

SOUTER, J., concurring

SUPREME COURT OF THE UNITED STATES

Nos. 06–1666 and 07–394

MOHAMMAD MUNAF, ET AL., PETITIONERS
06–1666 *v.*
PETE GEREN, SECRETARY OF THE
ARMY, ET AL.

PETE GEREN, SECRETARY OF THE ARMY, ET AL.,
PETITIONERS
07–394 *v.*
SANDRA K. OMAR AND AHMED S. OMAR, AS
NEXT FRIENDS OF SHAWQI AHMAD OMAR

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 12, 2008]

JUSTICE SOUTER, with whom JUSTICE GINSBURG and
JUSTICE BREYER join, concurring.

The Court holds that “[u]nder circumstances such as those presented here, . . . habeas corpus provides petitioners with no relief.” *Ante*, at 2. The Court’s opinion makes clear that those circumstances include the following: (1) Omar and Munaf “voluntarily traveled to Iraq.” *Ante*, at 16. They are being held (2) in the “territory” of (3) an “all[y]” of the United States, *ante*, at 22, (4) by our troops, see *ante*, at 8, (5) “during ongoing hostilities” that (6) “involv[e] our troops,” *ante*, at 22. (7) The government of a foreign sovereign, Iraq, has decided to prosecute them “for crimes committed on its soil.” *Ante*, at 17. And (8) “the State Department has determined that . . . the department that would have authority over Munaf and Omar . . . as well as its prison and detention facilities have generally

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met internationally accepted standards for basic prisoner needs.” *Ante*, at 25 (internal quotation marks omitted). Because I consider these circumstances essential to the Court’s holding, I join its opinion.

The Court accordingly reserves judgment on an “extreme case in which the Executive has determined that a detainee [in United States custody] is likely to be tortured but decides to transfer him anyway.” *Ante*, at 24–25. I would add that 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. Although the Court rightly points out that any likelihood of extreme mistreatment at the receiving government’s hands is a proper matter for the political branches to consider, see *ante*, at 23–24, if the political branches did favor transfer it would be in order to ask whether substantive due process bars the Government from consigning its own people to torture. And although the Court points out that habeas is aimed at securing release, not protective detention, see *ante*, at 16, habeas would not be the only avenue open to an objecting prisoner; “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 v. Hood*, 327 U. S. 678, 684 (1946).