Washington and Lee Law Review

Volume 70 | Issue 4 Article 15

Fall 9-1-2013

Torturous Transfers: Examining Detainee Habeas Jurisdiction for Nonremoval Challenges and Deference to Diplomatic Assurances

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I. Introduction

Each year, the U.S. government decides whether to transfer individuals from the United States to foreign countries in connection with deportation proceedings, detainee releases, and extradition requests.[1] Individuals facing transfer may bring a statutory claim against the U.S. government in federal court to bar their transfer on the grounds that it is more likely than not that they will be tortured in the recipient country. To challenge their pending involuntary transfer,[2] they rely on U.S. treaty obligations under the 1984 United Nations Convention Against

1. *See* Steve Vladeck, *Why the "*Munaf *Sequels" Matter: A Primer on FARRA, REAL ID, and the Role of the Courts in Transfer/Extradition Cases*, LAWFARE (June 12, 2012, 9:00 AM), http://www.lawfareblog.com/2012/06/why-the-munaf-sequels-matter/ (last visited Mar. 7, 2013) (discussing forms of transfer) (on file with the Washington and Lee Law Review).

2. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 956–57 (9th Cir. 2012) (per curiam) (detailing Garcia's challenge to his extradition to the Philippines alleging it would violate his statutory rights); Omar v. McHugh (*Omar II*), 646 F.3d 13, 17–18 (D.C. Cir. 2011) (explaining Omar's claim that a statute grants him a right to judicial review of the conditions in the receiving country—Iraq—prior to his transfer from U.S. military custody to Iraqi authority); Mironescu v. Costner, 480 F.3d 664, 667 (4th Cir. 2007) (discussing Mironescu's petition for habeas corpus—claiming that his extradition to Romania would violate his statutory rights).

Torture (CAT),[3] incorporated into U.S. law by the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA).[4] CAT and FARRA proscribe the transfer of a person if "there are substantial grounds for believing the person would be in danger of being subjected to torture upon return."[5]

Ideally, fact-specific decisions in these cases depend on the context in which a person raises a FARRA claim: either in connection with post-9/11 detention at Guantanamo Bay, normal extradition of individuals wanted by another country for criminal prosecution, or to serve a postconviction sentence.[6] With respect to the first category, Guantanamo detainees require a recipient country in which to resettle[7] after successfully challenging their detention.[8] Facing the threat of torture in many of their home or proposed recipient countries, these individuals look to FARRA to stop their transfer to a country in which they believe they face a substantial likelihood of being tortured.[9]

These FARRA claims, however, transcend the unique context of Guantanamo Bay military detention cases. Individuals facing ordinary extradition seek to raise claims of torture as well.[10]

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3. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1988 U.S.T. 202, 1465 U.N.T.S. 85 [hereinafter CAT]. CAT was adopted by unanimous agreement of the U.N. General Assembly, was signed on April 18, 1988, and entered into force as to the United States on November 20, 1994. While the United States signed and ratified CAT, it was deemed nonself-executing. *See* 136 CONG. REC. 36,198 (1990) (detailing the nature of CAT).

4. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-761 (2006) (codified at 8 U.S.C. § 1231 note (2012)).

5. 8 U.S.C. § 1231 note.

6. *See supra* note 2 (discussing the different contexts of FARRA claims).

7. *See* Samuel Chow, *The* Kiyemba *Paradox: Creating a Judicial Framework to Eradicate Indefinite, Unlawful Executive Detentions*, 19 CARDOZO J. INT'L & COMP. L. 775, 776 (2011) (discussing the difficulty in actual release of Guantanamo Bay detainees).

8. *See* Exec. Order No. 13,492, 3 C.F.R. 13492 (Jan. 22, 2009) (explaining the challenges the executive faced in considering detainee release options).

9. *See* Munaf v. Geren, 553 U.S. 674, 692 (2008) (discussing petitioners' claims that if they were surrendered to Iraqi custody they would likely face torture, and thus international law forbids their transfer).

10. *See* Stephen I. Vladeck, *Normalizing Guantanamo*, 48 AM. CRIM. L. REV. 1547, 1549–50 (2011) (discussing how the U.S. District Court for the District of Columbia's holding in a non-Guantanamo, military detention case may affect congressional constraints on the scope of federal habeas review in

Under FARRA, individuals facing extradition may challenge their extradition by petitioning a U.S. court through the writ of habeas corpus.[11] The United States Court of Appeals for the Ninth Circuit heard one such case, *Trinidad y Garcia v. Thomas*,[12] in 2012. *Garcia* involved a man wanted by the Philippines to face kidnapping conspiracy charges.[13] Facing imminent transfer, the man filed a habeas petition to challenge his extradition under FARRA, claiming he faced a likelihood of torture in the Philippines.[14] The Ninth Circuit established jurisdiction to hear Trinidad's claim based on the conclusion that federal courts have habeas jurisdiction to hear extradition challenge requests under FARRA, and held that a court's inquiry ends once the Secretary of State determines that torture is not "more likely than not."[15] Despite the intended sui generis nature of the Guantanamo Bay detainee transfer challenges, the Ninth Circuit referred to those situations for guidance[16] and deemed courts unable to contradict Executive Branch foreign policy decisions.[17]

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other nonrelated cases).

11. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 956–57 (9th Cir. 2012) (per curiam) (detailing Trinidad's claims of torture if extradited to the Philippines); Khouzam v. Attorney Gen. of the U.S. (*Khouzam II*), 549 F.3d 235, 239 (3d Cir. 2008) (detailing Khouzam's claims of torture if removed to Egypt); Mironescu v. Costner, 480 F.3d 664, 667 (4th Cir. 2007) (detailing Mironescu's claims of torture if extradited to Romania).

12. 683 F.3d 952 (9th Cir. 2012).

13. *Id.* at 956.

14. *See id.* at 963

> Trinidad raises two distinct rationales for why he may not be extradited. First, he contends that he may "invoke the writ to challenge the Secretary's decision to surrender him in violation of his substantive due process right to be free from torture" at the hands of a foreign government. . . . Alternatively, he asserts that . . . he possesses a statutory right under the Convention and the FARR Act that precludes the United States from extraditing him to a country where torture is "more likely than not" to occur.

(citations omitted).

15. *Id.* at 956–57.

16. *See* Vladeck, *supra* note 10, at 1549 (discussing how the reasoning in *Omar II*, and by proxy *Garcia*, is divorced from what was supposed to be the sui generis nature of post-9/11 terrorism cases).

17. *See* Munaf v. Geren, 553 U.S. 674, 702 (2008) ("The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area."); Boumediene v.

As this Note will explain, the *Garcia* decision is significant for two reasons. First, it suggests that the law governing ordinary extraditions will continue to matter long after the last detainee is released from Guantanamo Bay.[18] Courts disagree as to whether they have jurisdiction to hear ordinary extradition cases raising claims of torture.[19] Those courts that have granted jurisdiction have failed to provide the type of substantive review that a historical analysis of the development of habeas corpus law suggests courts should undertake in these ordinary extradition cases.[20] Whether federal courts have habeas jurisdiction to hear non-Guantanamo extraditees' FARRA claims has significant ramifications with regard to the rights of these individuals under United States law.[21] And second, while FARRA applies to both Guantanamo Bay detainee release cases and ordinary extradition cases, the contexts are sufficiently dissimilar that the former should not inform the latter.[22] This Note will instead propose a rule of limited inquiry that will differentiate between Guantanamo-specific decisions and conventional extradition cases. Such a rule would ensure that extraditees have sufficient opportunity to challenge their extradition, and guarantee that the United States upholds its obligations under CAT and the U.S. Constitution.[23]

This Note addresses two main issues raised by extraditee transfer challenges based on FARRA: (1) whether the Ninth Circuit's holding in *Garcia*—holding that extraditees have

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Bush, 553 U.S. 723, 783 (2008) ("The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain."); Vladeck, *supra* note 10, at 1547–48 (discussing the "seepage" of doctrine from terrorism cases, notably *Boumediene* and *Munaf*, into "more conventional bodies of jurisprudence").

18. *See* Vladeck, *supra* note 1 (discussing the importance of this jurisprudence).

19. *See infra* note 25 (discussing the circuit split over federal habeas jurisdiction).

20. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 957 (9th Cir. 2012) (per curiam) (explaining that, while the court has jurisdiction to hear a transferee's claim, once the Secretary of State files a declaration that it is *not* more likely than not that torture will occur, the court's review comes to an end).

21. *See* Vladeck, *supra* note 1 (explaining the effects of jurisdiction on detainee and extraditee rights).

22. *See id.* (explaining the differences between these contexts).

23. *See infra* Part VI (discussing the details of a rule of limited inquiry).

jurisdiction to challenge their transfers under CAT/FARRA,[24] creating a circuit split[25]—was correct; and (2) whether, despite potential bars to such attempts—including judicial precedent,[26] the doctrine of separation of powers, and the judicially created rule of noninquiry[27]—extraditees may attempt to rebut government assurances that torture will not occur upon extradition.[28]

Part II of this Note reviews the legal provisions that establish the foundation for today's extradition cases.[29] This Part examines the historical roots of the writ of habeas corpus and the Suspension Clause[30] before evaluating the statutory bases for

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24. *See Garcia*, 683 F.3d at 956–57 (holding that the district court did have jurisdiction over the action because neither the FARRA nor the REAL ID Act repealed federal habeas jurisdiction over Trinidad's claims, and remanding so the Secretary of State could comply with her obligations in making a determination regarding the likelihood of torture). This case will be discussed in detail *infra* Part III.B.

25. *See Garcia*, 683 F.3d at 1013 (Kozinski, C.J., dissenting in part) (explaining that the majority decision of the Ninth Circuit creates a circuit split as to the federal courts' jurisdiction to hear habeas petitions from individuals in U.S. custody hoping to challenge their transfer/extradition to a foreign sovereign, claiming it is more likely than not that they will be tortured). A circuit split has now emerged between the Ninth Circuit, and the D.C. and the Fourth Circuits. The D.C. Circuit held in *Omar v. McHugh (Omar II)*, 646 F.3d 13, 17 (D.C. Cir. 2011), and the Fourth Circuit held in *Mironescu v. Costner*, 480 F.3d 664, 674 (4th Cir. 2007), that the REAL ID Act of 2005 divested federal courts of jurisdiction in such cases. The REAL ID Act of 2005 was enacted to streamline judicial review in immigration cases and currently provides that "a [habeas] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the [CAT] and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment . . . ." REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 310–11 (codified at 8 U.S.C. § 1252(a)(4) (2012)).

26. *See infra* Part V.A (discussing whether the relevant case law supports detainee challenges of transfer and the scope of review provided to such claims).

27. *See infra* Part V.B (discussing whether the separation of powers doctrine or the rule of noninquiry bars judicial review).

28. *See* Lopez-Smith v. Hood, 121 F.3d 1322, 1327 (9th Cir. 1997) ("[U]nder what is called the rule of non-inquiry in extradition law, courts in this country refrain from examining the penal systems of requesting nations, leaving to the Secretary of State determinations of whether the defendant is likely to be treated humanely." (quotations omitted)).

29. *See infra* Part II (discussing CAT, FARRA, and the REAL ID Act).

30. U.S. CONST. art. I, § 9, cl. 2. *See infra* Part II.A (discussing the history of habeas corpus and its interactions with the Constitution).

detainee extradition challenges including FARRA and the REAL ID Act.[31] Part III analyzes relevant case law, including the Ninth Circuit's decision in *Garcia* and the 2008 Supreme Court decisions[32] in *Boumediene v. Bush*[33] and *Munaf v. Geren*.[34] Part IV argues that *Garcia* correctly determined that federal courts have jurisdiction over challenges to extradition based on FARRA,[35] while Part V argues that federal courts have a constitutional basis—and responsibility—to provide substantive review in considering detainee FARRA claims.[36] Part VI proposes a rule of limited review that courts could employ in the future to address these challenges in a manner consistent with the concept of meaningful review.[37] In closing, Part VII defends the proposed rule, providing a basis for future debate in this expanding field and bridging the gap between constitutional and human rights law.[38]

II. Habeas Corpus and the Domestic Statutory Bases for Detainee Challenges

The writ of habeas corpus provides the primary constitutional basis by which detainees in U.S. custody may challenge their impending transfer to a foreign country.[39] FARRA

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31. CAT, *supra* note 3; Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681–761 (2006) (codified at 8 U.S.C. § 1231 note (2012)); REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 310–11 (codified at 8 U.S.C. § 1252(a)(4) (2012)).

32. *See infra* Part III.A–B (discussing *Boumediene*, *Munaf*, and *Garcia*).

33. 553 U.S. 723 (2008).

34. 553 U.S. 674 (2008).

35. *See infra* Part IV (examining the circuit split and discussing why *Garcia*'s holding on jurisdiction is more persuasive).

36. *See infra* Part V.A–B (discussing how the relevant case law supports challenges on CAT and FARRA grounds by individuals facing transfer and how the separation of power doctrine and the rule of noninquiry do not pose a bar to such jurisdiction).

37. *See infra* Part VI (discussing the proposal for limited judicial review).

38. *See infra* Part VI (discussing how the proposal accords with the history of habeas corpus and addresses the need for deference to the Executive Branch).

39. *See* John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. REV. 1973, 2019 (2010) (explaining habeas's use).

forms the statutory basis for such challenges when transferees allege they face a substantial likelihood of torture in the country to which they are to be transferred.[40] An analysis of the bases for detainee transfer challenges follows and forms the foundation for this Note's subsequent arguments.

A. The Historical Roots of Habeas

Since its introduction in English common law in the mid-1600s, habeas corpus provided detainees a remedy to challenge their detention in court in order to protect the individual's right[41] to be free from bodily restraint.[42] At its inception, courts in feudal England used this remedy "principally as a means to enforce allocations of authority between and among the various power centers,"[43] establishing whether the court possessed jurisdiction to hear such claims.[44] The scope of judicial review

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40. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681–761 (2006) (codified at 8 U.S.C. § 1231 note (2012)).

41. *See* 28 U.S.C. § 2241(c)(3) (2012) (making the writ of habeas corpus available to all persons "in custody in violation of the Constitution or laws or treaties of the United States"); Boumediene v. Bush, 553 U.S. 723, 771 (2008) (holding that Guantanamo detainees possess constitutional habeas corpus rights); INS v. St. Cyr, 533 U.S. 289, 301–03 (2001) (discussing the history of habeas corpus); Trinidad y Garcia v. Thomas, 683 F.3d 952, 957 (9th Cir. 2012) (per curiam) (reviewing habeas's history as a remedy allowing challenges to detention); Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509, 522–23 (D.C. Cir. 2009) (Griffith, J., concurring in the judgment and dissenting in part) ("Since at least the seventeenth century, the Great Writ has prohibited the transfer of prisoners to places beyond the [Supreme Court's] reach where they would be subject to continued detention on behalf of the government.")

42. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2101 (2007) (discussing the procedural rights of individuals challenging their detention or removal).

43. MICHAEL P. ALLEN, MICHAEL FINCH & CAPRICE L. ROBERTS, FEDERAL COURTS 868 (2008). *See Boumediene*, 553 U.S. at 725 (discussing the history of the writ of habeas corpus and corresponding judicial review).

44. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 956 (9th Cir. 2012) (per curiam) (detailing the contours of habeas as a remedy in England in the 1600s and 1700s) (citing INS v. St. Cyr, 533 U.S. 289, 301–03 (2001))); Mironescu v. Costner, 480 F.3d 664, 676 (4th Cir. 2007) (explaining that "[th]e historical dichotomy in the immigration context between the limited role played by the courts in habeas corpus proceedings, and judicial review in which a court decid[es] on the whole record whether there is substantial evidence to support

quickly expanded from the mid-1600s onward, as the writ of habeas corpus became a tool of expansive use,[45] including as a means to protect individual liberty from claims of unlawful transfer.[46]

Through the writ's derivation from British royal privilege, the King's Bench commonly issued writs that lacked a basis in established precedent.[47] Lord Chief Justice Mansfield issued a wide variety of writs during this period to prevent individuals from being unlawfully removed from England.[48] This royal prerogative gave the writ of habeas corpus its immense and varied power,[49] granting the release of an African slave, commanding the discharge of seamen exempt from impressments into the British Navy, and helping to free asylum inmates and apprentices.[50] The British people saw the writ as so important that when the King's Bench suspended the writ by royal order in the late 1600s, it inflamed the people, leading to the passage of the Habeas Corpus Act of 1679 to solidify the writ's availability and enshrine its importance as a check on government power.[51] Further, by the eighteenth century, English habeas courts heard statutory claims that a prisoner's detention was unlawful, expanding the bases of a prisoner's claims to the Magna Carta, Parliament's newest innovation.[52]

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administrative findings of fact" is not present in extradition).

45. *See* Boumediene v. Bush, 553 U.S. 723, 740–44 (2008) (explaining the expansion of habeas corpus).

46. *See id.* at 725 (discussing the history of the writ of habeas corpus and corresponding judicial review); ALLEN ET AL., *supra* note 43, at 868–69 (discussing habeas's uses).

47. ALLEN ET AL., *supra* note 43, at 868–69.

48. *See* Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 975 (2011) (reviewing PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010)).

49. *See Boumediene*, 553 U.S. at 743 (discussing the source of habeas's power).

50. *See* I.N.S. v. St. Cyr, 533 U.S. 289, 303 (2001) (citing examples of habeas's success in freeing detained individuals in a variety of situations).

51. *See* Boumediene v. Bush, 553 U.S. 723, 743 (2008) (discussing the British view of the writ of habeas corpus and the passage of the Habeas Corpus Act of 1679).

52. *See* Omar v. McHugh (*Omar II*), 646 F.3d 13, 27 (D.C. Cir. 2011) (citing a variety of old English sources for the proposition that English habeas courts

The framers of the new U.S. nation's constitution continued to protect and expand the power of habeas corpus after the United States won independence from England in the late 1700s.[53] The Constitution's Article I Suspension Clause[54] provides that the writ of habeas corpus "shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it,"[55] thus exemplifying the framers' view that the writ existed as a "vital instrument for the protection of individual liberty"—freedom against government power.[56] The history of the Great Writ's purpose in checking power in England was well known to the framers:

> It no doubt confirmed their view that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power. The Framers' inherent distrust of government power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make government accountable, but also to secure individual liberty.[57]

But a more comprehensive analysis of the scope of the Suspension Clause "begin[s] with precedents as of 1789" because, as the Supreme Court emphasized, "'at the absolute minimum,' the [Suspension] Clause protects the writ as it existed when the Constitution was drafted and ratified."[58]

In 1789, the writ of habeas corpus allowed individuals to challenge their government-ordered detention or their transfer beyond the habeas court's jurisdiction.[59] As a resolution during the New York Ratifying Convention made clear, the Suspension

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heard statutory-based claims of unlawful detention).

53. *See Boumediene*, 553 U.S. at 743–45 (discussing the use of habeas in 1700s America).

54. U.S. CONST. art. I, § 9, cl. 2.

55. *Id.*

56. Boumediene v. Bush, 553 U.S. 723, 743 (2008).

57. *Id.* at 742.

58. *See id.* at 746 (quoting I.N.S. v. St. Cyr, 533 U.S. 289, 301 (2001)).

59. Brief of Legal Historians and Habeas Corpus Experts as Amici Curiae in Support of Petitioner at 3, Trinidad y Garcia v. Thomas, 683 F.3d 952 (9th Cir. 2012) (per curiam) (No. 12-6615), http://www.lawfareblog.com/wp-content/uploads/2012/11/Trinidad-y-Garcia-Cert-Amicus.pdf [hereinafter Brief of Legal Historians].

Clause was intended "not only [to] protect[] against arbitrary suspensions of the writ but also [to] guarantee[] an *affirmative right to judicial inquiry into causes of detention*."[60] During this period, habeas extended to all detention "*contra legem terrae*," meaning against the law of the land, not just those raising claims of torture.[61] As the Supreme Court recounted:

> [T]he writ of habeas corpus was available to non-enemy aliens as well as to citizens. It enabled them to challenge Executive and private detention in civil cases as well as criminal. Moreover, the issuance of the writ was not limited to challenges to the jurisdiction of the custodian, but encompassed detentions based on errors of law, including the erroneous application or interpretation of statutes.[62]

Thus, habeas provided an effective means to challenge all manners of illegal confinement.[63] During the 1700s, there was "no suggestion that habeas relief in cases involving Executive detention was only available for constitutional error."[64] Rather, the Court stated that the Great Writ "has always been available to review the legality of Executive detention," notwithstanding the basis of a detainee's claim on "the Constitution or laws or treaties of the United States."[65] Thus, in the 1800s U.S. state courts heard claims of unlawful detention or transfer based on statute.[66] By allowing challenges to the Congress's power, the

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60. *See* Boumediene v. Bush, 553 U.S. 723, 744 (2008) (citing Resolution of the New York Ratifying Convention (July 26, 1788) (emphasis added)).

61. 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 54 (Williams S. Hein Co. 1986) (1642); *see also* Vladeck, *supra* note 48, at 975 (noting that "the habeas jurisdiction of King's Bench ran to *any* possible unlawful transfer, and not just to those rising claims of torture").

62. I.N.S. v. St. Cyr, 533 U.S. 289, 301–02 (2001).

63. 3 WILLIAM BLACKSTONE, COMMENTARIES *131.

64. *St. Cyr*, 533 U.S. at 302–03 (quotations omitted).

65. *Id.* at 302–03, 305 (quotations omitted); *see also* Omar v. McHugh (*Omar II*), 646 F.3d 13, 27 (D.C. Cir. 2011) (Griffith, J., concurring) (discussing the historical availability of the writ of habeas corpus).

66. *See St. Cyr*, 533 U.S. at 302–03 (explaining the evolution of habeas claims); Kennedy & Co. v. Fairman, 2 N.C. (1 Hayw.) 408 (N.C. Super. Ct. L. & Eq. 1796) (discussing a debtor's claim); Respublica v. Keppele, 2 U.S. 197, 198–99 (Pa. 1793) (discussing an indentured servant's claim); Respublica v. Betsey, 1 U.S. 469 (Pa. 1789) (discussing a slave's claim); Commonwealth v. Downes, 41 Mass. (24 Pick.) 227 (1836) (discussing a military enlistee's claim); *In re* Stacy, 10 Johns. 328, 333–34 (N.Y. Sup. Ct. 1813) (holding that a civilian in military custody on accusations of treason must be released).

writ further operated as an "essential mechanism in the separation-of-powers scheme."[67]

Today, the Supreme Court continues to adhere to the understanding that "constitutional habeas is at least as robust as common law habeas was when Congress passed the Judiciary Act of 1789."[68] The Court explained in *Boumediene* that "[t]he Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom."[69] In this way, the writ of habeas corpus is a remedy, not a right, meaning its availability for relief does not depend on the applicability of other constitutional protections.[70] Instead, habeas exists as an adaptable remedy, altered in application and scope based on the circumstances of the case.[71] Modern courts widely accept that petitioners allege a proper claim for habeas relief when they request a judicial order barring their transfer to, or from, a place of incarceration.[72] The rule,

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Further, any claim that the Suspension Clause applies only to statutory claims that existed in 1789 can be defeated by the claim heard in *St Cyr*. *See* Omar v. McHugh (*Omar II*), 646 F.3d 13, 27 (D.C. Cir. 2011) (discussing the application of the Suspension Clause to claims beyond statutory ones). There, an alien filed a habeas petition seeking to block his removal under the Immigration and Nationality Act of 1952, which paralleled a claim first created by Congress in the Immigration Act of 1917. *Id.* Despite the statute originating in the twentieth century, the Court determined that the alien's claim "could have been answered in 1789 by a common-law judge with power to issue the writ of habeas corpus" because the alien challenged "the legality of Executive detention." *St. Cyr*, 533 U.S. at 305; *see also Omar II*, 646 F.3d at 28 (citing *St. Cyr,* 533 U.S. at 305).

67. Boumediene v. Bush, 553 U.S. 723, 743 (2008). The framers had this understanding as well. *See id.* (explaining that the framers believed the writ to be a vital component of separation of powers).

68. Omar v. McHugh (*Omar II*), 646 F.3d 13, 26–27 (D.C. Cir. 2011) (citing I.N.S. v. St. Cyr, 533 U.S. 289, 301 (2001)).

69. *Boumediene*, 553 U.S. at 739.

70. *See id.* at 780 ("Habeas is, at its core, an equitable remedy."); Stephen I. Vladeck, *Insular Thinking About Habeas*, 97 IOWA L. REV. BULLETIN 16, 19 & n.23 (2012) (citing 28 U.S.C. § 2241(c)(3) (2012)), http://www.uiowa.edu/~ilr/bulletin/ILRB_97_Vladeck.pdf (explaining that the writ of habeas corpus is often mischaracterized as a right rather than a remedy).

71. *See Boumediene*, 553 U.S. at 779 (explaining habeas's adaptability).

72. *See* I.N.S. v. St. Cyr, 533 U.S. 289, 305–08 (2001) (explaining the long history of judicial review of deportations through habeas petitions); *In re* Bonner, 151 U.S. 242, 255–56 (1894) (explaining petitioner's habeas challenge to his detention, holding it to be "in violation of the laws of the United States, and that [petitioner] was therefore entitled to be discharged from the custody of the

therefore, became as follows: if a prisoner can state "a colorable argument that his transfer is unlawful—even if he must overcome a strong presumption on the merits—based on the executive branch's assurances, then that transfer is, in fact, unlawful."[73] With the passage of FARRA, the Great Writ captured a new statutory claim, allowing individuals in U.S. custody to challenge their transfer to a foreign country based on their anticipated treatment in the receiving state.[74]

B. CAT and FARRA, U.S. State Department Regulations, and the 2005 REAL ID Act

The United States ratified the U.N. Convention Against Torture (CAT) in 1994,[75] Article 3 of which states that "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[76] Congress interpreted CAT as a nonself-executing treaty,[77] and

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warden of the institution"); Benson v. McMahon, 127 U.S. 457, 462 (1888) (reviewing petitioner's claim of unlawful extradition through the writ of habeas corpus); Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509, 513 (D.C. Cir. 2009) (discussing whether the court has jurisdiction over petitioner's habeas claim); Ward v. Rutherford, 921 F.2d 286, 288 (D.C. Cir. 1990) ("[A]ctions taken by magistrates in international extradition matters are subject to habeas corpus review by an Article III district judge."); Miller v. Overholser, 206 F.2d 415, 419–20 (D.C. Cir. 1952) ("We think it has been settled since . . . *Bonner* that the writ [of habeas corpus] is available to test the validity not only of the fact of confinement but also of the place of confinement.").

73. Vladeck, *supra* note 10, at 1561; *see also* Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509, 525 (D.C. Cir. 2009) (Griffith, J., concurring in the judgment and dissenting in part) (arguing the habeas rights given to detainees in *Boumediene* cannot be safeguarded without allowing challenges to government assurances).

74. *See* Omar v. McHugh (*Omar II*), 646 F.3d 13, 28 (D.C. Cir. 2011) (Griffith, J., concurring) (explaining the effects of FARRA on the writ of habeas corpus).

75. *See supra* note 3 and accompanying text (discussing the implementation of CAT).

76. CAT, *supra* note 3, at art. 3.

77. *See* Medellin v. Texas, 552 U.S. 491, 505 n.2 (2008) (recounting the legislative history regarding the nature of CAT). As a nonself-executing treaty, CAT does not create rights enforceable in U.S. courts without the passage of domestic legislation. *See id.* (explaining nonself-executing treaties).

passed FARRA[78] to effectuate U.S. international legal obligations under the Convention.[79] FARRA provides that:

> It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.[80]

Thus, FARRA creates a statutory prohibition against transferring a detainee to countries in which a court determines that the detainee faces a "substantial" risk of torture.[81] In so doing, FARRA extends the scope of habeas petitions to encompass challenges to detainee transfers on the basis that such a "substantial" risk exists, notwithstanding negotiated assurances from that country's government to the contrary.[82] Furthermore, FARRA's prohibition on transfers to countries in which a detainee might face torture "generate[s] interests cognizable as liberty interests under the Due Process Clause, which guarantees that persons will not be deprived of life, liberty, or property, without due process of law."[83]

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78. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681–761 (2006) (codified at 8 U.S.C. § 1231 note (2012)).

79. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 956–57 (9th Cir. 2012) (per curiam) (discussing Congress's reasons for passing FARRA); *Omar II*, 646 F.3d at 18 n.2 ("[I]t is undisputed that the FARR Act implements the Convention Against Torture."); Edu v. Holder, 624 F.3d 1137, 114 (9th Cir. 2010) ("Congress then implemented CAT in the Foreign Affairs Reform and Restructuring Act of 1998."); Pierre v. Attorney Gen., 528 F.3d 180, 185–86 (3d Cir. 2008) ("[I]n 1998, Congress passed legislation to implement the United States' obligations under the CAT: the Foreign Affairs Reform and Restructuring Act ('the FARR Act')."); Pierre v. Gonzales, 502 F.3d 109, 114 (2d Cir. 2007) ("To implement the CAT, Congress amended the immigration laws with the Foreign Affairs Reform and Restructuring Act of 1998 ('the FARR Act')."); Cadet v. Bulger, 377 F.3d 1173, 1180 (11th Cir. 2004) ("In order to implement Article 3 of CAT, Congress passed the Foreign Affairs Reform and Restructuring Act of 1998 ('the FARR Act')."); Huang v. Ashcroft, 390 F.3d 1118, 1121 (9th Cir. 2004) ("Congress passed the Foreign Affairs Reform and Restructuring Act (the FARR Act) in 1998 to implement Article 3 of CAT.").

80. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-761 (2006) (codified at 8 U.S.C. § 1231 note (2012)).

81. *Id.*; *see also* Vladeck, *supra* note 10, at 1554 (discussing FARRA).

82. Vladeck, *supra* note 10, at 1554.

83. Trinidad y Garcia v. Thomas, 683 F.3d 952, 956–57 (9th Cir. 2012) (per

FARRA directs relevant Executive Branch agencies to promulgate regulations to implement U.S. obligations under CAT.[84] These regulations broadly address three categories of persons: (1) individuals subject to "expedited removal" who may be summarily removed from the United States upon arrival for lack of required documentation[85] or posing a threat to national security;[86] (2) individuals subject to immigration removal orders;[87] and (3) individuals subject to extradition for prosecution in a foreign country.[88]

Shortly after FARRA's passage, the U.S. State Department promulgated procedural regulations to address those individuals subject to immigration removal orders.[89] These

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curiam) (citing U.S. CONST. amend. V; Mathews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970)).

84. *See* 8 U.S.C. § 1231 note (2012) (explaining that FARRA requires "the appropriate agencies . . . prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture").

85. *See, e.g.*, 8 C.F.R. § 235.3 (2013).

86. *Id.* at § 235.8.

87. COMM. ON INT'L HUMAN RIGHTS OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. & CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, N.Y. UNIV. SCH. OF LAW, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS" 50 (2004) [hereinafter TORTURE BY PROXY], http://www.chrgj.org/docs/TortureByProxy.pdf.

88. *Id.* at 15–16.

89. *See* 8 C.F.R. §§ 208.16–208.17 (stating the regulations for FARRA implementation); Trinidad y Garcia v. Thomas, 683 F.3d 952, 956 (9th Cir. 2012) (per curiam) (stating that the U.S. Department of State is the appropriate agency under 8 U.S.C. § 1231 that must prescribe regulations to implement U.S. obligations under CAT). This accords with case law stating, "[i]t is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds." Ahmad v. Wigen, 910 F.3d 1063, 1067 (2d Cir. 1990); *see also* Neely v. Henkel, 180 U.S. 109, 122–23 (1901) (explaining that "the appellant cannot be extradited except upon the order of a judge of a court of the United States"); Hoxha v. Levi, 465 F.3d 554, 563 (3d Cir. 2006) (noting that "humanitarian considerations are within the purview of the executive branch . . . in deciding whether a petitioner is extraditable"); United States v. Kin Hong, 110 F.3d 103, 110–11 & nn. 11–12 (1st Cir. 1997) (stating that "the Secretary may also decline to surrender the [petitioner] on any number of discretionary grounds, including . . . humanitarian and foreign policy considerations"); Lopez-Smith v. Hood, 121 F.3d 1322, 1326–27 (9th Cir. 1997) (stating that "the Secretary of State may order surrender of an American citizen whose extradition had been requested" (quotations omitted)); Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1198 (1991)

regulations[90] state that the Secretary of State (the Secretary), before approving the removal of an individual relying on FARRA to prevent his transfer, must determine whether the potential transferee is "more likely than not"[91] to be tortured in the receiving country[92] based on an analysis of relevant U.S. government and nongovernmental organization reports.[93] If in considering the petitioner's CAT/FARRA claim the immigration

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(same).

90. 8 C.F.R. §§ 208.16–208.17 (2013).

91. 8 C.F.R. § 208.16(c)(4); *see also* S. Res. of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 101st Cong. (1990), 136 CONG. REC. 36,193 (using the same standard as the regulation); S. EXEC. REP. NO. 101-30, at 30 (1990) ("That the United States understands the phrase 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in Article 3 of the Convention to mean 'if it is more likely than not that he would be tortured.'"); U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Second Periodic Reports of States Parties Due in 1999, Addendum: United States, U.N. Doc. CAT/C/48/Add.3, at 57 (Jan. 13, 2006) (explaining the standard for assessing torture). The "more likely than not" standard originates from the test used for relief from removal in persecution cases. *See* Tanusri Prasanna, *Taking Remedies Seriously: The Normative Implications of Risking Torture*, 50 COLUM. J. TRANSNAT'L L. 370, 393–94 (2012); *see* John T. Parry, *Torture Nation, Torture Law*, 97 GEO. L.J. 1001, 1039 (2009) (claiming that "[t]he goal of the understanding was to conform the Convention to existing U.S. immigration law, which prevents a person from being deported to a country where it is more likely than not that he or she would be persecuted").

92. *See* S. Res. of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 101st Cong. (1990), 136 CONG. REC. 36,193 (explaining the Senate's understanding in ratifying CAT, involving "the phrase where there are substantial grounds for believing that he would be in danger of being subjected to torture" as being construed to mean "if it more likely than not that he would be tortured" (quotations omitted)); Lyle Denniston, Munaf*'s Impact Widens Again*, SCOTUSBLOG (June 10, 2012, 8:18 AM), http://www.scotusblog.com/2012/06/munafs-impact-widens-again/ (last visited Mar. 7, 2013) (discussing the Secretary's process of review and certification) (on file with the Washington and Lee Law Review); *see also* Trinidad y Garcia v. Thomas, 683 F.3d 952, 956 (9th Cir. 2012) (per curiam) (stating that "[a]n extraditee may be surrendered only after the Secretary makes a determination regarding possible torture" and explaining a determination prior to surrender of an extraditee who makes a CAT claim is mandatory (citing 22 C.F.R. § 95.2–.3)).

93. *See* Brief of Appellee at 13–14, Trinidad y Garcia v. Thomas, 683 F.3d 952 (9th Cir. 2012) (per curiam) (No. 09-56999) [hereinafter *Garcia* Brief of Appellee], 2010 WL 4199736 at *14 (detailing the sources used in making a determination about the likelihood of torture).

judge decides the petitioner is more likely than not to be tortured in the receiving state, FARRA entitles the individual to protection, typically by preventing his removal.[94]

The same inquiry occurs for persons facing extradition for prosecution in a foreign country.[95] Under State Department FARRA regulations, the standard procedure for extradition begins with a judicial determination that an individual is extraditable, before the Secretary makes the final extradition decision.[96] During this process, the individual may raise a claim under CAT/FARRA that he is likely to be tortured in the requesting state.[97] In such a case, the Secretary considers the potential extraditee's claim on the basis of "the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."[98] The Secretary's extradition decision is not subject to judicial review.[99]

While FARRA took important steps to realize CAT's aims, the Executive Branch regulations implementing CAT/FARRA's nonrefoulement (nontransfer) obligations failed to establish clear procedural guidelines by which potential transferees may refute Executive Branch determinations denying their torture claims.[100] As a result, "there appears to be nothing to prevent arbitrary decisions and no procedural safeguards to ensure compliance with U.S. obligations under CAT and FARRA," particularly in the extradition context.[101] More drastically, however, some courts

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94. *See* 8 C.F.R. § 208.16(c)(4) (explaining the process an immigration judge must take in considering a petition for withholding of removal due to torture under CAT).

95. *See* 22 C.F.R. § 95.2 (detailing the procedures for extraditees challenging their extradition pursuant to CAT and FARRA).

96. *See* TORTURE BY PROXY, *supra* note 87, at 53 (reviewing how the process truly works when the Secretary considers a petition for extradition).

97. *Id.*

98. 22 C.F.R. § 95.2(a)(2) (2013).

99. *See* 22 C.F.R. § 95.4 (2013) ("Decisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review.").

100. *See* TORTURE BY PROXY, *supra* note 87, at 54 (arguing that shortcomings in the CAT- and FARRA-implementing regulations have made it difficult for potential transferees to refute Executive Branch assurances).

101. *Id.* For these reasons—and to address this problem—this Note will propose a rule of limited inquiry in these cases to ensure the Executive has incentive to abide by its CAT and FARRA obligations. *Infra* Part VI.

subsequently interpreted FARRA to foreclose administrative and judicial review in extradition cases, denying federal courts requisite jurisdiction to hear transferees' claims.[102]

Subsequent to FARRA, Congress passed the 2005 REAL ID Act[103] to streamline judicial review of immigration cases.[104] The Act provides:

> Notwithstanding any other provision of law, . . . or any other habeas corpus provision, . . . a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations [CAT] . . . .[105]

The REAL ID Act intended to ensure that this provision represented the "sole and exclusive means" for courts to hear CAT claims, even in habeas petitions.[106] While the provision appears to restrict judicial review to removal order challenges,[107] the legislative history of the Act indicates that Congress did not intend to limit detainees' substantive right under FARRA to challenge their extradition based on claims of torture risk.[108] Thus, petitioners used these laws to challenge their transfer in the military detention and extradition settings.[109]

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102. *See* TORTURE BY PROXY, *supra* note 87, at 54 (discussing the courts that denied jurisdiction to review extradition cases under FARRA).

103. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 310–11 (codified at 8 U.S.C. § 1252(a)(5) (2012)).

104. *Id.* The relevant portion affects 8 U.S.C. § 1252(a)(4) (2012). *See* Vladeck, *supra* note 10, at 1567 (explaining the congressional reasoning for passing the REAL ID Act).

105. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 310–11 (codified at 8 U.S.C. § 1252(a)(5) (2012)).

106. *Id.*

107. *Id.*; *see* Vladeck, supra note 10, at 1555 (discussing the effects of the provision).

108. H.R. REP. No. 109-72, at 176 (2005) (Conf. Rep.); *see* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.U. SCH. L. REV. 133, 137 n.17 (2006) (discussing the legislative history).

109. *See* Munaf v. Geren, 553 U.S. 674, 692 (2008) (explaining the challenge to military detention under FARRA); Trinidad y Garcia v. Thomas, 673 F.3d 952, 956–57 (9th Cir. 2012) (per curiam) (explaining the extradition challenge under FARRA).

III. The Foundational Cases

After the passage of FARRA, challenges under the statute arose in Guantanamo Bay detainee release cases and ordinary extradition proceedings.[110] The Supreme Court's holdings in two 2008 Guantanamo-related cases examined detainee release challenges based on the unlawful nature of such a transfer.[111] These cases, however, set the stage for the challenges in the extradition context under FARRA.[112] The following Part will consider the cases and their impacts in turn.

A. The D.C. Circuit's Guantanamo Jurisprudence

After the September 11, 2001 attacks, Congress enacted the Authorization of Use of Military Force (AUMF),[113] granting authority to the President of the United States to use "necessary and appropriate force" against the individuals, nonstate actors, groups, or organizations responsible for and involved in the attacks.[114] Under AUMF, the government detained hundreds of terrorism suspects and sent them to the detention facility at the U.S. Naval Station in Guantanamo Bay.[115] But after a few years of confinement without criminal charges, this form of detention led to complaints.[116]

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110. *See supra* note 109 (discussing two contexts raising FARRA claims).

111. *See* Boumediene v. Bush, 553 U.S. 723, 793 (2008) (holding that Guantanamo Bay detainees are entitled to the writ of habeas corpus to challenge their detention); *Munaf*, 553 U.S. at 689–90 (holding that the Court could not prevent the transfer of detainees in the custody of the U.S. military to Iraqi authorities to stand trial for alleged crimes).

112. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 956–57 (9th Cir. 2012) (per curiam) (examining FARRA in the context of the proposed extradition of Trinidad to the Philippines).

113. Authorization of Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2012)).

114. Boumediene v. Bush, 553 U.S. 723, 733 (2008) (citing S.J. Res. 23, 107th Cong. (2001) (enacted)).

115. *Guantanamo Bay Naval Base (Cuba)*, N.Y. TIMES, Apr. 25, 2011, http://topics.nytimes.com/top/news/national/usstatesterritoriesandpossessions/guantanamobaynavalbasecuba/index.html, (last visited Oct. 10, 2013) (on file with the Washington and Lee Law Review).

116. Jennifer L. Milko, *Separation of Powers and Guantanamo Detainees: Defining the Proper Roles of the Executive and Judiciary in Habeas Cases and*

In 2002, some detainees at Guantanamo Bay began to file habeas petitions to challenge their status and detention.[117] After the U.S. District Court for the District of Columbia dismissed detainees' petitions on the basis that they lacked jurisdiction, the Supreme Court reversed that decision, ruling that district courts do possess jurisdiction to hear detainees' habeas petitions.[118]

In response, the government implemented necessary due process procedures to enhance the legal legitimacy of the detentions.[119] Combatant Status Review Tribunals (CSRTs) were developed and tasked with deciding whether Guantanamo detainees were in fact "enemy combatants"—the requisite standard to lawfully detain a person.[120]

Congress followed suit in attempting to circumvent the Supreme Court's ruling and facilitate the continuing detentions at Guantanamo Bay, passing the Detainee Treatment Act (DTA) in 2005.[121] DTA effectively stripped the courts of federal habeas jurisdiction to hear claims of Guantanamo detainees,[122] and granted the Court of Appeals for the D.C. Circuit exclusive jurisdiction to review CSRT decisions.[123] After the Supreme

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the Need for Supreme Guidance, 50 DUQ. L. REV. 173, 176 (2012).

117. *See Boumediene*, 553 U.S. at 734 (holding that the district courts had jurisdiction to hear detainee habeas petitions, which they had a constitutional right to file).

118. *See id.* (reviewing the legislative history in the *Boumediene* case).

119. *See id.* (explaining the government-instituted procedures implemented to create a solid legal basis for detention).

120. *See In re* Guantanamo Detainee Litigation, 581 F. Supp. 2d 33, 36 (D.D.C. 2008), *rev'd sub nom.* Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010) (per curiam), *reinstated as amended*, Kiyemba v. Obama, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *cert. denied*, 131 S. Ct. 1631 (2011) (discussing the use of CSRTs and the standards they employ). The D.C. District Court defined an "enemy combatant" as "an individual who was part of or supporting the Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." *Guantanamo Detainee Litigation*, 581 F. Supp. 2d at 36; *see also* Milko, *supra* note 116, at 177 n.21 (discussing the CSRTs and the enemy combatant standard).

121. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (codified as amended in various sections of titles 10, 28, and 42 U.S.C.).

122. *See* Boumediene v. Bush, 553 U.S. 723, 735 (2008) (discussing the congressional motive behind the passage of the DTA and DTA's effects on jurisdiction).

123. *See id.* at 735 (discussing the effects of the DTA).

Court ruled that DTA did not apply to petitions currently pending before the district court,[124] Congress responded by passing the Military Commissions Act (MCA) of 2006,[125] Section 7 of which stripped federal jurisdiction from pending and future Guantanamo detention and transfer cases.[126] In passing the MCA—and particularly Section 7—Congress set the stage for the Court's landmark 2008 ruling in *Boumediene*.[127]

In *Boumediene*, six Algerians detained at Guantanamo Bay—due to their alleged connections to al Qaeda or the Taliban and their alleged plot to attack the U.S. Embassy in Sarajevo[128]— petitioned the D.C. District Court for a writ of habeas corpus to challenge their detention, which the court denied.[129] The Supreme Court took the case on appeal[130] and on June 12, 2008, in a 5–4 decision, ruled that Lakhdar Boumediene and other prisoners held by the U.S. military at Guantanamo Bay possess a constitutional right to challenge their detention in the U.S. court system through a habeas petition.[131] Habeas forces the government to justify the individual's continued detention,[132] and further requires a prisoner be provided "a *meaningful opportunity* to demonstrate that he is being held pursuant to the erroneous application or

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124. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 576–77 (2006) (holding that the DTA does not apply to petitions currently pending before the district court).

125. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in various sections of titles 10, 18, and 28 U.S.C.).

126. Military Commissions Act of 2006 § 7(a)(2), Pub. L. No. 109-366, 120 Stat. 2600, 2635–36 (2006) (codified as amended 28 U.S.C. § 2241 (2006)); *see also Boumediene*, 553 U.S. at 735 (detailing the effects of the MCA on jurisdiction).

127. *See* Milko, *supra* note 116, at 178 (explaining how the passage of the MCA led the way for the detainees' petition in *Boumediene*, challenging their detention in U.S. court).

128. Boumediene v. Bush, 553 U.S. 723, 734 (2008).

129. *See id.* (discussing the history of the Algerian detainees' petition).

130. *Id.* at 735–36.

131. *See id.* at 771 ("Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention."). The Court held this privilege to be constitutional and it is not to be withdrawn "except in conformance with the Suspension Clause." *Id.* at 732.

132. *Id.*

interpretation of relevant law."[133] The Court explained that the habeas court must "have the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy."[134] Instead, the current review procedures employed by the DTA served as an insufficient substitute based on the historical nature of the Great Writ.[135] Further, Section 7 of the MCA unconstitutionally suspended the writ without providing an adequate alternative, impermissibly violating the Suspension Clause, which the Court held "has full effect" for Guantanamo detainees.[136] Though heralded as a monumental win for detainees, the Court had more to come.[137]

In its second landmark decision on June 12, 2008, *Munaf v. Geren*, the Court unanimously held that a federal judge has no power to enjoin U.S. military forces in Iraq from turning over two U.S. citizens for criminal prosecution in Iraqi courts.[138] Here, the two petitioners, Shawqi Ahmad Omar and Mohammed Munaf, separately requested the D.C. District Court to enjoin their transfers because they feared that they would be mistreated or tortured in Iraqi custody.[139] The

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133. *Id.* at 779 (citation omitted) (emphasis added).

134. Boumediene v. Bush, 553 U.S. 723, 792 (2008). Under what was then the current review process under DTA, courts of appeal could not examine evidence outside the CSRT record, preventing them from considering any evidence unavailable at the time of the initial CSRT hearing. *Id.* at 789–90. The Supreme Court found this "troubling." *Id.* at 787–88. The Court also found disconcerting the lack of language in the DTA permitting the remedy of release, but the Court determined such a remedy could be implied from the language of the statute. *Id.*

135. *See id.* (explaining the insufficiency of review under the DTA).

136. *Id.* at 792.

137. *See* Milko, *supra* note 116, at 179 (arguing that the *Boumediene* decision was a positive statement of detainee rights).

138. *See* Munaf v. Geren, 553 U.S. 674, 698–99 (2008) ("Rather, 'the same principles of comity and respect for foreign sovereigns that preclude judicial scrutiny of foreign convictions necessarily render invalid attempts to shield citizens from foreign prosecution in order to preempt such nonreviewable adjudications.'" (quoting Omar v. Harvey, 479 F.3d 1, 17 (D.C. Cir. 2007) (Brown, J., dissenting in part) (quotations omitted))).

139. *See id.* at 700 ("Petitioners contend that these general principles are trumped in their cases because their transfer to Iraqi custody is likely to result in torture."); Vladeck, *supra* note 10, at 1550–51 (discussing the two separate habeas petitions from Omar and Munaf). The pair's petitions were consolidated

Supreme Court found the detainees' status in U.S. military custody sufficient to trigger federal habeas jurisdiction.[140]

Regarding petitioners' claims of transfer leading to torture and mistreatment, the Court deferred to the Solicitor General, accepting his statements "that it is the *policy* of the United States *not* to transfer an individual in circumstances where torture is likely to result,"[141] and that "the [U.S.] State Department has determined that the [Iraqi] Justice Ministry—the department that would have authority over Munaf and Omar—as well as its prison and detention facilities have generally met internationally accepted standards for basic prisoner needs."[142]

Finally, the Court turned to whether FARRA might otherwise entitle petitioners to a statutory remedy, but did not rule on the issue because the petitioners failed to properly raise it.[143] Thus, the Government prevailed: "[t]he Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and under the Government's ability to speak with one voice in this area."[144]

B. A Lasting Legacy: Beyond the War on Terror and into Ordinary Extradition

Lower court judges read Chief Justice Roberts's language in *Munaf* as a forceful directive not to second-guess the government's judgment about the necessity of detention for

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for oral argument. *Id.* at 1552.

140. *Munaf*, 553 U.S. at 686–88.

141. *Id.* at 702 (emphasis added).

142. *Id.* (quotations omitted).

143. *See id.* at 703 (stating that FARRA might provide the petitioners with a statutory remedy, but declining to decide the issue); Vladeck, *supra* note 10, at 1554 (explaining that the Supreme Court acknowledged a potential remedy under FARRA, but did not answer the question). This seemed a bit ironic, as the parties barely addressed the merits of the case at oral argument or in their briefs, instead focusing on the jurisdiction issue before the Court. *Id.* at 1554–55. While the Court proceeded to decide the merits anyway, it sidestepped the FARRA claims for want of proper pleading. *Id.*

144. Munaf v. Geren, 553 U.S. 674, 702 (2008).

prisoners *anywhere* and in *any* context[145]—including extradition.[146] After the Supreme Court's decisions in *Boumediene* and *Munaf*, the D.C. District Court and the D.C. Circuit considered over 200 habeas petitions filed on behalf of Guantanamo detainees.[147] By 2011, a clear trend emerged.[148] Detainees prevailed in the majority of cases in the D.C. District Court, which read *Boumediene* to grant detainees power to effectuate their release from U.S. custody, or to require that they receive notice that the government plans to transfer them to a foreign country before that transfer can occur.[149] But the government denied the habeas petitions, and the D.C. Circuit Court, interpreting *Munaf* to require it to defer to the Executive Branch,[150]

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145. *See id.* (stating that the court should not second-guess Executive Branch determinations on the need for detention); Lyle Denniston, Munaf*'s Impact Widens Again*, SCOTUSBLOG (June 10, 2012, 8:18 AM), http://www.scotusblog.com/2012/06/munafs-impact-widens-again/ (last visited Mar. 7, 2013) (discussing *Munaf*'s effects on lower courts) (on file with the Washington and Lee Law Review).

146. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 956–57 (9th Cir. 2012) (per curiam) (explaining that once the Secretary declares torture unlikely, the inquiry comes to an end).

147. Linda Greenhouse, *Justices, 5–4, Back Detainee Appeals for Guantanamo*, N.Y. TIMES, June 13, 2008, http://www.nytimes.com/2008/06/13/washington/13scotus.html (last visited Feb. 25, 2013) (on file with the Washington and Lee Law Review).

148. *See* Lyle Denniston, Boumediene: *The Record So Far*, SCOTUSBLOG (Jan. 2, 2011, 11:44 PM), http://www.scotusblog.com/2011/01/boumediene (last visited Feb. 25, 2013) (arguing for a trend in the Guantanamo Bay detainee rights cases) (on file with the Washington and Lee Law Review).

149. *See id.* (explaining the reading of *Boumediene* by the D.C. District Court as one that mandated the release of many detainees); Greenhouse, *supra* note 147 (stating that detainees were at least entitled to receive notice of their transfer prior to its occurrence).

150. *See* Denniston, *supra* note 145 (discussing the result of detainee petitions after review beyond the D.C. District Court). Despite numerous petitions for certiorari to the U.S. Supreme Court, the Court never reached the merits, denying certiorari in most cases and leaving the D.C. Circuit desperately in need of guidance and clarification. *Id*. The Supreme Court failed to address the merits of all eight certiorari petitions on Guantanamo detainee issues at the end of the 2010 term. *Id.* Detainees filed new petitions each term on these issues and the courts' interpretation of the law. *Id.*; *see also* Milko, *supra* note 116, at 175 & n.14 ("At the end of the 2010 Supreme Court Term, all eight petitions for certiorari on various Guantanamo detainee issues failed to be addressed on the merits. Additional petitions for certiorari pertaining to detainees' rights and the D.C. Circuit's interpretation of the law on these matters continue to be filed." (citations omitted)). Some even claimed that today's cases serve as powerful evidence that

did not order the detainees' release.[151]

The Supreme Court, however, had not intended for the D.C. Circuit to adopt such a broad, deferential interpretation of its ruling in *Munaf*.[152] The Court viewed *Munaf* as a fact-specific, limited holding regarding foreign justice systems and individuals in a foreign country.[153] Under the D.C. Circuit's interpretation, however, the *Munaf* ruling began to be used as a transsubstantive rule, and its holdings began to seep into nonwar-related extradition cases as well.[154] In essence,

> whereas *Munaf* was an extradition case resting on circumstances-specific factual determination about the likelihood that the detainees faced mistreatment at the hands

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"judges are [now] effectively robo-signing habeas denials and rubber stamping government allegations." Press Release, Seton Hall Univ. Sch. of Law: Ctr. for Policy & Research, Seton Hall Law Report Reveals Courts Deny GTMO Habeas Relief and Fail to Reject Government Allegations at Unusually High Rates Since Appeals Court Decision in 2010 (May 2, 2012) (last visited Mar. 1, 2013), *available at* http://law.shu.edu/About/News_Events/releases.cfm? id=289524 (quoting Seton Hall University Law Professor and leading author of the cited report, Mark Denbeaux) (on file with the Washington and Lee Law Review).

151. Lyle Denniston, *Down to the Last on Detainees*, SCOTUSBLOG (May. 23, 2011, 10:55 AM), http://www.scotusblog.com/2011/05/down-to-the-last-on-detainees/ (last visited Oct. 5, 2013) (on file with the Washington and Lee Law Review). It is important to point out that many detainees were in fact released from Guantanamo; the U.S. State Department counted 520 detainees released from 2002–2008. News Release, U.S. Dep't of Def., Detainee Transfer Announced (Dec. 16, 2008), http://www.defenselink.mil/releases/release. aspx?releaseid=12394 ("Since 2002, approximately 520 detainees have departed Guantánamo . . . .") (on file with the Washington and Lee Law Review); Al-Marri v. Bush, No. Civ. A.04-2035(GK), 2005 WL 774843, at *4 (D.D.C Apr. 4, 2005) ("Several of the 65 [transferees] have been transferred to countries that our own State Department has acknowledged torture prisoners, including Pakistan, Saudi Arabia, and Morocco."). As of January 2013, the number of current detainees at Guantanamo is down to 166; 86 were cleared for release by the government in 2009, but still remain. Guantánamo by the Numbers, AM. CIV. LIBERTIES UNION (Dec. 27, 2012), http://www.aclu.org/national-security/guantanamo-numbers (last visited Mar. 3, 2013) (citing HUMAN RIGHTS WATCH and the N.Y. TIMES) (on file with the Washington and Lee Law Review).

152. *See* Munaf v. Geren, 553 U.S. 674, 686–88 (2008) (explaining that this case was different because the petitioner, in U.S. military custody, was not asking for release into Iraqi custody, but rather the exact opposite—shelter from Iraqi custody); Vladeck, *supra* note 10, at 1550 (discussing the limited holding of *Munaf*).

153. *See* Vladeck, *supra* note 10, at 1550 (discussing how the Supreme Court intended *Munaf* to have narrow effect).

154. *Id.*

> of a specific foreign sovereign (i.e., Iraq), the D.C. Circuit held that it also applied to preclude notice of judicial review of a detainee's involuntary non-criminal transfer to an as-yet-undetermined country about which no specific determinations could have been made.[155]

Thus, *Munaf's* "highly narrow analysis" became "a general rule purporting to bar judicial second-guessing of the executive branch in *any* case in which a detainee in U.S. custody faced transfer to the custody of a foreign sovereign."[156] The Court explained in *Munaf* that decisions requiring foreign policy expertise and diplomatic tools remain the prerogative of the Executive, allowing the government to speak with one voice without fear of judicial challenge.[157]

Additionally, Chief Justice Roberts left a caveat in his *Munaf* opinion: a more extreme case may arise that would warrant a different outcome.[158] Such a situation could take many forms, including: (1) one in which "the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway;"[159] (2) one in which "the probability of torture is well documented, . . . [but] the Executive fails to acknowledge it;"[160] or (3) one in which "the transfer process may be a ruse—and a fraud on the court—designed to maintain control over the detainees beyond the reach of the writ."[161] Regarding the final point, the D.C. Circuit intimated that transferees could establish such a case by presenting evidence contradicting recipient government assurances that they would not be tortured.[162] While such a situation might warrant a different holding, the Court in *Munaf*

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155. *Id.* at 1559 (citing Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509, 515 n.6 (D.C. Cir. 2009)).

156. *Id.* at 1559–60.

157. *See* Munaf v. Geren, 553 U.S. 674, 702 (2008) (explaining government transfer determinations based on assessment of the foreign country's legal system and the ability to obtain reliable diplomatic assurances).

158. *See id.* (explaining the caveat); *infra* notes 159–61 (same).

159. *Munaf*, 553 U.S. at 702.

160. *See id.* at 706 (Souter, J., concurring) (explaining an additional situation that he would extend the Chief Justice Roberts' caveat to cover as an extreme case not addressed by the Court's holding in *Munaf*).

161. Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509, 521 n.7 (D.C. Cir. 2009).

162. *See id.* (suggesting that detainees might be able to combat government assurances).

did not provide an answer for a case on those facts.[163] Further, the D.C. Circuit stopped short of declaring the judiciary powerless to intervene, thereby leaving room to grant greater judicial inquiry into the soundness of the government assurances in some situations.[164]

The Ninth Circuit faced one such extradition case potentially qualifying for greater judicial inquiry in *Trinidad y Garcia v. Thomas* in 2012.[165] The Philippines sought extradition of Hedelito Trinidad y Garcia in connection with his alleged participation in a kidnap-for-ransom conspiracy.[166] *Garcia* asked whether courts may inquire into Executive Branch assurances that an individual facing extradition will not be tortured by the country to which his extradition is being sought.[167] Sitting en banc, the Ninth Circuit held that, although federal courts have jurisdiction to hear such a habeas petition, the courts may not provide relief from extradition so long as the Secretary of State complies with her statutory and regulatory obligations.[168]

The Secretary must examine whether it is "more likely than not" that the extraditee will be tortured upon return.[169] If she does not have evidence to meet the "more likely than not" standard, she must certify, through the filing of a formal

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163. *See* Munaf v. Geren, 683 F.3d 674, 703 (2008) (presenting the situation but declining to answer it in the *Munaf* case).

164. *See Kiyemba II*, 561 F.3d at 514 n.5 (noting that while more extreme cases may exist where the "executive has determined that a detainee is likely to be tortured but decides to transfer him anyway," neither this case, nor *Munaf*, is such a case).

165. Trinidad y Garcia v. Thomas, 683 F.3d 952, 952 (9th Cir. 2012) (per curiam).

166. *Garcia* Brief of Appellee, *supra* note 93, at *5.

167. *See Garcia*, 683 F.3d at 957 (discussing the question presented). Judge Berzon framed Trinidad's claim: "because the FARR Act prohibits extradition if, on the information available to the Secretary, he more likely than not will be tortured, the Secretary's decision to extradite him would be illegal under positive, Congressionally enacted federal law." *Id.* at 987 (Berzon, J., concurring in part and dissenting in part).

168. *See id.* at 957 (majority opinion) (stating that if the Secretary declares that it is not "more likely than not" that torture will occur, "the court's inquiry shall have reached its end and Trinidad y Garcia's liberty interest shall be fully vindicated"). This accords with State Department regulations. 22 C.F.R. § 95.4 (2012) ("Decisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review.").

169. 22 C.F.R. § 95.4.

document, that the extraditee in question will not be tortured upon return.[170] According to the *Garcia* majority, such a declaration fulfills the extraditee's liberty interest and forecloses further review despite any evidence the extraditee may have to counter the veracity of the State Department's negotiated assurances that the transferee will not be tortured.[171]

By expressly foreclosing any supervisory role and declaring "[t]o the extent that we have previously implied greater judicial review of the substance of the Secretary's extradition decision other than compliance with her obligations under domestic law, . . . we overrule that precedent,"[172] the Ninth Circuit denied Trinidad any opportunity to rebut the Secretary's assurances.[173] Moreover, the court refused to address the specific substantive claims that the extraditee raised under CAT/FARRA.[174]

Several factors indicate that Trinidad's case warranted judicial review under Chief Justice Roberts's *Munaf* caveat.[175] First, while U.S. courts refrain from evaluating the strength of the case or the criminal justice system of a foreign country when considering extradition requests,[176] the Philippine government's evidence supporting its extradition request hardly implicated Trinidad.[177] As the U.S. magistrate judge in the case acknowledged, "if the matter rested on [this] evidence . . . alone,

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170. *Id.*

171. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 957 (9th Cir. 2012) (per curiam) (holding that the Secretary's declaration ends the inquiry).

172. *Id.* (citations omitted).

173. *See id.* (holding that Trinidad would not be allowed to present evidence to rebut the Secretary's determination based on 22 C.F.R. § 95.2 (2012)).

174. *Id.*

175. *See* Munaf v. Geren, 553 U.S. 674, 702 (2008) (suggesting that there might be "more extreme case[s] in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway").

176. *See* Mironescu v. Costner, 480 F.3d 664, 668–68 (4th Cir. 2007) ("[U]nder what is called the rule of non-inquiry in extradition law, courts in this country refrain from examining the penal systems of requesting nations, leaving to the Secretary of State determinations of whether the defendant is likely to be treated humanely." (citing *Lopez–Smith v. Hood,* 121 F.3d 1322, 1327 (9th Cir. 1997)) (quotations omitted)).

177. *See Garcia* Brief of Appellee, *supra* note 93, at *5–9 (reviewing the evidence presented by the Philippines as its basis for requesting Trinidad's extradition). Among other issues, this included a coerced confession implicating Trinidad that the court later threw out, and a highly suspect identification. *Id.*

the court would be hard pressed to find that there was a sufficient showing of probable cause connecting Trinidad to the crime."[178] More importantly, Trinidad presented six volumes of exhibits to support his CAT/FARRA claim that he credibly feared torture in the Philippines.[179] "These records, consisting of court documents, police reports, sworn testimonies, and human rights reports, established the Philippines Government's systemic use of torture."[180] From detailed accounts of horrific treatment and brutal techniques used on Trinidad's alleged coconspirators,[181] to reports of gross and flagrant human rights violations, including the prolific use of summary execution,[182] the veracity of Trinidad's claim seemed clear.[183] Nonetheless, the Secretary of State denied Trinidad's requests for a CAT/FARRA hearing and an opportunity to review and rebut evidence offered by the Philippines Government, stating: "there is no formal hearing process for this decision [to extradite]."[184] With that solitary explanation, Trinidad ran out of options.[185]

But the Ninth Circuit's opinion in *Garcia* created a circuit split.[186] Federal courts disagreed on whether they possess the authority to even *hear* challenges to extradition orders or FARRA-based transfer challenges.[187] The Ninth Circuit, in *Garcia*, ruled that federal courts do possess such authority, a

178. *Id.* at *9.

179. *Id.* at *14.

180. *Id.* Many of the reports came from the U.S. State Department. *See id.* (detailing the source of the reports on human rights in the Philippines).

181. *See id.* at *15–24 (detailing shootings, suffocations, beatings, and executions).

182. *Garcia* Brief of Appellee, *supra* note 93, at *23. These reports came from the U.S. State Department, Amnesty International, and the Philippine Government's own Commission on Human Rights. *Id.*

183. *See id.* at *15–24 (arguing that the extensive documentation of torture in the Philippines and of Trinidad's alleged coconspirators made it very likely Trinidad would be tortured).

184. *Id.* at *24.

185. Trinidad y Garcia v. Thomas, 683 F.3d 952, 952 (9th Cir. 2012) (per curiam). This was truly the end for Trinidad, as the Supreme Court denied certiorari on January 7, 2013. Trinidad y Garcia v. Thomas, 133 S.Ct. 845, 845 (2013).

186. *See supra* note 25 (discussing the circuit split on the question of whether federal habeas jurisdiction exists to consider CAT and FARRA claims).

187. *See supra* note 25 (discussing the circuit split).

departure from the Fourth and the D.C. Circuits' rulings in *Mironescu*[188] and *Omar II* denying federal courts' habeas jurisdiction over extraditions or FARRA-based transfer challenges.[189] But as the Supreme Court has cautioned, a judicial determination that a statute precludes habeas review should not be lightly concluded.[190] This Note will argue that the Fourth and the D.C. Circuits came to the incorrect conclusion.

IV. Establishing Federal Courts' Jurisdiction over FARRA Challenges to Detainee Extradition Orders

Garcia created a circuit split between the Ninth Circuit on one hand and the Fourth and D.C. Circuits on the other[191] as to "whether Congress can strip the courts of habeas jurisdiction to consider a statutory claim [under CAT/FARRA] that a transfer is unlawful."[192] The Fourth and D.C. Circuits held that FARRA stripped federal courts of habeas jurisdiction over CAT/FARRA claims because FARRA and the REAL ID Act provide a sufficiently "clear statement" of intent to deprive courts of such jurisdiction.[193] As this Part will argue, the Ninth Circuit in *Garcia* correctly held the opposite: FARRA and the REAL ID Act fail to provide such a statement, thus retaining federal courts' jurisdiction over CAT/FARRA challenges.[194]

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188. Mironescu v. Costner, 480 F.3d 664, 674 (4th Cir. 2007).

189. *See supra* note 25 (discussing the circuit split); *infra* Part IV (same).

190. *See* INS v. St. Cyr, 533 U.S. 289, 299 (2001) (stating that a decision that a statute strips the availability of habeas review should be avoided if possible); Demore v. Kim, 538 U.S. 510, 517 (2003) (same).

191. *Compare* Trinidad y Garcia v. Thomas, 683 F.3d 952, 952 (9th Cir. 2012) (per curiam) (holding that FARRA/REAL ID Act do not strip federal habeas jurisdiction), *with* Omar v. McHugh (*Omar II*), 646 F.3d 13, 17, 18 (D.C. Cir. 2011) (holding that FARRA/REAL ID Act do strip the courts of habeas jurisdiction), *and* Mironescu v. Costner, 480 F.3d 664, 674 (4th Cir. 2007) (same).

192. *Omar II*, 646 F.3d at 26 (Griffith, J., concurring).

193. *See id.* at 17, 18 (majority opinion) (holding that FARRA and the REAL ID Act strip the courts of habeas jurisdiction); *Mironescu*, 480 F.3d at 674 (same).

194. *Garcia*, 683 F.3d at 956.

A. Omar II *and* Mironescu*: Attempts to Limit Jurisdiction to Final Orders of Removal*

In *Omar II*, the D.C. Circuit read FARRA and the REAL ID Act as divesting federal courts of habeas jurisdiction over CAT/FARRA claims.[195] The Supreme Court ruled on Shawqi Omar's first habeas petition[196] as part of its *Munaf* decision[197] that it could not stop Omar from being turned over to Iraqi authorities for prosecution.[198] Following that decision, Omar amended his petition to claim that FARRA and the REAL ID Act granted him a statutory and constitutional right to judicial review of conditions affecting his potential likelihood of being tortured in Iraqi custody prior to his transfer to that country for prosecution.[199]

Ignoring previous circuit court decisions finding that FARRA could be enforced through habeas,[200] the D.C. Circuit in *Omar II*

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195. *See Omar II*, 646 F.3d at 17 ("[Th]is Court has already held that the FARR Act, as supplemented by the REAL ID Act of 2005, does not give military transferees such as Omar that right.").

196. *Id.* The D.C. Circuit recounted Omar's situation:

> Shawqi Omar is a dual citizen of Jordan and the United States. Since 2004, the U.S. military has detained Omar in Iraq based on evidence that Omar participated in al Qaeda's terrorist activities there. The United States apparently intends to transfer Omar to the custody of Iraq's government. But since 2005, Omar has pursued a habeas corpus petition in the U.S. court system seeking to block his transfer.

Id. at 14.

197. Omar v. McHugh (*Omar II*), 646 F.3d 13, 15–16 (D.C. Cir. 2011); *see* Munaf v. Geren, 553 U.S. 674, 692–703 (2008) (discussing Omar's initial habeas petition where he claimed: (1) habeas and due process rights against transfer if he was likely to be tortured upon removal, and (2) "right to judicial review of conditions in the receiving country before he could be transferred" (quoting *Omar II*, 646 F.3d at 15)). The Supreme Court unanimously rejected Omar's arguments in 2008. *Id.*

198. *See Munaf*, 553 U.S. at 702 (stating that the Court could not prevent Omar and Munaf from being turned over to Iraqi authorities to be tried for alleged violations of Iraqi law).

199. *See Omar II*, 646 F.3d at 15 (laying out Omar's arguments in his amended petition).

200. *See* Vladeck, *supra* note 10, at 1564 ("[T]he D.C. Circuit nevertheless ignored other circuit court decisions holding that FARRA could be enforced via habeas . . . ."). *See, e.g.,* Saint Fort v. Ashcroft, 329 F.3d 191, 193 (1st Cir. 2003); Wang v. Ashcroft, 320 F.3d 130, 141 (2d Cir. 2003) (holding that FARRA could be enforced through habeas); Ogbudimkpa v. Ashcroft, 342 F.3d 207, 209 (3d Cir. 2003) (same); Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1007 (9th Cir.

read § 2242(d) of FARRA to provide "a right to judicial review of conditions in the receiving country *only in the immigration context*, for aliens seeking review of a *final order of removal*."[201] According to the D.C. Circuit, Omar's status as a detainee in U.S. military custody facing transfer—"not an alien seeking review of a final order of removal under the immigration laws"—prevented him from receiving any right to judicial review of conditions in Iraq under FARRA.[202] Claiming FARRA never conferred a substantive right allowing challenges to detainee transfer cases other than in the context of removal proceedings, the D.C. Circuit concluded that the jurisdictional issue in the FARRA context was moot.[203]

The D.C. Circuit further reasoned that the 2005 REAL ID Act deprived extraditees and military transferees of any hypothetical substantive right to have their claims heard.[204] The court read the REAL ID Act as restricting the right to judicial review to immigration transferees seeking review of their final removal orders.[205] Because Omar was "not subject to a removal order and ha[d] not filed—and, as a military transferee, [was] not eligible to file—a petition for review under section 242 of the Immigration and Nationality Act," the REAL ID Act supported the court's conclusion that Omar "possesse[d] no statutory right to judicial review of conditions in the receiving country."[206]

2000) (same). *See generally* Stephen I. Vladeck, Comment, *Non-Self-Executing Treaties and the Suspension Clause After* St. Cyr; Ogbudimkpa v. Ashcroft, 113 YALE L.J. 2007, 2008–11 (2004) (discussing the rationale behind the court of appeals holdings that interpreted FARRA to avoid divesting federal courts of habeas jurisdiction).

201. *Omar II*, 646 F.3d at 17 (emphasis added).

202. *Id.* at 17–18; Mironescu v. Costner, 480 F.3d 664, 674–76 (4th Cir. 2007) (holding that FARRA only allows claims by immigration detainees facing a final order of removal); *Munaf*, 553 U.S. at 703 n.6 (explaining that "claims under the FARR Act may be limited to certain immigration proceedings").

203. Omar v. McHugh (*Omar II*), 646 F.3d 13, 21–22 (D.C. Cir. 2011).

204. *Id.* at 22–23.

205. *See id.* at 22 ("REAL ID Act merely confirmed what the FARR Act said—that only immigration transferees may obtain judicial review of conditions in the receiving country."); REAL ID Act of 2005, Pub. L. No. 109-13, § 1252(a)(4), 119 Stat. 231, 310–11 (codified at 8 U.S.C. § 1252(a)(5) (2012)).

206. *Omar II*, 646 F.3d at 18.

In 2007, the Fourth Circuit reached a similar conclusion in *Mironescu*.[207] Petru Mironescu, who was wanted by Romanian authorities on automobile theft charges, filed a habeas petition asking the court to block his extradition on the grounds that he faced a credible threat of torture.[208] The Fourth Circuit denied his petition, holding that the REAL ID Act, in conjunction with § 2242(d) of FARRA, deprived federal courts of habeas jurisdiction to hear claims under CAT and FARRA.[209]

But not all circuits agreed with the Fourth and D.C. Circuits' conclusions.[210] Some looked to alternative statutory interpretations, the historic uses for writs of habeas corpus, and customary international law[211] in arriving at the common, critical conclusion that federal courts possess jurisdiction to hear extraditees' CAT and FARRA claims.[212]

B. Garcia *and Beyond: The Case for Federal Jurisdiction*

Contrary to the Fourth and D.C. Circuits' holdings, the Ninth Circuit found in *Trinidad y Garcia v. Thomas* that federal courts have jurisdiction over extradition cases raising challenges to their transfer under FARRA.[213] The Ninth Circuit held that FARRA

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207. *See infra* notes 208–09 (providing a summary of *Mironescu*).

208. Mironescu v. Rice, No. 05-683, 2006 WL 167981, at *1 (M.D.N.C. Jan. 20, 2006).

209. *See* Mironescu v. Costner, 480 F.3d 664, at 673–77 (4th Cir. 2007)

> This [Section 2242(d)] language plainly conveys that although courts may consider or review CAT or FARR Act claims as part of their review of a final removal order, they are otherwise precluded from considering or reviewing such claims. As Mironescu presents his claim as part of his challenge to extradition, rather than removal, § 2242(d) clearly precluded the district court from exercising jurisdiction.

210. *See supra* note 25 (discussing the circuit split).

211. *See infra* Part IV.B (discussing customary international law).

212. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 956 (9th Cir. 2012) (per curiam) (holding that the court does possess jurisdiction to entertain Trinidad's habeas petition: "Neither the REAL ID Act (8 U.S.C. § 1252(a)(4)) nor FARRA (8 U.S.C. § 1231 note) repeals all federal habeas jurisdiction over Trinidad y Garcia's claims").

213. *Id.* at 956–57.

lacks a clear intent to strip federal courts' jurisdiction over such challenges,[214] and the court interpreted the REAL ID Act as "confined to addressing final orders of removal, without affecting federal habeas jurisdiction [in extradition cases]."[215] It thus concluded that the "plausible alternative statutory construction" preserved federal habeas jurisdiction to hear detainee extradition challenges.[216]

Four factors confirm the validity of the Ninth Circuit's holding in *Garcia*. First, courts assume that a statute's language accurately reflects the drafters' intent.[217] Thus, as a general rule of statutory interpretation, courts attempt to enforce the literal meaning of a statute.[218] They realize, however, that this assumption might not be accurate because of imperfections in the drafting process.[219] Linguistic flaws and ambiguities demand that courts apply canons of interpretation in order to preserve the law's intent.[220] Thus, to preserve the law's intent, courts "consider the history of the subject matter involved, the end to be attained . . . and the purpose to be accomplished" in deciding how to apply the law.[221] Congress passed FARRA to align domestic law with U.S. obligations under CAT.[222] CAT, and thus FARRA,

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214. *Id.*

215. *Id.* (citing Nadarajah v. Gonzales, 443 F.3d 1069, 1076 (9th Cir. 2006)).

216. *Id.*

217. *See* 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:1 (7th ed. 2007) ("When the intention of the legislature is so apparent from the face of a statute that there can be no question as to its meaning, there is no room for construction."); Landon Wade Magnusson, *Tying Off Loose Ends: Protecting American Citizens From Torture Beyond America's Borders*, 15 YALE HUM. RTS. & DEV. L.J. 19, 41 (2012) (discussing the way courts interpret a law's intentions to achieve the spirit of the law).

218. *See supra* note 217 and accompanying text (discussing rules of statutory interpretation).

219. *See* 2A SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 217, § 45:2 ("Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses."); Magnusson, *supra* note 217, at 41 (discussing the imperfections created by drafters in crafting statutes).

220. Magnusson, *supra* note 217, at 41 (discussing judicial use of canons of construction as means to ensure they preserve the intent of a law).

221. 2A SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 217, § 45:5 (citing Garcia v. United States, 469 U.S. 70, 75 (1984)).

222. 136 CONG. REC. 36,198 (1990); *see supra* note 91 (discussing reasons for FARRA's passage).

demonstrates a clear intent to eradicate and prevent all forms of torture worldwide, including transfers of persons to places posing a risk of torture.[223] CAT's Article 3 prohibition of such transfers is "general and unlimited: [w]ithout exception, a signatory country may not extradite a person likely to face torture."[224] Therefore, restricting FARRA claims to final orders of removal creates a loophole that would prevent individuals facing extradition from challenging their impending transfers, thereby preventing the law's intent to eradicate torture.[225]

The second factor that confirms the Ninth Circuit's *Garcia* holding is its compliance with relevant international law,[226] under which the list of universally accepted customs that rise to the level of enforceable law includes several abhorrent practices, including genocide, slavery, and torture.[227] Customary international law goes further as well, recognizing the principle of nonrefoulement, which forbids states from transferring individuals in its custody to a state practicing torture.[228]

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223. *See* Comm'n on Human Rights, Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 5, U.N. Doc. E/CN.4/1984/72 (Mar. 9, 1984) (discussing the intent of CAT and FARRA); J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 1 (1988) ("The principal aim of the Convention is to strengthen the existing prohibition of [torture and other cruel, inhuman or degrading treatment or punishment] by a number of supportive measures."); Magnusson, *supra* note 217, at 39, 41 (discussing CAT's goals as evidenced by accompanying documents).

224. Trinidad y Garcia v. Thomas, 683 F.3d 952, 986 (9th Cir. 2012) (Berzon, J., concurring in part and dissenting in part).

225. *See, e.g.*, Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509, 514–15 (D.C. Cir. 2009) (restricting FARRA claims to challenges to a final order removal handed down in immigration cases).

226. *See* GAIL H. MILLER, DEFINING TORTURE 3 (2008), http://www.cardozo.yu.edu/cms/uploadedFiles/FLOERSHEIMER/Defining%20Torture.pdf ("Under customary international law, the prohibition of torture is *jus cogens*—a peremptory norm that is non-derogable under any circumstances. It is binding on all nations. This elevated status within international law places torture on par with slavery and genocide." (citations omitted)); Magnusson, *supra* note 217, at 47–48 (discussing how an interpretation of FARRA that allows for the transfer of individuals within U.S. custody to a foreign sovereign practicing torture violates international law).

227. MILLER, *supra* note 226, at 3.

228. *See* Magnusson, *supra* note 217, at 48 n.191 (discussing the origination

Additionally, U.S. law emphasizes under the *Charming Betsy* canon that, "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."[229] Therefore, FARRA and the REAL ID Act provisions interpreted to restrict federal habeas jurisdiction in immigration cases to final orders of removal—thereby denying potential extraditee challenges under the Acts—run contrary to international law.[230]

Third, the D.C. and Fourth Circuits' conclusion that FARRA or the REAL ID Act removes federal habeas jurisdiction in extradition challenge cases is unconstitutional.[231] The Constitution's framers designed the Suspension Clause to incorporate the broadly utilized common law writ of habeas corpus as a baseline,[232] thus encouraging robust inquiry into potential transfers of detainees.[233] As such, the Suspension Clause must encompass the jurisdiction of federal courts to issue writs of habeas corpus in extradition- and FARRA-based transfer challenges,[234] unless an adequate alternative for hearing such

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of nonrefouler in the refugee context before its expansion into international law by CAT, and its recent application in England).

229. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114 (1987); *see also* Murray v. The Charming Betsy, 6 U.S. 64, 118 (1804) (stating that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

230. *See* Vladeck, *supra* note 10, at 1563–64 (discussing the discrepancy created by "final order of removal" in both FARRA and the REAL ID Act).

231. *See* Brief of Legal Historians, *supra* note 59, at 17 n.4

> The [Ninth Circuit] Court of Appeals held [in *Garcia*] that such authority in this case comes from the federal habeas statute, and that neither FARRA nor the REAL ID Act of 2005 provided the requisite "clear statement" to divest the federal courts of such jurisdiction. Although *amici* agree with this analysis, the Suspension Clause discussion . . . undergirds this conclusion by demonstrating why a statute taking away such jurisdiction (without providing an adequate alternative) would be unconstitutional.

(citations omitted).

232. *See id.* at 16 (discussing the Suspension Clause's preservation of the common law nature of the writ).

233. *See id.* (discussing how incorporating the Suspension Clause as a baseline fosters vigorous inquiry into the conditions surrounding a potential transfer); *supra* Part II.A (discussing the history of habeas corpus and its uses).

234. *See* Brief of Legal Historians, *supra* note 59, at 16 (discussing the Suspension Clause's preservation of the common law nature of the writ).

challenges exists.[235] The D.C. and Fourth Circuits' interpretation of FARRA and the REAL ID Act in *Omar II* and *Mironescu* failed to provide a viable alternative judicial forum for extraditee challenges based on torture claims,[236] thereby rendering their interpretation of those Acts unconstitutional.[237]

Finally, it is worth noting that other circuit court judges have agreed with the Ninth Circuit's ruling in *Garcia* that FARRA does not remove federal courts' jurisdiction over extraditee challenge cases.[238] While the D.C. Circuit Court's *Omar II* majority reasoned that the use of the word "policy" instead of "right" in FARRA § 2242(a) evinced Congress's intent to foreclose detainees' constitutional habeas and procedural due process protections,[239] D.C. Circuit Court Judge Griffith's concurrence concluded otherwise:[240]

> When an American citizen is in U.S. custody, the Constitution's guarantee of habeas corpus entitles him to assert any claim that his detention or transfer is unlawful. Because Congress may not deprive Omar of access to the courts without suspending the writ or repealing the statutory [FARRA] basis for his claim, neither of which it has done here, we must consider his argument . . . .[241]

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235. *Id.*; *see Garcia* Brief of Appellee, *supra* note 93, at *55 ("Where Congress fails to provide an adequate substitute, the Suspension Clause is violated." (quotations omitted) (citing Boumediene v. Bush, 553 U.S. 723, 771–72 (2008))).

236. *See* Vladeck, *supra* note 10, at 1562 (detailing the Fourth Circuit's denial of habeas review for Mironescu without providing him another option to air his claims).

237. *See id.* (stating that the failure to provide an adequate alternative to habeas review violates the Suspension Clause).

238. *Infra* note 242.

239. *See* Brief of Legal Historians, *supra* note 59, at 22 n.7 (explaining the significance of word choice, according to the D.C. Circuit in *Omar II*).

240. *See* Omar v. McHugh (*Omar II*), 646 F.3d 13, 25–29 (D.C. Cir. 2011) (Griffith, J., concurring) ("I agree that the [FARRA] statute grants Omar, who is being held in Iraq by the U.S. military, no right against being transferred to Iraqi authorities, but I disagree with the majority's suggestion that we have no jurisdiction to consider his claim.").

241. *Id.*

Judge Griffith concluded, as several other circuits had,[242] that the Constitution required the court to hear a potential extraditee's claim that transfer would result in torture.[243]

The four factors discussed above provide a clear basis for establishing federal courts' jurisdiction over cases challenging extradition orders under CAT or FARRA.[244] Despite the D.C. and Fourth Circuits' rulings in *Omar II* and *Mironescu* denying federal jurisdiction in such cases, the Ninth Circuit's opposite holding on the issue of jurisdiction in *Garcia* accords most fully with FARRA's statutory intent, well-established international legal custom and its canonical application to U.S. law, and the historical uses for writs of habeas corpus enshrined in the Constitution's Suspension Clause.[245] As the following Part will argue, however, even the Ninth Circuit's *Garcia* ruling erred in failing to address substantively the merits of the petitioner's FARRA claim regarding his likelihood of being tortured after his removal from the United States.[246]

V. The Need for Substantive Review of Detainee Torture Claims Under FARRA

Garcia established a clear basis for federal courts' jurisdiction over extraditees' habeas petitions, but did not adopt a clear stance on how substantive a review must be granted to

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242. *See* Cadet v. Bulger, 377 F.3d 1173, 1182–83 (11th Cir. 2004) (finding jurisdiction); Ogbudimkpa v. Ashcroft, 342 F.3d 207, 215–18 (3d Cir. 2003) (same); Saint Fort v. Ashcroft, 329 F.3d 191, 200–02 (1st Cir. 2003) (same); Wang v. Ashcroft, 320 F.3d 130, 142 (2d Cir. 2003) (same); Cornejo Barreto v. Seifert (*Cornejo Barreto I*), 218 F.3d 1004, 1016 n.13 (9th Cir. 2000) (same). *But see* Mironescu v. Costner, 480 F.3d 664, 676 (4th Cir. 2007) (finding jurisdiction to be stripped); Cornejo Barreto v. Seifert (*Cornejo Barreto II*), 379 F.3d 1075, 1086 (9th Cir. 2004), *vacated as moot*, 389 F.3d 1307 (9th Cir. 2004) (en banc) (same).

243. *Omar II*, 646 F.3d at 25–29.

244. *See supra* Part IV.B (arguing for the circuit split to be resolved in favor of the *Garcia* conclusion).

245. *See supra* Part IV.A–B (laying out the circuit split and the argument for why *Garcia* comes to the best conclusion).

246. *See infra* Part V (arguing that courts need to review the merits of FARRA claims).

detainee torture concerns under FARRA.[247] Yet the Supreme Court's finding in *Boumediene* provides a clear indication that detainee torture concerns arising under FARRA necessitate a full substantive review on the merits of detainee claims.[248] An analysis of the rule of noninquiry's intended applications further strengthens this case for substantive review.

A. The Case for Meaningful Review

As noted above,[249] because the writ of habeas corpus is an adaptable remedy rather than a right, its application and scope depend on the circumstances of a specific case.[250] To properly consider the circumstances of an extraditee's case raising claims of potential torture, a court must meaningfully review the Executive's ability to lawfully extradite an individual who believes he will be tortured.[251] Deficiencies of the judicial

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247. *See* Brief of Legal Historians, *supra* note 59, at 17–18 (explaining that the Ninth Circuit reached the correct result as to jurisdiction in *Garcia* but neglected the substantive challenge a detainee might raise under FARRA). The Ninth Circuit held that federal courts *do* have authority to hear challenges to extradition or transfer based on FARRA; however, it limited that jurisdiction to a requirement that the Secretary of State file a declaration averring that it is *not* "more likely than not" that the petitioner will face torture upon removal. Trinidad y Garcia v. Thomas, 683 F.3d 952, 957 (9th Cir. 2012) (per curiam) (quoting 22 C.F.R. § 95.2 (2013) (emphasis added)). Once the Secretary files such a declaration, however, "the court's inquiry shall have reached its end," and petitioner receives no opportunity to rebut the Secretary's assurances. *Id.* This holding can be attributed to a misreading of the Supreme Court's decision in *Munaf*. *See* Brief of Legal Historians, *supra* note 59, at 20

> Notwithstanding *Boumediene*, the Court of Appeals held that a mere declaration by the Secretary (or her designee) that the petitioner will not be transferred to torture is the complete judicial review available to detainees in this context, based on a misreading of this Court's decision (on the same day as *Boumediene*) in *Munaf*. Whereas *Munaf* recognizes the need to accord appropriate deference to the Secretary's determination, nothing in *Munaf* suggests that such deference should be absolute—as the Court of Appeals concluded.

248. *See* Boumediene v. Bush, 553 U.S. 723, 779 (2008) (detailing the necessary review with reference to INS v. St. Cyr, 533 U.S. 289, 302 (2001)).

249. *Supra* Part II.

250. *See Boumediene,* 553 U.S. at 779 (reviewing the nature of habeas).

251. *See id.* at 783 ("The habeas court must have sufficient authority to conduct a meaningful review of *both* the cause for detention and the Executive's power to detain.").

proceeding certifying extraditability and the limited deference accorded to the Executive Branch in such cases require that courts conduct more expansive review.[252]

"[T]he common-law habeas court's role was most extensive in cases . . . where there had been little or no previous judicial review."[253] By analogizing habeas to procedural due process, the Court determined that "the necessary scope of habeas review in part depend[ed] on the rigor of any earlier proceedings."[254] In *Boumediene*, the only review of petitioner's indefinite military detention came from the CSRTs.[255] The Supreme Court, affirming the D.C. Circuit, considered the CSRTs' review insufficient to satisfy the "meaningful opportunity" for review required under the Suspension Clause:

> For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the [underlying] proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding.[256]

Similarly, in *Garcia*, the State Department "denied Trinidad an opportunity to review and rebut any evidence against him;"[257] his administrative proceedings, therefore, were similarly insufficient to those provided by the CSRTs in *Boumediene*.[258] Such closed

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252. *See id.* at 780 (discussing the need for judicial review based on the sufficiency of the underlying judicial proceedings); Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509, 523 (D.C. Cir. 2009) (Griffith, J., concurring in the judgment and dissenting in part) (arguing that deference to the Executive Branch need not be absolute).

253. *Boumediene*, 553 U.S. at 780.

254. *Id.* at 781.

255. *Id.* at 779–92.

256. *Id.* at 786 (citations omitted); *cf.* Khouzam v. Attorney Gen. of the U.S. (*Khouzam II*), 549 F.3d 235, 259 (3d Cir. 2008) (holding that in removal proceedings, it violates due process to deny a noncitizen the opportunity to rebut diplomatic assurances made by a foreign sovereign that the detainee will not be tortured once removed).

257. *Garcia* Brief of Appellee, *supra* note 93, at *24.

258. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 997–98 (9th Cir. 2012) (per curiam) (finding that Trinidad's administrative review was insufficient).

proceedings require a "more searching review"[259] because of the high risk of harm that may occur as a result of an erroneous determination.[260] Given the Supreme Court's holding that the CSRTs did not provide petitioners an adequate forum for review under the Suspension Clause,[261] *Garcia*'s judicial forum should fail any similar standard of adequacy.[262] Therefore, sufficient judicial review requires assessment of the government's evidence and presentation by the petitioner regarding his torture claim before ending the extradition inquiry.[263]

Additionally, while the Supreme Court in *Munaf* emphasized the importance of according appropriate deference to the Secretary's determination of the likelihood of the petitioner's torture, nothing suggests that such deference must be absolute or that it cannot be overcome—particularly in the context of extradition.[264] As D.C. Circuit Court Judge Griffith stated, "I do not believe *Munaf* compels absolute deference to the government . . . and I believe the premise of *Boumediene* requires that the detainees have . . . some opportunity to challenge the government assurances."[265] Thus, to ensure the accuracy of the government's representations, individuals must be able to challenge the veracity of the assurances for a "naked declaration

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259. *Id.* at 997.

260. *See id.* (explaining why closed proceedings require more intense inquiry).

261. *See* Boumediene v. Bush, 553 U.S. 723, 767 (2008) ("[T]he procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review.").

262. *See Garcia*, 683 F.3d at 997–98 (Berzon, J., concurring in part and dissenting in part) (arguing the Secretary's decision on the likelihood of torture is insufficient based on the *Boumediene* analysis of CSRTs' deficiencies).

263. *See id.* (detailing the contours of sufficient judicial review).

264. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 997–98 (9th Cir. 2012) (Berzon, J., concurring in part and dissenting in part) (discussing the contours of deference); Brief of Legal Historians, *supra* note 59, at 20; *Garcia*, 683 F.3d at 967 (Tallman, J., dissenting) (believing that the judiciary should not play a role in the review of Trinidad's claims, but noting that Congress will either prefer courts play a "minimal role" and accord "minimal" review, or play a "greater role," but not suggesting courts have no role in reviewing the extradition process).

265. Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509, 523 (D.C. Cir. 2009) (Griffith, J., concurring in the judgment and dissenting in part).

simply cannot resolve the issue."[266] Therefore, if deference need not be absolute, courts must have the authority in cases in which a detainee brings a FARRA claim to review negotiated assurances that torture will not occur.[267]

The preceding cases establish that an extraditee *should* have a right to substantive review of his claim under CAT or FARRA challenging his transfer, and to present evidence to rebut the requesting country's assurances to the U.S. government that he will not be tortured upon return.[268] Before proceeding to a substantive review of the merits of an extraditee's claim, however, the court must consider whether the rule of noninquiry allows it to consider the merits of such a claim.

B. Supplemental Considerations in Support of Substantive Review: Separation of Powers and the Rule of Noninquiry

Judicial power is limited.[269] For example, courts may not evaluate the conduct of foreign governments according to the U.S. Constitution.[270] Despite the limits of judicial inquiry, "it is

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266. Al Odah v. United States, 559 F.3d 539, 545 (D.C. Cir. 2009) (per curiam). *See also id.* at 545 ("[I]t is the [habeas] court's responsibility to make the materiality determination itself.").

267. *See* Brief of Legal Historians, *supra* note 59, at 22–23 (arguing that "it seems clear that the [*Munaf*] Court meant to leave open at least some possibility for a detainee to rebut the Secretary's assurances").

268. *See* Boumediene v. Bush, 553 U.S. 723, 767 (2008) (arguing for meaningful review of detainee challenges to detention or transfer); *Garcia*, 683 F.3d at 985–98 (Berzon, J., concurring in part and dissenting in part) (arguing for limited review of the Secretary's decision regarding torture in the context of an extraditee's FARRA claim).

269. *Boumediene*, 553 U.S. at 744.

270. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 995 (9th Cir. 2012) (per curiam) (providing an example of the judiciary's limited power); Munaf v. Geren, 553 U.S. 674, 677 (2008) (stating that a foreign sovereign has the right to prosecute American citizens for the crimes committed on its soil, and those Americans cannot complain that the foreign sovereign's legal system does not include all of the rights guaranteed by the U.S. Constitution); Neely v. Henkel, 180 U.S. 109, 123 (1901)

> [W]hen an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of the country may prescribe for its own

indubitably the role of courts to ensure that American officials obey the law."[271] *Garcia* cited the rule of noninquiry as a potential limitation on courts' right to review the Secretary of State's determination regarding the likelihood that a detainee would face torture upon his transfer to a foreign country.[272] Fundamentally, the rule of noninquiry can be understood as a prudential constraint under the Separation of Powers Doctrine on judges' ability to overrule the Executive Branch's extradition authority.[273] Yet confusion exists among the courts as to when the rule applies.[274] In 1993, the First Circuit in *In re Extradition of Howard*[275] articulated the view on the rule's applicability garnering the most widespread acceptance:

> The rule did not spring from a belief that courts, as an institution, lack either the [constitutional] authority or the capacity to evaluate foreign legal systems. Rather, the rule came into being as judges, attempting to interpret particular treaties, concluded that, *absent a contrary indication in a specific instance*, the ratification of an extradition treaty mandated non-inquiry as a matter of international comity.[276]

Because the rule of noninquiry is a judge-made rule, statutes such as FARRA creating express substantive rights enforceable through habeas relief preempt the rule's application.[277] As a

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> people, unless a different mode be provided for by treaty stipulations between that country and the United States.

271. *Garcia*, 683 F.3d at 995 (Berzon, J., concurring in part and dissenting in part).

272. *Id.* at 957 (majority opinion) (citing Lopez-Smith v. Hood, 121 F.3d 1322, 1326–27 (9th Cir. 1997)); *see* Brief of Legal Historians, *supra* note 59, at 24 (citing the Ninth Circuit's conclusion on the role of separation of powers and the rule of noninquiry in *Garcia*).

273. *See* Brief of Legal Historians, *supra* note 59, at 24 (detailing the rule of noninquiry).

274. *See id.* at 23–24 (explaining the various understandings of the rule of noninquiry).

275. *In re* Extradition of Howard, 996 F.2d 1320 (1st Cir. 1993).

276. *Id.* at 1330 n.6 (emphasis added); *see also* Brief of Legal Historians, *supra* note 59, at 24 (arguing that the First Circuit's articulation formulation is the correct interpretation of the rule of noninquiry); Parry, *supra* note 39, at 1978–96 (examining the evolution of the noninquiry doctrine).

277. *See* Brief of Legal Historians, *supra* note 59, at 24 (discussing the rule of noninquiry).

result, courts are justified in undertaking a factual inquiry based on a FARRA claim regarding the circumstances of the transfer.[278] Thus, under the rule of noninquiry, nothing prohibits judicial scrutiny into the substance of the Secretary of State's determination that a transferee does not face a substantial risk of torture.[279]

Furthermore, an analogous rule governing common law habeas jurisprudence at the time of the Constitution's ratification also supports such an interpretation. Eighteenth century English judges routinely discarded a black-letter rule forbidding them from examining facts that contested an individual's transfer[280] in cases in which there had been little previous judicial review regarding the causes for his detention.[281] When no other opportunity for judicial review existed and a prisoner applied for habeas relief, courts engaged in factual inquiries into the detention, regardless of any rule barring inquiry.[282] Under FARRA and the REAL ID Act, which confine judicial review to final orders of removal, extradition cases like *Garcia* in which no other opportunity for review exists fit squarely into such a framework, further justifying the need for a substantive inquiry into the circumstances of an individual's impending transfer.[283]

Having established a clear legal justification for substantive judicial review of detainee claims under CAT and FARRA, courts must carefully develop a framework for such reviews, balancing

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278. *See id.* (arguing for the legitimacy of judicial review in the FARRA context); Trinidad y Garcia v. Thomas, 683 F.3d 952, 985–98 (9th Cir. 2012) (Berzon, J., concurring in part and dissenting in part) (arguing for limited review of these decisions).

279. *See* Brief of Legal Historians, *supra* note 59, at 23–24 (analyzing the effects of the rule of noninquiry on the Secretary's review of the likelihood of torture).

280. *See id.* at 23 n.7 (comparing the rule of noninquiry to the old English rule).

281. *See* Boumediene v. Bush, 553 U.S. 723, 780 (2008) (explaining that judges did not consistently follow the black-letter rule as it was subject to exceptions in habeas cases).

282. *See* Brief of Legal Historians, *supra* note 59, at 23 n.7 (detailing the history of prisoner habeas review (citing Fallon & Meltzer, *supra* note 42, at 2102)).

283. *See* Brief of Legal Historians, *supra* note 59, at 23 (arguing for the necessity of substantive judicial review into a potential transfer in extradition cases).

legitimate concerns of the executive branch with the need for judicial scrutiny.[284] It is toward this goal that this Note turns next.

VI. Proposing a Rule of Limited Inquiry to Provide Meaningful Judicial Review

Two procedural questions confront any potential rule for judicial review of detainee transfer challenges arising under FARRA.[285] First, when the Executive Branch examines a challenge to detention or removal, what procedural protections must it provide? Second, when a reviewing court, exercising habeas jurisdiction, reviews Executive Branch determinations that a transferee does not face a substantial likelihood of torture, what is the appropriate scope of judicial review?[286] These questions indicate that such a rule must strike a balance between providing meaningful review to transferees' petitions, staying true to the intention of habeas corpus protections, and following the law on one hand while respecting the purview of the executive branch on the other.[287] As a result, a rule of limited inquiry, in which the courts examine the government's findings and negotiated assurances and examine the petitioner's evidence, best protects these competing interests and requirements while providing detainees the meaningful review they are constitutionally guaranteed.

A. What Habeas Demands

In circumstances in which a detainee can present "reasonably available evidence demonstrating there is no basis for his continued detention," habeas demands he have the

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284. *See infra* Part VI.A (examining habeas's demands for judicial review).

285. *See* Fallon & Meltzer, *supra* note 42, at 2089 (discussing the procedural rights of individuals challenging their detention or removal).

286. *See id.* (inquiring about the due scope of review).

287. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 961 (9th Cir. 2012) (per curiam) (explaining the competing interests that must be balanced in developing a rule of inquiry).

opportunity to make such a presentation to a habeas court.[288] When an individual faces the possibility of being transferred to a country in which he may face a substantial risk of torture, the "rudimentaries of an adversary proceeding" demand that he be afforded an opportunity to challenge the government's representations that torture is not likely to occur.[289] While this explains the availability of adversarial review of the status of Guantanamo detainees, it neglects the same process for the lawfulness of extraditions.[290] To safeguard the habeas protections affirmed by and extended to detainees by the Supreme Court in *Boumediene*, extraditees must be able to challenge the government's assurances that transfer will not result in torture. In all of these instances, because habeas exists as an "adaptable remedy" in which the "precise application and scope [changes] depending on the circumstances,"[291] the writ demands that courts undertake a full substantive review of an individual's claim that he will be tortured if transferred to a foreign country.[292]

B. Assuaging Government Concerns Regarding Enhanced Judicial Review

The State Department expresses concerns regarding judicial review of its torture determinations in extradition cases.[293] The

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288. Boumediene v. Bush, 553 U.S. 723, 790 (2008).

289. Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509, 535 (D.C. Cir. 2009) (Griffith, J., concurring in the judgment and dissenting in part).

290. *See id.* at 525 (Griffith, J., concurring in the judgment and dissenting in part) (comparing review for Guantanamo Bay detainees and potential extraditees).

291. *Boumediene*, 553 U.S. at 779.

292. *See* Brief of Legal Historians, *supra* note 59, at 5–6

> FARRA . . . creates a substantive right against the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture. Thus, the Suspension Clause requires that courts afford detainees an opportunity to show that it *is* "more likely than not" that they will be tortured once transferred, even when the Secretary avers to the contrary.

(quotations omitted).

293. *See generally* Trinidad y Garcia v. Thomas, 683 F.3d 952 (9th Cir. 2012) (per curiam) (discussing government concerns to judicial review in this context); *see also* Alperin v. Vatican Bank, 410 F.3d 532, 556 (9th Cir. 2005) (stating that

government emphasizes the "sensitive and delicate" nature of obtaining assurances from a foreign government, which may involve conditions on extraction or setting up a monitoring process to track the extraditee's treatment upon return.[294] Because of the nature of this process, the government alleges that judicial review in this area may harm foreign relations, jeopardize foreign relations, or both.[295]

In response, employing a "scaled approach"—evaluating the State Department's declaration that an extradition can occur consistent with CAT based on the record regarding the likelihood of torture upon extradition[296]—emphasizes the importance of judicial deference to the Secretary's substantive determination.[297] While extradition cases involve information regarding diplomatic relations with other countries, they do not seem to implicate—as cases like *Boumediene* and *Munaf* did—national security.[298]

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the State Department's views on the political question doctrine are considered in deciding to exercise review).

294. *See Garcia*, 683 F.3d at 999 (discussing the process of obtaining government assurances); Mironescu v. Costner, 480 F.3d 664, 671–72 (4th Cir. 2007) (explaining that how the executive branch is well-suited to making extradition decisions); United States v. Kin Hong, 110 F.3d 103, 110 (1st Cir. 1997) ("The State Department alone, and not the judiciary, has the power to attach conditions to an order of extradition."); Emami v. Dist. Court, 834 F.2d 1444, 1454 (9th Cir. 1987) ("The need for flexibility in the exercise of Executive discretion is heightened in international extradition proceedings which necessarily implicate the foreign policy interests of the United States." (quoting Escobedo v. United States, 623 F.2d 1098, 1105 (5th Cir. 1980) (citation omitted))); Sindona v. Grant, 619 F.2d 167, 174 (2d Cir. 1980) (explaining that "the degree of risk to [the petitioning detainee's] life from extradition is an issue that properly falls within the exclusive purview of the executive branch").

295. *See Garcia*, 683 F.3d at 999–1001 (Berzon, J., concurring in part and dissenting in part) (discussing the government's four main concerns about involving the judiciary in review of executive determinations on the likelihood of torture).

296. *See* Munaf v. Geren, 553 U.S. 674, 702 (2008) ("The Solicitor General explains that such [likelihood-of-torture] determinations are based on 'the Executive's assessment of the foreign country's legal system and . . . the Executive['s] . . . ability to obtain foreign assurances it considers reliable.'" (citation omitted)). In many ways, this comports with the caveat left by Chief Justice Roberts in *Munaf*, stating that a more extreme case—one in which evidence of torture is identified by the State Department but the Secretary decides to extradite anyway—may arise and warrant further judicial review. *Id.*

297. *See Garcia*, 683 F.3d at 998 (explaining how a scaled approach encompasses deference to executive branch assurances).

298. *See id.* at 999 (discussing the differences between normal extradition

Because of the courts' familiarity in dealing with sensitive information, they have developed effective procedures, such as in camera review and protective orders, for reviewing such information in a guarded manner.[299] Through these means, courts ameliorate the danger of revealing confidential or classified information,[300] and may in fact bolster U.S. foreign relations by ensuring the United States honor its international obligations under CAT.[301]

Further, judges often face the task of assessing the likelihood of torture in removal proceedings in immigration courts.[302] While courts lack the "ability to communicate with the foreign government or to weigh the situation there, including the bilateral relationship with the United States, with resources and

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cases and Guantanamo detainee cases and their relative effects on national security).

299. *See id.* (explaining judicial mechanisms for dealing with classified and sensitive foreign policy information); Mironescu v. Costner, 480 F.3d 664, 673 (4th Cir. 2007) (explaining that the court has "no reason to doubt that district courts can adequately protect the confidentiality of such [sensitive] communications [between the executive branch and foreign governments] by considering them in camera, as the district court intends to do here"); Quinn v. Robinson, 783 F.2d 776, 788 (9th Cir. 1986) (discussing the availability of in camera disclosure for judicial consideration of sensitive State Department information); Eain v. Wilkes, 641 F.2d 504, 514–15 (7th Cir. 1981) (explaining that the State Department can and has made it a practice to share information with the courts during extradition proceedings, often through an in camera review process); *see also* Boumediene v. Bush, 553 U.S. 723, 796 (2008) ("We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible."); Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1988) (codified at 18 U.S.C.A. App. 3) (describing procedures for the use of classified information in criminal proceedings); FED. R. CIV. P. 5.2 (describing procedures for protective orders and filing documents under seal); Robert Timothy Reagan, *The New "Public Court": Classified Information in Federal Court*, 53 VILL. L. REV. 889, 904–05 (2008) (exploring procedures for the use of classified information in post-9/11 federal civil and criminal proceedings).

300. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 1000 (9th Cir. 2012) (per curiam) (discussing the effects of protective measures).

301. *See Garcia* Brief of Appellee, *supra* note 93, at *28 (explaining the benefits of judicial review in transfer and torture determinations).

302. *See Garcia*, 683 F.3d at 1000 ("In the immigration context, courts frequently review claims that an individual, if removed, is likely to be tortured and therefore is entitled to withholding or deferral of removal under CAT and the FARR Act."); *Garcia* Brief of Appellee, *supra* note 93, at *28 (explaining judicial review of torture claims in immigration courts).

expertise comparable to those of the State Department,"[303] adjudicating claims of torture and entitlement to relief under CAT and FARRA in immigration cases often involves assessing diplomatic assurances of the kind found in extradition proceedings.[304] If judicial competence allows evaluations of foreign assurances in the immigration context, courts must be capable of doing the same in the extradition context.[305]

Finally, the government expresses further concern with timeliness and the ability of judges to make determinations regarding the probability of an individual facing torture.[306] Promptness in extradition proceedings helps ensure that other nations will remain prompt in responding to U.S. requests and prevents statute of limitations problems.[307] In addressing this valid concern, courts regularly implement expedited procedures and proceedings when necessary and appropriate.[308] Weighing

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303. Reply Brief for Appellant at 43, Trinidad y Garcia v. Thomas, 683 F.3d 952 (9th Cir. 2012) (per curiam) (No. 09-56999) [hereinafter *Garcia* Brief for Appellant].

304. *See Garcia*, 683 F.3d at 1000 (Berzon, J., concurring in part and dissenting in part) (explaining what courts must evaluate in reviewing potential extraditions); Khouzam v. Attorney Gen. of the U.S. (*Khouzam II*), 549 F.3d 235, 259 (3d Cir. 2008)

> Prior to removal on the basis of diplomatic assurances, Khouzam must be afforded notice and an opportunity to test the reliability of those assurances in a hearing . . . . The alien must have an opportunity to present, before a neutral and impartial decisionmaker, evidence and arguments challenging the reliability of diplomatic assurances proffered by the Government, and the Government's compliance with the relevant regulations.

Further, Canada, the United Kingdom, and other European states all allow judicial review of diplomatic assurances. Parry, *supra* note 39, at 2022.

305. *See Garcia*, 683 F.3d at 1000 (arguing for the competence of judges to review diplomatic assurances in other contexts, and not just the immigration context).

306. *Id.*; *see Garcia* Brief for Appellant, *supra* note 303, at 30, 43 ("A timely extradition process is a necessary aspect of a functioning extradition relationship. Excessive delay can jeopardize a foreign prosecution and undercut the core objective of extradition relationships in ensuring that fugitives are brought to justice in the country in which their criminal conduct occurred.").

307. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 1000 (9th Cir. 2012) (per curiam) (discussing the benefits of promptness in judicial review).

308. *See id.* (explaining the various procedures courts take to ensure expediency). Trinidad, in his reply brief, felt that blame for the delay in his case rested with the government and felt a court decision could expedite the proceedings:

the government's rightful interest in timeliness against a petitioner's right to habeas relief if his extradition would be unlawful, courts have determined that a petitioner's liberty interests must outweigh the government's delay concerns, which can be ameliorated through expedition.[309]

C. A Framework for Review

Because FARRA does not foreclose substantive judicial review in extradition cases, appropriate procedures for meaningful review for individuals facing extradition orders can be established. After analyzing many cases involving FARRA claims, using a "rule of limited inquiry" allows extraditees to challenge their transfer under FARRA while guaranteeing that the Secretary adheres to U.S. obligations under CAT and FARRA.[310]

Under a rule of limited inquiry, the transferee bears the burden of demonstrating through "strong, credible, and specific evidence" that, despite the Secretary's contrary determination, his torture upon extradition *is* more likely than not.[311] To

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> But the Government, not Trinidad, is responsible for protracting the litigation. At every stage, Trinidad sought judicial review of his FARR Act claim but the district court deferred review of his claim until his second habeas petition. . . .[T]he Government vigorously challenged Trinidad's right to seek habeas review requiring multiple rounds of briefing. The Government even disregarded a court order to produce the administrative record, further delaying the process. In any event, the en banc Court's resolution of this issue here will expedite the habeas process for all future cases.

Appellee's Supplemental en banc Brief at 64–65, Trinidad y Garcia v. Thomas, 683 F.3d 952 (9th Cir. 2012) (per curiam) (No. 09-56999).

309. *See Garcia* 683 F.3d at 1000 (Berzon, J., concurring in part and dissenting in part) (expressing the importance of a petitioner's liberty interests over the government's concerns regarding timeliness); Mironescu v. Costner, 480 F.3d 664, 673 (4th Cir. 2007) (arguing that although "habeas review may delay extradition, or preclude it altogether, [it] cannot negate [the detainee's] right to obtain habeas relief if he is being detained in violation of federal law").

310. *See Garcia* 683 F.3d at 1000 (Berzon, J., concurring in part and dissenting in part) (explaining how the rule of limited inquiry strikes a balance between competing demands).

311. *Id.* at 1001; *see also* Brief of Legal Historians, *supra* note 59, at 23 (stating that "the deference to which the Secretary is entitled means simply that the burden on the merits is properly placed on the detainee in such

establish a prima facie case under his FARRA claim, he must show that no reasonable factfinder could find otherwise.[312] If and only if he meets both prongs, the burden shifts to the Secretary to produce evidence, if she so chooses, to establish the basis for her determination that torture is, in fact, *not* more likely than not.[313] The reviewing court will "inquire only into credible claims of physical mistreatment or . . . punishment,"[314] examining the evidence presented by both sides in determining whether extradition would lawfully abide by the prohibitions set out under FARRA.[315] This pre-extradition procedure[316] ensures that the government adheres to its CAT and FARRA obligations and protects the rights of people facing extradition,[317] and that the court accords appropriate deference to the executive once extradition is final and review is foreclosed.[318]

Cabining review ensures that examining courts will not need to conduct a full, searching evaluation of negotiated assurances and the Secretary's decisions in extradition cases.[319] In this way,

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circumstances—as it should be").

312. *Garcia*, 683 F.3d at 1001.

313. *Id.*

314. Parry, *supra* note 39, at 2023.

315. *Id.*

316. *See, e.g.*, Brock v. Roadway Express, Inc., 481 U.S. 252, 261–62 (1987) (explaining that "the [Supreme] Court has upheld procedures affording less than a full evidentiary hearing if some kind of a hearing ensuring an effective initial check against mistaken decisions is provided before the deprivation occurs, and a prompt opportunity for complete administrative and judicial review is available" (quotations omitted)). Such procedures are common and have been held to be necessary by the Supreme Court in other circumstances. *Id.*

317. *See* Parry, *supra* note 39, at 2022 (explaining how this procedure would honor CAT and FARRA obligations).

318. *See* 22 C.F.R. §§ 95.1–95.4 (2013) (laying out the process for hearing challenges to extradition, and ending review once the Secretary signs a final order of extradition).

319. *See* Parry, *supra* note 39, at 2022 (explaining the benefits of a rule of limited inquiry). The government argues that judicial competence in immigration cases does not indicate such competence in the extradition process because extradition treaties bear on human rights norms and commitments, meaning torture is less likely in extradition. *See Garcia* Brief of Appellant, *supra* note 303, at 19–20 (detailing the government's arguments). While that may raise the bar for the showing a detainee must make to combat the Secretary's certification of CAT and FARRA compliance, it should not obviate all judicial review of substantive FARRA enforcement in habeas. Trinidad y Garcia v. Thomas, 683 F.3d 952, 1000 (9th Cir. 2012) (per curiam).

courts can play a vital—but restrained—role in ensuring that the government fulfills habeas's demands while respecting the expertise of the executive.[320]

VII. Conclusion

With the development of the circuit split on the issue of jurisdiction after the Ninth Circuit's decision in *Garcia*,[321] the "thorny constitutional thicket" worsened,[322] as predicted by scholars.[323] But this debate is not without an answer.[324] *Garcia*'s holding—establishing federal courts' habeas jurisdiction to hear FARRA claims by potential extraditees challenging their transfer[325]—conforms with FARRA's statutory intent, well-established international legal custom and its applicability to U.S. law, and the historic uses for writs of habeas corpus enshrined in the Constitution's Suspension Clause.[326] Additionally, courts have a further role in this process.[327] Based on the flexible remedy of habeas corpus, *Boumediene*'s promise of meaningful review, and the Suspension Clause's guarantee of a sufficient forum, extraditee torture concerns arising under FARRA necessitate a substantive review on the merits of habeas claims.[328] This requirement is met by a rule of limited inquiry,

320. *See* Boumediene v. Bush, 553 U.S. 723, 783 (2008) ("Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain.").

321. *See supra* note 25 (discussing the circuit split); *supra* Part IV (same).

322. Vladeck, *supra* note 10, at 1572.

323. *Id*.

324. *See supra* Part IV.B (discussing the case for federal courts' habeas jurisdiction over FARRA claims).

325. Trinidad y Garcia v. Thomas, 683 F.3d 952, 956–57 (9th Cir. 2012) (per curiam).

326. *See supra* Part IV.A–B (laying out the circuit split and arguing for *Garcia* as the best conclusion).

327. *See* Boumediene v. Bush, 553 U.S. 723, 771 (2008) (discussing the role of courts in judicial review of the merits of petitioners' claims); Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2009) (same); Khouzam v. Attorney Gen. of the U.S. (*Khouzam II*), 549 F.3d 235, 250 (3d Cir. 2008) (same).

328. Boumediene v. Bush, 553 U.S. 723, 779 (2008) (quoting INS v. St. Cyr, 533 U.S. 289, 302 (2001)).

which ensures that the government abides by habeas's demands, the court provides the appropriate deference to the Executive Branch, and both respect the rights of extraditees.[329]

"Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations . . . , it most assuredly envisions a role for all three branches when individual liberties are at stake."[330] While foreign affairs remains, in large part, within the Executive Branch's purview, this competence does not foreclose a role (if even minimal) for the other branches—particularly the Judiciary.[331]

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329. *See supra* Part VI (discussing a rule of limited inquiry).

330. *Hamdi*, 542 U.S. at 536. *See also Khouzam II*, 549 F.3d at 250 ("Although the Executive and Legislative Branches bear primary responsibility for the conduct of foreign affairs, it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." (quoting Baker v. Carr, 369 U.S. 186, 211 (1962) (quotations omitted))); United States v. Decker, 600 F.2d 733, 738 (9th Cir. 1979) ("We are less inclined to withhold review when individual liberty . . . is implicated.").

331. *See supra* Part V.A (discussing the role of the courts in the foreign policy arena).