"MacArthurism" in the Court

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On June 12, 2008, the Supreme Court decided *Munaf v. Geren*, a case concerning the habeas corpus rights of United States citizens who are being detained by U.S. military forces outside the U.S. (in this instance, in Iraq).[1]

In *Munaf*, the Court held unanimously, in an opinion written by Chief Justice John G. Roberts, Jr., that federal courts have, at least in the conceded circumstances of these detentions, jurisdiction under the federal habeas corpus statute to review prisoner petitions challenging the legality of the detention.

The Supreme Court also held in *Munaf*, however, that federal courts may not—again, at least not in these circumstances—enjoin the U.S. from transferring detainees to the custody of a sovereign government, in the territory of which they are being held, for that sovereign to commence criminal prosecutions. (The Chief Justice's *Munaf* opinion is interesting, complex and, probably as part of achieving Court unanimity, quite hedged; in future cases, the Court might develop this decision into an important precedent.)

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On the threshold issue of federal court habeas jurisdiction, *Munaf* draws distinctions between its circumstances and those that the Supreme Court confronted in a 1948 case, *Hirota v. MacArthur*,[2] which came from the Pacific theater following World War II. The lead litigant, Koki Hirota, was a former Foreign Minister and later the Prime Minister of Japan (all

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For a selected archive of Jackson List posts, see my homepage at www.law.stjohns.edu. To subscribe to the Jackson List, which does not display recipient identities or distribute their email addresses, send a note to barrettj@stjohns.edu.

[1] 553 U.S. ___, 128 S. Ct. 2207, www.supremecourtus.gov/opinions/07pdf/06-1666.pdf (U.S. June 12, 2008).

[2] 338 U.S. 197 (1949) (*per curiam*).

before its attack on Pearl Harbor). Following the war, the International Military Tribunal for the Far East (IMTFE), established by General Douglas MacArthur, convicted Hirota and others of war crimes.

In late 1948, Hirota and co-defendants attacked the IMTFE's legality by seeking writs of habeas corpus directly from the Supreme Court itself. That December, after first agreeing to hear oral argument, the Court held in *Hirota v. MacArthur* that it lacked jurisdiction.[3] The Court decided these cases by a vote of 6-1 and issued its brief opinion *per curiam*. The dissenter merely noted his vote and did not write an opinion. An eighth justice participated fully in the case but never voted. The ninth, Justice Robert H. Jackson, participated in—indeed, his vote broke a 4-4 tie and created—the preliminary decision to hear oral argument,[4] but he did not participate in the final decision.[5]

In *Hirota*, the Supreme Court concluded, in a brief *per curiam* opinion, that the IMTFE was the tribunal of an international alliance, "not a tribunal of the United States." General MacArthur, then commanding Japan following its defeat, occupation and control by "[t]he United States and other allied countries," "ha[d] been selected and [wa]s acting as the Supreme Commander for the Allied Powers." In setting up the IMTFE, MacArthur had acted "as the agent of the Allied Powers." In such circumstances, the Supreme Court held, "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…."[6]

In 2008's *Munaf v. Geren*, the unanimous Supreme Court rejected the executive branch's reliance on *Hirota* to claim that the Court lacked jurisdiction. Chief Justice Roberts described the 1948 decision as a "slip of

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[3] *See Hirota v. MacArthur*, 338 U.S. 197 (1948) (*per curiam*).

[4] *See Hirota v. MacArthur*, 335 U.S. 876, 876-81 (statement of Jackson, J.).

[5] *See Hirota*, 338 U.S. at 199. In *Hirota*, the justices in the majority were Chief Justice Fred M. Vinson and Associate Justices Hugo L. Black, Stanley F. Reed, Felix Frankfurter, William O. Douglas and Harold H. Burton. When the decision was announced on December 20, 1948, Justice Douglas announced that he concurred in the result for reasons that he would state later in a written opinion and he did, six months later, file a concurring opinion. Justice Frank Murphy, the lone dissenter in the case, merely announced his vote and did not write an opinion. Justice Wiley B. Rutledge announced at the time of the Court's decision that he reserved his individual decision and the announcement of his vote until a later time; almost nine months later, he died without having announced his vote. For further information on the case, see Stephen I. Vladeck, *Deconstructing* Hirota*: Habeas Corpus, Citizenship, and Article III*, 95 GEORGETOWN LAW JOURNAL 1497 (June 2007).

[6] *Hirota*, 338 U.S. at 198 (*per curiam*).

a case…."[7] He also discussed two circumstances that had been present there—the Solicitor General's concession that General MacArthur was not, in relevant circumstances, subject to United States government authority, and the absence of any United States citizen among the petitioners—that were absent in the 2008/Iraq/Munaf-and-fellow-petitioners cases.[8]

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Chief Justice Roberts's *Munaf* opinion treatment of *Hirota* also features a line that has not been much noted. According to the Chief Justice, "those familiar with the history of the period would appreciate the possibility of confusion over who General MacArthur took orders from…."[9]

Chief Justice Roberts is a student of history and, in occasional spots, a judicial writer who can be interestingly direct and uninhibited. His *Munaf* quip refers, it seems, to General MacArthur's *very* supreme stature when he commanded the allied forces occupying Japan. The historical "period" to which the Chief Justice referred also may encompass the Korean War a few years after *Hirota*, when MacArthur commanded U.S. forces fighting under United Nations auspices. In April 1951, President Truman fired General MacArthur after he made unauthorized, suggestively insubordinate public statements criticizing the President's pursuit of peace negotiations, rather than expanded war, with North Korea and China.[10]

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Chief Justice Roberts's tweaking, perhaps somewhat derogatory mention of General MacArthur is a first in a Supreme Court opinion, but it is not new in Supreme Court discourse. One predecessor, albeit in private communications, was—who did you expect?—Justice Jackson.

In spring 1945, Jackson left the Supreme Court for what turned out to be seventeen months as the chief United States prosecutor of the principal surviving Nazi leaders before the International Military Tribunal

[7] *Munaf v. Geren*, 553 U.S. at ___, 128 S. Ct. at 2217, slip op. at 9.

[8] *Id.*, 553 U.S. at ___, 128 S. Ct. at 2217-18, slip op. at 10-11.

[9] *Id.*, 553 U.S. at ___, 128 S. Ct. at 2217, slip op. at 9.

[10] *See generally* Harry S. Truman Library & Museum, *FAQ: Why did President Truman dismiss General MacArthur?*, www.trumanlibrary.org/trivia/macarth.htm; Truman Library exhibit, *The Cold War Turns Hot*, www.trumanlibrary.org/hst/l.htm (with links to images of pertinent original documents, including President Truman's diary entries).

at Nuremberg. Jackson's assignment from President Truman was explicitly limited to prosecuting Axis war criminals in the European theater. Once Japan surrendered that August, however, parallel investigations and prosecutions before tribunals, both United States and international, began in the Pacific under the direction of the U.S. general who had led the victorious military campaign and now commanded the occupation: Douglas MacArthur. (Some of those cases, of course, produced the convictions of Hirota and his fellow 1948 petitioners to the Supreme Court.)

For many reasons, including Nuremberg's "head start" and its early diplomatic, organizational and public perception successes, President Truman and some of his emissaries and subordinates asked Jackson informally on a number of occasions to take responsibility for the prosecution of Japanese war criminals. Some Jackson colleagues and friends also made passing suggestions to him, it seems independently, that he "add Tokyo" to the work he was doing at Nuremberg.

Jackson at Nuremberg knew acutely that his hands were very full. He also knew that his work before the International Military Tribunal prosecuting Nazi war criminals was taking longer than he had hoped, keeping him away from Supreme Court work and burdening, and in some instances irritating, his fellow justices. Jackson also had articulated at London and Nuremberg principles of international legal responsibility that were universal, and he believed that no nation's civilian and military leaders were, or in a world of law could be, beyond scrutiny and accountability. And he had heard, at least in passing, critical reports about the "other" International Military Tribunal process.

Jackson also had a sense of humor—he enjoyed, and he often crafted, clever lines. "Handle Tokyo too," people urged him. "Not unless I get to prosecute MacArthur," quipped Jackson in reply.[11]

[11] In April 1951, by contrast, when the newly-fired General MacArthur had left Tokyo and was about to land in San Francisco and receive a hero's welcome, Jackson happened to be dictating a private letter to a close friend who was a leading lawyer there. Jackson included two lines in his letter that indicate that he was more troubled then by the Washington situation than he was by the General: "I suppose you [San Franciscans] will have a great day honoring MacArthur. The mess here smells worse every day." Jackson's friend, who had served with him in President Franklin D. Roosevelt's administration, responded by writing fuller comments in that vein:

> San Francisco gave General MacArthur a great welcome [on April 18, 1951]. New York must have outdone itself yesterday [April 20th]. Did you hear his [April 19th] speech before the Joint Session of Congress? I thought it a magnificent forensic performance, though the issues of policy involved are of a sort to challenge divine wisdom. What a tragedy that, at so critical a juncture

> in our nation's history, we should have such a mess at the top level and so little ground for confidence in the quality and intelligence of White House leadership.

Robert H. Jackson to Arthur H. Kent, Apr. 16, 1951, and Kent to Jackson, Apr. 21, 1951, both in the Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C., Container 26, Folder 7.