship between the United States and Omar's custody is directly analogous to that in *Hirota.* Omar is being held by United States military officers, but they are acting as part of an international body - the MNF-I - which derives authority ***16** from United Nations Security Council resolutions issued at the request of the sovereign Government of Iraq. In addition, that multinational force seeks to facilitate the investigation and prosecution of Omar by the sovereign Government of Iraq. Accordingly, *Hirota* dictates that the district court lacked jurisdiction here.

The district court declined to apply *Hirota* because Omar is a U.S. citizen, while the *Hirota* petitioners were aliens. But the majority opinion in *Hirota,* as well as Justice Douglas' concurrence, makes clear that the international identity and composition of the military tribunal pursuant to which petitioners were being held, and not the citizenship of the petitioners, was the key to the Court's jurisdictional ruling. Similarly here, the international identity and composition of the multinational force pursuant to which Omar is being held in Iraq divests U.S. courts of habeas jurisdiction to review the custodial decisions of that force, regardless of the citizenship of the detainee.

The district court also believed that the Supreme Court's reasoning in *Hirota* has been overtaken by other cases, and declared that *Hirota* is no longer controlling precedent. But the Supreme Court's and this Court's decisions emphatically establish that only the Supreme Court can decide that its precedents are no longer governing. The district court was not free to make that determination. Thus, *Hirota* continues ***17** to apply, and it dictates that the district court's unprecedented injunction be reversed and that Omar's habeas petition be dismissed.

B. The district court's injunction suffers from another, perhaps even more fundamental, jurisdictional defect. The injunction, as well as the habeas petition itself, raises non-justiciable political questions implicating highly sensitive warmaking, national security, and foreign relations functions that are constitutionally vested in the Executive and are not appropriate subjects for judicial review.

Omar was captured by military personnel in an active zone of combat in Iraq, while harboring foreign and domestic fighters who were planning both direct participation in the Iraqi insurgency and the kidnappings of foreigners to finance that insurgency. Until his capture, Omar presented a serious risk to the multinational military forces, including United States military personnel, and to civilians in Iraq. The proper handling of such a captured enemy combatant - *e.g.,* whether to keep him in military custody, convene a military tribunal, or refer him to domestic authorities for prosecution - is a question fraught with military and diplomatic significance and is committed to the military forces in Iraq, and is not subject to second-guessing by a habeas court outside of the combat zone, half-way around the world. Indeed, such quintessential military decisions have for centuries been made by the commanders in the field without judicial oversight or interference at home.

***18** The handling of Omar also implicates the relations between the United States, the 27 other nations participating in the MNF-I, and, equally important, Iraq itself. The United Nations Security Council granted authority to the MNF-I and charged it with, *inter alia,* the vital mission of maintaining security and stability in Iraq, including by preventing and deterring terrorism, and assisting in the rebuilding of Iraqi institutions. Because of his significant role in the insurgency, surrendering Omar for prosecution has an important bearing on the security of troops from all of the countries participating in MNF-I. And Iraq itself has a strong interest in being able to investigate and prosecute those who allegedly commit crimes within its borders. Decisions concerning the circumstances in which it is feasible and appropriate to support the Iraqi Government, the United Nations, and the other participants in MNF-I, by facilitating the investigation and prosecution of Omar by the Iraqi judicial system, are inherently political decisions ultimately grounded in the military and foreign relations interests of the United States.

Furthermore, the federal courts - under the "Rule of Non-Inquiry" - have for decades held that they have no legitimate role in judging foreign judicial systems and thereby overriding decisions by the Executive Branch to surrender individuals, including citizens, to foreign countries for criminal proceedings. As the Supreme Court observed more than a century ago in rejecting a habeas petition filed by a ***19** citizen who sought to avoid facing trial for offenses committed in military-occupied Cuba in the wake of the Spanish-American War, "[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 punishment as the laws of that country may proscribe for its own people." *Neely v. Henkel,* 180 U.S. 109, 123 (1900). Courts have thus long refused to engage in the type of review sought by Omar here to avoid investigation and prosecution before the Iraqi criminal court for offenses committed in Iraq.

Of course, Executive Branch officials would not turn Omar over to the Iraqi judicial system if they believed that Omar would likely be tortured in that system. But the Rule of Non-Inquiry and other separation of powers principles make clear that the decision about whether Omar can legally be surrendered to the Iraqi court is committed to the Executive Branch, which takes into account a variety of considerations that cannot properly be weighed by the courts. The wartime context in which Omar's overseas detention arises only underscores that decisions concerning the proper handling of Omar are for the Executive, and not the courts.

C. In addition to the other jurisdictional defects, the entire premise of the district court's injunction is fundamentally flawed and inconsistent with Article III of the Constitution. The district court imposed the injunction to ensure that Omar's habeas action did not become "prematurely moot" by his release from U.S. military ***20** custody and placement into the custody of Iraqi authorities following a potential conviction and sentence by the Iraqi court. JA 175. But even under the legal theory proposed by petitioners, those "prematurely mooting" events would grant Omar all of the relief to which he is entitled through a writ of habeas corpus, namely release from detention by the United States or MNF-I. Article III of the Constitution does not permit a court to preserve artificially a "case or controversy" by enjoining a party from providing the very relief sought in an action. Indeed, the anomaly that the habeas petition here resists - and, in fact, identifies irreparable harm in - the very relief that a habeas petition traditionally seeks only underscores the correctness of *Hirota* and the applicability of the political question doctrine. Habeas provides a mechanism to test the legality of executive detention, not a means to test the validity of multinational detention, let alone a means to preserve that detention or prevent cooperation between a multinational force and the civilian authorities of Iraq. It is improper for Omar to seek to use the habeas process to shield himself from prosecution by a foreign sovereign, especially when he freely chose to live within its territory, and it was similarly improper for the district court to issue an injunction that effectively prevents the Government of Iraq from prosecuting Omar for crimes committed on sovereign Iraqi territory.

*21 STANDARD OF REVIEW

This Court reviews a district court's decision regarding whether to grant a preliminary injunction for abuse of discretion, but, to the extent such a decision hinges on questions of law, as it does here, appellate review is essentially *de novo.* See, *e.g., Serono Labs., Inc. v. Shalala,* 158 F.3d 1313, 1318 (D.C. Cir. 1998). "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States,* 518 U.S. 81, 100 (1996). The standard applicable in the district court required the petitioner to demonstrate "1) a substantial likelihood of success on the merits, 2) that [he] would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction." *City Fed. Fin. Corp. v. Office of Thrift Supervision,* 58 F. 3d 738, 746 (D.C. Cir. 1995).

ARGUMENT

I. THE DISTRICT COURT'S INJUNCTION CONTRAVENES THE RULE OF *HIROTA v. GENERAL OF THE ARMY MACARTHUR.*

This case is governed by the Supreme Court's decision in *Hirota v. General of the Army MacArthur,* 338 U.S. 197 (1948), which held that United States courts lack jurisdiction to hear habeas claims by military detainees held by United States forces acting as part of a multinational force. The military detainee at issue in this case is ***22** being held by United States forces acting as part of the MNF-I, which derives authority from the United Nations Security Council. The district court nonetheless refused to apply *Hirota* because it mistakenly relied on the reasoning of Justice Douglas's concurring opinion, rather than on the reasoning of the five-Justice majority opinion. In addition, the district court wrongly usurped the power of the Supreme Court to determine whether *Hirota* remains good law. The Supreme Court has not overruled *Hirota* or done anything else to undermine its continuing validity, and it remains binding precedent for both the district court and this Court.

A. In *Hirota,* the Supreme Court considered a habeas petition filed on behalf of several Japanese individuals who had been convicted of war-related crimes in post-World War II Japan. Significantly, these Japanese petitioners were in the custody of United States military personnel acting as part of the Allied Powers. Specifically, the Hirota petitioners were in the custody of the "Commanding General of the United States Eighth Army who held them pursuant to the orders of [General] MacArthur, Supreme Commander for the Allied Powers." 338 U.S. at 199 (Douglas, J., concurring). The *Hirota* petitioners named as respondents General MacArthur, the Commanding General of the United States Eighth Army (a subordinate of General MacArthur), the Chief of Staff of the United States Army, and the United States Secretaries of the Army and Defense. *Ibid.*

***23** The *Hirota* petitioners had been convicted by the International Military Tribunal for the Far East, a court established by General MacArthur acting "as an agent of the Allied Powers." 338 U.S. at 198; *id.* at 199, 207 (Douglas, J., concurring). In establishing this Tribunal, General MacArthur had acted under a direct chain of command from the United States Government. *Id.* at 207.[3] Authorization to establish the Tribunal came from the Far Eastern Commission, an international body composed of representatives of eleven nations. This Commission acted by communicating its views to the United States Government, which transmitted them to General MacArthur through the United States Joint Chiefs of Staff. *Id.* at 206.

The *Hirota* petitioners were convicted by the Tribunal. Some were sentenced to death, while others were given various terms of imprisonment. They appealed to General MacArthur. Although several members of the Far Eastern Commission recommended or agreed to acquiesce in various forms of leniency, General MacArthur declined to intervene in the judgments and directed the Commanding ***24** General of the United States Eighth Army to execute some of the petitioners. Then, the petitioners sought leave to file petitions for habeas corpus in the Supreme Court.[4]

The Supreme Court held that it lacked jurisdiction to hear the habeas claims because the petitioners had been convicted by an international tribunal. The Court explained:

> The United States and other allied countries conquered and now occupy and control Japan. General Douglas MacArthur has been selected and is acting as the Supreme Commander for the Allied Powers. The military tribunal sentencing these petitioners has been set up by General MacArthur as the agent of the Allied Powers.

Id. at 198 (majority op.). The Court concluded that, because "the tribunal sentencing these petitioners is not a tribunal of the United States," the "courts of the United States have no power" to grant the requested relief. *Ibid.;* accord *id.* at 204 (Douglas, J., concurring) (referring to the court as an "international tribunal").

The *Hirota* Court thus held that the Tribunal at issue was not a United States tribunal, even though it had been established by a United States military officer under the direct command and control of the United States, and even though its rulings were ***25** subject to appeal to, and modification by, that same United States military officer. Indeed, the petitioners in *Hirota* were actually being held by an officer in the United States Army, who reported to General MacArthur, a United States Army officer, who received orders from the President of the United States and the Joint Chiefs of Staff. The Court further held that federal courts lacked habeas jurisdiction over a claim brought by a person convicted by that Tribunal even though that person was held in the custody of a United States military officer and the Tribunal's sentences were to be carried out by a subordinate United States military officer.

B. *Hirota* compels the dismissal of this habeas petition as well. In both cases, the petitioners were in the actual custody of United States military officers acting as part of a multinational force (here, the MNF-I; in *Hirota,* the Allied Powers). While the United States is certainly an important and influential part of MNF-I, that fact was true as well of the role of the United States within the Allied Powers in Japan. See 338 U.S. at 207 (Douglas, J., concurring) (noting that the Allied Powers were "international in character" despite being "dominated by American influence"). Here, the United Nations, the United States, and our coalition partners all plainly view the MNF-I as having a distinct identity from the forces of any particular nation, and it would be both extraordinary and highly improper for a court essentially to countermand that judgment and disregard MNF-I's distinct, international identity.

***26** To be sure, here, as in *Hirota,* the United States armed forces are actually holding the detainee and those forces are commanded by United States military officers answering directly to the United States Government through their chain of command. In both instances, however, the detainees' status and custody was ultimately determined and carried out under the auspices of an international entity here, the United Nations Security Council and MNF-I; in *Hirota,* the Far Eastern Commission and the Allied Powers.

It is true, as the district court notes, that Omar has not yet been charged with any crime, JA 163, and that he is not challenging a decision or sentence of a sovereign nation, JA 171 n. 11. But the district court could hardly evade the logic of *Hirota* or otherwise avoid the substantial separation of powers problems inherent in its injunction by interfering with the multinational force's pre-trial detention of Omar and the sovereign Iraqi court's ability to initiate judicial proceedings against him, thereby foreclosing the possibility of a foreign conviction. The MNF-I's detention of Omar and desire to facilitate his proceedings before the Iraqi court are no less a part of the mission of the multinational forces in Iraq operating pursuant to the U.N. Security Council's mandate than was the trial and conviction of the *Hirota* petitioners a part of the mission of the multinational forces acting on behalf of the Allied Powers. Accordingly, the Supreme Court's holding that United States courts lacked ***27** jurisdiction over the habeas petition in *Hirota* is controlling here, and requires reversal of the district court's injunction and dismissal of the habeas petition.

C. The district court held that *Hirota* was "inapplicable" (JA 168) for three reasons. None of those reasons withstands scrutiny.

First, the district court noted that the petitioners in *Hirota* were aliens, while Omar is a dual citizen of the United States and Jordan. JA 168. But the citizenship of the petitioners played no role in the decision in *Hirota.* The Court's jurisdictional ruling was grounded on the fact that the petitioners were convicted by a tribunal that was "not a tribunal of the United States." 338 U.S. at 198. Indeed, Justice Douglas criticized the majority's opinion because it turned solely on the fact that "the tribunal is international," and did not consider other factors such as citizenship. 338 U.S. at 204-05 ("illustrat[ing] the gravity and seriousness of the conclusion of the Court" with three hypothetical scenarios, two of which are expressly limited to U.S. citizens). See also Thomas M. Franck and Stephen H. Yuhan, *The United States and the International Criminal Court: Unilateralism,* 35 N.Y.U.J.I.L.P. 519, 544 (2003) ("Though the petitioners in *Hirota* were not American citizens, the nationality of the accused apparently was not relevant to the decision.").

Contrary to the district court's suggestion, neither *Johnson v. Eisentrager,* 339 U.S. 763, 770 (1950), nor any other decision of the Supreme Court, undermines or ***28** restricts the rule of *Hirota.* Unlike *Hirota,* which turned on the fact that the actions of U.S. military officers as part of a multinational force are not treated as actions of the United States for habeas purposes, *Eisentrager* relied on the fact that the petitioners in that case were not United States citizens and had no meaningful connection to the United States. *Eisentrager* did not rely on *Hirota* in support of its holding, although it did point to it as an example of how even military detainees have an opportunity to come into United States courts and attempt to establish jurisdiction. Likewise, nothing in *Rasul v. Bush,* 542 U.S. 466 (2004), in which the Court partially revisited *Eisentrager,* undermines the continuing validity of *Hirota.* That case involved aliens in the custody of U.S. military forces, and not international forces.

To be sure, as the dissenters in *Rasul* pointed out, citizenship may provide a basis for exercising habeas jurisdiction, even where the detention is abroad, when the individual is being held *by United States forces.* See *id.* at 501-02 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J.). But citizenship, in itself, is not a font of habeas jurisdiction when the individual is being held by a foreign or international body. Indeed, if it were, then the federal courts would be open, on habeas jurisdiction, to the claims of United States citizens being held under the authority of *any* non-American tribunal.

***29** It is well-settled, however, that federal courts may not entertain such claims. For example, in *United States ex rel. Keefe v. Dulles,* 222 F.2d 390, 391-92 (D.C. Cir. 1954), *cert. denied,* 348 U.S. 952 (1955), this Court refused to hear the habeas petition of an American soldier stationed overseas who was held on charges brought by French authorities, despite claims that the United States Secretaries of State, Defense, and the Army had conspired to deprive the soldier of his rights in connection with his incarceration in a French prison. See also *Duchow v. United States,* No. Civ.A.95-2121, 1995 WL 425037, at *1, *3 (E.D. La. July 19, 1995) (concluding that a U.S. citizen detained by the Bolivian government was not entitled to habeas relief).

Other courts have similarly concluded that it is inappropriate for United States courts to issue habeas writs in cases involving American citizens detained under the authority of non-United States entities - even when those United States citizens are in the actual custody of the United States. See, *e.g., Bishop v. Reno,* 210 F.3d 1295 (11th Cir.), *cert. denied,* 531 U.S. 897 (2000) (United States citizen convicted in the Bahamas, but serving his sentence in the United States pursuant to treaty, not entitled to challenge his sentence through habeas corpus); *Pfeifer v. Bureau of Prisons,* 615 F.2d 873,876 (9th Cir.) ("Americans who are incarcerated in Mexican prisons *** have no right to relief from United States courts," and petitioner convicted in Mexico ***30** but serving his sentence in a United States prison could not challenge the constitutionality of his conviction), *cert. denied,* 447 U.S. 908 (1980). Accordingly, Omar's U.S. citizenship is not a valid basis for concluding that *Hirota* does not apply.

Second, the district court declined to apply the rule of *Hirota* because of two emails attributed to the United States Department of State, one stating that Omar was "under U.S. military care, custody and control," and the other stating that he was "under control of Coalition Forces (U.S. and MNF)." JA 169. The same, however, could have been said about the petitioners in *Hirota.* As discussed, the *Hirota* petitioners were in the custody of the commander of the United States Eighth Army, who was acting as part of the Allied Powers, just as Omar is in the custody of United States military officers acting as part of the MNF-I. Because there is no allegation that Omar's current custodians are more controlled by the United States than were General MacArthur and his subordinates, this is not a valid basis for departing from *Hirota.* Moreover, these emails do no more than reflect the fact that the United States military makes up a significant portion of MNF-I. The point remains, however, that Omar is ultimately being held by the MNF-I pursuant to the relevant United Nations Security Council resolutions. JA137.

Third, the district court suggested that it was free to disregard *Hirota* because of subsequent "significant evolution of the Supreme Court's habeas jurisprudence." ***31** JA 169. That was error. The Supreme Court has emphatically reserved to itself the ability to overrule its precedents; the district court was not free to assume that prerogative. See *Agostini v. Felton,* 521 U.S. 203, 237 (1997) (reaffirming that " '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions' ") (quoting *Rodriguez de Quijas v. Sherson/American Express, Inc.,* 490 U.S. 477, 484 (1989)). This Court has frequently recognized this fundamental jurisprudential principle. See, *e.g., United States Air Tour Ass'n v. FAA,* 298 F.3d 997, 1012 n.8 (D.C. Cir. 2002) (lower courts lack power to determine that Supreme Court decision has been overruled), *cert. denied,* 538 U.S. 977 (2003); *United States v. Webb,* 255 F.3d 890, 898 (D.C. Cir. 2001); *United States v. Weathers,* 186 F.3d 948, 957 n. 12 (D.C. Cir. 1999), *cert. denied,* 529 U.S. 1005 (2000).

Thus, because the Supreme Court has not overruled *Hirota,* that decision remains binding on the lower courts. Cf. *Rumsfeld v. Padilla,* 542 U.S. 426, 435-37 (2004) (reaffirming, *inter alia,* the immediate custodian rule of *Wales v. Whitney,* 114 U.S. 564 (1885), and reversing lower court decisions identifying an exception to *Wales* in subsequent habeas decisions).

***32** At any rate, the district court's suggestion that the Supreme Court has abandoned *Hirota,* even implicitly, is wrong. The district court cited several decisions that it believed have expanded the scope of habeas corpus since *Hirota* was decided, or contain general statements that habeas relief is to be applied broadly. See JA 169-171. The district court then suggested that "[t]he lack of precedent directly on point requires this court to examine the fundamental concepts underlying habeas jurisprudence." JA 171. As discussed, however, *Hirota* is directly on point: Omar is being held by United States military personnel under the auspices of a multinational force that is distinct from the United States military and ultimately derives its existence from an international body. The Supreme Court's holding in *Hirota* that there is no federal habeas jurisdiction in such circumstances is therefore controlling, and the district court's recourse to general "concepts underlying habeas jurisprudence" in an effort to side-step *Hirota* was misplaced. Cf. *Padilla,* 542 U.S. at 437 ("That our understanding of custody has broadened to include restraints short of physical confinement does nothing to undermine the rationale or statutory foundation of *Wales'* immediate custodian rule when physical custody *is* at issue.").

*33 II. THE DISTRICT COURT'S INJUNCTION VIOLATES CONSTITUTIONAL SEPARATION OF POWERS PRINCIPLES AND DIRECTLY IMPLICATES NON-JUSTICIABLE MATTERS.

If the Court concludes that *Hirota* is controlling, then it need go no further to dispose of this case. Even apart from *Hirota,* however, the district court's unprecedented injunction is fundamentally flawed and must be set aside. By interfering with core military determinations in a zone of active combat and with sensitive national security and foreign relations matters related to the rebuilding and supporting of Iraqi political and judicial institutions, the district court's injunction violates fundamental principles of the constitutional separation of powers. In particular, it is flatly inconsistent with the Rule of Non-Inquiry, which the federal courts have applied for decades in declining to review decisions by the Executive Branch concerning conditions in foreign countries for individuals being transferred for criminal justice purposes. As we discuss below, this important rule is premised on the separation of powers doctrine and helps retain the properly limited role of the courts in this area of law fraught with foreign policy considerations.

Moreover, the district court's injunction, and the habeas petition that precipitated it, raise non-justiciable political questions going to the heart of constitutional separation of powers principles. Petitioners asked the district court to override the decision by U.S. military officers acting as part of the MNF-I to facilitate ***34** the investigation and prosecution of Omar for crimes committed in Iraq as part of MNF-I's mandate from the United Nations Security Counsel. Yet, Omar was taken into custody because military officials determined that he had close links to the head of the insurgency in Iraq, and he led a conspiracy to kidnap foreigners in Baghdad in order to ransom them to raise money for the insurgency. Under such circumstances, the district court's order enjoining the U.S. military from carrying out the objectives of the MNF-I and facilitating the investigation and prosecution of Omar by the Government of Iraq for crimes committed in Iraq placed the district court in an untenable position in our constitutional system of separated powers.

A. The Supreme Court, this Court, and other courts of appeals have long recognized that fundamental separation of powers principles preclude a court from second-guessing decisions by the Executive Branch concerning conditions in foreign countries for individuals being transferred for criminal justice purposes.

In *Neely v. Henkel,* 180 U.S. 109 (1900), for example, the Supreme Court held that a United States citizen could not challenge the fairness or legitimacy of Cuba's judicial process in resisting extradition to Cuba to stand trial for crimes committed in Cuba surrounding United States military occupation of that island following the Spanish-American War. The Court emphasized that the extradition was inextricably connected to the policy of the United States, reflected in international agreements, to ***35** rebuild and support the independent government of Cuba, *id.* at 121-22, 123-25, and was related to sensitive military affairs-including the nature and duration of the U.S. military occupation of Cuba - raising political questions that were inherently "the function of the political branch of the Government to determine," *id.* at 124.

Neely claimed that extradition would violate his constitutional rights because Cuba's judicial system did not afford the same level of due process provided in American courts, much as Omar claimed before the district court that "if he were to be turned over to the Iraqi criminal system," he would "be subject to indefinite imprisonment without due process." JA 83-84. The Court rejected Neely's argument, as "citizenship does not give him an immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated." 180 U.S. at 123.

Thus, as a general matter, "[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." *Ibid.* That is because the guarantees of the United States Constitution "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." *Id.* at 122. The Court reached that conclusion in *Neely* in the context of a habeas petition filed by a United States citizen *in this country* ***36** seeking to prevent his return to Cuba to face justice before the Cuban criminal justice system. The same principles apply *a fortiori* where, as here, the habeas petitioner is detained by military officials *in the foreign land* where he is sought to be tried by the local authorities for offenses committed there.

This Court invoked the same basic limitations imposed on the Court's jurisdiction by constitutional separation of powers principles in *Holmes v. Laird,* 459 F.2d 1211 (D.C. Cir.), *cert. denied,* 409 U.S. 869 (1972). That case involved the interaction between the United States and Germany regarding United States service member citizens accused of criminal acts in Germany. These citizens were retained in the custody of the United States military during the pendency of judicial proceedings against them in the German courts. *Id.* at 1214. After they were convicted in those courts, the *Holmes* petitioners fled to the United States, where they again came under United States military custody, and sought a habeas writ preventing their forced return to Germany to serve their sentences. *Ibid.* This Court denied that attempt.

The Court began by noting that Germany's power to try and convict even United States citizens for crimes committed within its territory was "complete." *Id.* at 1216 & nn.34 & 35 (citing *Wilson v. Girard,* 354 U.S. 524, 529 (1957); *Reid v. Covert,* 354 U.S. 1, 15 n.29 (1957); ***37** *Schooner Exch. v. McFadden,* 11 U.S. (7 Cranch) 116, 136 (1812)). The Court then rejected the petitioners' invitation to examine the fairness of their treatment by the German courts, and declined to enjoin the transfer, holding that "the contemplated surrender of appellants to the Federal Republic of Germany is a matter beyond the purview of this court." *Id.* at 1225. Similarly here, the potential transfer of Omar to Iraqi custody so that he can be tried in an Iraqi court for crimes that occurred in Iraq is beyond the purview of this Court. The district court therefore had no basis for enjoining the transfer to consider whether, or to what extent, Omar would be afforded due process in the CCCI proceedings. See JA 174 (referring to Omar's claim that a transfer to Iraqi authorities would deprive him of due process rights); JA 175 (the court, citing its "own unfamiliarity with the functioning of the CCCI" as a basis for granting the injunction).[5]

The decisions in *Neely* and *Holmes* are not outliers. To the contrary, they belong to a well-established line of judicial rulings refusing, for separation of powers reasons, to review the Executive's decision to turn over an individual to a foreign country for criminal prosecution or to serve a criminal sentence. Under this particular application of separation of powers doctrine, known as the Rule of Non-Inquiry, the ***38** surrender of a fugitive to a foreign government is "purely a national act *** performed through the Secretary of State," within the Executive's "powers to conduct foreign affairs." *In re Kaine,* 55 U.S. 103, 110 (1852). "Within the parameters established by the Constitution, the ultimate decision to extradite is, as has frequently been noted, reserved to the Executive as among its powers to conduct foreign affairs." *Plaster v. United States,* 720 F.2d 340, 354 (4th Cir. 1983); see *Shapiro v. Secretary of State,* 499 F.2d 527, 531 (D.C. Cir. 1974) (per curiam) (noting that "extradition is ordinarily a matter within the exclusive purview of the Executive"), *aff'd on other grounds,* 424 U.S. 614, 622 n.6 (1976) (noting that extradition issue had fallen out of case by the time it reached the Supreme Court).

The Rule of Non-Inquiry "is shaped by concerns about institutional competence and by notions of separation of powers." *United States v. Kin-Hong,* 110 F.3d 103, 110 (1st Cir. 1997). As the Second Circuit has observed, "[t]he interests of international comity are ill-served by requiring a foreign nation *** to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced. It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds." *Ahmad v. Wigen,* 910 F.2d 1063, 1067 (2d Cir. 1990) (citation omitted). Thus, under the Rule of Non-Inquiry, "courts in this country refrain from examining the penal systems of ***39** requesting nations, leaving to the Secretary of State determinations of whether the defendant is likely to be treated humanely." *Lopez-Smith v. Hood,* 121 F.3d 1322, 1327 (9th Cir. 1997); accord *Kin-Hong,* 110 F.3d at 110.

For example, courts are not to consider evidence regarding the requesting country's "law enforcement procedures and its treatment of prisoners"; such evidence is irrelevant and improper in a court challenge to extradition. *Ahmad,* 910 F.2d at 1067. "[I]t is the function of the Secretary of State - not the courts - to determine whether extradition should be denied on humanitarian grounds." *Sidali v. INS,* 107 F.3d 191, 195 n.7 (3d Cir. 1997); accord *In re Requested Extradition of Smyth,* 61 F.3d 711, 714 (9th Cir. 1995) ("[C]ourts are ill-equipped as institutions and ill-advised as a matter of separation of powers and foreign relations policy to make inquiries into and pronouncements about the workings of foreign countries' justice systems."); *Kin-Hong,* 110 F.3d at 110 (the "rule on non-inquiry, like extradition procedures generally, is shaped by concerns about institutional competence and by notions of separation of powers").

Further, as the First Circuit discussed in *Kin-Hong,* 110 F.3d at 110, the extradition system contains "split responsibilities" because it involves both legal issues suitable for judicial determination and foreign policy issues, such as whether and to what extent the Secretary of State should "use diplomatic methods to obtain ***40** fair treatment for the [fugitive]." That court noted that the Rule of Non-Inquiry is one of the means of ensuring "that the judicial inquiry does not unnecessarily impinge upon executive prerogatives and expertise." *Ibid.* As the First Circuit concluded, "[i]t is not that questions about what awaits the [fugitive] in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed." *Id.* at 111.

The separation of powers concerns here are even stronger than in the traditional extradition context for at least two reasons: First, Omar's detention, trial, and punishment for offenses against MNF-I forces, Iraqi officials, and Iraqi and other civilians necessarily implicates vital military decisions and sensitive foreign relations matters in an area of active combat operations; and second, Omar is not on American soil awaiting extradition to a foreign country; he is already in the territory of Iraq, where he went of his own free will and where he committed crimes against the Iraqi people. He cannot attempt to use the habeas remedy of a federal court in the United States to escape the judicial system of the country where he chose to be and is being held in custody. Indeed, in this case, unlike the extradition setting, there is no legal issue concerning an extradition treaty for the courts; there are only political questions. Petitioner, unlike the person being held for extradition, is not being held pursuant to ***41** an extradition treaty or statute. Moreover, unlike a person challenging extradition from the United States, who would be released in the United States if there were no basis for detention under the extradition treaty, petitioner, if released pursuant to a successful habeas petition, would be released in Iraq and would still be subject to criminal proceedings in Iraq.[6] For all these reasons, it follows a *fortiori* that the separation of powers principles that preclude judicial review of a foreign sovereign's judicial process in traditional extradition cases also forbid the unprecedented and intrusive injunction the district court imposed in this far more sensitive area of separation of powers concerns.

B. Both the district court's injunction and the habeas petition itself raise quintessential political questions beyond the authority or competence of the judiciary to answer. This Court has recently reaffirmed that "the courts lack jurisdiction over political decisions that are by their nature 'committed to the political branches to the exclusion of the judiciary.' " *Schneider v. Kissinger,* 412 F.3d 190, 193 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1768 (2006) (quoting *Antolok v. United States,* 873 F.2d 369, 379 (D.C. Cir. 1989) (separate opinion of Sentelle, J.)); accord ***42** *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 215 (1974) (the political question doctrine is a jurisdictional limitation upon the federal courts); *Hwang Geum Joo v. Japan,* 413 F.3d 45, 47-48 (D.C. Cir. 2005) (same), *cert. denied,* 126 S. Ct. 1418 (2006). This case raises quintessential political questions committed to the discretion of the political branches.

The political question doctrine is a product of the constitutional separation of powers. See *Baker v. Carr,* 369 U.S. 186, 210

(1962); *Schneider,* 412 F.3d at 193. It deprives the courts of jurisdiction, even in habeas cases. See *Murtishaw v. Woodford,* 255 F.3d 926, 961 (9th Cir. 2001), *cert. denied*, 535 U.S. 935 (2002). The Supreme Court has established several factors that individually or in combination may be used to identify non-justiciable political questions:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or

[2] a lack of judicially discoverable and manageable standards for resolving it; or

[3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or

[4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or

[5] an unusual need for unquestioning adherence to a political decision already made; or

***43** [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

Only one of these factors need be present for a non-justiciable political question. *Bancoult v. McNamara,* 445 F.3d 427, 432 (D.C. Cir. 2006); *Schneider,* 412 F.3d at 194. In this instance, as we now show, all six factors are present and establish that Omar's petition should have been dismissed because it raises inherently political questions.

1. The first factor is clearly met here because the district court's injunction interferes with the Executive's textual constitutional authority to implement foreign policy and military functions for the purpose of protecting national security. Indeed, this factor alone demonstrates that Omar's petition raises political questions. As this Court has observed, "decision-making in the fields of foreign policy and national security is textually committed to the political branches of government." *Schneider,* 412 F.3d at 194; accord *Committee of United States Citizens v. Reagan,* 859 F.2d 929, 933-34 (D.C. Cir. 1988). And, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Department of the Navy v. Egan,* 484 U.S. 518, 530 (1988).

Article II of the Constitution "provides allocation of foreign relations and national security to the President, the unitary chief executive." ***44** *Schneider,* 412 F.3d at 195 (quoting from both Sections 2 and 3 of Article II); *Bancoult* 445 F.3d at 433-34; *District No. 1, Pacific Coast District v. Maritime Administration,* 215 F.3d 37, 42 (D.C. Cir. 2000) (national defense and foreign policy judgments by Executive Branch are "not subjects fit for judicial involvement"). "By contrast, in Article III defining the judicial power of the United States the closest there is to a reference to foreign relations is the extension of jurisdiction to 'Cases affecting Ambassadors, other public Ministers and Consuls.' " *Schneider,* 412 F.3d at 195 (quoting U.S. Const. Art. III, § 1).

Given this textual commitment to the political branches, "national security and foreign relations" are "topics that serve as the quintessential sources of political questions." *Bancoult,* 445 F.3d at 433 (collecting cases). Therefore, "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee,* 453 U.S. 280, 292 (1981); accord *Baker,* 369 U.S. at 211 (1962) (questions concerning foreign relations "frequently *** involve the exercise of a discretion demonstrably committed to the executive or legislature"); *United States v. Curtiss-Wright Exp. Corp.,* 299 U.S. 304, 320 (1936) (recognizing "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"); *El-Shifa Pharm. Indus. Co. v. United States,* 378 F.3d 1346, 1365 (Fed. Cir. 2004) (noting that the ***45** "Constitution does not contemplate or support" judicial review of actions of the President in his "role as Commander-in-Chief" in ordering the destruction of property believed to belong to al-Qaeda). That is particularly true when the relevant events and individuals are all abroad.

Further, capturing and detaining individuals in combat circumstances are fundamental incidents of waging war, and, as such, are entrusted to the Executive. See, *e.g., Hamdi v. Rumsfeld,* 542 U.S. 507, 531 (2004) (plurality opinion) ("Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them"); *Curran v. Laird,* 420 F.2d 122, 130 (D.C. Cir. 1969) (en banc) ("It is - and must be - true that the Executive should be accorded wide and normally unassailable discretion with respect to the conduct of the national defense and the prosecution of national objectives through military means"); *El Shifa,* 378 F.3d at 1361-70 (military decisions taken by Executive to thwart attacks by enemies are political questions beyond proper judicial review).

In this instance, United States military personnel, acting as part of the MNF-I, apprehended Omar in Baghdad, Iraq, where an insurgency continues to engage United States military and the multinational forces in deadly combat. Omar had amassed weapons and Improvised Explosive Device-making materials, and was harboring an ***46** Iraqi insurgent and four foreign Jordanian fighters, all of whom stated their intent to attack American and/or Coalition forces. JA 138. Thus, Omar represented a clear threat to American and Coalition troops in an active zone of combat. Accordingly, upon his apprehension, United States troops certainly could have immediately handed Omar over to Iraqi government personnel without approval by a court in the United States. The fact that Omar continues to be held by United States troops in Baghdad because they are being used temporarily to detain individuals facing trial in Iraqi courts should not change this matter and make it justiciable. Nor should the ability of the Government of Iraq to prosecute individuals for offenses committed in Iraq turn on the happenstance of whether the individuals are initially captured by United States forces, coalition forces, or Iraqi forces - particularly because the Government of Iraq has asked for the assistance of United States and coalition forces in capturing and detaining individuals who have committed terrorist or other criminal acts in Iraqi.

Moreover, even beyond his direct impact on the warmaking function of the Executive, Omar presents a threat to the security of U.S. personnel in an active combat zone, the reduction of which is the responsibility of the Executive. According to General Gardner, U.S. forces believe that Omar directed and participated in the selection and surveillance of potential kidnap victims in order to fund the Iraqi insurgency. JA 138. Given the significant presence of United States military ***47** personnel and civilians in Baghdad and throughout Iraq, Omar. presents an obvious and immediate threat to the security of U.S. personnel In Iraq.

The foreign policy implications of the issues raised by Omar are also prominent. The Iraqi government has a paramount interest in the investigation and prosecution of individuals who have committed offenses in Iraq, and Iraq, the United States, and the MNF-I have a compelling interest in the functioning of Iraqi institutions, including the court system. The military operations conducted in Iraq by members of the United States armed forces acting as part of the MNF-I are authorized by United Nations Security Council resolutions issued at the request of the sovereign Government of Iraq. Obviously, the scope of authority (and any obligations) created by those resolutions are a most delicate question of foreign policy, plainly not suited for judicial review. See *Ntakirutimana v. Reno,* 184 F.3d 419, 430 (5th Cir. 1999) (United Nations authority is beyond the scope of habeas review), *cert. denied,* 528 U.S. 1135 (2000). Indeed, the very documents empowering the MNF-I specifically address the delicate nature of these foreign policy-laden issues. See, *e.g.,* JA 150 (Iraqi request for assistance from MNF-I, noting the presence of "fundamental security and policy issues, including policy on sensitive offensive operations," and specifically noting that "these are sensitive issues for a number of sovereign governments, including Iraq and the United States").

***48** In addition, because the apprehension and detention of Omar was related to the security of MNF-I troops, this case implicates relations between the United States and the United Nations, as well as all the other countries participating in the MNF-I. Moreover, the extent to which the MNF-I fosters the development of Iraqi criminal courts by allowing those courts to deal with cases implicating both the domestic criminal laws of Iraq and the military authority to detain enemy combatants is already a delicate foreign-policy judgment balancing diplomatic and military imperatives. "[I]t is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch." *People's Mojahedin Org. v. Department of State,* 182 F.3d 17, 23 (D.C. Cir. 1999) (citing *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103 (1948)), *cert. denied,* 529 U.S. 1104 (2000). See also *Holmes v. Laird,* 459 F.2d 1211, 1215 (D.C. Cir.) ("[I]n situations such as this, '[t]he controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them [the courts] must move with the circumspection appropriate when [a court] is adjudicating issues inevitably entangled in the conduct of our international relations.' ") (quoting *Romero v. International Terminal Operating Co.,* 358 U.S. 354, 383 (1959)), *cert. denied,* 409 U.S. 869 (1972); *Smith v. Reagan,* 844 F.2d 195, 198 (4th Cir.) (granting relief sought would "involve courts in matters of the most delicate diplomacy"), *cert. denied,* 488 U.S. 954 (1988).

***49** The potential foreign policy implications of this case are profound. The district court's injunction on its face appears to cover conduct of *all* members of the MNF-I, regardless of their nationality. JA 161 (forbidding "any persons acting in concert or participation with [Respondents]" from "remov[ing] the petitioner from United States or MNF-I custody"). The scope of the injunction, which apparently was intended by the district court to cover even *foreign* military forces in Iraq, is thus startling. Plainly, adjudication of this matter will be "inimical to the foreign policy interests of the United States," and the case is therefore "nonjusticiable under the political question doctrine." *Hwang Geum Joo v. Japan,* 413 F.3d 45, 52 (D.C. Cir. 2005), *cert. denied,* 126 S. Ct. 1418 (2006).

The evidence before the district court further illustrates the extremely delicate foreign policy decisions with which the petition asks the courts to interfere. Omar is currently being held by the MNF-I, a coalition force that includes the United States. JA 137. Because Omar is a United States national, the MNF-I consulted with United States authorities before ascertaining that he would be charged by the Iraqi criminal court. JA 139. (The MNF-I maintains physical custody of detainees while their cases are being heard by the Iraqi court, and releases them to an Iraqi Ministry of Justice facility only upon their conviction. JA 141.)

***50** By prohibiting the United States and its military personnel acting as part of the MNF-I from turning Omar over to the Iraqi Ministry of Justice, the preliminary injunction interferes significantly with this delicate balance at a critical time as the United States and its allies are closely engaged in helping the new Iraqi government and its institutions gain legitimacy and assume a proper governing role. This preliminary injunction by a district court undermines the United States' foreign policy decisions to support and facilitate the establishment and growth of a successful Iraqi justice system, in part, by acting through the MNF-I to hold persons during their prosecution before the Iraqi courts, and to turn individuals over to Iraqi authorities upon their conviction by that court. This is precisely the type of foreign policy action that is outside the realm of the courts.

2. This case also meets the second *Baker* factor - the lack of judicially discoverable and manageable standards for resolving the issues.

Petitioners assert a "reason to believe that the United States military may turn Omar over to the custody of Iraqi authorities in an effort to evade the strictures of United States law." JA 18-19. The obvious problem with this accusation is that the Petition identifies no United States law, nor is there any, to restrict the ability of the Executive to induce the MNF-I to transfer Omar to the custody of Iraqi authorities. The decision regarding whether, and under what circumstances to turn Omar over to ***51** Iraqi authorities depends upon a variety of policy considerations, including the state of relations between the United States and Iraq, an assessment of the safety and fairness of the Iraqi judicial and penal systems generally and with respect to Omar specifically, and an understanding of the importance of custody of Omar to the MNF-I, the United States, and Iraq.

As the discussion about the Rule of Non-Inquiry shows, it would be difficult or impossible for the courts to use manageable standards in this area. Under our law, United States officials are barred from turning over individuals to other countries if they are more likely than not to be tortured in the receiving country. See *Auguste v. Ridge,* 395 F.3d 123, 149 (3d Cir. 2005). Accordingly, as the Executive Branch decides whether or not to surrender an individual to a foreign government, it must take into account a series of factors in order to decide if that surrender is consistent with U.S. law. Thus, the Executive Branch might decide to surrender an individual because it concludes that he is not likely to be tortured, to deny surrender of a person whom it thinks likely will be tortured, or to condition surrender on the requesting state's provision of appropriate assurances for proper treatment. See 22 C.F.R. § 95.3 (State Department regulations describing process for deciding whether to extradite a fugitive in the face of torture claims); *United States v. Kin-Hong,* 110 F.3d 103, 110 (1st Cir. 1997) (explaining that, in the extradition context, "the Secretary [of State] ***52** may attach conditions to the surrender of the [fugitive] ***. Of course, the Secretary may also elect to use diplomatic methods to obtain fair treatment for the [fugitive]").

Assurances of proper treatment can relate to torture or other aspects of the receiving state's criminal justice system and serve to protect against mistreatment, for example, by having the receiving state ensure that the individual will have regular access to counsel and the protections afforded under that country's laws. The decision to seek assurances is made by the Executive Branch on a case-by-case basis.

Evaluating the need for assurances, and the reliability of assurances obtained, can itself involve sensitive and complex judgments about: the identity, position, or other information relating to the foreign official relaying the assurances to the United States; political or legal developments in the receiving country that would provide the needed context for the assurances provided; and the nature of diplomatic relations between the United States and the requesting foreign state at that moment. The Executive Branch officials analyzing the relevant information may also make sensitive judgments regarding the requesting state's incentives and capacities to fulfill assurances given. See *Peroff v. Hylton,* 563 F.2d 1099, 1102 (4th Cir. 1977) ("The need for flexibility in the exercise of Executive discretion is heightened in international extradition proceedings which necessarily implicate the foreign policy interests of the United States").

***53** Under such circumstances, judicial review of a decision by the Executive Branch to surrender a particular individual to a specific requesting foreign country would place the federal courts in an unfamiliar and obviously inappropriate position. For example, if the Executive accepts the assurance of a foreign government that, despite a history of human rights abuses in that country, the person will not be tortured - thereby complying with U.S. law - a district court or court of appeals could evaluate this decision only by second-guessing the expert opinion of the Executive that such an assurance can be trusted. It is difficult to contemplate how judges would make such a prediction, lacking any ability to communicate with the foreign state or to weigh the current situation within that country.

3. With respect to the third *Baker* factor - he impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion - the discussion above should make the answer plain. The petition here cannot be decided without determining the correctness of the Executive decisions regarding whether to help the newly-established Government of Iraq, and in particular its judicial and penal systems, by participating in the functions of the MNF-I that include capturing alleged criminals and detaining them during their Iraqi judicial proceedings. There is simply no basis for a judicial determination of this policy question. Cf. *Schneider,* 412 F.3d at 197 (refusing to “pass judgment on the means used by the United States to keep that [Allende] government from taking power [in Chile]”).

***54 4.** The fourth *Baker* factor - the impossibility of a court undertaking independent resolution without expressing lack of the respect due coordinate branches of government - also weighs heavily in favor of finding a non-justiciable political question here. The Executive, and in particular the military department, has actively supported the apprehension and detention of Omar by the MNF-I, as well as the transfer of Omar to the CCCI for investigation and prosecution. There is simply no way to provide Omar the relief sought in the petition without directly disrespecting those decisions. See *Schneider,* 412 F.3d at 198. And in the current volatile atmosphere in Iraq, an order disrespecting the Executive Branch’s determinations concerning the capacity of the Iraqi legal system (and effectively disrespecting the Iraqi legal system itself) could have profound consequences.

5. The fifth *Baker* factor - an unusual need for unquestioning adherence to a political decision already made - also applies here. As explained, the United States Government is pursuing a policy designed to maintain security and stability in Iraq and to facilitate the operation of Iraqi institutions, including the courts. Facilitating the investigation and prosecution of Omar by the CCCI directly advances those objectives. Under these circumstances, the injunction here by the district court creates substantial problems because it greatly undermines the policy decisions already made by the United States with respect to the delicate and difficult questions ***55** concerning the handling of Omar and the continued prosecution of the conflict in Iraq.

6. The sixth *Baker* factor - the potentiality of embarrassment from multifarious pronouncements by various departments on one question - also clearly is applicable here. See *Baker v. Carr,* 369 U.S. 186, 211 (1962) (“many” questions touching upon foreign relations “uniquely demand single-voiced statement of the Government’s views”). The Supreme Court has recognized “the very delicate, plenary and exclusive power of the President as the *sole* organ of the federal government in the field of international relations.” *United States v. Curtiss-Wright Exp. Corp.,* 299 U.S. 304, 320 (1936) (emphasis added). The district court’s injunction directly undermines the Executive’s decisions with respect to the handling of Omar and sends a mixed message to the new Government of Iraq as well as our coalition partners in Iraq.

In sum, although the presence of any *one* of the factors discussed above is a sufficient basis to conclude that this case raises non-justiciable political questions, the district court’s injunction and Omar’s petition contravene all *six* factors. The fundamental separation of powers issues discussed above therefore provide an alternative basis to reverse the district court’s unprecedented injunction, and order that this habeas action be dismissed.

*56 III. THE DISTRICT COURT’S INJUNCTION EXCEEDS THE BOUNDARIES OF ARTICLE III AND HABEAS PRINCIPLES.

Even if the district court had jurisdiction to consider the habeas petition and enter some type of injunctive relief - which the Government vigorously contests - the scope of the preliminary injunction issued by the district court exceeded its legal authority under Article III of the Constitution and principles of habeas corpus. As its name suggests, the writ of habeas corpus is a specific legal tool aimed at terminating unlawful custody. Over the years, its scope has been expanded to include non-custodial incidents of criminal conviction, such as the loss of the right to vote, but the universe of harms that the writ is designed to remedy is still circumscribed. In the context of a pre-trial detainee such as Omar, there are, obviously, no incidents of criminal conviction at issue, and the termination of pretrial detention would ordinarily moot Omar’s habeas corpus petition. See *Yohey v. Collins,* 985 F.2d 222, 228-29 (5th Cir. 1993) (conviction of pretrial detainee ends pretrial detention and moots habeas corpus petition challenging that detention); *Fassler v. United States,* 858 F.2d 1016 (5th Cir. 1988) (same), *cert. denied,* 490 U.S. 1099 (1989); *Thorne v. Warden, Brooklyn House of Detention of Men,* 479 F.2d 297 (2d

Cir. 1973); see also *Spencer v. Kemna,* 523 U.S. 1 (1998) (habeas challenge to parole violation moot once prisoner released); *Lane v. Williams,* 455 U.S. 624, 632 (1982) (same).

***57** While courts undoubtedly have some authority to issue injunctions that protect their jurisdiction, a court may not artificially prolong a case or controversy by issuing an injunction the effect of which is to prevent the Government from rendering the petition moot by granting relief. Cf. *Franks v. Bowman Transp. Co., Inc.,* 424 U.S. 747, 754 (1976) ("Insofar as the concept of mootness defines constitutionally minimal conditions for the invocation of federal judicial power, its meaning and scope, as with all concepts of justiciability, must be derived from the fundamental policies informing the 'cases and controversies' limitation imposed by Art. III."); *Flast v. Cohen,* 392 U.S. 83, 94-95 (1968) ("Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."). Yet that is precisely what the preliminary injunction under review does. The petition ultimately seeks Omar's release from MNF-I custody. See JA 23. But under the guise of precluding the Government from rendering the case "prematurely moot," JA 175, the preliminary injunction forbids this very act. JA 161 (forbidding respondents from "remov[ing] the petitioner from United States or MNF-I custody"). The very fact that the petitioner resists the remedy ***58** that habeas typically provides underscores that this case lies beyond the jurisdiction of the district court and implicates political questions. The traditional remedy of release from custody in the unusual circumstances of this case would still allow Iraqi authorities to detain Omar for prosecution, which is precisely what Omar seeks to avoid. Accordingly, a court could only give Omar the relief he wants by granting him safe passage out of Iraq or continued detention by the MNF-I. But neither remedy would implicate the traditional office of habeas, and both would raise political questions of the first order.

From the text of the district court's opinion, it can be inferred that the district court intended merely to enjoin transfer of custody from the MNF-I to any other entity and specifically to Iraqi custody. See JA 13 (discussing petitioner's claim that "he is likely to suffer irreparable injury if transferred to Iraqi custody"). But even if the injunction only forbade transfer from MNF-I custody to Iraqi (or any other) custody, it would still be subject to the same criticism. Transfer of Omar to Iraqi physical custody - just like his release - would end his detention by the MNF-I, which is the sole arguable basis for the district court's jurisdiction. There is no more basis for enjoining such a transfer than there is for enjoining Omar's outright release in Iraq. See *Al-Anazi v. Bush,* 370 F. Supp. 2d 188, 196 (D.D.C. 2005) ("[T]here is no justification for issuance of an injunction pursuant to the All Writs Act when petitioners are obtaining the same relief through transfer that they could hope to ***59** obtain through habeas."). That is particularly true given that Omar freely chose to live in Iraq and subject himself to the jurisdiction of Iraqi authorities, and that he would be equally subject to Iraq's jurisdiction whether MNF-I forces transfer him to the custody of the Iraqi court or merely release him within Iraq's sovereign territory.

The district court is undoubtedly correct that Omar's release from MNF-I custody and transfer to Iraqi custody following a conviction and sentence by the Iraqi criminal court would surely moot his habeas petition, and likely prevent any further petition, as it is beyond the authority of the courts of this country to review the judgments of the judicial systems of other countries. But, as explained, that is because such a release and transfer would grant petitioner the only release he could possibly seek under the writ of habeas corpus. On its face, the preliminary injunction would prevent such a transfer even in the event of a conviction by the Iraqi court. At a minimum, this Court must modify the preliminary injunction so that it becomes void if and when Omar is convicted in the Iraqi court. This would partially alleviate the foreign policy problems caused by the preliminary injunction because it would allow the Iraqi government to take custody of Omar if and when he is convicted by the CCCI, as described in the Gardner Declaration.

*60 CONCLUSION

For the foregoing reasons, the preliminary injunction issued by the district court should be vacated and the habeas petition for Omar dismissed.

Footnotes	
*	Authorities chiefly relied upon are marked with an asterisk.

2	"JA __" citations refer to pages in the Joint Appendix filed in this Court.
1	In addition to forces from the United States, military forces from the following countries are participants in the MNF-I: Albania, Armenia, Australia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Czech Republic, Denmark, El Salvador, Estonia, Georgia, Italy, Japan, Kazakhstan, South Korea, Latvia, Lithuania, Macedonia, Mongolia, Netherlands, Norway, Poland, Romania, Slovakia, United Kingdom, and Ukraine.
2	Omar is related to al Zarqawi by marriage. His second wife and al-Zarqawi's first wife are sisters. Omar's son, Ahmed, who is also one of the petitioners in this case, is married to the daughter of Abu Muhammad al Maqdesi, who is al Zarqawi's spiritual advisor. (Ahmed's name is spelled "Ahmad" in the Gardner Declaration). Maqdesi has been imprisoned multiple times in Jordan for crimes against the Jordanian government. JA 137.
3	This chain of command was later confirmed in dramatic fashion in 1951, when the President of the United States relieved General MacArthur as Supreme Commander of the Allied Powers, replacing him in that position with Lieutenant General Matthew B. Ridgway. *See* Richard H. Rovere and Arthur M. Schlesinger, Jr., *The General and The President and the Future of American Foreign Policy* 171-72 (1951).
4	See *Hirota v. General of the Army MacArthur,* No. 239 Misc. at 25 (Motion for Leave to File Petition for Writ of Habeas Corpus); Message from Acting Political Advisor in Japan to Secretary of State (Nov. 22, 1948), *reprinted in* United States Department of State, *Foreign Relations of the United States, 1948, vol 6, The Far East and Australasia* 897-98 (Washington, D.C. Government Printing Office, 1974); Text of General MacArthur's Review of War Crimes Sentences (Nov. 24, 1948), *reprinted in Foreign Relations* 908.
5	In any event, the CCCI affords ample procedural protections to defendants. For example, evidence is presented through sworn testimony, a defendant is entitled to counsel, that counsel is allowed to present questions, and the defendant is allowed to refuse to answer questions. See JA 140-141.
6	Under federal law, turning Omar over to Iraqi authorities would not constitute an extradition because he has at all relevant times been within the sovereign territory of Iraq. Cf. 18 U.S.C. §§ 3184 (extradition statute governing "Fugitives from foreign country to United States").