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Habeas Corpus, Constructive Custody And The Future Of Federal Jurisdiction After *Munaf*

Karen Shafrir

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**HABEAS CORPUS, CONSTRUCTIVE
CUSTODY AND THE FUTURE OF FEDERAL
JURISDICTION AFTER *MUNAF***

Karen Shafrir *

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SUMMARY

In 2004-05, two American Citizens, Shaqir Omar and Mohhamed Munaf, were separately arrested in Iraq and placed in the Camp Cropper Military Facility, pending adjudication. Both prisoners filed writs of habeas corpus in the United States District Court for the District of Columbia. The primary issue that the lower courts grappled with was whether or not the courts had jurisdiction to hear the petitions. After various appeals, the United States Supreme Court concluded that the federal courts did have jurisdiction to entertain the habeas petitions but that the petitions would fail on the merits. This paper argues that the standard set forth by the Supreme Court for jurisdiction over habeas jurisdiction, "actual custody" is too formalistic and ultimately antithetical to the statutory habeas provision found in 28 U.S.C. § 2241. The paper concludes that rather than the limited "actual custody" threshold, the Court should have used the more liberal "constructive custody" standard recently articulated in various war-on-terror cases.

“There is no principle more sacred to the jurisprudence of our country or more essential to the liberty of its citizens than the right to be free from arbitrary and indefinite detention at the whim of the executive.”¹

-JUDGE JOHN D. BATES

A. INTRODUCTION

The writ of habeas corpus is one of the most time-honored - and currently contested - protections of the U.S. Constitution.² As one of the only common-law remedies enshrined in the Constitution, it has served as an essential check on the Executive Branch, preserving the rights of federal detainees and ensuring that the government does not detain anyone unlawfully.³ Recent years, however, have witnessed unprecedented challenges to both the availability of the writ and to its scope, as Congress and the President have each attempted to limit judicial review of entire classes of federal detainees.⁴ With little precedent to guide them, the federal courts have been beset by difficult and challenging questions concerning the nature of the constitutional protection, especially in the context of the “war on terrorism.” Indeed, for the first time since the aftermath of World War II, the courts have had to consider whether there are substantive limits on their ability to entertain habeas petitions from individuals held outside the territorial United States.

Although the overwhelming majority of both judicial and scholarly attention to date has focused on the scope of habeas corpus for *non*-citizens held outside the territorial United States –

¹ *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 38-39 (D.D.C. 2004).

² *See* U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

³ *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (holding that without express Congressional intent, INS may not limit the right of a person facing deportation from bringing a habeas corpus action in federal court).

⁴ *See, e.g., Military Commissions Act of 2006*, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635-36 (2006).

including at Guantánamo Bay, Cuba⁵—the Supreme Court in 2008 also considered two cases involving the detention of U.S. citizens in Iraq. As this paper argues, these two cases - *Munaf v. Geren* and *Geren v. Omar*⁶ - are at least as significant as the Guantánamo cases, if not more so, for the cases implicate fundamental questions about access to the writ for U.S. citizens that would apply irrespective of where the individuals are held.

Both *Munaf* and *Omar* are U.S. citizens who have been detained in Iraq by the Multi-National Force - Iraq (MNF-I), a military force spearheaded by the United States. Both filed habeas petitions contesting their detention, but by the time *Munaf*'s petition was resolved by the D.C. District Court, he had been transferred to the Central Criminal Court of Iraq (CCC-I), and, after a fifteen-minute trial, was convicted of abetting a kidnapping and sentenced to death. His conviction was later vacated and remanded to the CCC-I for a new trial.⁷ *Omar*, in contrast, remained in detention for two years, with no formal charges ever being filed. Both petitioners' families filed next of kin habeas petitions in the District Court of Washington, DC.

Both the D.C. District Court and the D.C. Circuit were divided with respect to whether they could ever entertain the two petitions.⁸ The government argued that jurisdiction over both petitions was precluded by the Supreme Court's terse per curiam opinion in *Hirota v. McArthur*, a case arising out of the Tokyo international war crimes tribunal.⁹ With little guidance or precedent with which to work, the courts reached different jurisdictional conclusions in the two cases that relied on a series of

⁵ See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (holding that aliens detained as enemy combatants at Guantánamo Bay were entitled to file habeas corpus petitions to challenge the legality of their detention).

⁶ 128 S.Ct. 2207 (2008).

⁷ See Josh White & Robert Barnes, *Iraq Detention Case Heads to High Court*, WASH. POST, Mar. 23, 2008, at A5.

⁸ Compare *Omar v. Harvey*, 416 F. Supp. 2d 19 (D.D.C. 2006), *aff'd*, 479 F.3d 1 (D.C. Cir. 2007), *aff'd in part*, 128 S. Ct. 2207 (2008) with *Mohammed ex rel. Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006), *aff'd*, 482 F.3d 582 (D.C. Cir. 2007), *rev'd in part*, 128 S. Ct. 2207 (2008).

⁹ 338 U.S. 197 (1948) (per curiam).

factors, including citizenship, the existence of a foreign conviction, and the nature of custody. Thus, analyzing almost identical circumstances, the district and circuit courts in *Munaf* concluded that there was no federal jurisdiction over his habeas petition, whereas the district and circuit courts in *Omar* concluded such jurisdiction to exist.

The Supreme Court consolidated the two cases on appeal, attempting to answer two fundamental questions: (1) whether the U.S. Federal Courts have jurisdiction to hear habeas claims of prisoners in situations like Omar and Munaf's and (2) whether or not the habeas petitioners could prevail on the merits of their claims.¹⁰ As to the jurisdictional analysis, Chief Justice Roberts dispersed quickly of the government's reliance upon *Hirota*, noting, "[t]hat slip of a case cannot bear the weight the Government would place on it."¹¹ Relying on the plain text of the federal habeas statute, Chief Justice Roberts concluded 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."¹²

This paper argues that the Supreme Court was correct in eliminating the "totality" or piecemeal approach to the existence *vel non* of federal jurisdiction applied in the lower courts; however Chief Justice Roberts conclusion that "actual custody" is necessary to trigger federal jurisdiction in habeas petitions is improper with respect to such an important constitutional protection. In order to protect the writ of habeas corpus, the federal courts should understand their jurisdiction as being dependent upon one factor: whether the federal courts have authority over the detainee's *effective* custodian.¹³

To make this argument, this paper begins by demonstrating that the various tests applied by the lower courts in

¹⁰ See *Munaf*, 128 S. Ct. at 2214.

¹¹ *Id.* at 2217.

¹² *Id.*

¹³ See *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 45 (D.D.C. 2004) (concluding that the habeas statute must be read broadly, so that jurisdiction is triggered in federal courts when the United States is the constructive custodian of the petitioner).

Omar and *Munaf* in determining jurisdiction over the prisoners' habeas petitions have been inappropriate. In effect, this section will argue that the Court was right to streamline the jurisdictional analysis. However, the significant defect that still remains in the Court's analysis is that it is focused on *actual* instead of *constructive* custody. In order to remedy this defect, this paper argues that an approach that focuses on one criterion—effective custody by the U.S. government at the time of filing—should be the dispositive factor. Second, this paper demonstrates why using such a rule-based approach for issues such as habeas jurisdiction is imperative in today's legal and political environment. Finally, this paper argues that a broad interpretation of the concept of "custody" is essential to the successful administration of such a rule. So construed, this paper argues that *Omar* and *Munaf* are representations of *why* such a clear rule for habeas jurisdiction is needed now more than ever, and ultimately concludes that in order to maintain the spirit of habeas jurisprudence, federal courts should construe jurisdiction widely using the "effective custodian" standard as their guidelines.

B. BACKGROUND AND FACTS

Shawqi Omar and Mohammed Munaf are U.S. citizens who separately traveled to Iraq and allegedly became involved in various insurgency-related activities against the Iraqi government and the coalition of foreign military forces comprising the Multinational Force–Iraq ("MNF–I"). Each were detained and held for various periods of time. The importance of their individual stories is tantamount to understanding the need for effective judicial review of such cases, where potentially innocent individuals are detained indefinitely by the United States Government.

Habeas petitioner Mohammed Munaf is an Iraqi who emigrated to the United States with his wife, a native Romanian, in 1990.¹⁴ In 2000, Munaf was naturalized as an American citizen,

¹⁴See Petition for Writ of Certiorari at 3, *Munaf v. Geren*, 128 S. Ct. 2207 (U.S. 2008) (No. 06-1666).

and in 2001, Munaf and his family moved back to Romania.¹⁵ In 2005, Munaf led a group of Romanian journalists to Baghdad, where they were kidnapped by an Iraqi group identifying themselves as “Muadh Ibn Jabal Bridage.”¹⁶ The group released the prisoners late in May of 2005, fifty-five days after their captivity, at which point they were taken to the Romanian embassy in Baghdad.¹⁷

After their release, U.S. military officials took custody of Munaf and transported him to Camp Cropper, a U.S. prison base near Baghdad.¹⁸ On August 18, 2006, after fifteen months in custody without being charged, Munaf petitioned for a writ of habeas corpus in the U.S. District Court for the District of Columbia.¹⁹ Three weeks after the writ was filed, Munaf was informed that his trial by an Iraqi court would begin, and if convicted, that he would be transferred to exclusive Iraqi custody.²⁰ As Munaf is a Sunni Muslim, he claimed he will face significant torture if transferred, and thus, also filed a Temporary Restraining Order (“TRO”) to prevent his transfer pending adjudication of his habeas petition.²¹

The subsequent series of events is contested by each party. According to the government’s brief, Munaf admitted on camera, in writing, and at the Iraqi investigative court that he participated in the kidnapping of the journalists for a profit.²² The government contends that Munaf was represented by counsel of his choice, and that he had the opportunity to present evidence and witnesses in the investigative court.²³ The investigative court

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *See id.*

¹⁸ *See id.* The “true nature” of camp cropper is one of debate. Discussed in *infra* Section IV.

¹⁹ *See* Petition for a Writ of Certiorari at 5, *Munaf v. Geren*, 128 S. Ct. 2207 (U.S. 2008) (No. 06-1666) (U.S. 6/13/2007).

²⁰ *See id.* at 5.

²¹ *See id.* (citations omitted).

²² Brief for the Federal Parties at 9, *Munaf v. Geren*, 128 S. Ct. 2207 (U.S. 2008) (No. 06-1666).

²³ *See id.*

determined that there was sufficient evidence to proceed, and referred the case to Central Criminal Court of Iraq (CCCI) for further proceedings.²⁴ In that hearing, Munaf repudiated the confessions, alleging that the confession had been forced.²⁵ The CCCI, “after considering the evidence gathered by the investigative court, taking the additional statements from the defendants, and hearing argument from the Iraqi prosecutor and multiple defense attorneys,” found Munaf guilty and sentenced him to death.²⁶

Munaf’s version of the facts varies fairly significantly from the government’s account. While the government contends that Munaf’s confession was legitimate, he contends that it was coerced and that “unspecified officials told him that if he did not confess, he, his sister, and his wife would be sexually assaulted.”²⁷ Moreover, Munaf claims that the requisite formal complaint from the Romanian government necessary for prosecution in front of an Iraqi tribunal was not only missing, but, in fact, was never authorized.²⁸ Since his conviction in the CCCI, Munaf has filed an appeal with the Iraqi Court of Cassation, and the government has confirmed that Munaf will remain at Camp Cropper while this appeal is pending.²⁹ Munaf’s appeal was successful in February of 2008, with the Iraqi appeals court remanding Munaf’s case for a new trial.³⁰

Shawqi Omar, age 49, first came to the United States as a seventeen-year-old student. In 1983, he married Sandra Kay Sulzle (“Ms. Omar”), in Mobridge, South Dakota, and three years later became an American citizen. The Omars eventually moved to Minnesota, where Omar served in the Minnesota National Guard. He and his wife have six children, all U.S. citizens. After Saddam

²⁴ *See id.* at 10.

²⁵ *See id.*

²⁶ *Id.*

²⁷ Mohammed v. Harvey, 456 F. Supp. 2d 115, 118 (D.D.C. 2006).

²⁸ Brief for the Appellants at 6, Munaf v. Harvey, 482 F.3d 582 (D.C. Cir. 2007) (No. 06-5324). There is now evidence that the Romanian government has officially denied that it deputized any American official to speak on its behalf. *Id.*

²⁹ *See id.*

³⁰ *See* White & Barnes, *supra* note 7, at A5.

Hussein's fall, Omar, who was born in Kuwait and speaks Arabic fluently, traveled to Iraq in the hope of securing work in the country's reconstruction.³¹

On October 29, 2004, American forces arrested Omar at his Baghdad home, claiming he had some connection to insurgent activity. While his ten-year-old child stood by, U.S. soldiers ransacked Omar's house and beat him.³² After his arrest, Omar was held incommunicado for several months. On December 22, 2004, the U.S. government, responding to entreaties for information from Omar American wife, told Ms. Omar that her husband was imprisoned "under United States military care, custody and control."³³ To date, Omar and his counsel have not been told why he was arrested or why he has been imprisoned for more than fifteen months without charge or access to counsel.

C. THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Munaf filed a motion in the United States District Court for, *inter alia*, a petition of habeas corpus.³⁴ The district court dismissed all motions for lack of subject matter jurisdiction. To determine jurisdiction, the court first focused on the language of the Federal Habeas Statute, 28 U.S.C. 2441.³⁵ The language of the statute, in conjunction with the court's own jurisprudence, lead the court to conclude that "the turnkey of the habeas statute is the requirement of custody."³⁶ Under this framework, a court only has jurisdiction to issue a habeas writ if the petitioner is in the "custody under or by color of the authority of the United States" or "in

³¹ See Brief for the Habeas Petitioners at 3, *Munaf v. Geren*, 128 S. Ct. 2207 (U.S. 2008).

³² See *id.* at 22.

³³ Reply Brief in Support of Petitioners' Motion for a Temporary Restraining Order at 3, *Omar v. Harvey*, 416 F. Supp. 2d 19 (D.D.C. 2006) (No. 05-2374), 2006 WL 4048728.

³⁴ *Mohammed ex rel. Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006), *aff'd*, 482 F.3d 582 (D.C. Cir. 2007), *rev'd in part*, 128 S. Ct. 2207 (2008).

³⁵ *Id.* at 121.

³⁶ *Id.* (citing *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 45 (D.D.C. 2004)).

violation of the Constitution or laws or treaties of the United States.”³⁷

The court noted that the Supreme Court had “very liberally” construed the definition of the “custody” requirement.³⁸ A minimum threshold, however, was that the petitioner was held in “constructive custody” by the United State government.³⁹ The court then stated that if the requirement for habeas is constructive custody, then the converse must also be true: “if the petitioner is in custody under some authority other than the United States, there is no habeas jurisdiction.”⁴⁰ Under these guidelines, the court found that Munaf failed to meet the threshold requirement, because he was not being held either by the United States or in violation of the Constitution, laws or treaties of the United States. In reaching this conclusion, the court found that the MNF-I – described by the government as a collation of troops who derive their ultimate power from the United Nations and not the United States - was Munaf’s true custodian.

Furthermore, at the time the petition was finally heard before the district court, Munaf had been tried and convicted by the CCCI. The court believed that this meant his current custodian was the Republic of Iraq and that, once he was transferred, Iraq seized jurisdiction over the criminal case against him. Because “the writ of habeas corpus will not reach a foreign sovereign” the U.S. Courts lose jurisdiction once a foreign sovereign has constructive custody, the precise situation in the case at bar, according to the court.⁴¹ The court did state that habeas may be invoked in exceptional circumstances, such as if the United States is acting as an intermediary in another country; however, Munaf failed to establish the existence of such circumstances here.

³⁷ *Id.* (quoting 28 U.S.C. § 2241).

³⁸ *Id.* (citing *Maleng v. Cook*, 490 U.S. 488, 492 (1989)).

³⁹ *Id.* (quoting *United States ex rel. Keefe v. Dulles*, 222 F.2d 390, 392 (D.C. Cir. 1954)).

⁴⁰ *Id.*

⁴¹ *Mohammed ex rel. Munaf v. Harvey*, 456 F. Supp. 2d 115, 122 (D.D.C. 2006), *aff’d*, 482 F.3d 582 (D.C. Cir. 2007), *rev’d in part*, 128 S. Ct. 2207 (2008).

The District Court analogized the MNF-I and the CCCI to the military tribunals of the *Hirota* case.⁴² There, the Court lacked jurisdiction to hear habeas petitions of Japanese citizens tried by a military tribunal where American military personnel contributed to the tribunal and the prisoners were in the physical custody of U.S. troops. The Supreme Court denied the prisoner's habeas petitions because the tribunal was not a tribunal of the United States. In their eyes, both were not run under the independent authority of the United States government and, thus, no habeas jurisdiction existed.⁴³

Even though it relied on *Hirota*, a case over a half-century old, the district court explained that modern habeas jurisprudence is in line with its decision in *Munaf*.⁴⁴ Listing the cases, it noted that new jurisprudence has taken an expansive view of habeas jurisdiction; yet the one constant in all the cases has been constructive custody. To this point, the court stated that this does not mean that the government could merely "cloak itself in the guise of a multinational force."⁴⁵ With no extensive discovery or briefing on whether or not the MNFI-I really *is* the United States

⁴² *Id.* at 123.

⁴³ In accepting the *Hirota* argument, the district court rejected two of Munaf's arguments. First, The court dismissed Munaf's analogy to *United States ex rel. Toth v. Quarles*. In *Quarles*, the Court found habeas jurisdiction to exist with a former U.S. airman who was arrested by military officials and taken to Korea and charged by a court martial. The key differentiation in the eyes of the district court between Quarles and Munaf was that Quarles was tried by a court martial that was an entirely American tribunal, established under the authority of an act of Congress. Here, the court opined, Munaf was never tried or held by a purely American entity, and thus *Quarles* did not control. Second, the court rejected Munaf's argument that *Johnson v. Eisentrager*, 339 U.S. 763 (1950) should also control. In *Eisentrager* the Supreme Court distinguished between the rights of aliens and citizens to bring habeas claims in U.S. courts. The district court once again distinguished Munaf's claim by stating that first, language relating to citizenship in *Eisentrager* was mere dicta, and, second, that the *Eisentrager* Court found that the petitioners were in the custody of the United States. Thus, it concluded, it was custody and not citizenship that controlled jurisdiction. See *id.* at 125-26.

⁴⁴ In explaining that "recent developments in the law of habeas corpus serve to confirm the holding in the instant case," the court cited a laundry list of recent decisions including *Padilla* and *Rasul*. See *id.* at 126.

⁴⁵ Mohammed *ex rel. Munaf v. Harvey*, 456 F. Supp. 2d 115, 126 (D.D.C. 2006), *aff'd*, 482 F.3d 582 (D.C. Cir. 2007), *rev'd in part*, 128 S. Ct. 2207 (2008).

government “cloaked,” the court concluded that due to Munaf’s conviction, there was no jurisdiction over Munaf’s custodian and thus, no jurisdiction over his habeas petition.

Omar fared slightly better in his petition. In December of 2005, Omar sought a Writ of Habeas Corpus and a temporary restraining order in the D.C. District Court (D.D.C.) enjoining his transfer to Iraqi custody.⁴⁶ The court concluded that it (1) had the power to issue a temporary restraining order and (2) that, pending appeals, it also had jurisdiction over Omar’s habeas petition. In reaching this conclusion, the court focused on the fact that unlike the petitioner in *Munaf*, Omar had yet to be convicted by a foreign tribunal, and thus the district court maintained jurisdiction to hear his claim.

In analyzing his claims, the court first focused on the legal grounds for issuing injunctive relief: (1) a substantial likelihood of success on the merits, (2) whether Omar 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.⁴⁷ The Court noted two important thresholds: first, whether or not the claimant has a substantial likelihood of success on the merits and second, whether there is evidence of irreparable injury.⁴⁸ Absent these crucial factors, injunctive relief should not be granted.⁴⁹

Under this legal standard, the court granted Omar the injunctive relief sought. In deciding whether or not the claimant had a likelihood of succeeding on his habeas petition, the court looked to the different factual claims of each party.⁵⁰ The court, agreeing with the thesis of this paper, reasoned that “[a] court’s

⁴⁶See *Omar v. Harvey*, 416 F. Supp. 2d 19, 22 (D.D.C. 2006), *aff’d*, 479 F.3d 1 (D.C. Cir. 2007), *aff’d in part*, 128 S. Ct. 2207 (2008).

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹*See id.* at 23. Moreover, the Court noted that injunctive relief is an “extraordinary form of judicial relief, ... [that] courts should grant such relief sparingly.” *Id.* at 22-23 (citations omitted).

⁵⁰ The government argued that the MNF-I was a multinational coalition, and thus, the U.S. government had no constructive custody over Omar. Omar argued that the MNF-I was the equivalent of U.S. custody. *See id.* at 24.

jurisdiction over a habeas petition rests on its jurisdiction over the petitioner's custodian."⁵¹ Since the identity of the custodian was still under dispute, the court granted the injunction *without* reaching the question of whether or not the United States government was indeed the custodian. The court concluded that the question raised by this factual dispute was "so serious, substantial, difficult and doubtful, as to make [it] fair ground for litigation and thus for more deliberative investigation."⁵²

Although the court agreed that the basic controlling jurisdictional factor was whether or not the court had jurisdiction over the custodian, the court distinguished *Hirota* on other factors aside from just the nature of the custodian. In rejecting the government's argument that the case was controlled by *Hirota*, the court noted that the petitioners in that case were Japanese citizens, whereas here, the habeas petitioner was an American citizen. It also noted that *Hirota* was decided before modern Supreme Court jurisprudence that has greatly expanded the definition of habeas. The court stated "[in] the time between the *Hirota* decision and the Supreme Court's most recent habeas decisions, the Supreme Court has expanded and clarified the application of the 'Great Writ' to better fulfill its ultimate purpose of allowing an individual to present 'a simple challenge to physical custody imposed by the Executive.'"⁵³ Thus, it focused on two factors aside from custody: that the petitioner here was an American citizen and that *Hirota* is probably not controlling in light of recent jurisprudence. Thus, the court decided that its primary goal was to focus on whether Omar had alleged *any* facts that *may* grant jurisdiction.⁵⁴ Although the court sufficiently distinguished *Hirota*, it left to another day the determination of what exactly should constitute the key to jurisdiction for habeas petitions. It did however state that if the

⁵¹ *Id.* at 24 (citing *Rumsfeld v. Padilla*, 542 U.S. 426, 442 (2004); *Rasul v. Bush*, 542 U.S. 466, 478-479 (2004)).

⁵² *Id.* at 23-24 (citations omitted).

⁵³ *Id.* at 25 (citing *Padilla*, 542 U.S. at 441).

⁵⁴ *Id.* at 26.

United States government is in fact Omar's custodian, that the federal courts *should* have jurisdiction.

**D. THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

Munaf appealed his District Court decision, asking the D.C. Circuit Court to find the lower court to have erred in dismissing his action for lack of jurisdiction. The Court of Appeals, "constrained by precedent," affirmed the lower court's finding that it does not have the power to hear Munaf's claim.⁵⁵ The precedents that Judge Sentelle referred to as "binding," *Hirota* and *Flick*, were cases where, because neither tribunal in question was a United States court, the Court held that the prisoners' habeas petitions had to be dismissed for lack of jurisdiction. The Court of Appeals distinguished *Hirota* and *Flick* from its recent decision in *Omar*, stating that because *Omar* had yet to be charged or convicted in a non-U.S. court, these precedents did not apply.⁵⁶ Munaf, however, had already been tried by the CCCI, an Iraqi court that the majority held was decidedly not a tribunal of the United States.⁵⁷ The Court's primary concern in *Hirota* was that the petitioners' claims "represented a collateral attack on the final judgment of an international tribunal." In light of these precedents, the court concluded that simply because Munaf was an American citizen does not displace the fact that Munaf has already been convicted by a foreign tribunal.⁵⁸

The court further ignored the fact that Munaf's plea was not challenging his foreign conviction, but the lawfulness of his

⁵⁵Munaf v. Geren, 482 F.3d 582 (D.C. Cir. 2007), *rev'd in part*, 128 S. Ct. 2207 (2008).

⁵⁵*Hirota v. General of the Army Douglas MacArthur*, 338 U.S. 197 (1948) (per curiam). The concurrence (Randolph, J.) agreed with the outcome of dismissal, but on meritorious rather than jurisdictional grounds. See *Munaf v. Geren*, 482 F.3d at 585.

⁵⁶See *id.* at 584.

⁵⁷The circuit court disagreed with Munaf's contention that *Hirota* and *Flick* were not controlling on his case because he is a U.S. citizen. The court found no indication that either *Hirota* or *Flick* suggested a distinction between citizens and non-citizens in terms of habeas jurisdiction. *Id.*

⁵⁸See *Munaf v. Geren*, 482 F.3d 582, 585 (D.C. Cir. 2007), *rev'd in part*, 128 S. Ct. 2207 (2008)..

original detention by the MNF-I. The court once again found that *Hirota* and *Flick* could not be distinguished on such grounds because the forces there were similar to those of the MNF-I. In both cases, the petitioners were held by a multinational force, of which the U.S. was merely a part, and not the controlling nation. Without clear evidence that Munaf's detention was controlled wholly by the United States, precedent barred any jurisdiction over his habeas claim.⁵⁹

Although reaching the conclusion that reliance on precedent barred jurisdiction, the circuit court made an important statement (albeit dicta). It noted that “[i]n holding that the district court lacks jurisdiction, we do not mean to suggest that we find the logic of *Hirota* especially clear or compelling, particularly applied to American citizens.”⁶⁰ The court further explained that *Hirota*'s short per curiam opinion did not explain why the fact of the criminal conviction by a non-U.S. court is dispositive on the habeas jurisdiction issue. It concluded “we are not free to disregard *Hirota* simply because we may find its logic less than compelling.” In doing so, it opened the door for the Supreme Court to overrule, or, at the very least, clarify *Hirota*.⁶¹

⁵⁹ *See id.*

⁶⁰ *Id.* at 588.

⁶¹ Judge Randolph's concurrence was the first to suggest that there may be jurisdiction to hear Munaf's claim, but that dismissal was still proper on the merits of the case. According to Randolph, the critical factor is that Munaf is an American citizen and that *Hirota*, where the petitioners were Japanese citizens, does not control. According to Randolph, there is a longstanding distinction between citizens and non-citizens, beginning with *Eisentrager* and more recently highlighted in *Rasul*. In both cases, the court distinguished between citizens and non-citizens for the purposes of jurisdiction in habeas petitions. However, simply because jurisdiction is warranted on the grounds of Munaf's citizenship status, dismissal was still warranted for other reasons. Randolph opined that Munaf's case was controlled by *Wilson v. Gerard*, 354 U.S. 524 (1957), a case wherein a soldier, after killing a Japanese woman in Japan, sought habeas relief in the U.S. courts. The district court denied the writ on merits, but issued a preliminary injunction barring the soldier's transfer. Under a security treaty between the United States and Japan, the court upheld the denial of writ but reversed on the injunction, reasoning that “a sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction.” Randolph analogized Munaf's case by stating that the petitioner's detention was a direct result of congressional statute and a U.N. treaty authorizing the

The government petitioned the district court's decision in *Omar*, claiming that the court lacked jurisdiction to hear Omar's claims, once again relying primarily on *Hirota* as precedent for this proposition.⁶² In agreeing with the district court that *Hirota* did not control for denying jurisdiction, the circuit court stated, "*Hirota* nowhere explains which 'circumstances' [for stripping jurisdiction] were controlling. Nor does anything in the opinion hold that federal courts lack habeas jurisdiction whenever, as the government insists, American officials detaining a petitioner are functioning as part of a multinational force. Indeed, the opinion articulates no general legal principle at all."⁶³

Although *Hirota* lacked a clear delineation of what could strip jurisdiction, the court found that one factor was most controlling.⁶⁴ In *Flick*, a case that relied on *Hirota* in order to strip jurisdiction, the Court considered a habeas petition filed by a German national held in Germany by American troops, pursuant to his conviction by the "Military Tribunal IV." Concluding that the military tribunal in question was in fact not a court of the United States, the Court dismissed the petition for lack of jurisdiction. In analyzing *Flick*, the Court concluded that the critical factor to take away from *Hirota* was *conviction by a foreign tribunal*. Thus, even if *Hirota* and subsequent cases delineated some criteria for jurisdiction stripping, the most critical factor - conviction by a foreign tribunal - was absent in the case at bar.

The court then addressed the political question issue raised by the Government - that the district court lacked jurisdiction to enter the preliminary injunction because the case "raise[s] quintessential political questions beyond the authority or competence of the judiciary to answer."⁶⁵ The circuit court relied on *Hamdi* in rejecting the proposition that Omar's case is non-judicial. In *Hamdi*, the Government argued separation of

MNF-I, and thus, the same result as *Gerard* is warranted. See *Munaf v. Geren*, 482 F.3d at 585-86.

⁶²*Omar v. Harvey*, 479 F.3d 1, 6 (D.C. Cir. 2007).

⁶³*Id.* at 7.

⁶⁴*Id.*

⁶⁵*Id.* at 9.

powers and national security concerns in attempting to strip jurisdiction from the courts. The *Hamdi* plurality rejected this notion, stating that “it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.”⁶⁶ Using *Hamdi*, the circuit court determined that Omar’s case presented no political question that could strip jurisdiction. It further explained that it is within the courts’ sound discretion to determine whether or not the Executive possesses the authority to transfer prisoners - Omar’s second claim.⁶⁷

Once it established jurisdiction, the court then turned to the propriety of the injunction. The government’s primary argument against the injunction was that “[Omar’s] transfer to Iraqi authorities constitutes release from American/MNF-I custody-‘all of the relief to which [Omar] is entitled through a writ of habeas corpus.’”⁶⁸ The court rejected this argument by pointing out the significant difference between transfer and “releasing him to walk free from his current detention.” Transfer to a foreign country seeking extradition is not the same as releasing him, the court concluded, mainly because if transferred, he remains in custody and if released, he may or may not.⁶⁹ Thus, the circuit court agreed with the district court that it not only had the power to *hear* the claim, but also that it had the power to grant Omar relief.

⁶⁶ *Id.*

⁶⁷ *See* Omar, 479 F.3d at 9..

⁶⁸ *Id.* at 12.

⁶⁹ *Id.* (The court further explained that even if the Iraqi government could pick up Omar, this sort of speculation was not sufficiently concrete to deny habeas jurisdiction. The majority vigorously disagreed with Judge Brown’s dissent on this point, stating that simply because the Iraqis *could* pick up Omar immediately after his release did not make this option the constructive equivalent to transfer).

**E. SORTING THROUGH CUSTODY, CITIZENSHIP
AND CONVICTION: WHAT THE SUPREME COURT
GOT RIGHT AND WHAT IT GOT WRONG**

All four courts in *Omar* and *Munaf* used different factors in determining whether or not jurisdiction was proper. In answering the issue of whether or not jurisdiction existed for the federal courts, Chief Justice Roberts concluded that both *Omar* and *Munaf* *could*, at the very least, have their claims heard by the lower court, even though their challenges ultimately failed on the merits. In finding that the MNF-I was the petitioners' *actual* custodian, he concluded that jurisdiction existed under the habeas statute.⁷⁰ Ultimately, the Court disagreed with the lower courts, ruling out the "totality of the circumstances" approach that they had employed.⁷¹ In doing so, Justice Roberts created what appears to be a bright-line rule, at least for the jurisdictional analysis, that courts hearing habeas petitions of those in the *actual* custody of the United States government have the jurisdictional authority to at least entertain such petitions.

The next portion of this paper argues that although Justice Roberts was correct in his conclusion that the lower courts' "totality" approaches to jurisdiction were wrong, his approach, *actual* custody, is improper as well. This paper thus focuses on the fact that the single most controlling factor in determining jurisdiction should be *constructive custody* by the United States government, and should not be limited to, as the Court suggested, *actual* custody. This paper adopts the position outlined in the *Abu Ali v. Ashcroft*, which concluded that the habeas statute must be read expansively to mean that the standard for jurisdiction is *constructive custody* by the United States.⁷²

I. A Brief History of "Custody" Under 28 U.S.C. § 2241

Custody by the United States government has been the

⁷⁰ *Munaf v. Geren*, 128 S.Ct. 2207, 2217 (2008).

⁷¹ *Id.* Although the Court relied on the fact that the United States Military was *Omar* and *Munaf*'s actual custodian, there was some discussion, in dicta, about the citizenship of the petitioners.

⁷² *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, (D.D.C. 2004).

cornerstone of the federal habeas jurisdiction since the Thirty-ninth Congress passed its amendments to the habeas statute in 1867.⁷³ One hundred and fifty years later, the most current version of the statute still holds the same meaning, stating that “the writ of habeas corpus shall not be extended to a prisoner unless he is in *custody under or by color of the authority of the United States*.”⁷⁴ The statute also lists four other factors that can trigger jurisdiction, three of which explicitly require custody by the United States government.⁷⁵ Only one provision that strips federal court jurisdiction to hear habeas claims can be found in the most recent version of the statute, effective January 28, 2008. It reads that an alien, having been deemed an enemy combatant or awaiting such a determination, may not bring a habeas claim in a court of the United States.⁷⁶ No other language in the statute details factors that automatically *strip* jurisdiction.

Although the statute clearly states that the controlling factor for habeas jurisdiction is the nature of the custodian, recent cases have incorrectly presented a “totality of the circumstances” approach to habeas jurisdiction that include such factors as citizenship, conviction by a foreign tribunal and detention overseas. This “totality” approach to jurisdiction emerged in WW-II and then essentially disappeared; however it has recently

⁷³ See Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (“[T]he several courts of the United States, . . . shall have the power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States Said writ shall be directed to the person in whose custody the party is detained.”)

⁷⁴ 28 U.S.C. § 2241(c)(1) (emphasis added).

⁷⁵ See 28 U.S.C. § 2241(c)(2)-(5) (“(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or (5) It is necessary to bring him into court to testify or for trial.” Only the final factor, bringing the prisoner into court to testify, does not list custody explicitly; however, bringing a prisoner into a U.S. Court to testify would be considered constructive custody under any definition”).

⁷⁶ See 28 U.S.C. § 2241(e)(1)-(2).

reemerged in post-9/11 cases where courts have decided that their quasi-related factual nature to WW-II cases warrants similar readings.⁷⁷ In the case heavily relied upon by the lower courts, *Hirota v. McArthur*, the Supreme Court contemplated four factors- detention overseas, the existence of a multi-national force, foreign citizenship and criminal conviction - in denying jurisdiction to hear petitions of Japanese citizens detained by the United States government.⁷⁸ The Court concluded, “Under 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 and for this reason the motions for leave to file petitions for writs of habeas corpus are denied.”

The *Hirota* Court did not delineate *which* of these “circumstances” controlled; as a result, courts attempting to apply such precedent have had a difficult time formulating coherent rules for granting or denying jurisdiction. *Omar* and *Munaf* exemplify the issues experienced by courts attempting to decide habeas jurisdiction.⁷⁹ The Chief Justice disposed of these arguments, tersely concluding that the “slip of a case cannot bear the weight the Government would place on it.”⁸⁰

The next three sections of this paper discusses what the Court concluded in *Munaf* and elaborates on what the court correctly and incorrectly concluded in light of habeas jurisprudence. Ultimately, the paper concludes that Chief Justice

⁷⁷ See Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship and Article III*, 95 GEO L.J. 1497, 1504 (2007).

⁷⁸ See *Hirota*, 338 U.S. at 197.

⁷⁹ Compare *Omar v. Harvey*, 416 F. Supp. 2d 19 (D.D.C. 2006), *aff'd*, 479 F.3d 1 (D.C. Cir. 2007), with *Mohammed ex rel. Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006), *aff'd*, 482 F.3d 582 (D.C. Cir. 2007)(The district court in *Munaf* rejected habeas jurisdiction on the grounds that the MNF-I was not custody, stating that “the turnkey of habeas jurisdiction is custody.” Yet, the circuit court concluded that the key to denying *Munaf*’s jurisdiction was his conviction by a foreign tribunal. In *Omar*, the court concluded that jurisdiction was proper because there was no conviction by a foreign tribunal and that the MNF-I as his custodian may legitimately be the United States government, in which case there is jurisdiction based on the immediate custodian rule).

⁸⁰ *Munaf*, 128 S. Ct. at 2217.

Roberts was correct in dismissing the multi-factor approach used by the lower courts; it then concludes that, in light of the both the habeas statute's plain language, interpretive case law, and the current system of detention and conviction abroad, that "constructive custody" by the government should have been considered the controlling factor for the Supreme Court in answering the question of jurisdiction over habeas petitions filed in U.S. courts.

**F. WHAT THE COURT GOT RIGHT: THE INCORRECT
USE OF A CONVICTION BY A FOREIGN TRIBUNAL AS A
FACTOR IN DECIDING JURISDICTION OVER
OMAR AND MUNAF'S CLAIMS**

Conviction by a foreign tribunal, or lack thereof, became the deciding factor for both the district court in *Omar* and the circuit court in *Munaf*. In accepting the argument that conviction by a foreign tribunal is the key to stripping federal jurisdiction, the district court in *Omar* concluded that although *Hirota* did not clearly delineate that particular rule, *Flick*, did.⁸¹ In *Flick*, the primary question was whether or not the court that had tried the petitioner was a United States court. Since that answer was decidedly no, the Court concluded that "no court of this country has power or authority to review, affirm, set aside or annul the judgment and sentence imposed on Flick."⁸² Because a foreign tribunal had already convicted Flick, his habeas petition could not be heard in a court of the United States. Using *Flick*'s interpretation of *Hirota*, the *Omar* court determined the critical factor for jurisdiction to be the detainee's convictions by an international tribunal. Under this standard, *Hirota* did not control because Omar had yet to be convicted by a foreign tribunal.⁸³

Without the presence of *Hirota*'s critical factor - conviction

⁸¹ The *Omar* court stated that if it was left with just *Hirota* as a guide, that it would be freer to interpret which factor controlled. Yet *Flick* made clear that the guiding principle was conviction. *Flick* was a District of Columbia Circuit case and thus not binding upon the Supreme Court.

⁸² *Omar v. Harvey*, 479 F.3d 1, 7 (D.C. Cir. 2007).

⁸³ See *supra* note 63.

- the court maintained jurisdiction over Omar's case. Yet the court in *Munaf*, using the same logic, came to the opposite conclusion. There, the court decided that because Munaf had already been convicted of a crime by the CCC-I, *Hirota* and *Flick* did in fact control. Because granting jurisdiction in Munaf's case would be a "collateral attack on an international tribunal" - a premise that both *Hirota* and numerous other cases held as a basis for dismissal on jurisdictional grounds - the court had no choice but to deny Munaf's petition on jurisdictional grounds.⁸⁴

Both courts viewed *Hirota* as a precedent barring review of cases where the petitioners have been tried by a foreign tribunal. This incorrect conclusion was a significant departure from the rule in *Hirota* and one that even the Government no longer supported.⁸⁵ The Supreme Court dismissed this approach, implicitly concluding that the factors of pre or post conviction by a foreign tribunal were *not* central to the analysis.⁸⁶ The Court correctly declined to apply the rule promulgated by the D.C. Circuit, which would have concluded that United States courts had jurisdiction when Munaf filed his habeas petition, lost that jurisdiction when the CCCI entered Munaf's conviction, and regained jurisdiction when the Court of Cassation vacated the conviction.

Furthermore, it is a well-established principle of law that jurisdiction attaches at the time of *filing*.⁸⁷ When the D.C. Circuit concluded that jurisdiction hinged on foreign conviction, it completely ignored the fact that at the time Munaf filed his claim challenging his *current* detention by the United States government, he had never stepped foot into an Iraqi courtroom and his counsel was completely unaware that an Iraqi trial would take place within the next few weeks. Had his conviction already occurred, the

⁸⁴ See *supra* note 58.

⁸⁵ In their brief in the Supreme Court, even the government argued that this fundamental flaw encourages the government to quickly transfer and convict individuals in order to deny U.S. courts the ability to hear their habeas claims. See Reply Brief for the Federal Parties, *Munaf v. Geren*, 128 S. Ct. 2207 (U.S. 2008) (Nos. 07-394 and 06-1666, 28-30).

⁸⁶ *Munaf v. Geren*, 128 S. Ct. at 2216 ("[w]e think these concessions [actual custody by the Government] the end of the jurisdictional inquiry.").

⁸⁷ See, e.g., *Ex parte Endo*, 323 U.S. 283 (1944).

United States courts would most likely have had their hands tied in the manner discussed by the D.C. Circuit.⁸⁸ However, conviction *ex post facto* of filing had absolutely no bearing on jurisdiction, because jurisdiction attached at the time of filing.

The Court, contrary to both D.C. Circuit Courts, correctly concluded that conviction by a foreign court did not apply to a jurisdictional analysis when the United States government acts as the custodian of the petitioner. Holding that conviction at *any stage* in the proceedings bars jurisdiction has the impact of encouraging extradition to the legal system of other countries from U.S. custody in order to obtain a conviction and thus deny the U.S. courts jurisdiction over habeas petitions.⁸⁹

Presumably, the Court recognized that there are factual scenarios in which conviction would play a role in the dismissal of a case, but it would be on a 12(b)(6) claim on the merits and not a 12(b)(1) claim on jurisdiction.⁹⁰ If Munaf's confinement was the result of a conviction in an Iraqi court and the United States was holding him for a valid diplomatic reason, such as helping maintain the Iraqi jail system, then Munaf's claim might lack *merit* and therefore warrant dismissal.⁹¹ The Court clearly recognized this distinction, as it concluded that, since Munaf had challenged his unlawful detention, the only relevant analysis for determining *jurisdiction* was whether or not he was actually held in the custody of the United States government. The fact that his conviction occurred after his filing had no bearing on the jurisdictional element of his then-current claim.⁹²

⁸⁸ See *supra* note 63.

⁸⁹ See, e.g., *Rasul v. Bush*, 542 U.S. 466, 479 (2004) (stating that the U.S. government cannot transfer prisoners abroad in order to avoid federal court jurisdiction).

⁹⁰ See FED. R. CIV. P. 12(b)1, 12(b)(6).

⁹¹ Any dismissal that would come from international conviction by a sovereign nation would be on the merits of the case, and not for lack of jurisdiction. If the Executive is holding an individual in custody, the United States courts have the ability to *hear* the case, regardless of the fact that other factors may warrant its dismissal on meritorious grounds. See *Munaf*, 128 S. Ct. at 2218.

⁹² See *Munaf v. Geren*, 128 S. Ct. 2207, 2218 (2008). (The Court concluded that Munaf's claim did fail on the merits; however this was not related to the jurisdictional analysis).

**G. WHAT THE COURT FAILED TO ADDRESS:
U.S. CITIZENSHIP (OR THE LACK THEREOF)
AS A BASIS FOR JURISDICTION**

Citizenship as a factor for habeas jurisdiction has been centrally debated in numerous cases, particularly in the context of the “war on terror.”⁹³ Regardless of whether Congress chooses to condition statutory jurisdiction on the citizenship of the plaintiff, the Supreme Court has yet to decide whether or not Article III of the United States Constitution imposes some sort of limitation on the courts’ ability to hear cases brought by non-citizen detainees.⁹⁴ The Supreme Court in *Munaf*, once again, skirted the issue of whether citizenship is indeed a controlling factor regarding jurisdiction.⁹⁵ The opinion’s strong dicta indicates that United States citizenship plays at least *some* role in the analysis, although what that role is remains unclear.⁹⁶ The following section analyzes the precedents that have used citizenship as a basis for denying or granting relief, and concludes that the Supreme Court failed in *Munaf* by concluding that *jurisdictional* analysis should be void of any consideration of the petitioner’s citizenship.

The basis for using non-citizenship as a basis for denying relief stems in part from *Hirota*.⁹⁷ Building off this precedent, courts considering recent detainee cases have used citizenship as a strong factor in either granting or denying jurisdiction.⁹⁸ In *Abu Ali v. Ashcroft*, a case involving a habeas petition filed by an American citizen who had been extradited to Saudi Arabia, the government argued that the court lacked jurisdiction under *Hirota* because Ali had been in the custody of a foreign nation.⁹⁹ The court rejected this argument in part due to Ali’s citizenship status, stating “a *citizen* cannot be so easily separated from his

⁹³ See e.g., *Boumediene v. Bush*, 128 S. Ct. 2299 (2008).

⁹⁴ See Vladeck, *supra* note 76, at 1503.

⁹⁵ See *Munaf*, 128 S. Ct. at 2218 (stating that the Court has indicated that habeas jurisdiction can depend on citizenship, but declined to set out a bright-line rule on whether jurisdiction depends on citizenship status).

⁹⁶ See *id.*

⁹⁷ See *Hirota v. MacArthur*, 338 U.S. 197 (1949).

⁹⁸ *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 31 (D.D.C. 2004)

⁹⁹ See *id.*

constitutional rights.”¹⁰⁰ Other courts have also relied on citizenship to control habeas jurisdiction.¹⁰¹

In *Munaf*, the Court stated, albeit in dicta, that *Hirota* was distinguishable on the grounds that, inter alia, the citizenship of the petitioners there differed from that of Omar and Munaf.¹⁰² The key issue with the Court’s analysis is its wording: “These cases concern American citizens while *Hirota* did not, and the Court has indicated that habeas jurisdiction *can* depend on citizenship.”¹⁰³ The Court relied on two cases in which citizenship did play a role in a totality approach to habeas jurisdiction,¹⁰⁴ a test that Court here seems to have explicitly declined to extend.¹⁰⁵ Thus, the Court once again failed to address whether or not citizenship should play a role at all, yet it indicated that such does at least play *some* role in the analysis.¹⁰⁶

The problem with *granting* jurisdiction based on one’s citizenship is that the necessary corollary - *denying* jurisdiction for *non-citizens* - is troublesome. As a threshold matter, the founders did not intend for jurisdiction over habeas corpus claims to be distinguished on the basis of citizenship. In a letter to a foreign national, Thomas Jefferson stated “[t]he Habeas Corpus secures every man here, alien or citizen, against everything which is not law, whatever shape it may assume.”¹⁰⁷ Thus, although in Omar and Munaf’s case their citizenship may have been a helpful

¹⁰⁰ *Id.* (emphasis added). The court later went on to say that “[t]he differences between the rights of citizens and the rights of aliens are considerable in this context.” *Id.* at 55.

¹⁰¹ See, e.g., *Burns v. Willson*, 346 U.S. 137 (1953) (plurality); see also *United States ex rel. Toth v. Quarles* 350 U.S. 11 (1955) (Courts had jurisdiction to hear claims of U.S. citizens detained by the military).

¹⁰² See *Munaf v. Geren*, 128 S.Ct. 2207, 2218 (2008).

¹⁰³ *Id.* (emphasis added).

¹⁰⁴ The Court relied on *Johnson v. Eisentrager*, 339 U.S. 763, 781 (1950) and *Rasul v. Bush*, 542 U.S. 466, 486, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004), two cases that used a totality approach, balancing a group of factors, in deciding jurisdiction.

¹⁰⁵ See *Munaf*, 128 S. Ct. at 2216 (concluding that the concession by the United States government concerning custody ends the jurisdictional analysis).

¹⁰⁶ *Id.* at 2218.

¹⁰⁷ Thomas Jefferson, *The Writings of Thomas Jefferson*, available at: <http://books.google.com/books?id=4dnSCIToke0C&printsec=titlepage&dq=thomas+jefferson+to+ah+rowan+1798#PPP13,M1> Book pg. 61

component, relying on citizenship as a turnkey of jurisdiction appears potentially unconstitutional.

At least one scholar has also suggested the same conclusion - that jurisdiction over habeas petitions cannot hinge on citizenship.¹⁰⁸ He states: “[w]here any habeas petitioner alleges sufficient facts to establish that he is in the ‘custody’ of the United States, at least within the meaning of evolving habeas jurisprudence, there is nothing in Article III that should otherwise be read to limit the jurisdiction of the federal courts.”¹⁰⁹ His argument is based on an analogy that he draws between structural rights and subject matter jurisdiction. He suggests that those “structural interests enmeshed in Article III” e.g., federal subject matter jurisdiction, should not be distinguished on case specific facts.¹¹⁰ Thus, while some individual constitutional rights may vary in application based on personal characteristics, i.e. citizen versus non-citizen, *structural* rights must apply with equal force to all. He concludes that since jurisdiction in Article III is a structural right, that it “admits of no internal distinctions.”¹¹¹

In his view, one critical difference between individual and structural rights rests upon one’s ability to *waive* the former but not the latter. For example, a defendant can waive personal jurisdiction merely by responding to a complaint, whereas subject matter jurisdiction cannot be waived under any circumstance. Indeed, courts must resolve subject matter jurisdiction *sua sponte*, even when the parties do not contest it.¹¹² The reason for this distinction is that the individual’s right to due process constrains the government only when the individual actively invokes it; if the defendant does not invoke his due process rights, for example, the

¹⁰⁸ See Vladeck, *supra* note 76, at 1504.

¹⁰⁹ *Id.* at 1503.

¹¹⁰ *Id.* at 1543.

¹¹¹ *Id.* at 1544.

¹¹² See FED. R. CIV. P 12(h)(1); see also *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) (stating that the dismissal of a claim based on lack of subject matter jurisdiction must be raised by the court *sua sponte* and that courts may not extend hypothetical jurisdiction).

court can proceed based solely on his silence.¹¹³ In contrast, federal subject matter jurisdiction constrains the power of the courts no matter who the parties are or what their claims may be. Vladeck's analogy, then, suggests that just as the structural nature of subject matter jurisdiction imposes a non-circumstance-based limit on the courts, it similarly confers non-circumstance-based power. Put more plainly, the constitutional grant of federal question jurisdiction in Article III exists completely regardless of who the plaintiff and the defendant are in the federal question suit.¹¹⁴

Vladeck maintains that *Hirota* (and other cases implicitly questioning the *constitutional* limits on jurisdiction over habeas petitions) should not be read as distinguishing between citizens and non-citizens. As long as Article III countenances federal question jurisdiction where the plaintiff is a citizen, it must similarly countenance jurisdiction over the same suit brought by a non-citizen. Vladeck thus reads *Hirota* as an "all or nothing proposition."¹¹⁵ The case either precludes jurisdiction over habeas petitions brought by *anyone* in *Hirota*'s position - or it precludes it to none. The bright-line rule of "actual custody" used by the Court cannot withstand constitutional scrutiny if citizenship becomes a key factor in such cases.

Citizenship, as a controlling factor, was also incorrectly relied upon by Omar and Munaf in their appeals.¹¹⁶ The habeas petitioners argued a string of cases recognizing jurisdiction to U.S. citizens detained abroad.¹¹⁷ The issue with this argument is that by

¹¹³ See Vladeck, *supra* note 76, at 1544.

¹¹⁴ *Id.* at 1544-55.

¹¹⁵ *Id.* ("[B]ecause constitutional federal question jurisdiction exists irrespective of the citizenship of the parties, it would be counter-textual to conclude that Article III foreclosed jurisdiction over federal question suits brought by non-citizens where it did not similarly foreclose jurisdiction over such suits by citizens.")

¹¹⁶ This is not to suggest that the petitioners should not have included citizenship as one of the arguments in their brief. Citizenship does have an appealing view in the eyes of the Court and thus the plea of citizenship is one that is shrewdly made by counsel. See, e.g., *Rasul*, 542 U.S. at 466 (Scalia, J. dissenting).

¹¹⁷ See Petition for a Writ of Certiorari at 30-35, *Munaf v. Geren*, 128 S. Ct. 2207 (U.S. 2008) (No. 06-1666) (U.S. 6/13/2007).

insinuating that U.S. citizens are somehow treated differently under the constitution's habeas provision, *ipso facto* non-citizens do not enjoy such privilege. This idea is significantly undercut by the Court's own jurisprudence. The Court in *Rasul* clearly stated that both case law and the habeas statute "draw[s] *no distinction* between Americans and aliens held in federal custody."¹¹⁸

Justice Robert's noted that citizenship is at least a factor, presumably going to petitioners' likelihood of success on the merits. Justice Roberts was correct in concluding that the status of the alien does not relate to the authority of the federal courts to *entertain* the petition in the first place.¹¹⁹ Such an approach would have been dangerously formalistic and an unprecedented subversion of the purpose of federal habeas review. Importantly, the Court nowhere concludes that citizenship, standing alone, should be a controlling factor for jurisdiction, which is an important conclusion for the status of habeas jurisprudence in and of itself.

H. WHAT THE COURT GOT WRONG: USING CONSTRUCTIVE (AS OPPOSED TO ACTUAL) CUSTODY AS THE APPROPRIATE STANDARD FOR HABEAS JURISDICTION

This paper does not aim to suggest that there is no constitutional limitation on the power of the courts to entertain federal habeas petitions. If the central relief sought in a habeas petition is to either charge or release a detainee that is being held unlawfully, then the central issue for the courts is deciding *who* the detainees custodian is, and whether the federal courts have power over *that* custodian. The identity of the detainee (citizen v. non-citizen) or events that took place after the filing (conviction by a foreign tribunal) should be irrelevant. By using this standard,

¹¹⁸ The court further explained that "nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the "'privilege of litigation'" in U.S. courts. 321 F.3d, at 1139. The courts of the United States have traditionally been open to nonresident aliens. *Cf. Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578, 28 S.Ct. 337, 52 L.Ed. 625 (1908).

¹¹⁹ *Munaf v. Geren*, 128 S.Ct. 2207, 2218 (2008).

courts will be in line with the plain language of the federal habeas statute,¹²⁰ the intent of the founders,¹²¹ and the other constitutional limits on the power of the federal courts.¹²²

The requirement of custody has always been the cornerstone of habeas jurisprudence.¹²³ Every habeas statute, from the Judiciary Act of 1789 to the modern habeas statute, has used the term “in custody” to instruct courts on at least one consideration for whether the courts have the power to reach the merits.¹²⁴ Although the Court initially took a relatively narrow view of the term custody,¹²⁵ a series of cases from 1963 to 1973 reshaped and expanded its definition.¹²⁶ The Court’s new approach used a standard of constructive, rather than actual physical, custody as the deciding factor for jurisdiction in federal courts. By using an expansive view of the custody requirement, the Supreme Court guaranteed habeas protection to petitioners who may not be in the physical custody, but rather in the *constructive* custody of the government.¹²⁷

¹²⁰ 28 U.S.C. § 1983(c)(1)(2000) (“He is in custody under or by color of the authority of the United States.”)

¹²¹ See Jefferson, *supra* note 105.

¹²² See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992) (holding that in order to trigger federal jurisdiction, petitioners must have suffered injury in fact).

¹²³ See Larry W. Yackle, *Explaining Habeas Corpus*, 60 NYU L. REV. 991, 998-99 (1985).

¹²⁴ 17B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3637 (3d ed. 2007).

¹²⁵ See, e.g., McNally v. Hill, 293 U.S. 131, 139 (1934) (stating that a prisoner who is serving a prison sentence cannot challenge a subsequent sentence because it does not affect his *current* custody).

¹²⁶ See, e.g., Jones v. Cunningham, 371 U.S. 236, 242 (1963) (holding that the Court had jurisdiction over a habeas petition brought by a former prisoner against his parole board when the board had sufficiently limited his liberties to the point that it was his custodian); See also Hensley v. Municipal Court 411 U.S. 345 (1973) (holding that the conditions imposed on petitioner by the terms of his release did constitute custody for the sake of determining habeas jurisdiction).

¹²⁷ The district court in the case that appeared before the Supreme Court as *Munaf* stated: “a prisoner is in constructive custody of the United States when he is in the actual, physical custody of some person or entity who cannot be deemed the United States, but is being held under the authority of the United States or on its behalf.” Mohammed v. Harvey, 456 F. Supp. 2d 115, 122 (D.D.C. 2006), *aff’d*, 482 F.3d 582 (D.C. Cir. 2007), *rev’d in part*, 128 S.Ct. 2207 (2008).

The use of constructive custody as the cornerstone for habeas jurisdiction has also been recognized in modern jurisprudence concerning detainees. In *Rasul*, the court recognized the notion that it is not the identity of the petitioners, but rather the ability to adjudicate the custodian that determines jurisdiction.¹²⁸ Other cases have similarly recognized that the “turnkey of the habeas statute is the requirement of custody.”¹²⁹ Thus, the departure by the lower courts in the cases of Omar and Munaf from this standard in favor of a totality of the circumstances view of jurisdiction undermines not only the roots of habeas corpus, but also modern day jurisprudence.¹³⁰

Chief Justice Roberts recognized the impropriety in using such an approach. As long as at least one federal district court has personal jurisdiction over the custodian, *where* the custodian is located does not matter under the statute.¹³¹ As previously mentioned, the only factor barring jurisdiction under 2241 is status as an alien enemy combatant. The statute makes no mention that the custodian must be located within the territorial jurisdiction of a district court.

Chief Justice Roberts somewhat narrow view of the custodian requirement is contrary to the habeas statute. First, courts have long agreed that habeas is one of the cornerstones of American jurisprudence.¹³² Construing a narrow interpretation of

¹²⁸ See *Rasul v. Bush*, 542 U.S. 466, 481 (2004). See also *Braden v. 30th Judicial Circuit Court of Ky.*, 140 U.S. 484, 495 (1973).

¹²⁹ *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 45 (D.D.C. 2004).

¹³⁰ Although the modern jurisprudence generally concerned those detainees held at Guantanamo Bay, Cuba, scholars in the field agree that the relevant factor for detainees *abroad* is still the identity of the ultimate custodian. “For U.S. Citizens held abroad the only relevant jurisdictional inquiry is whether an ultimate custodian- here the Secretary of the Army- is within the territorial jurisdiction of the district court.” See *Petition for Writ of Certiorari at 27, Munaf v. Geren*, 128 S. Ct. 2207 (U.S. 2008) (No. 06-1666).

¹³¹ See *Rumsfeld v. Padilla*, 542 US 426, 435 (2004). In a case where multiple courts have jurisdiction, the court has relied upon the “so called immediate custodian rule” to require that the petition name the detainee’s immediate custodian and that it be filed only in those courts with jurisdiction over that official. *Id.*

¹³² See, e.g., *Smith v. Bennett*, 365 U.S. 708, 712-13 (1961) (stating that there is no higher duty than to maintain access to the writ unimpaired); see also *Harris v. Nelson*,

custody for purposes of habeas jurisdiction risks limiting one of the most fundamental rights all prisoners rely upon. Second, a narrow interpretation of custody means the government can use formalistic conceptions of the writ to evade judicial review of detention.¹³³ Formalistic conceptions limit access to the courts for meaningful review of those constructively detained by the United States government.

“There is no principle more sacred to the jurisprudence of our country or more essential to the liberty of its citizens than the right to be free from arbitrary and indefinite detention at the whim of the executive.”¹³⁴ Although the preceding quotation is from the D.C. District Court just four years ago, this premise - that the right to question one’s detention cannot be limited whenever the executive deems it so - predates the Constitution.¹³⁵ The writ is so fundamental to our notions of justice, that it is one of exceedingly few common law rights enshrined in the Constitution.¹³⁶

Since the right to petition one’s own detention is so fundamental to the idea of due process, any actions that significantly limit it tread on very dangerous territory. The government argued that [an] “individual who is held abroad pursuant to international authority (and not solely United States law) is not ‘in custody under or by color of the authority of the

394 U.S. 286, 290-91 (1969) (“The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.”).

¹³³ See 350 F. Supp. 2d at 47. In fact, this is exactly what the government did try to do in *Abu Ali*. By saying that Ali was tried formally in the custody of Saudi authorities, the government argued that the court lacked jurisdiction to hear Ali’s claim. The Court rejected this formalistic argument for a more liberal view of custody, stating “any attempt to read a requirement that the individual be in the actual physical custody of the United States does not find footing in the text of the statute itself.” *Id.*

¹³⁴ *Id.* at 39.

¹³⁵ For an exhaustive review of the English Common Law approach to habeas jurisdiction, see Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. (forthcoming May 2008), available at <http://ssrn.com/abstract=1008252>.

¹³⁶ U.S. CONST. art. I, § IX (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

United States,” and therefore “the writ of habeas corpus does not extend to such a detainee.”¹³⁷ The significant issue with this statement is that it adopts a formalistic rather than a constructive view of custody.

However, this formalistic approach allows the government to create a definition of custody that is so narrow that it effectively strips detainees of rights whenever the custodian is not *purely* American in composition. This not only seems inherently incongruent with the spirit of habeas, but also creates practical issues. If the government wants to restrict the right of detainees’ access to courts, all it has to do is create “multi-national” forces, which in essence are not multinational at all.¹³⁸

The court in *Abu Ali* recognized exactly this problem. There, Abu Ali, a citizen of the United States, filed a habeas corpus petition against several officials of the United States challenging his ongoing detention in a Saudi Arabian prison, allegedly at the behest and ongoing supervision of the United States.¹³⁹ The government argued that because Abu Ali was being held by a foreign sovereign, the district court had no jurisdiction to entertain the petition, regardless of how extensive a role United States played in his extradition and continued confinement.¹⁴⁰ In rejecting the government’s argument, the court recognized that “courts have given the writ an exceptionally broad reach” and that “[M]odern habeas jurisprudence emphasizes the breadth and flexibility of the Great Writ in vindicating the fundamental concern in a democratic society of checking the powers of the state vis-a-vis an individual in custody.”¹⁴¹

The court set forth a framework for determining when jurisdiction is triggered over a prisoner’s habeas petition: where the custodian possesses either actual or “constructive” custody of the petitioner.¹⁴² The court laid out an extensive history of habeas

¹³⁷ Brief for the Federal Parties, *supra* note 22, at 20.

¹³⁸ See *supra* Section III.

¹³⁹ See *Abu Ali v. Ashcroft*, 350 F.Supp.2d 28, 32 (D.D.C. 2004).

¹⁴⁰ *Id.* at 40.

¹⁴¹ *Id.* at 39 (citations omitted).

¹⁴² *Id.* at 47.

jurisprudence leading to the conclusion that the constructive custodian standard is the only interpretation consistent with the Constitution, the habeas statute, and prior case law.¹⁴³ It concluded that in order to maintain a habeas corpus action, the petitioner must be “in custody” and that his custody must be the result of the respondent’s action from which he seeks habeas corpus relief. The court stated in relevant part:

The Supreme Court has given the custody requirement a liberal construction, and it is not necessary that the petitioner be in physical control of the respondent. It is enough that the imprisoning sovereign is the respondent’s agent; that his liberty is restrained by the respondent’s parole conditions; or that he can point to some continuing collateral disability which is the result of the respondent’s action.¹⁴⁴

As the *Abu Ali* court so poignantly stated, the goal of habeas is not to restrict access to the courts, but to create an expansive framework to grant a prisoner the ability to question his detention in a court of law. Nowhere is this right more necessary than in situations where the Executive can easily - at least under a formalistic interpretation - create barriers to this jurisdiction. If courts contract the fundamental basis of habeas corpus, that it is the identity of the custodian that determines jurisdiction, then they risk stripping all individuals of the most basic right enshrined in our Constitution, common law, and statute.

I. WHY USING A RULE OF CONSTRUCTIVE CUSTODY AS THE STAPLE TO JURISDICTION MATTERS

As alluded to briefly above, courts need to use custody as

¹⁴³ See, e.g., *LoBue v. Christopher*, 82 F.3d 1081, 1082 (D.C. Cir.1996) (concluding that an individual released on bail pending his challenge to the federal extradition statute was “in the constructive custody of the U.S. Marshall for the Northern District of Illinois” and therefore could bring a habeas petition challenging his confinement); see also *U.S. ex rel. Keefe v. Dulles*, 222 F.2d 390 (D.C. Cir.1954).

¹⁴⁴ *Abu Ali*, 350 F. Supp. 2d at 47.

their jurisdictional basis primarily because it eliminates any uncertainty for habeas petitioners. For example, *Hirota* took four independent factors and added them together to deny jurisdiction.¹⁴⁵ The courts in *Omar* and *Munaf* relied on divergent factors and interpreted *Hirota* differently.¹⁴⁶ This struggle in interpreting a case that left habeas jurisdiction subject to essentially “a totality of the circumstances” test perfectly highlights the point that courts need more guidance on which one factor should control.¹⁴⁷

Using custody as the controlling factor not only helps courts in determining jurisdiction, but also forces courts to take a “functionalist” approach to jurisdiction. This approach guarantees rights to petitioners enshrined by the habeas statute - that those being held under the custody of the United States may bring habeas claims. Thus, the courts role in this decision making process is to decide exactly *who* is the custodian, and not whether or not other factors apply. Using judicial resources to determine whether or not the government is the custodian, rather than doing a totality of the circumstances test manipulating myriad factors, is not only proper but also guarantees efficiency and effectiveness in executing habeas decisions.

Recent events, such as Munaf’s overturned conviction by the CCCI, further highlight that amorphous factors such as conviction unnecessarily complicate the situation and allow courts to manipulate factors on a case by case basis. If courts simply focus on custody - as virtually all other case law outside of the realm deciding detainee cases has - it will ensure that the United States government cannot rely on fleeting factors in trying to strip

¹⁴⁵ See *Hirota v. MacArthur*, 338 U.S. 197, 198 (1949).

¹⁴⁶ Compare *Omar v. Harvey*, 416 F. Supp. 2d 19 (D.D.C. 2006), *aff’d*, 479 F.3d 1 (D.C. Cir. 2007), *aff’d in part*, 128 S. Ct. 2207 (2008) with *Mohammed ex rel. Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006), *aff’d*, 482 F.3d 582 (D.C. Cir. 2007), *rev’d in part*, 128 S. Ct. 2207 (2008).

¹⁴⁷ The *Munaf* Court of Appeals said that *Hirota* generates “no legal principle at all” mainly because it failed to explain why these factors mattered in the first place. *Mohammed*, 456 F. Supp. 2d at 7.

courts of jurisdiction.¹⁴⁸ By adopting a bright-line rule that custody is in fact the “turnkey of jurisdiction,” the Court will ensure that when the United States government is indeed a detainee’s custodian, as required under the habeas statute, that his claims will be heard, regardless of other factors.

Using a rules-based approach to difficult questions of constitutional law is not a recent development. As a threshold matter, it should be noted exactly what a “rule” in the eyes of the law truly is. One scholar, Kathleen Sullivan, has proposed the following definition for a “rule:” “A legal directive is ‘rule’-like when it binds a decision-maker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decision-maker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere.”¹⁴⁹ This definition of a legal rule is contrasted with a legal standard: “[s]tandards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances. Thus, the application of a standard in one case ties the decisionmaker’s hand in the next case less than does a rule - the more facts one may take into account, the more likely that some of them will be different the next time.”¹⁵⁰

The totality of the circumstances approach applied by the lower courts in the cases of Omar and Munaf represent a *standard*. Both courts applied the requisite facts of each petitioner and came to opposite conclusions. Such a standard allows for individual biases of each judge in each specific circumstance to override the custody element of the habeas statute. Rules, by contrast, “reduce the danger of official arbitrariness or bias by preventing decisionmakers from factoring the parties’ particular attractive or unattractive qualities into the decisionmaking calculus.”¹⁵¹

Such a distinction for cases involving the war on terror is

¹⁴⁸ See *Boumediene v. Bush*, 128 S. Ct. 2229, 2279 (Souter, J. concurring).

¹⁴⁹ Kathleen Sullivan, *The Justices of Rules and Standards*, 106 HARV. LAW REV. 22, 58 (1992).

¹⁵⁰ *Id.* at 59.

¹⁵¹ *Id.* at 52.

imperative to the just administration of petitions for habeas corpus. If a judge hears a set of facts that involve highly political issues, such as terrorism, the risk of bias becomes that much more tenuous. Furthermore, *Omar* and *Munaf* are perfect examples of how difficult a jurisdictional analysis becomes when myriad factors are introduced. The rules-based approach in such a jurisdictional question will make the administration of the writ, in relation to jurisdiction, something that cannot be stripped away when new facts, which do not speak to the element of jurisdiction, are introduced.

This line of reasoning acknowledges the fact that a rules based approach reflects the idea that the “the danger of unfairness from official arbitrariness or bias is greater than the danger of unfairness from the arbitrariness that flows from the grossness of rules.”¹⁵² In other words, this paper argues that the danger that a standard will be misapplied because of personal bias far outweighs the dangers that a bright-line rule will create. In sum, the only room for misapplication of this rule in terms of determining jurisdiction lays in the fact-finder’s abilities to determine whether or not there was constructive custody at the time of filing.

J. CONCLUSION

The future of federal jurisdiction over habeas claims is a precarious one. The Supreme Court’s habeas jurisprudence has repeatedly and historically emphasized the necessity of relatively generous guidelines governing the scope of the writ. This generosity has not been born out of particular fealty to the detainees in these cases, but rather a concern that formalistic interpretations would too easily allow the Executive Branch to frustrate the central purposes of the “Great Writ.” Indeed, the significance of habeas corpus is as much about protecting the power of the courts to hear the claims as it is about protecting the claim itself.

In light of these principles, the Supreme Court’s decisions

¹⁵² *Id.*

in *Omar* and *Munaf* may set a dangerous precedent. Justice Roberts' concluded that "actual custody," potentially among other factors such as citizenship, should be the guideline under which courts should determine their jurisdiction over habeas petitions. This paper has presented a new approach. Instead of attempting to interpret cryptic precedent and decide which factors among many *those* courts thought were important, that future detainee cases should focus on one factor: the nature of the ultimate custodian at the time of filing. If this custodian is the United States government, a factual question to be determined by trial courts, then the claim should not be denied for lack of jurisdiction. If the courts are to present a rule that certain factors automatically strip jurisdiction, regardless of the nature of the custodian, it will preclude its ability to hear all such cases on merits,¹⁵³ which, in light of recent torture allegations, is a very dangerous proposition.

Furthermore, in order for this rule to be effectively applied, courts should adopt liberal interpretation of the term "custody." The entire point of habeas corpus is that the writ is directed not to the detainee, but to the jailor, in whatever form he may take.¹⁵⁴ Leaving aside any meritorious claims that this paper does not address, the Supreme Court's narrow interpretation of jurisdiction warps prior case law and the spirit of American habeas jurisprudence. As Chief Justice Hughes wrote seventy years ago, "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."¹⁵⁵ Such a sentiment has an even greater force today for Omar, Munaf and other future detainees whose claims are yet to be filed.

¹⁵³ See, e.g., *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998) (rejecting the doctrine of "hypothetical jurisdiction," and holding that federal courts must settle questions of subject matter jurisdiction before reaching any substantive questions presented on the merits).

¹⁵⁴ See, e.g., *Armentaro v. INS*, 412 F.3d 1088, 1098 (9th Cir. 2005) (Berzon, J., dissenting) (explaining that the historical purpose of the Writ is actually to get the jailer to show up to court).

¹⁵⁵ *Bowen v. Johnston*, 306 U.S. 19, 26 (1939).

