

Habeas Corpus Relief Will Not Be Granted to American Citizens Seeking to Avoid Prosecution in Foreign Sovereign Nations: *Munaf v. Geren*

HABEAS CORPUS – IN GENERAL – NECESSITY, NATURE, AND SUFFICIENCY OF RESTRAINT OR DETENTION – NATURE OF REMEDY IN GENERAL – The United States Supreme Court found that while the United States courts do have jurisdiction over writs of habeas corpus filed for American Citizens being held overseas by American forces acting as a multinational coalition, the courts cannot enjoin the transfer of those citizens to foreign custody or prevent their foreign prosecution.

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

The Multinational Force – Iraq (“MNF-I”) is a multinational coalition operating in Iraq.¹ It is composed of troops from twenty six nations and led by the United States military at the behest of Iraqi Government and the United Nations Security Council.² This force is tasked with humanitarian and military activities, such as the detaining of prisoners who threaten the security of the new Iraqi Government.³ While the government itself is responsible for the apprehension and imprisonment of alleged criminals within Iraqi borders, the MNF-I has agreed to keep many of those individuals in temporary custody, because many of Iraq’s prison facilities have been destroyed.⁴ Shawqi Omar and Mohammad Munaf (the petitioners) were prisoners at a facility controlled by the MNF-I.⁵

Petitioner Omar, an American citizen, was arrested in Iraq in 2004 for allegedly aiding former al Qaeda leader Abu Musab al-Zarqawi by collaborating with other terrorist groups, escorting foreign fighters into Iraq, and coordinating kidnappings in Iraq.⁶ During the raid in which Omar was arrested, MNF-I found explosives and other weapons, as well as other soldiers, who were all detained.⁷ The other soldiers gave statements that implicated Omar in the terrorist activity and the MNF-I designated Omar as a threat to Iraqi security.⁸ The Combined Review and Release Board (“CRRB”), consisting of Iraqi Government officials and MNF-I officers, also found Omar to be a security threat.⁹ He was then placed into the custody of United States forces operating under the MNF-I.¹⁰

After he was detained, members of Omar’s family filed a writ of habeas corpus¹¹ on his behalf in the District Court for the District of Columbia.¹² When the Department of Justice informed Omar that the MNF-I was going to refer him to the Central Criminal Court of Iraq

1. *Munaf v. Geren* 128 S. Ct. 2209, 2213 (2008).

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

3. *Id.*

4. *Id.*

5. *Id.* at 2213-14.

6. *Id.* at 2214.

7. *Munaf*, 128 S. Ct. at 2214

8. *Id.*

9. *Id.*

10. *Id.*

11. “A writ employed to bring a person before the court, most frequently to ensure that the party’s imprisonment or detention is not illegal.” BLACK’S LAW DICTIONARY 589 (8th ed. 2005).

12. *Munaf*, 128 S. Ct. at 2214 (citing *Omar v. Harvey*, 479 F. 3d 1, 4 (CADDC 2007)).

(“CCCI”) for further proceedings, Omar sought a preliminary injunction¹³ preventing his removal from MNF-I or U.S. custody.¹⁴ The injunction was granted, and affirmed by the Court of Appeals for the District of Columbia, based on the fact that he had not yet been convicted in Iraq.¹⁵ That court read the injunction to prevent Omar from being transferred or presented to the Iraqi Government for prosecution, as well as to prevent the Iraqi Government from hearing details concerning his possible release.¹⁶

Petitioner Munaf, of U.S./Iraqi dual citizenship, was kidnapped along with the group of journalists he was with in Iraq.¹⁷ Once the group was freed, the MNF-I detained Munaf believing that he was behind the kidnappings.¹⁸ After an MNF-I tribunal determined that Munaf posed a threat to Iraqi security, he was detained and referred to the CCCI for further proceedings.¹⁹ The CCCI found him guilty of the kidnapping, but that verdict was vacated by the Iraqi Court of Cassation (an appellate court) and remanded for further proceedings.²⁰

Meanwhile, Munaf’s sister had already petitioned for a writ of habeas corpus in the District Court for the District of Columbia.²¹ That court dismissed the petition citing lack of jurisdiction, based on the Supreme Court’s ruling in *Hirota v. MacArthur*.²² The Court of Appeals for the District of Columbia affirmed, noting that they too were bound by the *Hirota* decision.²³ Munaf had already been convicted by a foreign tribunal, like the petitioner in *Hirota*.²⁴ The Supreme Court consolidated the *Omar* and *Munaf* cases and granted certiorari.²⁵

In a unanimous decision, the Court held that: (1) United States courts do have jurisdiction over writs of habeas corpus filed for American citizens being held overseas by American forces acting as a part of a multinational coalition; however, (2) district courts cannot enjoin the transfer of those prisoners to Iraqi custody or prevent their trial before Iraqi courts.²⁶

Chief Justice Roberts delivered the opinion of the Court.²⁷ The Court first discussed whether the district courts have jurisdiction over the habeas corpus petitions filed for Omar and

13. “A temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case.” BLACK’S LAW DICTIONARY 650 (8th ed. 2005).

14. *Munaf*, 128 S. Ct. at 2214

15. *Id.* at 2214-15 (citing *Omar*, 479 F.3d 1). The Court of Appeals distinguished this petition from that of the petitioner in *Hirota v. MacArthur*, 338 U.S. 197 (1948) (*per curiam*), because that petitioner had already been convicted by a foreign tribunal. *Hirota*, 338 U.S. 197 (1948).

16. *Munaf*, 128 S. Ct. at 2215.

17. *Id.*

18. *Id.*

19. *Id.* at 2215.

20. *Id.* During the CCCI trial, Munaf admitted both in person and in writing that he had facilitated the kidnappings, but then recanted that confession. *Id.* After the remand, Munaf remained in custody pending the further proceedings. *Id.*

21. *Munaf*, 128 S. Ct. at 2215 (citing *Mohammed v. Harvey (Mohammed I)*, 456 F. Supp. 2d 115, 118 (D.D.C. 2006)).

22. *Id.* at 2215 (citing *Hirota v. MacArthur*, 338 U.S. 197 (1949)) (denying habeas corpus relief to foreign citizens being held outside of the United States).

23. *Id.* at 2215-16.

24. *Id.* at 2216 (citing *Mohammed v. Harvey (Mohammed II)*, 482 F. 3d 582, 583-584 (C.A.D.C. 2007)).

25. *Id.* at 2216.

26. *Munaf*, 128 S. Ct. at 2213.

27. *Id.* at 2203.

Munaf.²⁸ It found that the habeas statute, 28 U.S.C. § 2241, does confer that jurisdiction to the district courts, mainly because the prisoners were in custody of the MNF-I, a U.S. backed force.²⁹ Justice Roberts then differentiated this case from the Supreme Court's ruling in *Hirota* by noting that the petitioners in *Hirota* were not American citizens and were not in the same type of custody that the habeas statute describes.³⁰ He also noted that General MacArthur, who led the international coalition in *Hirota*, was not subject to United States authority, unlike the MNF-I.³¹ For these reasons, the Court declined to extend the *Hirota* ruling to this instance.³²

With the jurisdictional issue addressed, the Court moved on to the question of whether the district court could enjoin U.S. forces from transferring detainees to a sovereign country's custody for criminal prosecution.³³ Justice Roberts began by noting that the Supreme Court addresses such issues involving foreign relations very carefully, and rarely interferes with the executive branch in military and national security affairs.³⁴ He then examined petitioner Omar's case, specifically the preliminary injunction granted by the district court.³⁵ Citing a long line of precedent, the Court explained that a preliminary injunction is a drastic measure that requires the petitioning party to demonstrate that success on the merits is likely.³⁶ The district court had granted and the circuit court affirmed the injunction based on the jurisdictional issues, which, according to the Court, is not a satisfactory reason to grant a preliminary injunction.³⁷ Thus, the Court held that the district court abused its discretion by granting the injunction based on the jurisdictional issues alone.³⁸

Justice Roberts then noted that the errors from the lower courts³⁹ would require reversal and remand, which would ordinarily end the opinion.⁴⁰ However, due to its nature, the Court found it appropriate to address this issue on the merits, as well.⁴¹ After establishing the Supreme

28. *Id.* at 2216.

29. *Id.* at 2216. The text of 28 U.S.C. § 2241 reads, in part:

The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

....

(2) He is in custody in violation of the Constitution or laws or treaties of the United States . . .

28 U.S.C. §§ 2241(c)(1), (3) (2008).

30. *Munaf*, 128 S. Ct. at 2216-17 (citing *Hirota*, 338 U.S. at 198).

31. *Id.* at 2217.

32. *Id.* at 2217-18.

33. *Id.* at 2218

34. *Id.* at 2218 (citing *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988)).

35. *Munaf*, 128 S.Ct. at 2218-19.

36. *Id.* at 2219. (citing 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948, at 129 (2d ed. 1995); *Yakus v. United States*, 321 U.S. 414, 440 (1944); *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (*per curiam*); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975))).

37. *Munaf*, 128 S. Ct. at 2219

38. *Id.*

39. *Id.* Those errors stemmed from the lower court's decision in *Munaf* to dismiss for lack of jurisdiction and the lower court's decision in *Omar* affirming his petition for a preliminary injunction. *Id.*

40. *Id.*

41. *Id.* Justice Roberts noted that “[t]here are occasions, however, when it is appropriate to proceed further and address the merits. This is one of them.” *Id.*

Court's authority to address the merits of the claims,⁴² Justice Roberts began to examine the substance of the two writs.⁴³ Both writs claimed that the prisoners had a right not to be transferred and that they were unlawfully detained.⁴⁴ The unlawful detention portion served essentially the same purpose as the non-transfer claim; both sought to avoid a transfer into Iraqi custody.⁴⁵ Here, Justice Roberts differentiated the normal habeas corpus petition from what the petitioners were seeking.⁴⁶ While the normal habeas claim seeks release from unlawful detention, the petitioners were attempting to use the habeas claim to prevent being transferred into Iraqi custody.⁴⁷ The Court denounced this attempt, and established that Iraq, as a sovereign nation, has a right to prosecute crimes committed within its borders.⁴⁸ All American citizens are subject to this provision in any sovereign nation, even if the nation's criminal process offers fewer rights than those of the U.S. Constitution.⁴⁹

With this in mind, Justice Roberts then turned to the petitioners' due process argument.⁵⁰ Citing authority from *Wilson v. Girard*,⁵¹ the Court confirmed the ruling that habeas corpus could not be used to avoid the criminal jurisdiction of a foreign sovereign nation.⁵² The petitioners' "release" claim was also denounced by the court, as Justice Roberts distinguished it as a claim that sought not just simple release, but actual protection from the Iraqi Government.⁵³ This would not only directly conflict with the *Wilson* ruling, the court noted, but also directly conflict with the United Nations mandate requiring the MNF-I to help maintain stability and security in Iraq.⁵⁴ Since the MNF-I was in direct collaboration with the Iraqi Government, the Court reasoned that ordering a release from MNF-I custody would be the same as ordering a release from Iraqi custody.⁵⁵ Justice Roberts stated that such interference in a foreign sovereign's criminal proceedings is akin to the already barred review of foreign convictions.⁵⁶ The Court concluded this section of the opinion by highlighting the constitutional executive authority shown in *Neely v. Henkel*,⁵⁷ and *Wilson* to transfer citizens who committed crimes in foreign countries to those countries for prosecution.⁵⁸ Justice Roberts reasoned that to hold otherwise would be out of line with those decisions, and would intrude on the executive's military operations.⁵⁹

42. *Munaf*, 128 S. Ct. at 2219-20 (citing *City and County of Denver v. New York Trust Co.*, 229 U.S. 123, 136 (1913)).

43. *Id.* at 2220.

44. *Id.*

45. *Id.*

46. *Id.* at 2221.

47. *Munaf*, 128 S. Ct. at 2221.

48. *Id.* at 2221-22.

49. *Id.* at 2222. "When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the law of that country may prescribe for its own people." *Id.* (quoting *Neely v. Henkel*, 180 U.S. 109, 123 (1901)).

50. *Id.*

51. 354 U.S. 524 (1957).

52. *Munaf*, 128 S. Ct. at 2222 (citing *Wilson*, 354 U.S. 524 (1957)).

53. *Id.* at 2223.

54. *Id.* at 2223 (citing *Wilson*, 354 U.S. at 529).

55. *Id.* at 2223-24.

56. *Id.* at 2224 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 417-418 (1964)).

57. 180 U.S. 109 (1901).

58. *Munaf*, 128 S. Ct. at 2224-25.

59. *Id.*

The opinion then moved to the petitioners' contention that a transfer to Iraq would likely subject them to torture.⁶⁰ While the Court recognized the seriousness of this issue, it noted that the issue was a political question and thus for the legislature to decide.⁶¹ Both *Neely* and *Wilson* provided that the sovereign right of a country to prosecute criminals within its own borders should not be disturbed unless a treaty or some other diplomatic agreement required otherwise.⁶² Justice Roberts then noted that while the executive branch would be well within its power to decline to transfer a prisoner if torture was likely to result, the petitioners only argued that torture is a possibility, rather than a likelihood.⁶³ The Court also explained that by that time, the State Department had found that the prison and detention facilities which would hold the petitioners had "generally met internationally accepted standards for basic prisoner needs."⁶⁴ The Court again noted that it is not the job of the judiciary to question such determinations.⁶⁵

After refusing to consider the petitioners' Foreign Affairs Reform and Reconstruction Act claim,⁶⁶ the Court addressed the petitioners' final argument: that the government may not transfer a citizen without legal authority.⁶⁷ The Court quickly dismissed the petitioners' reliance on *Valentine v. United States ex rel. Neidecker*,⁶⁸ noting that case involved an extradition from the United States, and that it would make no sense to hold that the government could not transfer them to the country where they were already being detained, for that country's behalf.⁶⁹ Justice Roberts then dismissed the petitioners' contention that the Court's decision in *Wilson* supports the argument that the Executive Branch lacks the legal authority to transfer a citizen absent a treaty or statute.⁷⁰

Justice Souter concurred, joined by Justice Ginsburg and Justice Breyer.⁷¹ After briefly summarizing the majority's holding, Justice Souter added that the Court could examine a case where the Executive Branch is willing to knowingly transfer a citizen into a situation where the probability that they will be tortured is well documented.⁷² He then noted that while this is normally a political question, due process issues could arise if torture is well documented, even if the executive branch does not acknowledge such proof.⁷³ These issues, if they would arise, are

60. *Id.* at 2225.

61. *Id.*

62. *Id.*

63. *Munaf*, 128 S. Ct. at 2226.

64. *Id.*

65. *Id.*

66. *Id.* Justice Roberts noted that the Court would not consider this claim because it was not raised in the certiorari filings before the court. *Id.* In footnote 6, the court briefly discussed the issues that would have been addressed had the petitioners brought a claim under the FARR Act. *Id.* at 2226 n.6.

67. *Id.* at 2227.

68. 299 U.S. 5 (1936).

69. *Munaf*, 128 S. Ct. at 2227 (citing *Valentine*, 299 U.S. 5 (1936)) (holding that the Executive Branch may not extradite a person from the United States unless an act of Congress or treaty gives the Executive Branch the legal authority to do so).

70. *Id.* at 2227.

71. *Munaf*, 128 S. Ct. at 2228 (Souter, J., concurring).

72. *Id.*

73. *Id.*

for the Court to consider.⁷⁴ Justice Souter concluded by noting that while habeas corpus may not be a remedy for such situations, there will be other options.⁷⁵

One of the earliest cases examining the processes and functions associated with the writ of habeas corpus is *Ex parte Royall*.⁷⁶ In that case, petitioner Royall was indicted for selling a bond-backed coupon without a license.⁷⁷ The law required that he pay the state of Virginia certain taxes on each sale and a tax immediately upon receiving the license.⁷⁸ Royall argued that the law requiring him to pay the taxes on the coupons was unconstitutional.⁷⁹ At the time he filed his petition for habeas corpus, he was in the custody of the sergeant of the city of Richmond.⁸⁰

Justice Harlan delivered the opinion of the Court.⁸¹ He first considered the question of whether the circuit courts had jurisdiction to rule on habeas corpus petitions where the petitioner is held by state authorities on alleged breaches of state law.⁸² After examining the language of the habeas statute, Justice Harlan determined that the circuit would have jurisdiction over any petition where the claimant was allegedly being held in violation of his constitutional rights.⁸³ He noted that the statute was worded in such a way that predicted situations involving habeas petitions being filed to challenge the constitutionality of state imposed custody.⁸⁴ Any detention that is possibly in contradiction with the Constitution is reviewable by the habeas writ, and state authority would not upset this notion.⁸⁵

Justice Harlan then considered whether the habeas petition merited relief.⁸⁶ The statute dictated that the petitioner would be entitled to relief unless it appears from the petition that the petitioner was not entitled to relief.⁸⁷ However, Justice Harlan noted that the Court is required to uphold the ends of justice, even if that means suspending the release of a successful habeas petitioner.⁸⁸ Despite the fact that the circuit court had the jurisdiction to examine the writ and order release if it found the detention unconstitutional, the circuit court was not bound to do so immediately.⁸⁹ He concluded by noting that the circuit court would still have the authority to review the habeas petition even after the petitioner has been convicted in a state court and thus imprisoned.⁹⁰

74. *Id.*

75. *Id.* See *Bell v. Hood*, 327 U.S. 678 (1946). “Where federally protected rights [are threatened], it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.” *Bell*, 327 U.S. at 684.

76. 117 U.S. 241 (1886).

77. *Royall*, 117 U.S. at 242-43.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 245.

82. *Royall*, 117 U.S. at 245.

83. *Id.* at 245-47.

84. *Id.* at 248-49.

85. *Id.* at 250.

86. *Id.*

87. *Royall*, 117 U.S. at 250.

88. *Id.* at 250-51.

89. *Id.* at 251.

90. *Id.* at 253.

The jurisdiction of the federal courts to review habeas corpus petitions filed by citizens held by American forces outside of the United States now arises out of the statutory language of § 2241(c)(1).⁹¹ The Supreme Court examined the language of that statute in *Wales v. Whitney*,⁹² which was an appeal by a detainee whose habeas corpus petition to be released from an unlawful detention was denied by the Supreme Court of the District of Columbia.⁹³ In *Wales*, the appellant Wales was imprisoned by the Secretary of the Navy and forced to stay within the city limits of Washington D.C.⁹⁴ The Supreme Court of the District of Columbia ruled that there was not a significant restraint on liberty that would justify the granting of a habeas petition.⁹⁵

Justice Miller delivered the opinion of the Court.⁹⁶ He noted that a successful writ of habeas corpus requires actual confinement, rather than just a restraint on where one can or cannot go.⁹⁷ Addressing the statute, Justice Miller explained that when a prisoner is in custody, he is under the control of the people who have the ability to produce him, and the writ should be directed at that authority.⁹⁸ Once that condition is satisfied, if the writ has merit it will be granted, the Court held.⁹⁹

In *Munaf*, the Government unsuccessfully argued that the district court did not have jurisdiction over the habeas petition because of the Supreme Court's ruling in *Hirota v. MacArthur*.¹⁰⁰ In *Hirota*, the court denied habeas relief to foreign citizens being held outside of the United States.¹⁰¹ The case involved two Japanese citizens who were being held by the International Military Tribunal of the Far East after World War II.¹⁰² They were former high officials of the Japanese Government and were found guilty of committing crimes against humanity.¹⁰³ Both Japanese citizens filed writs of habeas corpus in the Supreme Court.¹⁰⁴ The Court denied the motion without an opinion.¹⁰⁵ In his belated concurrence, Justice Douglas noted that the majority's decision may lead to troubling circumstances.¹⁰⁶ He warned that the Court's ruling did not carve out an exception for American citizens.¹⁰⁷ Using several hypothetical situations as examples,¹⁰⁸ Justice Douglas explained that there should be jurisdiction

91. *Munaf*, 128 S.Ct. at 2217.

92. 114 U.S. 564 (1885). While the petitioner in *Wales* was being held in the United States, the same statutory language applied in that case as does here. *Id.*

93. *Wales*, 114 U.S. at 565-67.

94. *Id.* at 566.

95. *Id.*

96. *Id.*

97. *Id.* at 571-72.

98. *Wales*, 114 U.S. at 574.

99. *Id.*

100. *Munaf*, 128 S.Ct. at 2217 (citing *Hirota*, 338 U.S. 197 (1949)).

101. *Hirota*, 338 U.S. at 198 (1949).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 198. The court reasoned that since the petitioners were being tried by a foreign tribunal, it had no jurisdiction over the matter, and denied the motions to file the writs. *Id.*

106. *Hirota*, 338 U.S. at 203 (Douglas, J., concurring) (per curiam).

107. *Id.* at 204. Justice Douglas noted that "I cannot believe that we would adhere to [the majority's] formula if these petitioners were American citizens." *Id.* at 205.

108. *Id.* at 205. Justice Douglas laid out the following examples:

(1) Suppose an American citizen collaborated with petitioners in plotting a war against the United States. The laws of the United States provide severe penalties for such conduct. May that citizen

to ensure that habeas is an available remedy to the American citizens being prosecuted by foreign tribunals.¹⁰⁹

About a year after *Hirota* was decided, the Supreme Court in *Johnson v. Eisentrager*¹¹⁰ again denied to extend habeas relief to foreign citizens challenging foreign detention.¹¹¹ That case involved twenty-one German nationals who all were formally a part of the German armed forces in China during World War II.¹¹² Upon Germany's surrender, they were all tried and convicted of war crimes by a Military Commission in China under the direction of the United States Military.¹¹³ The former soldiers were sent to a German facility, which was at under United States control at that time, to serve their sentence.¹¹⁴ The United States District Court for the District of Columbia dismissed their petition for habeas corpus due to lack of jurisdiction,¹¹⁵ but that ruling was overturned by the court of appeals.¹¹⁶ Writing for the majority, Justice Jackson ruled that the Supreme Court did not have jurisdiction over writs filed by aliens who have never been within the territorial boundaries of the United States.¹¹⁷ He, like Justice Douglas in *Hirota*, noted that this decision should not be read to apply to American citizens, as those cases would raise separate issues.¹¹⁸

An American citizen's attempt to avoid prosecution on foreign soil by filing a writ of habeas corpus was similarly denied in *Neely v. Henkel*.¹¹⁹ In that case, Neely allegedly embezzled money from the Cuban Government, in violation of Cuban law, while in the United States.¹²⁰ After evidence of probable cause was produced, he was arrested and was in the process of being extradited to Cuba for prosecution.¹²¹ Four days before the extradition order was to be signed, he filed a writ of habeas corpus in order to be released from the extradition proceedings, because, *inter alia*, Cuba's laws would not guarantee him the same rights as

be tried and convicted by an international tribunal and have no access to our courts to challenge the legality of the action of our representatives on it? May he, in the face of the safeguards which our Constitution provides even for traitors, have no protection against American action against him?

(2) Suppose an American citizen on a visit to Japan during the occupation commits murder, embezzlement, or the like. May he be tried by an international tribunal and have no recourse to our courts to challenge its jurisdiction over him?

(3) What about any other civilian so tried and convicted for such a crime committed during the occupation?

Id.

109. *Id.*

110. 339 U.S. 763 (1950).

111. *Johnson*, 339 U.S. at 763.

112. *Id.* at 765.

113. *Id.* at 766.

114. *Id.*

115. *Id.* at 767. The district court based its ruling on the Supreme Court's ruling in *Ahrens v. Clark*, 335 U.S. 188 (1898). *Id.*

116. *Johnson*, 339 U.S. at 767 (citing *Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949) (ruling that any person deprived of liberty under the authority of the United States would be entitled to the writ if that person could prove the imprisonment illegal), *rev'd*, 339 U.S. 763 (1950)).

117. *Id.* at 776.

118. *Id.* at 769. Justice Jackson noted that "[w]ith the citizen we are now little concerned, except to set his case apart as untouched by this decision"

119. 180 U.S. 109 (1901).

120. *Neely*, 180 U.S. at 112-13.

121. *Id.* at 113-14.

guaranteed by the Constitution.¹²² The Circuit Court of the United States denied for the Southern District of New York the petition.¹²³ The Supreme Court heard the appeal, with Justice Harlan writing for the majority.¹²⁴ He noted that citizenship in the United States does not provide immunity from foreign prosecution, even if that country's laws do not provide rights equal to the U.S. Constitution.¹²⁵ This proposition included both foreign countries and countries that were still under the authority of or occupied by the United States.¹²⁶ Since Neely did not bring a habeas claim that merited his release, his extradition was proper based on the power of the Executive Branch.¹²⁷

Almost sixty years later, an American citizen again unsuccessfully attempted to use habeas corpus to prevent prosecution in a foreign country in *Wilson v. Girard*.¹²⁸ This case involved an American soldier (Girard) who while stationed in Japan, killed a Japanese woman.¹²⁹ Certain terms of a then recently ratified Security Treaty between the United States and Japan established that Japan could exercise jurisdiction over the matter.¹³⁰ Before he was turned over to Japanese authorities, Girard filed a writ of habeas corpus in the United States District Court for the District of Columbia.¹³¹ The court denied that writ, but issued an injunction stopping his transfer to Japan.¹³² The Supreme Court granted certiorari and vacated the injunction.¹³³ The Court held that Japan had the right to prosecute Girard because he committed a crime within Japan's borders, and Japan had not surrendered its jurisdiction to do so.¹³⁴

The possible relief available from a successful habeas corpus petition was detailed in *Preiser v. Rodriguez*.¹³⁵ In this case, several prisoners in New York filed habeas corpus motions, along with civil rights actions, when their credits for good behavior were revoked, effectively increasing their prison sentence.¹³⁶ The petitioners based their habeas petition on the premise that by the time the petitions were ruled on, their original sentence prior to the taking of good behavior credits would expire.¹³⁷ Writing for the majority, Justice Stewart noted that at its core,

122. *Id.* at 122.

123. *Id.* at 114-15.

124. *Id.*

125. *Neely*, 180 U.S. at 123.

126. *Id.*

127. *Id.* at 125.

128. 354 U.S. 524, 529 (1957).

129. *Wilson*, 354 U.S. at 525-26.

130. *Id.* at 527-28. The relevant terms of the treaty stated:

3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

....

(c) If the state having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

Id. at 527-28.

131. *Girard v. Wilson (Wilson I)*, 152 F.Supp. 21, 22 (D.D.C. 1957), *rev'd*, 354 U.S. 524 (1957).

132. *Wilson I*, 152 F.Supp. at 27.

133. *Wilson*, 354 U.S. at 530.

134. *Id.* at 529.

135. *See generally* *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

136. *Preiser*, 411 U.S. at 477-82.

137. *Id.*

habeas corpus tested the legality of unlawful physical detention.¹³⁸ He mentioned that a successful habeas petition may not only provide immediate release from an illegal custody, but also successfully prevents a future illegal detention.¹³⁹ Thus, the Court reasoned, if the restoration of the prisoner's good behavior credits only shortened their sentence, rather than provide immediate release, habeas corpus could still provide the correct relief.¹⁴⁰

Justice Stewart's notion in *Preiser* that habeas relief may be available for future unlawful detention stemmed from the Supreme Court's holding in *Peyton v. Rowe*.¹⁴¹ *Peyton* involved two prisoners serving terms in Virginia.¹⁴² The first, Rowe, was convicted of rape and serving a thirty-year sentence.¹⁴³ He then pleaded guilty to an indictment of felonious abduction with intent to defile and was sentenced to a twenty-year term to run consecutively with the thirty-year rape sentence.¹⁴⁴ Rowe petitioned for habeas corpus, challenging the constitutionality of the second conviction.¹⁴⁵ Thacker, the second prisoner, was serving multiple consecutive sentences.¹⁴⁶ He also petitioned for habeas corpus, challenging the constitutionality of three of the consecutive sentences he was serving.¹⁴⁷ The district court in both instances denied the writs, ruling them invalid based upon the Supreme Court's ruling in *McNally v. Hill*.¹⁴⁸ The Court of Appeals for the Fourth Circuit consolidated both cases and reversed, noting that they would not adhere to the *McNally* ruling anymore.¹⁴⁹ Upon *Peyton*'s appeal, the Court granted certiorari.¹⁵⁰

Chief Justice Warren delivered the opinion of the Court.¹⁵¹ After outlining the history behind the habeas statute, he examined the Court's decision in *McNally*.¹⁵² In that case, the habeas petitioner's motion to challenge an upcoming consecutive sentence made while he was serving the first of the sentences was denied.¹⁵³ The Supreme Court affirmed the district court's ruling, holding that since *McNally* was not currently serving the term he was challenging, there was no illegal custody that could be defeated by a habeas writ.¹⁵⁴ Justice Warren rejected that application of the rule as being too harsh, since the delay involved in waiting for the consecutive sentence to begin prior to ruling on the habeas writ would almost certainly be unjust to the prisoners.¹⁵⁵ He also noted that the holding from *McNally* was inconsistent with the habeas

138. *Id.* at 484.

139. *Id.* at 487 (citing *Peyton v. Rowe*, 391 U.S. 54 (1968)).

140. *Id.* at 487. The petitioners in that case were denied relief, however, because they sought relief from the Civil Rights Act.

141. *Preiser*, 411 U.S. at 487 (citing *Peyton v. Rowe*, 391 U.S. 54 (1968)).

142. *Peyton*, 391 U.S. at 55.

143. *Id.* at 55-56.

144. *Id.* at 56.

145. *Id.* Rowe alleged his second conviction was unconstitutional because he was subjected to double jeopardy, the indictment was not valid, his guilty plea was involuntary, and he was inadequately represented. *Id.*

146. *Id.*

147. *Peyton*, 391 U.S. at 56.

148. *Id.* at 57 (citing *McNally v. Hill*, 293 U.S. 131 (1934)).

149. *Id.* (citing *Rowe v. Peyton*, 383 F.2d 709 (4th Cir. 1967), *aff'd*, 391 U.S. 54 (1968)). In *McNally*, the Court held that a sentence that had not yet begun to be served could *not* be challenged by a habeas petition. *McNally*, 239 U.S. at 135 (1934).

150. *Peyton*, 391 U.S. at 58-59.

151. *Id.*

152. *Id.* at 58-59.

153. *Id.* at 61 (citing *McNally*, 293 U.S. at 135 (1934)).

154. *Id.* (citing *McNally*, 239 U.S. 131).

155. *Peyton*, 391 U.S. at 61-62.

writ's principal goal: timely review of potential unlawful restraints on liberty.¹⁵⁶ If the *McNally* rule was applied in this case, the habeas petitions would not have been reviewable for at least twenty years.¹⁵⁷ In concluding his opinion, Justice Warren noted that the habeas statute does not deny the federal courts the authority to provide other relief than immediate release, as long as justice is served.¹⁵⁸

At first glance, the Court's decision in *Munaf* does not seem to be extraordinary. In fact, placed in the backdrop of past habeas cases, the *Munaf* case follows the precedent set by those previous rulings. The Court applied the habeas statute and ruled that the remedies sought by the petitioners were not available by means of a habeas writ.¹⁵⁹ While the Court *may* have been free to adjust the remedies available under the habeas statute,¹⁶⁰ it chose not to do so. The Court was well within its discretion to interpret the statute in this way.¹⁶¹ Based in part upon the State Department's satisfactory findings on Iraqi prisoner treatment, the majority opinion successfully avoided the petitioners' argument that they may face torture.¹⁶² Chief Justice Roberts could easily justify this decision, based on those findings, by noting that it was not the place of the Judiciary to question such decisions of the executive.¹⁶³ What remains unanswered, however, is what would happen if there was a greater possibility of torture to be endured by American citizens. The Solicitor General only provided that prisoner transfer would be avoided if torture was *likely* to result.¹⁶⁴ Obviously, the legislature would take action to rectify such a scenario, but petitioners in future cases similar to *Munaf* may not have the time to wait for legislative action. If such a situation arose, the Court may be forced to consider extending alternate habeas relief outside of what has already been provided while balancing the interest of not interfering with criminal proceedings of foreign sovereigns.

As mentioned, previous rulings have suggested that alternate habeas relief may be available to petitioners rather than the normal remedy (immediate release) if such alternative remedies would satisfy the aims of justice.¹⁶⁵ While the petitioners in those cases were not facing punishments rising to the level of torture, the Court in each case thought that the habeas statute was not offended by the alternate relief sought.¹⁶⁶ Even though both petitions in *Munaf* failed on the merits,¹⁶⁷ this opinion should not be read to cap the extent of habeas relief. The Court's analysis in this case was simple: because Iraq is now a foreign sovereign nation and the U.S.

156. *Id.* at 63.

157. *Id.* at 62. Under the *McNally* rule, neither petition could be ruled upon until after 1990. *Id.*

158. *Id.* at 67. In holding so, Justice Warren cited three examples: *Ex Parte Hull*, 312 U.S. 546, 550 (1941) (holding that prisoner whose parole was revoked because of a second conviction could challenge the second conviction despite the fact that he would not be released if he prevailed); *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (holding a habeas petitioner who is paroled can still obtain relief from the parole conditions); and *Walker v. Wainwright*, 390 U.S. 335, 336-37 (1968) (holding that a prisoner can challenge the first of consecutive sentences despite the fact that he would still be imprisoned for the second sentence if he succeeded).

159. *Munaf*, 128 S. Ct. at 2213.

160. *See Hull*, 312 U.S. at 550; *Jones*, 371 U.S. at 243; *Walker*, 390 U.S. at 336-37.

161. *Munaf*, 128 S. Ct. at 2216-17 (citing *Duncan v. Walker*, 533 U.S. 167, 172 (2001)).

162. *Id.* at 2225-26.

163. *Id.* at 2226.

164. *Id.* at 2226.

165. *See supra* note 158 and accompanying text.

166. *See supra* note 158. In these cases, the petitioners were challenging unlawful future convictions and conditions of parole.

167. *Munaf*, 128 S. Ct. at 2223-25.

does not generally interfere with the criminal proceedings of foreign sovereign nations, the petitioners in this case were without recourse.¹⁶⁸ The torture argument was essentially an afterthought for the Court because of this completed analysis, and the Court could have ignored it completely. But Chief Justice Roberts did not simply ignore that claim. Fortunately, the State Department had already provided a way around the torture question.¹⁶⁹

However, had the State Department not established such confidence in the Iraqi prison system,¹⁷⁰ the Court's analysis may have left itself powerless to help the petitioners, and they would be forced to wait for legislative remedies. This is so because the Court's reasoning establishes that if a country is a foreign sovereign nation; there are very few reasons ("likely"¹⁷¹ torture, for example) for the U.S. to interfere with the foreign country's criminal proceedings. In terms of interfering with a foreign nation's criminal system because of the likelihood of torture, the Court appears to have set a very high threshold to meet when faced with this possibility.¹⁷² In the future, the Court may be forced to adopt its own standards, especially if a similar petitioner who could not establish the *likelihood* of such treatment does in fact end up being tortured in a foreign criminal process.

In his concurrence, Justice Souter seemed to recognize the need for such a standard.¹⁷³ He hinted that the Executive Branch may not have the final say on determinations of prisoner treatment and that the Court could step in, if necessary, to prevent a transfer.¹⁷⁴ If the Court were to adopt this hypothetical standard, the threshold required to establish the probability of torture would seem to be lower than the "*likely*" standard established by the Solicitor General. Justice Souter also noted that a habeas writ may not be the only option for petitioners in these circumstances.¹⁷⁵ While true, the alternative habeas relief provided in *Hull, Jones, and Walker* indicate that the protective detention sought by the petitioners in this case may not stretch the habeas statute out of proportion.¹⁷⁶ Even though the type of relief sought was different in those cases, what was common among them was that the Court was seeking to provide a just remedy to the petitioners.¹⁷⁷ If a similar case were to arise in the near future where the habeas petitioners were again seeking unconventional habeas relief, the Court would be forced to determine whether the pinnacle of habeas relief had already been reached, or if it could be extended still further. Surprisingly, the petitioners did not base their arguments in part on *Hull, Jones, or Walker*.¹⁷⁸ If they did, the Court would most likely have been more inclined to make that

168. *Id.* at 2224

169. *Id.* at 2226.

170. *Id.*

171. *See supra* note 164.

172. *See infra* note 179.

173. *Munaf*, 128 S. Ct. at 2228 (Souter, J., concurring). Justice Souter explained:

"... nothing in today's opinion should be read as foreclosing relief for a citizen of the United States who resists transfer, say, from the American military to a foreign government for prosecution in a case of that sort, and I would extend the caveat to a case in which the probability of torture is well documented, *even if the Executive fails to acknowledge it.*"

Id. at 2228 (Souter, J., concurring).

174. *Id.*

175. *Id.* at 2228.

176. *See supra* note 158 and accompanying text.

177. *See supra* note 158 and accompanying text.

178. *See supra* note 158.

determination concerning the ultimate breadth of habeas relief. As of right now, however, that inquiry remains unanswered.

If it were to be determined in the future that alternate habeas relief could reach the needs of petitioners like Munaf and Omar, then the Court would face a balancing inquiry. The interests of the habeas relief would have to be weighed against the general reluctance to interfere with foreign criminal proceedings. While it has been established that the U.S. will not submit its citizens to “likely torture”,¹⁷⁹ Justice Souter realized that a less stringent standard may be appropriate.¹⁸⁰ Assuming hypothetically that such a standard comes into existence, and the petitioners establish the probability of torture to satisfy that standard, the Court would most likely then have to determine whether that probability outweighs the interests of preserving the sovereignty of foreign nations. The decision will also have to account for the general apathy the Court has shown towards citizens facing less than constitutional criminal proceedings in foreign countries.¹⁸¹ While the latter contention would involve obvious due process concerns and should not be a large hurdle to clear,¹⁸² the former would require a much deeper analysis. The Court has yet to reach such an analysis; however, many factors would most likely be involved, including but not limited to the current state of relations with the particular country where the citizens would be tried and the history of prisoner treatment from that country. What is unsettling about this analysis is that it may be impossible for a petitioner to prove the likelihood of torture to such a degree that would outweigh both countervailing interests without an already documented case of torture. That means one, or many, prisoners could be tortured before the likelihood of torture could be successfully established, either under the Solicitor General’s standard or the hypothetical standard based on Justice Souter’s opinion.

While some of the hypothetical possibilities presented in this analysis may seem unorthodox and potentially implausible, it is important to remember the context from which they could stem. Examining the growth of the Iraqi democracy is well beyond the scope of this case note. However, it is safe to say that Iraq is still in its democratic infancy, and the stability of the government, especially concerning prisoner treatment, should not be overstated. The Court’s opinions cannot be viewed in a vacuum, and external factors must be taken into account. Until Iraq establishes itself as an effective and stable democratic society, the treatment of prisoners will continue to be a concern. Justice Souter seemed to realize this in his concurrence, and left the door open for the Court to provide appropriate relief in the future, unrestrained by the Executive Branch if the petitioners could achieve a certain standard.¹⁸³ It is possible that relief could stem from the further extension of the habeas corpus writ, and that option seems to be well within the Court’s discretion, as long as the ends of justice are served. Unfortunately, it may take a documented case of torture before the Court examines this issue further, and petitioners like Munaf and Omar will be without adequate relief until that examination takes place.

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179. *Munaf*, 128 S.Ct. at 2226.

180. *See supra* note 173 and accompanying text.

181. *See Neely v. Henkel*, 180 U.S. 109 (1901).

182. *Munaf*, 128 S. Ct. at 2228 (Souter, J., concurring). It is likely a due process argument would succeed in such cases where torture was imminent.

183. *See supra* note 173 and accompanying text.