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From Boumediene to Garcia: the United States' (Non)Compliance with the United Nations Convention Against Torture and its Movement Away From Meaningful Review

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**FROM *BOUMEDIENE* TO *GARCIA*:
THE UNITED STATES’ (NON)COMPLIANCE
WITH THE UNITED NATIONS CONVENTION
AGAINST TORTURE AND ITS MOVEMENT
AWAY FROM MEANINGFUL REVIEW**

BRENNA D. NELINSON*

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I. INTRODUCTION

On September 11, 2001, the landscape of international relations dramatically shifted.¹ It was impossible to predict how the ensuing

1. See, e.g., Guy Raz, *Defining the War on Terror*, NPR, Sept. 1, 2012,

“War on Terror”² would necessarily impact domestic treatment of international law, influence detainment procedure for alleged “enemy combatants,”³ or compromise United States compliance with the United Nations Convention Against Torture (“UNCAT” or “the Convention”).⁴

Cases of first impression arose that challenged a newfound and newly respected broad Executive power in light of growing national security concerns.⁵ Though the Executive traditionally has had unfettered power to act during wartime, the extent of those powers in the extradition context has recently broadened and become subject to dangerous deferential treatment by the U.S. federal courts, despite affirmative UNCAT nonrefoulement obligations that indicate a need for Executive review.⁶ Judicial deference to the Executive has reached the point of noncompliance with UNCAT, due in large part to critical misreading of relevant precedent and recent legislation.⁷

<http://www.npr.org/templates/story/story.php?storyId=6416780> (explaining that the “war on terror” is difficult to define because it has an ambiguous beginning and end and has been waged against multiple adversaries).

2. President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html> (“Our war on terror . . . will not end until every terrorist group of global reach has been found, stopped, and defeated.”).

3. DEP’T. OF DEF., DIRECTIVE NO. 2310.01E, DETAINEE PROGRAM (Sept. 5, 2006), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf> (defining “enemy combatant” as “a person engaged in hostilities against the United States or its coalition partners during an armed conflict”).

4. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR, 39th Sess. Supp. No. 51, U.N. Doc. A/39/51 (1984) [hereinafter UNCAT]. *See generally* MANFRED NOWAK & ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE 101–102 (Philip Alston & Vaughan Lowe, eds., 2008) (explaining that the Committee Against Torture has become especially vigilant in monitoring United States use of diplomatic assurances in extradition cases following September 11, 2001).

5. *See generally* Rasul v. Bush, 542 U.S. 466 (2004) (holding that detainees at Guantanamo Bay have a right to habeas corpus); Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (dismissing due process claims for failure to specify culpable action by federal officials of a Canadian citizen whom the United States deported to Syria, where he was tortured).

6. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (limiting Executive deference during wartime by holding that the seizure of a steel mill to avoid labor disruptions was outside the scope of the Executive’s power).

7. *See, e.g.,* *Wartime and Emergency Powers: The War on Terror*, in JUDGING

The modern task of the courts is now to effectuate a delicate balance between deference to the Executive on matters of international concern, on the one hand, and to comply with basic principles of international law as codified in UNCAT and implemented via domestic legislation on the other.⁸ The palpable difficulties presented by the clash between domestic law and international policy, once a realm of advancement,⁹ have caused derogation from UNCAT nonrefoulement obligations.¹⁰

The United States adopted most of its UNCAT obligations via the Foreign Affairs Reform and Restructuring Act (“FARRA”), section 2242 of which implements UNCAT’s nonrefoulement mandate.¹¹ Recent extradition jurisprudence, however—characterized by the use of Executive assurances and foreclosure of judicial review—demonstrates noncompliance with the UNCAT nonrefoulement mandate and the promise not to “transfer to torture.”¹²

This comment will argue that the United States’ implementation of

EXECUTIVE POWER: SIXTEEN SUPREME COURT CASES THAT HAVE SHAPED THE AMERICAN PRESIDENCY 161, 164 (Richard J. Ellis, ed., 2009) (examining the breadth of contemporary executive power, and explaining that the questions facing the justices regarding this power following September 11, 2001 were of the most salient of all wartime jurisprudence).

8. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-822 (codified at 8 U.S.C. § 1231) [hereinafter FARRA].

9. *See generally* *Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (holding that noncitizen detainees have a constitutional right to habeas review and that any attempt to strip detainees of this review without a sufficient substitute will be held unconstitutional).

10. *See* NOWAK & MCARTHUR, *supra* note 4, at 185 (explaining that the Committee Against Torture feared a gap between policy and local implementation, partially because of the potential inadequacy of domestic legislation).

11. FARRA, *supra* note 8, § 2242; *see also* 8 C.F.R. § 1208.16(c)(1) (2012) (providing regulations for the obligations set forth in FARRA and formally defining torture for purposes of implementing the UNCAT nonrefoulement mandate).

12. *See* *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 984–85 (9th Cir. 2012) (en banc) (Berzon, J., concurring) (per curiam) (asserting that a pro forma “barebones declaration” by the Secretary of State in the form of an executive assurance that a detainee will not be tortured upon extradition is a wholly insufficient method of compliance with UNCAT); *see, e.g.*, Jeffrey H. Fisher, *Detainee Transfers After Munaf: Executive Deference and the Convention Against Torture*, 43 GA. L. REV. 953, 958 (2009) (explaining that certain commentators criticize the evaluation process and argue that because individual rights are implicated, detainees should be entitled to meaningful judicial review under FARRA).

its nonrefoulement obligation is patently inconsistent with the anti-torture goals of UNCAT.¹³ It will further argue that detainees raising claims under UNCAT and FARRA should have access to meaningful review beyond an Executive assurance that the detainee will not be subject to torture.¹⁴

Part II of this comment will include a foundational discussion of the “meaningful review” standard and recent extradition and transfer case law, as well as the implementation of UNCAT’s Article 3 nonrefoulement mandate. Part III will argue that the United States, in its handling of extradition cases, is in derogation of its UNCAT nonrefoulement obligations vis-à-vis a disallowance of substantive judicial review. Part IV will suggest and conclude that the United States might solve this compliance problem by eliminating the ambiguity in FARRA and accepting the necessary role of federal judicial review to comply with its obligations under the United Nations Convention Against Torture.

II. BACKGROUND

A. HISTORY AND CONTEMPLATIONS OF THE UNITED NATIONS CONVENTION AGAINST TORTURE

1. *A Brief History of the Creation and Goals of the United Nations Convention Against Torture*

The United Nations Convention Against Torture aims to “make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.”¹⁵ UNCAT Article 1 defines “torture” as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him

13. See Aaron S.J. Zelinsky, *Khouzam v. Chertoff: Torture, Removal, and the Rule of Noninquiry*, 28 YALE L. & POL’Y REV. 233, 239–40 (2009) (using the Third Circuit’s decision in an immigration removal case to explain that the use of the “rule of non-inquiry” is unique to the United States, to the point that foreign guidance should be instructive).

14. See *Trinidad y Garcia*, 683 F.3d at 963–66 (Tallman, J., dissenting) (asserting that habeas jurisdiction is available but the claim is foreclosed on its merits based on the Secretary’s assurance and that the rule of non-inquiry prohibits the judiciary from examining Executive extradition decisions).

15. UNCAT, *supra* note 4, Annex.

for an act he or a third person has committed or is suspected of having committed . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹⁶

The primary purpose of UNCAT is to reinforce the longstanding prohibition against torture in customary international law.¹⁷ This prohibition relates solely to cases of torture that occur in a governmental setting and implicates the actions of public officials or other individuals acting in a representative or official capacity.¹⁸

UNCAT was originally formed as an enforcement mechanism for the Declaration on the Protection of All Persons from Being Subjected to Torture and Any Other Cruel, Inhuman, or Degrading Treatment or Punishment.¹⁹ In 1977, the General Assembly requested that the Commission on Human Rights begin a draft convention against torture;²⁰ the following year, the Swedish

16. *Id.* art. 1. *See generally* The Summary prepared by the Secretary-General in accordance with Commission Resolution 18 (XXXIV) containing the comments received from Governments on the Draft Articles of the Convention on Torture, Commission on Human Rights, U.N. GAOR, 35th Sess., at 5, U.N. Doc. E/CN.4/1314 (1978) (containing the United States' agreement during the initial draft stages of UNCAT indicating the difficulty in separating "delineate torture" from other cruel acts, and thus its support for a broad definition).

17. *See* HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT 1 (1988) [hereinafter BURGERS & DANIELIUS] (explaining that UNCAT's real purpose is to strengthen an already existing prohibition of torture via additional supportive measures); *see also* Ashley Deeks, *Promises Not to Torture Diplomatic Assurances in U.S. Courts*, in AMERICAN SOCIETY OF INTERNATIONAL LAW DISCUSSION PAPER SERIES 6, 14 n.6 (2008), available at <http://www.asil.org/files/ASIL-08-DiscussionPaper.pdf> [hereinafter ASIL DISCUSSION] (noting, in support of the prima facie goals of UNCAT, that the plain language of the treaty contains a nonrefoulement obligation, unlike the International Covenant on Civil and Political Rights).

18. *See* BURGERS & DANIELIUS, *supra* note 17, at 1 (indicating that UNCAT seeks to influence the behavior of those who are apt to become involved in situations in which such practices might occur).

19. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), U.N. GOAR, 30th Sess. Supp. No.34, U.N. Doc. A/10034 (Dec. 9, 1975).

20. G.A. Res. 32/62, ¶ 1, U.N. Doc. A/RES/32/62 (Dec. 8, 1977).

government submitted a preliminary draft for the Convention.²¹ From these preliminary drafts, perpetual international momentum led to the complete creation of UNCAT in 1984 to which 147 States are now party.²² The United States Senate ratified UNCAT in 1990.²³ The contemporary Convention provides a universal definition of torture and addresses complex enforcement issues that arise in the extradition context.²⁴

Consistent with its aim to effectuate a uniform international combative effort to eradicate torture, Article 5(1) of UNCAT provides that “each State Party shall take such measures as may be necessary to establish its jurisdiction over the offenses referred to in [A]rticle 4” when the alleged offender has even the most attenuated connection to that state.²⁵ Parties to UNCAT are in current disagreement about whether nonrefoulement obligations apply extraterritorially.²⁶

21. Draft International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, submitted by Sweden, U.N. ESCOR, Comm’n on Hum. Rts., U.N. Doc. E/CN.4/1285 (1978) [hereinafter Swedish Draft Convention].

22. *U.N. Rights Expert Urge States to Comply with Convention Against Torture*, U.N. NEWS, <http://www.un.org/apps/news/story.asp?NewsID=36507#.UfgEzY21Gcw> (last visited Aug. 21, 2013); see also RACHEL MURRAY ET AL., *THE OPTIONAL PROTOCOL TO THE UN CONVENTION AGAINST TORTURE* 139–42 (2011) [hereinafter MURRAY ET AL.] (discussing implementation methods that might operate to increase compliance with the guidelines in UNCAT now that the treaty is widely ratified).

23. *Convention Against Torture: Hearing on S.718 Before the Committee on Foreign Relations*, 101st Cong., 2nd Session (1990) [hereinafter *Hearings*]; Stephen I. Vladeck, *Non-Self-Executing Treaties and the Suspension Clause After St. Cyr*, 113 *YALE L.J.* 2007, 2012–37 (2004) [hereinafter Vladeck, *Non-Self-Executing Treaties*].

24. For a discussion on the jurisdictional implications of UNCAT, see AHCENE BOULESBAA, *THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT* 171, 175–81 (1999).

25. UNCAT, *supra* note 4, art. 5; see MURRAY ET AL., *supra* note 22, at 3 (explaining that the jurisdictional article requires that States extend their jurisdiction in various situations “reflecting the well-established jurisdictional ‘heads’ of ‘territoriality’, ‘nationality’, and ‘passive personality’”).

26. See List of Issues to Be Considered During the Examination of the Second Periodic Report of the United States of America: Response of the United States of America, 31, 36, http://www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/listUSA36_En.pdf (last visited Aug. 21, 2013) (explaining that the United States has taken the

2. The Article 3 Nonrefoulement Prohibition: "Transfer to Torture"

Article 3 of UNCAT contains an unqualified nonrefoulement obligation.²⁷ Specifically, the principle of nonrefoulement contributes to international anti-torture efforts by forbidding nations to extradite or transfer when the detainee might be subject to torture in the receiving country.²⁸ Article 3, in its entirety, provides that,

(1) No 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. (2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.²⁹

Known as the "nonrefoulement clause" of the Convention, Article 3 embodies a *jus cogens* of international law: nations may not "transfer to torture" and nations of detainment must ensure that the detainee will not be subject to torture upon transfer.³⁰ This clause began as Article 4 of the original Swedish draft convention, which provided that "no state party may expel or extradite a person to a state where there are reasonable grounds to believe" that he may be subject to torture.³¹ UNCAT Article 3 now provides the same obligation.³²

position that the nonrefoulement prohibition does not apply to individuals outside of United States territory); see also Robert L. Newmark, *Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*, 71 WASH. U. L. REV. 833, 851–53 (1993) (explaining the historical limitations of U.S. nonrefoulement policy, compared to other countries).

27. UNCAT, *supra* note 4, art. 3. See generally NOWAK & MCARTHUR, *supra* note 4, at 148 (stating that nonrefoulement obligations are absolute); Convention Relating to the Status of Refugees art. 1(F), July 28, 1951, 189 U.N.T.S. 150 (providing another source of law for the absolute principle of nonrefoulement and further enforcing the notion that nonrefoulement principles are affirmative).

28. ASIL DISCUSSION, *supra* note 17, at 6.

29. UNCAT, *supra* note 4, art. 3.

30. ASIL Discussion, *supra* note 17, at 7 (explaining that despite disagreements among nations regarding the breadth and applicability of nonrefoulement principles and obligations, some states view nonrefoulement as a customary international law norm embedded in the prohibition against torture).

31. Swedish Draft Convention, *supra* note 21, art. 4.

32. UNCAT, *supra* note 4, art. 3; see NOWAK & MCARTHUR, *supra* note 4, at 151–52 (noting that the United States limited its obligations to explicit "torture"

The nonrefoulement prohibition is absolute, but there is disagreement among nations as to what triggers nonrefoulement.³³ When the United States Senate ratified UNCAT, it interpreted the Article 3 phrase “where there are substantial grounds for believing that he would be in danger of being subjected to torture” to mean “if it is *more likely than not* that he would be tortured.”³⁴ There is a customary international law presumption against torture; thus, one argument for the Article 3 nonrefoulement prohibition has traditionally been that nonrefoulement itself is a customary international law norm.³⁵ Notably, the United States disagrees with this view.³⁶

B. AFFIRMATIVE UNITED STATES’ NONREFOULEMENT
OBLIGATIONS: THE FOREIGN AFFAIRS REFORM AND
RESTRUCTURING ACT

1. United States Nonrefoulement Obligations Under FARRA

UNCAT is a non-self executing treaty, meaning that it provides no substantive rights without domestic ratification.³⁷ The United States has adopted most of its UNCAT obligations via FARRA, including its nonrefoulement obligation in its entirety.³⁸ Though the United States has held that its FARRA obligations do not extend extraterritorially, it remains United States policy not to send any detainee to a place where it is more likely than not that the individual

and nothing less).

33. See ASIL DISCUSSION, *supra* note 17, at 7 (indicating that other State parties to UNCAT believe the United States’ “more likely than not” nonrefoulement torture standard makes it easier for the United States to transfer detainees without appropriate review).

34. S. REP. NO. 101-30, at 3 (1990) (containing the Resolution of Advice and Consent to Ratification with the “more likely than not” standard) (emphasis added). *But see* ASIL DISCUSSION, *supra* note 17, at 7 (citing the ICRC view that nonrefoulement obligations apply in a broad range of contexts).

35. See ASIL DISCUSSION, *supra* note 17, at 7 (indicating that nonrefoulement is an accepted norm under international law).

36. See *id.* at 7 (explaining that despite the United States’ uncontested legal obligation not to transfer in the face of torture, it allows itself leeway in light of its opinion that, for example, the principle does not apply extraterritorially).

37. See generally Vladeck, *Non-Self-Executing Treaties*, *supra* note 23 (explaining that there is much debate over the availability of habeas review because of the non-self executing nature of the treaty).

38. FARRA, *supra* note 8, § 2242.

will be tortured.³⁹ The State Department enacted regulations pursuant to FARRA to implement domestic obligations under Article 3 of UNCAT. The regulations provide, in relevant part, that in cases where “allegations relating to torture are made . . . appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant.”⁴⁰

Detainees’ affirmative UNCAT rights are contained in FARRA, which is the domestic source of the United States’ “policy . . . not to expel [or] extradite . . . 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.”⁴¹ The regulations accompanying FARRA contemplate executive deference in nonrefoulement situations.⁴² While they do not explicitly discuss diplomatic or executive assurances, their repeated reference to the Secretary’s unilateral authority has served as the foundation for the use of assurances and the exclusion of judicial review in extradition and transfer determinations.⁴³ Because FARRA is a holistic adoption

39. See ASIL DISCUSSION, *supra* note 17, at 7–8 (noting that while the United States takes this position, other states disagree, and that a number of academics regard nonrefoulement as a customary international law norm embedded in the CIL prohibition against torture, and assert that nonrefoulement obligations attach in any situation in which “the act in question would be attributable to the State whether this occurs, or would occur, within the territory of the State or elsewhere”). *But see* John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1229 (2004) (“However, the Convention is generally inapplicable to transfers effected in the context of the current armed conflict because it has no extraterritorial effect . . . and, hence, cannot apply to . . . prisoners detained outside of U.S. territory at Guantánamo Bay territory at Guantánamo Bay . . .”).

40. 22 C.F.R. § 95.3(a) (2012); *see also id.* § 95.4 (“Decisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review.”).

41. FARRA, *supra* note 8, § 2242; 22 C.F.R. § 95.2(b) (providing that to fulfill UNCAT obligations, the State Department must determine if a detainee facing extradition is “more likely than not to be tortured”).

42. 22 C.F.R. § 95 (allowing the Secretary to decide whether to extradite an individual to the requesting state, deny the extradition, or extradite subject to conditions met through diplomatic assurances).

43. 22 C.F.R. § 95.4; *see* *Cornejo-Barreto v. Siefert*, 379 F.3d 1075, 1087 (9th Cir. 2004) (finding, in light of the Government position that the language of FARRA and the rule of non-inquiry preclude judicial review, the structure of UNCAT and the legislative intent behind FARRA indicate that the Secretary’s

of UNCAT obligations, the United States has assumed the absolute nature of the nonrefoulement mandate.⁴⁴

2. *FARRA's Provision of an Avenue for Review and the INS v. St. Cyr Habeas Standard*⁴⁵

Despite FARRA's substantive purpose of providing grounds for relief under UNCAT, it is unclear whether individuals in extradition or transfer proceedings may successfully invoke FARRA's nonrefoulement mandate offensively in civil litigation; that is, whether a detainee has a substantive challenge to the Executive's determination that may be enforced by a habeas writ.⁴⁶ Federal courts have said that FARRA does not strip them of their already-conferred statutory habeas jurisdiction⁴⁷ in UNCAT/FARRA claims. Still, courts have held that the same judicial inquiry is barred based on curious statutory interpretation.⁴⁸

torture determination was never meant to be reviewable). *But see* *Mironescu v. Costner*, 480 F.3d 664, 671–73 (4th Cir. 2007) (internal citations omitted) (holding that the rule of non-inquiry did not bar courts from reviewing torture concerns in habeas petitions specifically answering the “straightforward” question of “whether a fugitive would likely face torture in the requesting country,” and opining in dicta that in enacting FARRA, Congress intended to preclude judicial review of UNCAT claims but that petitioner here had not argued that denying him the opportunity to present his UNCAT/FARRA claims on habeas review violated the Suspension Clause).

44. S. REP. NO. 101-30 (1990). *See generally* NOWAK & MCARTHUR, *supra* note 4, at 147 (asserting that “[t]he Committee [Against Torture] has explicitly stated that nonrefoulement must be recognized as a *peremptory norm* under international law, and not merely as a principle enshrined in Article 3 [UN]CAT,” and noting that article three is influenced by the protection against refoulement in Article thirty-three of the 1951 Geneva Convention relating to the Status of Refugees).

45. 533 U.S. 289 (2001).

46. *See* Stephen I. 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/> [hereinafter Vladeck, *Why the “Munaf Sequels” Matter*] (theorizing that although FARRA is a domestic implementation of UNCAT, those facing extradition have not been able to successfully invoke FARRA as a basis for relief through civil litigation, namely habeas claims).

47. 28 U.S.C. § 2241 (2012) (“The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or of laws or treaties of the United States.”).

48. *See, e.g.,* *Khouzam v. Chartoff*, 549 F.3d 235, 242 (3d Cir. 2008) (interpreting § 2242(d) of FARRA to preclude judicial inquiry into either the

First, FARRA contains a jurisdictional clause that appears to vitiate judicial review both in statute and regulation.⁴⁹ Section 2242(d) of the statute provides that “nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section . . . except as part of the review of a final order of removal pursuant to [the immigration laws].”⁵⁰ Thus, the FARRA jurisdiction clause does not *divest* courts of habeas jurisdiction; rather, it does not *confer* such jurisdiction.⁵¹

Second, federal courts have interpreted the REAL ID Act of 2005 (“REAL ID”),⁵² originally implemented to streamline appeals of removal decisions by limiting the availability of the habeas writ in the immigration context, to divest the courts of habeas jurisdiction *outside* of the immigration context.⁵³ Despite REAL ID’s limitation to the immigrant context by its own admission, there has been significant debate over the function of FARRA in relation to habeas relief. Before REAL ID, courts did not have occasion to interpret FARRA as an avenue of fugitive relief because it was clear that detainees facing extradition or transfer could invoke

regulations adopted to implement the statute or claims raised under the statute).

49. FARRA, *supra* note 8, § 2242(d); 22 C.F.R. § 95(4).

50. FARRA, *supra* note 8, § 2242(d).

51. See Vladeck, *Why the “Munaf Sequels” Matter*, *supra* note 46 (explaining that habeas jurisdiction is already conferred statutorily, so while logically FARRA does not confer jurisdiction, it also does not divest jurisdiction). *Cf. Mironescu*, 480 F.3d at 674 (finding that FARRA strips courts of jurisdiction to review UNCAT claims).

52. REAL ID Act, 8 U.S.C. § 1252(a)(4) (2005) [hereinafter REAL ID Act] (“Notwithstanding any other provision of law (statutory or nonstatutory) . . . or any other habeas corpus provision . . . a 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 . . . [UNCAT], except as provided in subsection (e) of this section.”).

53. Compare *Khouzam*, 549 F.3d at 244 (allowing review of diplomatic assurances in the removal context despite the recognition that REAL ID “remove[d] habeas jurisdiction over this matter” because there is alternative jurisdiction to consider *Khouzam*’s arguments under that Act, but recognizing that this removal of habeas jurisdiction “would ordinarily present a Suspension Clause problem”), with *Omar v. McHugh*, 646 F.3d 13, 18, 20 (D.C. Cir. 2011), reissued *sua sponte* July 8, 2011 (holding that REAL ID divests federal courts of habeas jurisdiction in extradition and military transferee cases and that FARRA does not establish a right of judicial review, and also recognizing that “habeas corpus has been held not to be a valid means of inquiry into the treatment the relator is anticipated to receive in the requesting state”) (internal citation omitted).

FARRA/UNCAT as a basis for habeas review to challenge that decision.⁵⁴ When REAL ID was codified, some circuits interpreted the statute as reversing what FARRA implementation had accomplished; that is, as an extension of UNCAT, a basis of relief for those facing extradition when there exists substantial belief that the person would be in danger of being subjected to torture.⁵⁵

Although the jurisdictional statement in FARRA does not satisfy the “superclear statement” standard promulgated in *INS v. St. Cyr*,⁵⁶ it is unclear whether there might be a meritorious claim for habeas review under FARRA.⁵⁷ In *St. Cyr*, the Supreme Court held that a “clear, unambiguous, . . . express statement of congressional intent to preclude judicial consideration on habeas” is necessary for suspension of the writ.⁵⁸ FARRA, then, has been conflated with REAL ID in such a manner that sidesteps UNCAT obligations in extradition cases as implemented via FARRA by allowing one unrelated statute to dictate the rights provided by another.⁵⁹

C. LAYING THE GROUNDWORK FOR INTERPRETATION: FARRA AS AN ADEQUATE UNCAT SUBSET UNDER THE VIENNA CONVENTION

The confusion surrounding FARRA becomes especially apparent when interpreting the statute as an UNCAT subset. For purposes of

54. See Steve Vladeck, *The D.C. Circuit Vitiates the Suspension Clause*, PRAWFSBLAWG, (June 22, 2011, 9:19 AM) available at <http://prawfsblawg.blogspot.com/2011/06/the-dc-circuit-vitiates-the-suspension-clause.html> [hereinafter Vladeck, *D.C. Circuit Court Vitiates the Suspension Clause*] (explaining that in *Omar* the D.C. Circuit offered a fractured interpretation of REAL ID and FARRA because REAL ID did not “repeal FARRA”; such interpretation undermines the right conferred under *Boumediene* of access to federal courts for habeas review).

55. See *Omar*, 646 F.3d at 23 (interpreting REAL ID to foreclose judicial review in extradition cases).

56. 533 U.S. 289, 327 (2001); see also *Al Maqaleh v. Gates*, 605 F.3d 84, 93–94 (2010) (holding that “the practical obstacles inherent in resolving the petitioner’s entitlement to the writ” is one of the factors to consider when deciding whether to extend the writ under the Suspension Clause).

57. *Infra* Part III.C and accompanying text.

58. *St. Cyr*, 533 U.S. at 314.

59. See, e.g., *Omar*, 646 F.3d at 17 (“[FARRA] provides 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.”) (emphasis added); see also *infra* Part III.B and accompanying text (exemplifying the *Omar* panel’s disregard for a right to be free from torture under international law).

UNCAT compliance, a textually analogous statute is insufficient.⁶⁰ The Vienna Convention provides principles upon which the two documents may be compared to determine the sufficiency of FARRA.⁶¹ Article 31 of the Vienna Convention provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,” and requires interpretation and implementation consistent with its objectives.⁶² Article 31(1) requires that a treaty be interpreted “in light of its object and purpose.”⁶³ Further, Article 31(3)(c) provides that treaties should be interpreted within the context of “any relevant rules of international law applicable in the relations between the parties.”⁶⁴ These interpretation tools are necessary to determine the efficacy of FARRA as a domestic implementation of UNCAT.

D. THE EVOLUTION OF MEANINGFUL REVIEW AND *BOUMEDIENE V. BUSH*: THE SUPREME COURT DECLARES A RIGHT TO REVIEW

While the Vienna Convention provides a useful starting point for analyzing United States noncompliance with its UNCAT nonrefoulement obligations, a holistic inquiry into whether FARRA is serving its purpose as a tool for torture eradication requires a basic knowledge of detainee rights. The constitutional rights afforded to detainees were extensively explored in the post-9/11 Guantanamo cases.⁶⁵ In response to Congressional attempts to deprive detainees of habeas protection, the Supreme Court held that Congress had not presented a sufficient substitute for the writ, and that the Suspension Clause required an opportunity for meaningful review.⁶⁶

60. See NOWAK & MCARTHUR, *supra* note 4, at 151 (“It is not enough that a country has an extradition law in line with Article 3. Practice must also comply with Article 3 obligations.”).

61. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Vienna Convention].

62. *Id.* art. 31.

63. *Id.* art. 31(1).

64. *Id.* art. 31(3)(c).

65. See Stephen I. Vladeck, *Insular Thinking About Habeas*, 97 IOWA L. REV. BULL. 16, 17–18 (2012) [hereinafter Vladeck, *Insular Thinking*] (explaining the impact of the “insular” cases on subsequent litigation that implicates a right to substantive judicial review).

66. See, e.g., Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006) [hereinafter MCA] (establishing military tribunals to

From the beginning of the detainment of “enemy combatants,” federal courts and Congress have struggled with respect to the rights of wartime detainees seeking judicial review of their detention status and have attempted to give and take away relief from detainees.⁶⁷ It is through this implicit conversation between Congress and the judiciary about how noncitizen detainees in United States custody should be handled during perpetual wartime that the “meaningful review” standard developed.⁶⁸

The Guantanamo cases shed light upon United States noncompliance with its nonrefoulement obligations under UNCAT because the rights ultimately afforded to the Guantanamo detainees are tantamount to the rights at stake in the extradition context.⁶⁹ Through these cases, the Court recognized that Congress may not divest the judiciary of its habeas jurisdiction, absent a sufficient

hear suspected terrorist cases on the merits, effectively stripping federal courts of habeas jurisdiction); FARRA, *supra* note 8, § 1231 (providing a functionally similar mechanism to the MCA in that Congress indicated that it did not want the judiciary to review particular questions relating to the transfer of individuals as expressed in the Article 31 nonrefoulement clause). *See generally War, Terror, and the Federal Courts, Ten Years After 9/11*, 61 AM. U. L. REV. 1253, 1263–68 (June 2012) [hereinafter *War, Terror, and the Federal Courts*] (noting comments in Justice Kennedy’s majority opinion in *Boumediene* that it is a mere coincidence that courts have not had to be particularly involved in answering questions about the separation of and limits on the government’s war powers, and reflecting his speculation that that may change).

67. *See, e.g., Rasul v. Bush*, 542 U.S. 466 (2004) (holding that Guantanamo detainees may file habeas petitions in United States courts); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that Congress’ recent legislative attempts to strip detainees of the right to habeas proceedings were unsuccessful with regard to pending wartime cases). *But see* Detainee Treatment Act, Title X, 2006 DOD Authorization Act, Pub. L. No. 109-148, 119 Stat. 2680 (legislating Congress’s first substantive effort to strip U.S. federal courts of jurisdiction over habeas claims, as well as any other actions related to detainment, filed by Guantanamo detainees); MCA, *supra* note 66, § 7 (reflecting Congress’ response to the Court’s *Hamdan* holding, stripping detainees of the right to habeas providing that “no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus . . . [by] an enemy combatant”).

68. *See generally* Vladeck, *Insular Thinking*, *supra* note 65.

69. *See* Caroline Wells Stanton, *Rights and Remedies: Meaningful Habeas Corpus in Guantanamo*, 23 GEO. J. LEGAL ETHICS 891, 899, 903 (2010) (synthesizing relevant Supreme Court precedent to conclude that “the remedy of release is inseparable from the right to petition for habeas corpus” and explaining that without the power to order a remedy, the right to review of the Executive’s decision is really no right at all).

substitute for recourse, and that detainees are entitled to judicial review of their detention under basic principles of both constitutional and international law.⁷⁰ The debate in the Guantanamo cases was whether allowing detainees the constitutional privilege of habeas would have irreconcilable separation of powers implications.⁷¹ Despite these concerns, the Court landed on a right to “meaningful review.”⁷²

The Court noted in the Guantanamo cases that habeas is “an important judicial check on the Executive’s discretion in the realm of detentions.”⁷³ Much like concerns regarding FARRA’s foreclosure of extradition cases on their merits, in the Guantanamo cases the Court considered whether Congress might pass legislation preventing the judiciary from hearing the case of an accused military combatant *before* the military commission concerning detention review took place.⁷⁴ In both contexts, substantive relief is being denied. The Court consistently focused on the necessity of review and the lack of any operative substitute for protection.⁷⁵

70. *See, e.g., Boumediene*, 553 U.S. at 780–84 (holding that a detainee is entitled to seek the writ of habeas corpus and that the available review procedures under the Detainee Treatment Act are an inadequate substitute). *See generally* Larry W. Yackle, *Federal Courts: Habeas Corpus* 14–15 (2d ed. 2010) (explaining that it is rare that Congress’ power to suspend the writ is acknowledged, and that such suspension has occurred only a handful of times throughout United States history).

71. *See generally* U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”); *Omar v. McHugh*, 646 F.3d 13, 24 (D.C. Cir. 2011) (opining that the Executive historically has autonomous decision-making power during wartime).

72. *Boumediene*, 553 U.S. at 783; *see also Hamdan*, 548 U.S. at 557 (finding that military tribunals set up by the Bush administration were inapplicable to those detained prior to the legislation); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that habeas served as a necessary judicial check on the Executive’s powers granted under the Authorized Use of Military Force).

73. *Hamdi*, 542 U.S. at 536. *Compare id.* at 536–38 (retaining a check on the Executive’s power to detain suspected enemy combatants), *with Omar*, 646 F.3d at 24 (precluding all judicial review in extradition cases despite UNCAT obligations).

74. *See, e.g., Hamdan*, 548 U.S. at 594–95 (finding that the Detainee Treatment Act unconstitutionally attempted to strip courts of their authority to review Executive detention).

75. *Id.* at 611–13 (concluding that while *Hamdan* may have committed a crime, the substance of that crime was outside the jurisdiction of the military commission, which was established to specifically address crimes of war).

Without defining the parameters of the privilege, the Court squarely held in *Boumediene v. Bush* that noncitizen detainees have a right, pursuant to the United States Constitution, to challenge their detentions through habeas corpus in federal courts, and that Congress' attempts to create inadequate substitutes were unconstitutional.⁷⁶ Under the *Boumediene* "meaningful review" standard, a noncitizen detainee is entitled to "a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law."⁷⁷ Justice Kennedy's majority opinion in *Boumediene* laid the groundwork for the subsequent FARRA cases.⁷⁸ Though Justice Kennedy's dicta left the scope of "meaningful review" largely undefined, his language supports the need for comprehensive review in the extradition context.⁷⁹ In comparing post-conviction detention to executive detention, Justice Kennedy explained that "the need for collateral review" of an executive order is "most pressing," and "the need for habeas corpus is more urgent."⁸⁰ This articulated need in *Boumediene* for meaningful review where an autonomous Executive decision is made demonstrates an incorporation of international law into domestic practice, and contributes to concern about the legality of contemporary extradition.

76. *Boumediene*, 553 U.S. at 789 (declaring that Congress' attempt to divest federal courts of habeas jurisdiction in section 7 of the MCA was unconstitutional without a replacement for habeas protection); see also Vladeck, *Insular Thinking*, *supra* note 65, at 19 and accompanying text.

77. *Boumediene*, 553 U.S. at 728–29 (quoting *Ins v. St. Cyr*, 533 U.S. 289, 302 (2001)) (internal quotes omitted). See generally Aziz Z. Huq, *What Good is Habeas?*, 26 CONST. COMMENT 385, 389, 393 (2010) (explaining Justice Kennedy's habeas grant as "encompassing 'a meaningful review of both the cause for detention and the Executive's power to detain'").

78. *Boumediene*, 553 U.S. at 780–800; see, e.g., *Kiyemba v. Obama*, 561 F.3d 509, 526 (D.C. Cir. 2009) (Griffith, J., concurring in part, dissenting in part) (Circuit Judge Griffith, concurring) (characterizing, in the transfer context, that "[t]he constitutional habeas protections extended to these petitioners by *Boumediene* [would] be greatly diminished, if not eliminated, without an opportunity to challenge the government's assurances that their transfers will not result in continued detention on behalf of the United States").

79. See *Boumediene*, 553 U.S. at 782–83; *Trinidad y Garcia*, 683 F.3d at 961 (coloring in Kennedy's undefined "meaningful review" standard in an ordinary extradition circumstance with a solitary procedural right of ensuring the Secretary's completed due diligence).

80. *Id.* at 783.

E. CROSSROADS: THE *BOUMEDIENE* FRAMEWORK AND ATTEMPTS TO INVOKE UNCAT RIGHTS IN THE EXTRADITION CONTEXT

1. *Adaptations of Article 3 and the Use of Executive Assurances*

An individual in extradition proceedings, often called a “relator” or a “fugitive,” has already been formally charged with a crime in the country requesting extradition.⁸¹ Extradition specifically involves surrendering the relator to that country so that the individual might face criminal sanctions.⁸² Though extradition-based claims differ from those detention claims in the *Boumediene* line of cases,⁸³ doctrine has evolved such that the Executive’s role in extradition proceedings does not allow for judicial review.⁸⁴ Instead, claims for relief are foreclosed on their merits by way of the rule of non-inquiry, an archaic, judge-made standard grounded in United States sovereignty and the separation of powers.⁸⁵ The rule prohibits a judicial check on the Executive’s assurance regarding whether it is “more likely than not” that a relator will be tortured upon transfer; these assurances are the United States’ sole vehicle of compliance with UNCAT under FARRA.⁸⁶

81. John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. REV. 1973 (2010).

82. *Id.* at 2018 (explaining that extradition is “quintessentially a judicial process under [United States] law despite the executive functions of review and surrender”).

83. See Declaration of Richard Pierre-Prosper, ¶¶ 1–9, *Abdah v. Bush*, No. Civ. 04-1254(HHK), 2005 WL 711814, at *3 (D.D.C. Mar. 29, 2005) [hereinafter Prosper Declaration] (defining detainee transfer protocol as the Department of Defense’s decision to transfer a detainee to another government for either release or ongoing detention, and further explaining that detainees often fear torture based on poor human rights records).

84. See, e.g., *Trinidad y Garcia*, 683 F.3d at 961 (foreclosing a claim on the merits based solely on an executive assurance).

85. See Parry, *supra* note 81, at 1995–96 (clarifying that the rule of non-inquiry exists as a matter of tradition and allows courts to “compile reassuring string cites of cases in which [courts] refused . . . to inquire into possible violations of human rights”).

86. See generally BOULESBAA, *supra* note 24, at 178 (citing S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)) (stating that “every State remains free to adopt the principles which it regards as best and most suitable”); Caroline Wells Stanton, *Rights and Remedies: Meaningful Habeas Corpus in Guantanamo*, 23 GEO. J. LEGAL ETHICS 891, 899 (2010) (discussing the insufficiency of a purely procedural right).

Though the Committee Against Torture has scrutinized the process, the Executive relies on diplomatic assurances from other nations to decide whether to extradite.⁸⁷ Although a number of nations rely on diplomatic assurances, most provide for review rather than ending the inquiry at an Executive assurance.⁸⁸ The United States justifies its autonomous use of Executive assurances with the rule of non-inquiry, which has not been codified by Congress. Use of such assurances has led the Committee Against Torture to express reservations regarding the use of such assurances.⁸⁹ In fact, the Committee adopted guidance relating to UNCAT's Article 3⁹⁰ and decided that diplomatic assurances are inconsistent with UNCAT obligations.⁹¹ It criticized the opaque nature of the assurances and the difficulty in making sure that they were serving their purpose.⁹²

Diplomatic assurances of conditions in the receiving country rely on case-specific circumstances, the country's human rights record, the individual concerned, and concerns regarding torture or persecution to determine whether torture is likely in accordance with the UNCAT definition.⁹³ In the United States, the Secretary obtains

87. Cf. Comm. Against Torture, Rep. on its 36th Sess., May 1–19 2006, CAT/C/USA/Co/2 (May 18, 2006), available at http://www.aclu.org/images/torture/asset_upload_file807_25607.pdf [hereinafter Recommendations for Committee Against Torture] (contemplating the use of diplomatic assurances in the extradition context); NOWAK & MCARTHUR, *supra* note 4, at 150 (specifying that the use of diplomatic assurances should only be used with transparent procedures for obtaining such assurances including “adequate judicial mechanisms for review”).

88. ASIL DISCUSSION, *supra* note 17, at 66 (noting that Canada requires judicial review of executive assurances).

89. NOWAK & MCARTHUR, *supra* note 4, at 150 (noting that UNCAT has expressed concern over the secrecy of the procedure used by the United States).

90. U.N. Office of the High Comm'r for Human Rights, Comm. Against Torture, CAT General Comment No. 1: Implementation of Article 3 on the Convention in the Context of Article 22 (Refoulement and Communications), U.N. Doc. A/53/44, annex IX (Nov. 21, 1997) [hereinafter Committee Comment] (providing how to effectively implement UNCAT's nonrefoulement policy and specifically confining Article 3's application to “cases where there are substantial grounds for believing that the author would be in danger of being subjected to torture as defined in article 1 of the Convention”).

91. Committee Comment, *supra* note 90, ¶ 9(b).

92. See NOWAK & MCARTHUR, *supra* note 4, at 151–53 (requiring states to comply with the material and procedural guarantees set out by UNCAT).

93. See Prosper Declaration, *supra* note 83, ¶ 7; see also Katherine R. Hawkins, *The Promises of Torturers: Diplomatic Assurances and the Legality of*

such assurances from a country requesting extradition, and then makes his own “assurance” (the Executive assurance) by signing a formal statement with his determination.⁹⁴ Notably, however, detainees “have been transferred to countries that our own State Department has acknowledged torture prisoners.”⁹⁵ The preclusion of judicial review of assurances in the extradition context seems to be unique to the United States.⁹⁶ Both European and Canadian courts, for example, subject diplomatic assurances to review of at least some substance.⁹⁷

2. *The Changing Face of the Boumediene Holding Under UNCAT Claims: Munaf and Omar*

Comparatively, United States extradition practice differs from that of other countries, and recent case law provides context. *Munaf v. Geren* set the contemporary stage for understanding the intersection between international law and constitutional law with regard to United States compliance with UNCAT.⁹⁸ The Supreme Court unanimously held in *Munaf*, a non-extradition case *not implicating* FARRA that many scholars believe was meant to and should be

“*Rendition*”, 20 GEO. IMMIGR. L.J. 213, 232 (2006) (explaining that diplomatic assurances alone cannot be sufficient for the UNCAT Article 3 requirement that “authorities shall take into account all relevant considerations” in evaluating the likelihood of torture).

94. *Id.* ¶ 7 (discussing the duties of the Department of State in the transfer of detainees).

95. *Al-Marri v. Bush*, No. Civ. A. 04-2035(GK), 2005 WL 774843, at *4 (D.D.C. Apr. 4, 2005). *See, e.g., Trinidad y Garcia*, 683 F.3d at 984 (dismissing Trinidad y Garcia’s habeas plea despite evidence that other men accused in the same case were tortured by Philippine officials and a State Department report that torture is common among security and police forces there).

96. *See generally* ASIL DISCUSSION, *supra* note 17, at 10–11 (noting that the United States relies heavily on diplomatic and executive assurances).

97. *Id.* at 66, n.126.

98. *Munaf v. Geren*, 553 U.S. 674 (2008). *See generally* Lyle Denniston, *Munaf’s Impact Widens Again*, SCOTUSBLOG (June 10, 2012, 8:18 AM), <http://www.scotusblog.com/2012/06/munafs-impact-widens-again/> (expressing concern with *Munaf*, explaining that *Munaf*’s holding, because it has been a “major precedent” rather than remaining limited to its specific facts, has played a significant role in expanding executive power in subsequent cases as exemplified by the recent case law which gives the Secretary of State the final word in extradition cases); *cf. Omar*, 646 F.3d at 22 (interpreting *Munaf* as warning to federal judges not to question government decisions about Guantanamo Bay detainees).

limited to its facts,⁹⁹ that the federal judiciary did not have the power to block the Iraqi military from turning over U.S. citizens to the Iraqi military despite the petitioners' fear of torture if transferred.¹⁰⁰ Although the Court engaged in striking deference to the Executive, it noted in a crucial passage that because neither petitioner invoked FARRA in his habeas claim, the Court would not consider whether FARRA prohibited their transfer to Iraqi authorities, and thus refused to decide more generally whether a meritorious claim existed under the statute.¹⁰¹

The D.C. Circuit in *Kiyemba v. Obama* read *Munaf* to mandate conclusive Executive deference in transfer decisions.¹⁰² Two years after *Kiyemba*, in *Omar v. McHugh*,¹⁰³ the D.C. Circuit again relied on *Munaf*, this time to hold that the REAL ID Act of 2005 divested the federal judiciary of habeas jurisdiction in transfer cases.¹⁰⁴ The panel reasoned that while REAL ID created an alternate route for review for those in removal proceedings while barring the opportunity for habeas review, it did not do the same for transferees, and thus Omar could not invoke habeas under FARRA.¹⁰⁵ Curiously, *Munaf* did not consider the FARRA question, but the *Omar* court

99. See *Munaf*, 533 U.S. at 703, n.6 (“We hold that these habeas petitions raise no claim for relief under [FARRA] and express no opinion on whether *Munaf* and *Omar* may be permitted to amend their respective pleadings to raise such a claim on remand. Even if considered on the merits, several issues under the [FARRA] claim would have to be addressed.”).

100. *Id.* at 693–94.

101. *Id.* (discussing the possibility of a FARRA claim in this context); see also *id.* at 702 (“The judiciary is not suited to second-guess . . . 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.”); Stephen I. Vladeck, *Introductory Note to United States Supreme Court: Munaf v. Geren*, 47 INT’L LEGAL MATERIALS 705, 710 (2008) (“[T]he Court’s unnecessary analysis of *Munaf*’s torture claim suggests that future litigants will have an enormously high burden to surmount in order to state a viable claim on the merits.”).

102. 561 F.3d 509, 513–14 (holding in a broad construction of *Munaf* that executive assurances foreclosed petitioners’ claim for relief, disregarding petitioners’ argument that *Munaf* was unique to its facts and did not implicate FARRA like the present case; thus, ultimately interpreting *Munaf* to mean that CAT/FARRA claims in which the Secretary promises the detainee will not be transferred to torture are foreclosed on their merits).

103. 646 F.3d 13 (D.C. Cir. 2011).

104. *Id.* at 16.

105. *Id.* at 17.

relied on *Munaf* and the historical use of the habeas writ to invalidate Omar's argument that the habeas privilege and FARRA combined to create a right to judicial review.¹⁰⁶ Contemporary scholars argue that the *Omar* court effectively ignored the existence and operation of a universal anti-torture treaty in their decision.¹⁰⁷

3. *Trinidad y Garcia, UNCAT, and a Right Contained on a Piece of Paper*

Munaf was most recently applied in the Ninth Circuit in an extradition case, *Trinidad y Garcia v. Thomas*.¹⁰⁸ The panel in that case held that while it had *jurisdiction* to hear Garcia's habeas claim under FARRA, it could not provide relief so long as the Secretary put forth, in accordance with the Executive's standard for nonrefoulement, that it was not "more likely than not" that the detainee would be tortured upon transfer.¹⁰⁹ In so holding, the panel essentially limited UNCAT Article 3 to a purely procedural right. While the Secretary argued that it was within her sole discretion to decide whether "torture is more likely than not," the lawyers representing Garcia argued that extraditing him would constitute a violation of his affirmative UNCAT nonrefoulement rights.¹¹⁰

The Ninth Circuit concluded, en banc, that while Garcia could file his habeas claim alleging that his UNCAT rights were violated, his only right to review was to have the Secretary consider all evidence and subsequently decide whether the anti-torture standard had been met, as evidenced by the Secretary's signature.¹¹¹ Though the court went further than the *Omar* panel in recognizing the role of

106. *Id.* at 29 (arguing that no right to review was available before FARRA, and that FARRA also did not create such right).

107. See ASIL DISCUSSION, *supra* note 17.

108. See generally 683 F.3d 952 (9th Cir. 2012).

109. Compare *id.* at 961 (holding that REAL ID *does not* divest the court of habeas jurisdiction, though the claim is foreclosed when the Secretary has performed her duty in accordance with FARRA regulations), with *Omar*, 646 F.3d at 15 (holding that REAL ID *does* divest the court of habeas jurisdiction).

110. *Trinidad y Garcia*, 683 F.3d at 958; see also Fisher, *supra* note 12, at 978 ("Some lower courts' willingness . . . to examine the factual issues surrounding fear of torture claims indicates that FARRA could be a viable method to challenge transfer decisions.").

111. *Trinidad y Garcia*, 683 F.3d at 957 ("An extraditee thus possesses a narrow liberty interest: that the Secretary comply with her statutory and regulatory obligations.").

customary international law in dictating Garcia's rights, it defined that every UNCAT right as procedural.¹¹² Thus, the court *had* jurisdiction pursuant to the habeas statute, 28 U.S.C. § 2241(c), which "provides an avenue of relief to persons, such as Trinidad y Garcia, who are challenging the legality of extradition proceedings," but the extent of this "avenue" is an Executive assurance.¹¹³ Upon filing, "the court's inquiry shall have reached its end."¹¹⁴ Recognizing that UNCAT and FARRA at the very least required the Secretary to "formally" rule on whether extradition could take place, the court remanded Garcia's case to decide whether the Secretary had done her duty.¹¹⁵ Thus, an extradition to the requesting country could run the risk of violating international law.

III. ANALYSIS

Basic principles of international law alongside the *Boumediene*-conferred right to review require a substantive UNCAT right to seek review of an extradition or transfer decision. This analysis begins with the interpretation tools in the Vienna Convention, which collectively demonstrate FARRA's insufficiency as an UNCAT subset. It is given further dimension by a close look at what circuit courts have emphasized when hearing individuals seeking to enforce a FARRA right. Unless UNCAT was meant to confer a purely procedural right, Executive assurances, such as that settled on in *Trinidad y Garcia*, are insufficient to satisfy both the international treaty and its domestic counterpart.

A. A COMPLIANCE ANALYSIS UNDER THE VIENNA CONVENTION

To analyze United States compliance with the nonrefoulement mandate in UNCAT, a viable starting point is a juxtaposition of UNCAT's Article 3 text with FARRA's section 2242 text in accordance with the Vienna Convention.¹¹⁶ Such analysis

112. *Id.*

113. *Id.* at 958; *see infra* Part III.B (arguing that relief under FARRA requires a *Boumediene*-based opportunity for meaningful review in order to effectuate compliance with UNCAT).

114. *Id.* at 957.

115. *Id.*

116. *Compare* UNCAT, *supra* note 4, art. 3(1) (providing for an absolute nonrefoulement mandate), *with* FARRA, *supra* note 8, § 2242 (implementing

demonstrates that there are no textual problems with FARRA;¹¹⁷ however, despite FARRA's prima facie consistency with UNCAT, extradition jurisprudence suggests a derogation of United States nonrefoulement obligations.¹¹⁸

The UNCAT nonrefoulement clause provides 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.”¹¹⁹ The relevant clause of FARRA section 2242 provides that “[i]t 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.*”¹²⁰ The United States ratified UNCAT subject to the understanding that “substantial grounds for believing that he would be in danger of being subjected to torture” means “if it is more likely than not that he would be tortured.”¹²¹

Textually, FARRA is consistent with UNCAT. Because it is clear that FARRA was implemented as a domestic extension and execution of UNCAT and is meant to be interpreted as such, there is

UNCAT's Article 3 nonrefoulement mandate in its entirety).

117. See Vienna Convention, *supra* note 61. *But see* NOWAK & MCARTHUR, *supra* note 4, at 151 (“It is not enough that a country has an extradition law in line with Article 3. Practice must also comply with Article 3 obligations.”). See generally U.S. DEPARTMENT OF STATE, “Vienna Convention on the Law of Treaties,” <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Oct. 24, 2012) (explaining that the United States is not a party to the Vienna Convention since the Senate has not given its advice and consent to the treaty, but considers many provisions of the Convention to constitute customary international law).

118. See, e.g., *Trinidad y Garcia*, 683 F.3d at 957 (conferring a purely procedural right under FARRA despite FARRA's purpose as a domestic implementation of UNCAT's anti-torture initiative).

119. UNCAT, *supra* note 4, art. 3(1). See generally BURGERS & DANIELIUS, *supra* note 17, at 56 (remarking that during Working Group proposals for UNCAT Article 3 text, the United States suggested that a list of situations creating a specific risk of torture would have to include “religious persecution, denial of free speech, suppression of political dissent and of the free flow of information, and armed intervention in the affairs of a sovereign state”).

120. FARRA, *supra* note 8, § 2242 (emphasis added).

121. 136 CONG. REC. 36, 193 (1990); see *Hamoui v. Ashcroft*, 389 F.3d 821, 826, 827 (9th Cir. 2004) (supporting the “more likely than not standard” in that an applicant for UNCAT nonrefoulement relief need only show “a chance greater than fifty percent that he will be tortured if removed”).

little doubt as to its purpose.¹²² The question then becomes whether, with this knowledge, the United States has complied in its implementation of FARRA as an UNCAT subset.¹²³

United States management of fugitives and transferees is so fundamentally inconsistent with UNCAT that it is difficult to imagine FARRA being a domestic extension of the former despite the textual parallel.¹²⁴ Acknowledging that the relief required under UNCAT/FARRA is precisely what the *Boumediene* Court contemplated with its notion of “meaningful review” and further demonstrates this inconsistency.¹²⁵ The goal of UNCAT is to combat the international torture problem, an effort that necessarily includes providing detainees with an avenue through which to challenge their extraditions or transfers when there is a risk of torture, or the goal cannot be effectuated and rights cannot be enforced.¹²⁶ The implementation of FARRA has not allowed for such review.¹²⁷ Dictum by a number of Circuit Judges, specifically the rationale in *Omar* and *Trinidad y Garcia*, demonstrates the nonconforming implementation, partially by the interpretation of REAL ID and FARRA as mechanisms of foreclosure rather than relief, and partially by disregarding UNCAT.¹²⁸

122. See *Hearings*, *supra* note 23 (discussing the full implementation of UNCAT Article 3 into U.S. law via FARRA and the adoption of UNCAT’s absolute nonrefoulement obligation).

123. See *infra* Part III.B (analyzing U.S. implementation of FARRA within the context of its obligations under UNCAT); cf. NOWAK & MCARTHUR, *supra* note 4, at 129–30 (explaining that the UNCAT Committee requires that “domestic authorities of the host country” implement a torture risk-assessment test that places the burden of proof on the detainee to establish a prima facie case of actual systematic torture in the home country, or that he or she is personally at risk of being subjected to torture if returned).

124. Cf. *Omar v. McHugh*, 646 F.3d 13, 17–18 (D.C. Cir. 2011) (offering no rights of judicial review to extradition and military transferees under FARRA, and finding that the statute only offered rights to individuals in immigration proceedings).

125. *Boumediene*, 553 U.S. at 779; see discussion, *supra* Part II.D (discussing the requirements of meaningful review).

126. UNCAT, *supra* note 4, pmb1. (desiring “to make more effective the struggle against torture and other cruel, inhuman, or degrading treatment or punishment throughout the world”).

127. See *Omar*, 646 F.3d at 20 (concluding that Congress is not obligated to grant detainees subject to extradition the right to judicial review of the Secretary’s determination of the likelihood of torture in the receiving country).

128. See, e.g., *id.* at 23 (rejecting “that the REAL ID Act, to the extent it

Article 31(1) of the Vienna Convention requires that the “object and purpose” of a treaty be considered when interpreting the document.¹²⁹ The object and purpose of UNCAT was to create an internationally uniform mechanism to combat the use of torture.¹³⁰ The United States’ Executive has in effect interpreted this to mean that Executive assurances are sufficient to ensure a relator’s safety in a receiving country.¹³¹ In light of the goals of UNCAT, it seems strange that an Executive signatory—a single slip of paper not subject to review—would be adequate for compliance.¹³² What is more surprising still is the judiciary’s acceptance of this method considering the Supreme Court’s holding that “treaties, like statutes, are the ‘law of the land.’”¹³³ Presumably, a right contained in a treaty is empty unless it is enforced.

amended [FARRA], violated the Constitution’s guarantee of habeas corpus” and thus foreclosing FARRA rights rather than recognizing that the Act is limited to the immigration context). *See generally War, Terror, and the Federal Courts*, *supra* note 66, at 1269–70 (opining that principles of international law should play a role in interpreting domestic legislation); *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

129. Vienna Convention, *supra* note 61, art. 31(1).

130. *See* NOWAK & MCARTHUR, *supra* note 4, at 88 (noting article 2 of UNCAT which reads that “each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. No exceptional circumstances . . . may be invoked as a justification of torture,” reflective of a presupposition of the existence of a human right to personal integrity and dignity and is part of making more effective the efforts against torture).

131. *See, e.g.*, Implementation of the Convention Against Torture, 8 C.F.R. § 208.18 (2013) (declaring that once the Attorney General, together with the Secretary of State, determines that the diplomatic assurances against the use of torture are reliable enough to meet the Article 3 obligation, the detainee’s challenge to extradition is concluded).

132. *See* ASIL DISCUSSION, *supra* note 17, at 23–26, 42 (speculating that executive assurances are insufficient for UNCAT compliance); *cf. Khouzam*, 549 F.3d at 242–44, 252–53) (noting that the case contemplates the opportunity for review in light of the fact that the negotiating history of UNCAT and the legislative history of FARRA are silent on the use of assurances, and citing to other countries that allow judicial review of the reliability of diplomatic assurances).

133. Jane C. Kim, Note, *Nonrefoulement Under the Convention Against Torture: How U.S. Allowances for Diplomatic Assurances Contravene Treaty Obligations and Federal Law*, 32 BROOK. J. INT’L L. 1227, 1228, 1232 (2007) (quoting *Foster v. Neilson*, 27 U.S. 253, 314 (1829)).

Article 21(3)(c) requires consideration of “relevant rules of international law”¹³⁴ in treaty interpretation. There are no exceptions to UNCAT’s nonrefoulement obligation, which is widely accepted as a *jus cogens* norm of customary international law.¹³⁵ Further, as a means of implementation, it is doubtful that Executive assurances are an effective way to guarantee the operability of FARRA’s “substantial grounds to believe” standard.¹³⁶ As a result, with such assurances comprising the only mechanism for “relief,” the United States is derogating from its UNCAT obligations. The undisputable initiative of UNCAT makes clear that FARRA, in its implementation as an anti-torture framework, is implicitly in disaccord with UNCAT. An international treaty is only as effective as individual nation implementation allows.

B. EXTRADITION, EXECUTIVE ASSURANCES, AND DEFERENCE: A DEROGATION OF UNCAT TREATY OBLIGATIONS

Recent extradition jurisprudence, specifically within the United States Court of Appeals for the D.C. Circuit, exemplifies United States noncompliance with UNCAT.¹³⁷ The way in which transfer and extradition cases have been decided, beginning with *Munaf*¹³⁸

134. Vienna Convention, *supra* note 61, art. 31(3)(c).

135. See NOWAK & MCARTHUR, *supra* note 4, at 147 (recognizing that the nonrefoulement obligations in Article 3 of UNCAT are absolute).

136. See Special Rapporteur of the Comm’n on Human Rights, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, transmitted by Note of the Secretary-General*, U.N. DOC. A/60/316 (Aug. 30, 2005) (expressing the view that diplomatic assurances are ineffective because “such assurances are sought usually from States where the practice of torture is systematic[,] post-return monitoring mechanisms have proven to be no guarantee against torture[, and] diplomatic assurances are not legally binding . . .”).

137. See, e.g., *Omar v. McHugh*, 646 F.3d 13, 24 (D.C. Cir. 2011) (distinguishing *Munaf v. Geren*, 553 U.S. 674 (2008)) (“Given that the present cases involve habeas petitions that implicate sensitive foreign policy issues in the context of ongoing military operations, reaching the merits is the wisest course.”); *Kiyemba*, 561 F.3d at 514–15 (holding that relief under a writ of habeas corpus and removal under FARRA are separate and distinct, and one does not ensure the other); *Trinidad y Garcia*, 683 F.3d at 956–57 (remanding the detainee’s case in light of an explicit recognition that, under FARRA, that Department of State is the appropriate agency to prescribe regulations to implement the Article 3 UNCAT obligations, and that the Executive branch should be afforded deference when making determinations).

138. 553 U.S. at 692, 700 (holding that it is the duty of the Executive, not the Judiciary, to make decisions on foreign policy and the conduct of foreign states,

and ending most recently with the ambiguous decision in *Trinidad y Garcia*,¹³⁹ suggests a derogation of United States nonrefoulement obligations.¹⁴⁰ As the law stands, noncitizens who can prove that torture is “more likely than not” are entitled to UNCAT protection as a right; but the judicial deference given to the Executive in both the assurance that due diligence has been done (by way of diplomatic assurances), and in a misreading of *Munaf*, restricts this affirmative right to one country’s word that it will do the right thing.¹⁴¹ *Boumediene* tells us that in addition to this protection, detainees have a conclusive right to meaningful review.¹⁴² Under *Trinidad y Garcia*, this means the Secretary signing a piece of paper, and begs the question of whether a signature is an *appropriate form* of meaningful review.¹⁴³ If a signature is not meaningful review, then *Boumediene* is effectively undermined by the way federal Courts of Appeals have handled detainees facing extradition.¹⁴⁴ An under-inclusive interpretation of a FARRA-enforced right morphs that right into one that is solely procedural.¹⁴⁵

The unambiguous purpose of the nonrefoulement clause of

and, in recognition of that principle, rejecting the detainees’ habeas claim on its merits).

139. 683 F.3d at 957 (remanding the case to allow the Secretary of State to show that she exercised due diligence when assessing the detainee’s risk of being tortured upon extradition).

140. See generally Int’l Comm’n of Jurists & Swiss Comm. Against Torture, *Torture: How to Make the International Convention Effective* (2d ed. 1980) (draft optional protocol); National Commission of Jurists & Swiss Committee Against Torture, *Torture: How to Make the International Convention Effective*, 1980 (draft optional protocol) (suggesting ways in which nations can successfully implement UNCAT).

141. See generally ASIL DISCUSSION, *supra* note 17, at 7 (discussing the U.S. interpretation of the principle of nonrefoulement under Article 3 of the UNCAT); Kim, *supra* note 133, at 1230–32.

142. 533 U.S. at 783.

143. See *infra* Part III.C (elaborating on the use of Executive assurances in extradition assessments).

144. See Vladeck, *D.C. Circuit Court Vitiates the Suspension Clause*, *supra* note 54 (observing that the court’s decision in *Omar*, that detainees subject to extradition may not benefit from the protections of habeas corpus, undermines the Supreme Court’s holding in *Boumediene*).

145. See *Trinidad y Garcia*, 683 F.3d at 998 (Berzon, J., concurring in part, dissenting in part) (arguing that limiting judicial review to a procedural examination of the Secretary of State’s assessment undermines substantive UNCAT rights).

UNCAT is to ensure that detainees are not subjected to torture while undergoing the process of criminal sanctioning.¹⁴⁶ But the process of obtaining diplomatic assurances and manifesting their reliability in a signature is certainly an informal one, so regulations precluding judicial review of a FARRA claim (in essence an UNCAT claim) are fundamentally contrary to the statute itself.¹⁴⁷ The Executive's signature is based solely on diplomatic assurances, which are, in effect, verbal exchanges between nations regarding the likelihood of torture.¹⁴⁸ Because judicial review of the Secretary's subsequent decision is barred,¹⁴⁹ the Secretary's obligation to comply with UNCAT as implemented by FARRA is overlooked in favor of severe Executive deference.¹⁵⁰ This oversight occurs even in light of FARRA's requirement that "all evidence relevant to the possibility of future torture . . . be considered."¹⁵¹ Allowing this oversight is an

146. See, e.g., ASIL DISCUSSION, *supra* note 17, at 5; Hawkins, *supra* note 93, at 221 (explaining that under the federal regulations to FARRA, the United States ratified the UNCAT under the understanding that the Convention's "substantial grounds for believing that he would be in danger of being subjected to torture" is interpreted as "if it is more likely than not that he would be tortured"). *But see* Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (recognizing the Bush administration's argument that Arar's deportation was legal because it obtained promises from Syria, Arar's citizen country, that he would not be tortured).

147. See Dana Priest, *CIA's Assurances on Transferred Suspects Doubted*, WASH. POST, Mar. 17, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A42072-2005Mar16.html> (elucidating that the procedure for obtaining assurances is brief and informal, and involves no written assurance but instead a verbal exchange from foreign intelligence service which is cabled back to CIA headquarters).

148. *Cf. id.*

149. Barring judicial review in these extradition cases began with the rule of non-inquiry. Generally speaking, the Judiciary has taken the stance that the Executive is charged with weighing humanitarian grounds against extradition. ASIL DISCUSSION, *supra* note 17, at 12. *But see* ASIL DISCUSSION, *supra* note 17, at 20 (observing that some courts have suggested, but have not invoked, an exception to this rule in "situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a . . . court's sense of decency as to require reexamination of" the general principle against judicial review (quoting *Gallina v. Fraser*, 278 F.2d 77 (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1960))). See generally *Demjanjuk v. Petrovsky*, 776 F.2d 571, 584 (6th Cir. 1985) ("[C]ourt[s] [are not]empowered to order the extradition of any person. Extradition is an act of the Executive Branch.").

150. See Hawkins, *supra* note 93, at 228–29 (highlighting that the procedure for the assessment of diplomatic assurances is informal and vague).

151. 8 C.F.R. § 208.16. (c)(3) (2013); see, e.g., *Rashiah v. Ashcroft*, 388 F.3d 1126, 1133 (7th Cir. 2004) (holding that evidence of torture in a nation's human

explicit derogation of treaty obligations; the basic goals of UNCAT and the nonrefoulement clause in particular make clear that mechanisms as intangible and unreliable as diplomatic assurances and as unreviewable as Executive assurances are inappropriate for nonrefoulement compliance.¹⁵²

While poignant and compelling arguments support Executive deference on wartime matters,¹⁵³ the UNCAT-based right to be free from torture “is an international standard of the highest order” which does not gel with a wholly unreviewable Executive.¹⁵⁴ The D.C. Circuit’s rationale in *Omar*, in particular, fractures the Court’s *Munaf*

rights record does not prove that a petitioner personally is more likely than not to be tortured if deported, and explaining that a report of torture “unrelated to the applicant does not provide a basis for withholding removal without evidence that the applicant himself will be targeted”); *Rashiah v. Ashcroft*, 388 F.3d 1126 (7th Cir. 2004) (holding that evidence of torture in a nation’s human rights record does not prove that a petitioner personally is more likely than not to be tortured if deported, and explaining that a report of torture “unrelated to the applicant does not provide a basis for withholding removal without evidence that the applicant himself will be targeted”). *Contra* *Hawkins*, *supra* note 93, at 229 (noting that the second, third, fourth, sixth, seventh, eighth, and ninth circuits have all overturned UNCAT decisions by immigration judges for “failing to consider relevant evidence about the risk of torture”).

152. *See* *Hawkins*, *supra* note 93, at 217 (opining that executive assurances are “legally worthless” in light of the two main restrictions that UNCAT implementing legislation and regulations in the U.S. place on transfers: prisoners may not be rendered to countries where the odds of torture are greater than fifty percent, and the Executive must consider “all relevant evidence” in making this determination); *id.* at 261 (citing Ian Bruce, *Middleman Reveals Al Qaeda Secrets; Interrogation Methods Would be Illegal in U.S.*, THE HERALD SCOTLAND (Oct. 17, 2002), <http://www.heraldscotland.com/sport/spl/aberdeen/middleman-reveals-al-qaeda-secrets-interrogation-methods-would-be-illegal-in-us-1.136338>) (quoting the former head of the CIA’s counterterrorism division, Vincent Cannistraro’s skepticism of Syria’s assurances that it would not torture prisoners extradited to its territory). *See generally* *Hearings*, *supra* note 23 (making clear that the United States is adopting its nonrefoulement obligations under UNCAT for the purpose of combating torture); Vincent Cannistraro, former head of CIA counterterrorism division commenting for pub., Ian Bruce, *Middleman Reveals Al Qaeda Secrets*, THE HERALD, (Glasgow), Oct. 17, 2002, at 6 (stating explicitly that certain forms of torture are “crude, but highly effective, although we could never condone it publicly,” and that it is naïve to think, for example, “the Syrians were not going to use torture, even if they were making claims to the contrary.”).

153. *E.g.*, Fisher, *supra* note 12, at 979–81 (citing, among others, national security concerns, the importance of maintaining a uniform Executive voice, and the impairment of “Executive energy and decision making in foreign policy” as rationales for Executive deference in extradition decisions).

154. *Cornejo-Barreto*, 379 F.3d at 1016.

holding to stand for a warning to the judiciary to not involve itself in Executive affairs.¹⁵⁵ Nowhere in that court's opinion is there any recognition of critical treaty obligations under UNCAT.¹⁵⁶ Some Supreme Court critics argue for notions of judicial cosmopolitanism; the idea that decisions should rely at least in part, where relevant, on foreign and international law.¹⁵⁷ Few if any other western nations sacrifice substantive review in favor of a non-reviewable Executive assurance.¹⁵⁸ Perhaps acceptance of this on the circuit court level would, as Justice Sandra Day O'Connor claims, "enrich our own country's decisions."¹⁵⁹ The United States will remain in derogation of its nonrefoulement obligations lest it reach a viable method of reconciling international policy with constitutional doctrine.

C. DIVERGENT INTERPRETATIONS: UNCAT NONCOMPLIANCE AS
DEMONSTRATED BY THE D.C. AND NINTH CIRCUITS WITH
DISREGARD FOR FARRA IN RECENT EXTRADITION
JURISPRUDENCE

The Ninth and D.C. Circuits in *Omar* and *Trinidad y Garcia* demonstrated the inconsistency that is theoretically illustrated by the Vienna Convention analysis. Basic logic indicates that both circuits cannot be right in their respective extradition cases.¹⁶⁰ As mentioned above, while the *Munaf* Court dismissed petitioner's transfer injunction in a severe bout of Executive deference, it was not

155. *Omar v. McHugh*, 646 F.3d 13, 21 (D.C. Cir. 2011) ("[T]he inquiry that Omar asks this Court to undertake in this habeas case . . . is the precise inquiry that the Supreme Court in *Munaf* already rejected.").

156. *Id.* at 20–25 (disregarding and blatantly failing to consider the United States' obligations under UNCAT, and ignoring that treaty as a major player in deciding whether Omar should have the opportunity for judicial review of his case on the merits, the Secretary's Executive assurance notwithstanding).

157. Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2008 CATO SUP. CT. REV. 23, 39 (2007).

158. See ASIL DISCUSSION, *supra* note 17.

159. Sandra Day O'Connor, Assoc. Justice, U.S. Supreme Court, Remarks at the Southern Center for International Studies, 2 (Oct. 28, 2003) available at http://www.southerncenter.org/OConnor_transcript.pdf; see also *War, Terror, and the Federal Courts*, *supra* note 66, at 1269–70 (opining that international law can be beneficially instructive when interpreting domestic legislation).

160. Compare *Omar*, 646 F.3d at 25 (divesting the court of jurisdiction to review), with *Trinidad y Garcia*, 683 F.3d at 957 (holding that the court did have jurisdiction to review, but that review was limited to the Secretary's assurance that she completed due diligence under the torture standard).

occasioned to rule on whether, in another case, a successful claim could be brought under FARRA.¹⁶¹ This means, by extension, that the *Munaf* court *did not* comment on what type of review FARRA requires. Even so, subsequent en banc decisions expanded a holding that was at its own admittance limited to its facts, and used it to preclude relief.¹⁶² This is a curious conclusion considering that FARRA was ratified to create domestic obligations of otherwise non-self-executing UNCAT provisions.¹⁶³ If FARRA is not meant to provide protection from torture, then what is its role?

Kiyemba interpreted the Court's holding in *Munaf* to mean that the government's blanket assurance that it does not transfer to torture conclusively foreclosed claims for relief;¹⁶⁴ however, unlike *Munaf* and very significantly, the petitioners in *Kiyemba* invoked FARRA.¹⁶⁵ *Kiyemba* could not naturally embrace the *Munaf* logic because FARRA was not implicated in *Munaf*; thus, a new layer was added. But as if judicial review was anathema, the D.C. Circuit still held that FARRA review would undermine "norms of international comity."¹⁶⁶ The *Kiyemba* court thus broadened *Munaf*'s holding without any indication that FARRA might be an operable extension of UNCAT, and set a dangerous precedent for future extradition and transfer jurisprudence raised under UNCAT.¹⁶⁷

The D.C. Circuit's cavalier disregard for treaty obligations and the

161. *Munaf*, 553 U.S. at 702 ("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."); *id.* at 691 (rejecting detainees' habeas claims based on the merits of their particular case rather than because of a lack of jurisdiction).

162. *Id.* at 702 (noting also that "this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway"); see Vladeck, *Why the "Munaf Sequels" Matter*, *supra* note 46 ("Munaf required deference to the Executive Branch, but did not address whether such deference could ever be overcome, whether in a case where the detainee's claim arose under FARRA or otherwise.").

163. *Omar*, 646 F.3d at 17 ("[UNCAT] is non-self-executing and thus does not itself create any rights enforceable in U.S. courts.").

164. Vladeck, *Why the "Munaf Sequels" Matter*, *supra* note 46.

165. *Kiyemba*, 561 F.3d at 514–15.

166. *Id.* at 515.

167. *Cf.* Kim, *supra* note 133, at 1235–36, 1229–30 n.31 (noting that FARRA is a conclusive adoption of UNCAT and thus arguing that rights should be afforded under that statute).

purpose of FARRA took a severe turn in *Omar*.¹⁶⁸ In holding that REAL ID¹⁶⁹ divested it of habeas jurisdiction, the court left *no* avenue for relief for detainees bringing FARRA claims, and conclusively stated that FARRA does not give “transferees . . . a right to judicial review of their likely treatment in the receiving country.”¹⁷⁰ And so, they forgot about FARRA; FARRA actually *provides* a basis for relief as an UNCAT subset, so it is counter to the sole purpose of FARRA to claim that a transferee possesses no right to judicial review in the receiving country.¹⁷¹ Because this judicial review is functionally identical to judicial review of indefinite Executive detention, this right really has existed since *Boumediene*.¹⁷² The *Omar* panel also determined that its conclusion did not violate the Suspension Clause because “longstanding extradition principles” have never allowed habeas “to be a valid means of inquiry into the treatment [of] the relator,”¹⁷³ putting itself in disaccord not only with UNCAT, but with fundamental constitutional law in a contrived attempt to delineate between constitutional law and international law where such delineation is

168. *Omar*, 646 F.3d 13.

169. REAL ID Act, *supra* note 52 and accompanying text.

170. *Omar*, 646 F.3d at 15–16 (relying on “longstanding extradition principles” to withhold habeas review and allow REAL ID to divest the court of its remedial jurisdiction, and in doing so, relying solely on history, notions of the separation of powers, and constitutional superiority). *But see* *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (deeming *international authorities* as “instructive” when making constitutional decisions).

171. *See* Vladeck, *D.C. Circuit Court Vitiates the Suspension Clause*, *supra* note 54 (expressing the conflated rationale of the *Omar* panel and criticizing its disregard for the precedent set out under *Boumediene* in favor of a federal right to judicial review).

172. *See* Huq, *supra* note 77, at 397–98 (noting that the right to review existed before *Boumediene*, although that case gave color to such right); Brief of Legal Historians and Habeas Corpus Experts as Amici Curiae in Support of Petitioners, *Kiyemba*, 561 F.3d 509 (D.C. Cir. 2009), cert. denied, 559 U.S. at 2–4 (March 1, 2010) (per curiam) [hereinafter Brief of Legal Historians] (positing that the right to review in transfer claims actually existed at common law long before *Boumediene*); *see also* *Trinidad y Garcia*, 683 F.3d at 998 (Berzon, J., concurring) (arguing that since the Secretary of State’s assessment of torture practices is similar to the proceeding in *Boumediene* addressing executive detention, extradition claims can also be subject to habeas review).

173. *Omar*, 646 F.3d at 16. *But see* Brief of Legal Historians, *supra* note 172, at 16 (asserting *arguendo* that even if there was no right to judicial review pre-FARRA because there was no basis for relief, historically, the habeas writs were historically available to challenge potentially unlawful transfers).

implausible. The panel, in its focus on REAL ID, failed to reconcile the fact that before UNCAT was implemented in the United States, there was no basis for relief.

Accordingly, the Ninth Circuit's opinion in *Trinidad y Garcia* is in logical disaccord with *Omar*.¹⁷⁴ The court correctly held that REAL ID, in light of the fact that it is strictly an immigration statute, does not divest the court of habeas jurisdiction, but so long as the Secretary complies with her obligations under domestic law, any claim for relief is foreclosed anyway.¹⁷⁵ In so holding, it contradicted the D.C. Circuit's *Omar* decision that the REAL ID was a stand-in remedy for habeas under FARRA.¹⁷⁶ Though *Kiyemba* was part of a long lineage of Guantanamo cases, *Trinidad y Garcia* applied the deferential rationale found in *Kiyemba* to an ordinary extradition case, making the holding generally applicable extradition law in that circuit.¹⁷⁷

D. FARRA, REAL ID, AND EXTRADITION CASE LAW (IN)CONSISTENCIES

Allowing extradition cases to be foreclosed on their merits at the signature of the Secretary is insufficient under both UNCAT and FARRA. This deference (though unfounded) is substantively grounded in a misinterpretation of recent legislation and a dismissal of affirmative UNCAT obligations.¹⁷⁸ This is at once demonstrated

174. *Omar*, 646 F.3d 13; *Trinidad y Garcia*, 683 F.3d 952.

175. *Trinidad y Garcia*, 683 F.3d at 957.

176. *Id.* at 958 (“[REAL ID’s] consolidation of judicial review of immigration matters has no effect on federal courts’ habeas jurisdiction over claims made in the extradition context.”).

177. See discussion *infra* Part III.D (elaborating on the effects of the *Trinidad y Garcia* holding in light of UNCAT obligations). Compare *Kiyemba*, 561 F.3d at 514 (purporting to be a fact-specific holding, limited to the fact that the petitioner was a Guantanamo detainee and placing the case within the lineage of standard Guantanamo litigation), with *Trinidad y Garcia*, 683 F.3d at 956–57 (applying the holding in executive detention cases, making it generally applicable law, and divesting the federal courts of substantive habeas jurisdiction in *all* cases of habeas petitions brought before a court in the UNCAT/FARRA context and implicitly holding that there can never be a meritorious claim for review under FARRA).

178. See *Omar*, 646 F.3d at 18 (“Even if [FARRA] had extended a judicial review right to extradition or military transferees such as Omar . . . [REAL ID] made clear that those kinds of transferees have no such right.”); *Trinidad y Garcia*, 683 F.3d at 983 (Tallman J., dissenting) (stating that FARRA “contains nothing in the way of even mandatory language—other than its directive to create regulations

by the historical availability of the writ of habeas corpus in similar contexts, and confused by the fact that a well-established right is being foreclosed in the very instance it was meant to apply and protect those where there is a threat of torture.¹⁷⁹

The D.C. Circuit's *Omar* opinion reflects the fractured reasoning and misinterpretation that resulted in the elimination of *all* avenues of review for detainees facing extradition.¹⁸⁰ Whether forgetting or dismissing that FARRA is, in essence, a leg of UNCAT, the panel created a legally fictitious divide between the right to judicial review pre- and post- FARRA.¹⁸¹ In justifying its decision that REAL ID pretermitted review without an alternative avenue for recourse, the *Omar* panel mistook a lack of a *meritorious* habeas claim for no right to habeas *at all*.¹⁸²

But REAL ID is an immigration statute, as recognized by the Ninth Circuit in *Trinidad y Garcia*.¹⁸³ Considering the nature of the statute as evidenced by its legislative history, it is unclear how it has the effect of foreclosing review in the *extradition* context.¹⁸⁴ For a fugitive, under *Garcia*, there is a procedural right, and herein lies the majority's wrong turn. According to *Omar*, then, not only were there never really rights under *Boumediene*, as it can largely be viewed as its own source of equitable jurisdiction, but there are also *no*

to implement the United States' obligations under the Convention").

179. See, e.g., *INS v. St. Cyr*, 553 U.S. 289, 305 (2001) ("The writ of habeas corpus has always been available to review the legality of Executive detention."); see also *War, Terror, and the Federal Courts*, *supra* note 66, at 1275 ("To argue that, in the face of tremendously challenging legal issues, courts should be silent is to suggest a form of abdication that we should firmly reject.").

180. See *Omar*, 646 F.3d at 18–19; see also Vladeck, *D.C. Circuit Court Vitiates the Suspension Clause*, *supra* note 54.

181. See *Omar*, 646 F.3d at 19–20 (relying on a misinterpretation of the historical right to review); cf. Vladeck, *D.C. Circuit Court Vitiates the Suspension Clause*, *supra* note 54 (supporting the notion that the right to review always existed, but that it was not until FARRA was enacted as an extension of UNCAT that there was a basis for invoking that review, thus further supporting an argument that FARRA has been applied counter to its purpose as implementing UNCAT).

182. See *Omar*, 646 F.3d at 18; Vladeck, *D.C. Circuit Court Vitiates the Suspension Clause*, *supra* note 54 (explaining that the *Omar* court mistakenly assumed that before FARRA judicial review never existed, thus conflating a lack of meritorious habeas review with no right at all).

183. 683 F.3d at 958.

184. *Id.*

substantive UNCAT rights outside of the removal context.¹⁸⁵ Problematically, this perspective directly contravenes the United Nations Committee Reports, which detail the absolute nature of nonrefoulement generally, not the absolute nature of nonrefoulement as contained within the immigration context.¹⁸⁶ *Omar* did something different than *Trinidad y Garcia*: it essentially used REAL ID to preclude all merit-based claims under FARRA, thus invalidating those substantive rights contained in UNCAT and universally accepted under international law.¹⁸⁷

The court in *Trinidad y Garcia* embraced a legal fiction that meritorious claims were permissible under FARRA, despite its correct recognition that REAL ID should have no impact in the extradition context.¹⁸⁸ In allowing a “meritorious” claim for relief under FARRA that is subsequently foreclosed on its merits, the court essentially applied *Boumediene* as a mechanism for invoking substantive UNCAT rights, then defined the *Boumediene* “meaningful review” standard in the extradition context to mean the Secretary’s signature.¹⁸⁹ But meaningful review under FARRA as enforced via habeas corpus, assuming *arguendo* that Congress did not mean FARRA to be a place holder in the United States Code, requires more, or the UNCAT right to be free from torture is

185. See *Omar*, 646 F.3d at 17 (interpreting FARRA to grant the right to judicial review only to immigrants claiming review of a final order of removal). *But see* Fisher, *supra* note 12, at 962 (offering support for the use of judicial review to protect detainee rights because diplomatic assurances, which serve as the basis for executive assurances, are suspect).

186. *E.g.*, Committee Comment, *supra* note 90 (expressing concern with the sole use of diplomatic assurances as compliance with nonrefoulement obligations because they are generally insufficient to protect the right to be free from torture).

187. See *Trinidad y Garcia*, 683 F.3d at 956 (finding that REAL ID provided an alternative remedy in the removal context, without repealing federal habeas review).

188. *Id.* at 957, 988 (Circuit Judge Berzon, concurring) (explaining why Judge Tallman’s “understanding of [FARRA] could not be more wrong,” and citing UNCAT directly to establish that FARRA enacts “as U.S. domestic policy the international obligation the United States took in ratifying [UN]CAT”).

189. See generally *Boumediene*, 553 U.S. at 779 (leaving ambiguous the scope of habeas protection); *Munaf*, 533 U.S. at 674 (leaving open the question of whether FARRA may be invoked for relief); *Trinidad y Garcia*, 683 F.3d at 997–98 (Berzon, J., concurring) (maintaining that the court in *Boumediene* recognized that habeas is an adaptable remedy, and that, as such, some inquiry is necessary for an extradition to be consistent with UNCAT given that executive assurances are “not necessarily sufficient” for UNCAT).

effectively null.¹⁹⁰

E. UNCAT, AN ANTI-TORTURE MECHANISM, CONTEMPLATED
“MEANINGFUL REVIEW” UNDER FARRA

1. Boumediene protection in the extradition context

Under *Boumediene*, individuals facing extradition possess rights, but “rights are only as meaningful as the remedies available to enforce them.”¹⁹¹ For the purposes of review as a recourse under UNCAT, the *Boumediene* petitioners are functionally identical to the *Trinidad y Garcia* petitioners.¹⁹² The gap between the two groups is a fiction caused by recent circuit court dicta, which incorrectly interprets domestic legislation, effectively bifurcating a comprehensive mechanism of recourse.¹⁹³ This stems, at least in part, from a stagnated view of the recourse offered by writ as expanded in the Guantanamo cases and as necessary for UNCAT compliance.¹⁹⁴ Under *Boumediene*, those facing extradition are protected from non-reviewable detainment because those detainees are seeking review of an Executive decision that directly affects their status.¹⁹⁵ Both the

190. See *Trinidad y Garcia*, 683 F.3d at 988 (Berzon, J., concurring) (responding to Judge Tallman’s dissent in reasoning that FARRA’s “mandate to agencies that they ‘implement’ the United States’ obligations under [UN]CAT is a direction to put into practice the mandatory Article 3 obligations undertaken by signing [UN]CAT and incorporated into U.S. law by the [FARRA]. That mandate would be absurd if . . . no such obligations exist under U.S. law at all”).

191. Stanton, *supra* note 86, at 904; see also *id.* at 899–900 (explaining that the power to conduct habeas review inherently provides courts the power to grant a remedy).

192. In *Kiyemba*, the court differentiated between “simple” judicial release under habeas and political release under FARRA, creating an unnecessary distinction, where what matters is the original right to review.

193. E.g., *Omar v. McHugh*, 646 F.3d 13, 18 (D.C. Cir. 2011) (REAL ID); *Trinidad y Garcia*, 683 F.3d at 957 (executive assurances).

194. Cf. *War, Terror, and the Federal Courts*, *supra* note 66, at 1263 (positing that “it’s a happy coincidence of our history” that while the courts have not had to be particularly involved in answering questions about the separation of and limits on the government’s war powers, that may change circumstantially); *Hamdi*, 542 U.S. at 520 (plurality opinion) (elucidating similar thoughts to Kennedy’s in *Boumediene*, that the judiciary will sit to review the Executive in a deferential light, but to the extent the Executive starts deviating from acceptable practices under international law, “that understanding may unravel”).

195. See *Boumediene*, 553 U.S. at 766–67 (concluding that the “citizenship and status of the detainee and the adequacy of the process through which that status

Ninth Circuit and the D.C. Circuit adhere to flawed rationales.¹⁹⁶ In deciding their respective extradition cases, the circuits have misinterpreted legislation and compartmentalized meaningful review, contributing to United States' derogation of its UNCAT obligations.¹⁹⁷

The initial drafts of UNCAT suggest that some system of review is due for fugitives under FARRA, and that a signature, no matter how formal, will not suffice.¹⁹⁸ Instead, under extradition doctrine, FARRA has become words with no substance, a statutory oxymoron.¹⁹⁹ The detainees constitutionally entitled to the habeas privilege are functionally analogous to the petitioners attempting to enforce affirmative rights under UNCAT/FARRA.²⁰⁰ Any other reading not only severely undermines the *Boumediene* logic, but implicitly stands for the notion that indefinite detention is somehow worse than torture such that petitioners in the immediate line of *Boumediene* cases, because they risked indefinite detention rather than torture, had more of a need for judicial interference.²⁰¹

determination was made" is one of three circumstances under which the scope of the Suspension Clause is determined, and finding that the detainees, because they have contested their enemy combatant status, are entitled to habeas review of their detention).

196. *Omar*, 646 F.3d at 18; *Trinidad y Garcia*, 683 F.3d at 957.

197. Cf. NOWAK & MCARTHUR, *supra* note 4, at 212–13 (noting the then-Special Rapporteur on Torture, Theo van Boven's appeal to UNCAT state parties to implement a system to monitor the treatment of those extradited).

198. See Swedish Draft Convention, *supra* note 21, art. 3; First Revised Text of the Swedish Draft Convention, E/CN.4/WG.1/WP.1 (1979).

199. See *Trinidad y Garcia*, 683 F.3d at 987–88 (Berzon, J., concurring) (opining that Congress would not have "passed a statute with no intent to affect anyone's rights or obligations," and that if the Secretary of State's risk-assessment of torture is precatory, "then all of [FARRA] would be so," and the Secretary has a binding obligation to not extradite individuals likely to be subjected to torture in the receiving state).

200. See Vladeck, *D.C. Circuit Court Vitiates the Suspension Clause*, *supra* note 54 (explaining that federal habeas review is not limited to indefinite detention cases, as the court in *Omar* claims, but rather grants the right to judicial review to those facing transfer or extradition because it would be counterintuitive to claim that those facing extradition were without rights).

201. See, e.g., *Munaf*, 533 U.S. at 693–94; *Omar*, 646 F.3d at 24 (undermining the *Boumediene* rule by holding that Congress divested federal courts of their jurisdiction to hear a substantive claim for relief and finding that habeas review is inappropriate in the extradition context because those subject to extradition would not benefit from the relief granted in habeas claims, whereas those indefinitely detained would).

Courts continue to rely on the rationale used in the Guantanamo cases,²⁰² but have separated the detainees from the fugitives in practice such that one group has no rights, without regard for what is required under UNCAT.²⁰³ A second look at Justice Kennedy's language in his *Boumediene* majority opinion makes clear that meaningful habeas review is required in contexts, such as extradition, where the Executive has sole authority.²⁰⁴ His language also bolsters the argument that review is required under UNCAT.

2. A "Meaningful" Signature?: An Analysis of Executive Assurances Under UNCAT

Without FARRA, detainees have no avenue to invoke habeas defensively and thus no mechanism for review or recourse in an impending extradition; with FARRA, under a *Trinidad y Garcia* model, review is immediately foreclosed with a signature.²⁰⁵

The *Boumediene* right to meaningful review and the UNCAT right to be free from torture in essence combine to present a difficult

202. See Stephen I. Vladeck, *Normalizing Guantánamo*, 48 AM. CRIM. L. REV. 1547, 1558 (2011) [hereinafter Vladeck, *Normalizing Guantánamo*] (opining that *Boumediene*'s finding that detainees are entitled to non-statutory habeas review under the Suspension Clause considerations in *Boumediene* has brought on a wave of litigation, including in extradition cases, that has attempted to determine the scope of that right in light of the finding that Congress violated the suspension clause because it "took away access to a habeas remedy that had previously been available").

203. See *Trinidad y Garcia*, 683 F.3d at 980 (Tallman, J., dissenting) (emphasis in original) (attempting to distinguish those facing indefinite detention and those facing extradition by asserting that the "consequence of error" for the former "may be detention of persons for the duration of hostilities that may last a generation or more," whereas for the latter it "is in fact release from executive detention"). Compare *Boumediene*, 553 U.S. at 771 (benefiting from the privilege of habeas review), with *Omar*, 646 F.3d at 18 (denying meaningful review under the finding that REAL ID foreclosed such relief), and *Trinidad y Garcia*, 683 F.3d at 957 (holding that meaningful review is equivalent to the Secretary's assurance that torture upon transfer is not "more likely than not").

204. *Boumediene*, 553 U.S. at 783 ("Where a person is detained by executive order . . . the need for collateral review is most pressing."); see also *Trinidad y Garcia*, 683 F.3d at 987 (Berzon, J., concurring in part and dissenting in part) ("While the magistrate's determination of a detainee's extraditability seems to be a proceeding of the kind *Boumediene* held warrants minimal review, the torture determination is much more like the closed proceedings, which *Boumediene* held should be subject to somewhat more searching review.").

205. *Trinidad y Garcia*, 683 F.3d at 957.

challenge to Executive assurances as a vehicle for meaningful review. Because this standard leaves detainees with no avenue for recourse, both the Suspension Clause and UNCAT suggest that *Omar* and *Kiyemba* are wrong.²⁰⁶ The rationale in these cases begs the question of *Trinidad y Garcia*²⁰⁷ and what meaningful review really is. As the law stands, a detainee could *never* bring a meritorious case under the Secretary's declaration that he will not be tortured upon transfer.²⁰⁸ As if the jurisprudence does not make clear that these detainees are being overlooked for reasons of Executive deference, looking to other nations provides a substantial basis for the conclusion that the right to be free from torture requires more than a signature.²⁰⁹ Under *Trinidad y Garcia*, detainees facing extradition or transfer have a supposed right without any remedy.²¹⁰

206. *Cf. id.* at 984–86 (Berzon, J., concurring in part and dissenting in part) (disagreeing with the majority on the basis that not only is the majority's result a violation of the mandatory nonrefoulement mandate under UNCAT, it overlooked the petitioner's substantive claim that FARRA's prohibition of extradition in the face of torture makes the Secretary's determination on his extradition is illegal if, on the information available to her, it is more likely than not that petitioner will be tortured, and finding that the court has the right to review the Secretary's determination to ensure that she abides by her obligation to assess the risk of torture with due diligence); *see also* Vladeck, *Normalizing Guantánamo*, *supra* note 202, at 1554 (introducing the notion that FARRA may be seen to confer entitlement to a "substantive statutory right against transfer to torture" when raised in light of habeas corpus proceedings).

207. 683 F.3d at 957 ("An extraditee thus possesses a narrow liberty interest: that the Secretary comply with her statutory and regulatory obligations.").

208. *Cf. ASIL DISCUSSION*, *supra* note 17, at 25 n.126 (citing *Khouzam*, 549 F.3d at 564) (citing a Human Rights Watch affidavit stating that Austria, Canada, Germany, Netherlands, Russia, Sweden, Switzerland, Turkey, and the United Kingdom all provide judicial review of the reliability and sufficiency of diplomatic assurances, and thus observing that the United States may be alone in its practice of not providing for judicial review).

209. *See* NOWAK & MCARTHUR, *supra* note 4, at 150 (explaining, by example, that the fact that Venezuela disallowed Executive review of Supreme Court extradition decisions without possibility for appeal was contrary to Article 3, and more generally asserting the UNCAT Committee's recommendation that states parties implement "adequate judicial mechanisms for review" in order to mitigate concerns over the reliability of diplomatic).

210. *Cf. Stanton*, *supra* note 86, at 896–97 (explaining that U.S. courts recognize the right for Guantánamo detainees to bring habeas claims, but do not possess the power to enforce their immediate release, thereby granting detainees a right without a meaningful remedy).

IV. RECOMMENDATIONS: HOW TO RECONCILE THE TENSION BETWEEN INTERNATIONAL AND CONSTITUTIONAL PRINCIPLES

A. UNNECESSARY AMBIGUITIES

Post-*Munaf* cases have been plagued with a number of ambiguities, making it that much harder to understand how or why courts are making such extradition and transfer decisions. Despite what Judge Randolph of the D.C. Circuit maintained in his opinion in *Kiyemba*, removal is removal.²¹¹ A contrived distinction between FARRA relief and habeas relief not only undermines the advancement that United States federal courts have made with regard to fair treatment of wartime prisoners, it disallows otherwise available review for claims brought under UNCAT/FARRA.²¹² Because it defies logic to claim that extradition to another country versus relief from indefinite United States detainment should be distinct in their treatment and application, this differentiation should be abrogated moving forward to ensure that all detainees are able to exercise the rights objectively due to them.

The general need to accept and embrace the overlap between constitutional and international law with respect to extradition jurisprudence is demonstrated by the inoperativeness of a distinction between relief under the writ of habeas corpus and relief under FARRA.²¹³ The larger piece of this recognition is an understanding

211. *Kiyemba*, 555 F.3d at 519 (explaining that there is a substantive difference between seeking simple release under habeas proceedings and release into the United States because the habeas jurisdiction that was established in *Boumediene* does not also give federal courts the power to order release into the United States and away from all potential forms of torture or unlawful treatment). *Contra* Brief of Legal Historians, *supra* note 172, at 6 (arguing that the logic of *Kiyemba* and *Omar* is flawed, and that in light of recent extradition cases and the ambiguity of the “meaningful review” standard, the Secretary of State’s declaration disposes of such cases on the merits and this could not be what CAT/FARRA contemplated).

212. *See generally* Stanton, *supra* note 86, at 896, 900 (explaining “*ubi jus, ibi remedium*,” holds that “where there is a right, there is a remedy,” and that the remedy is release).

213. *See generally* Joshua Alexander Geltzer, *Decisions Detained: The Courts’ Embrace of Complexity in Guantánamo-Related Litigation*, 29 BERKELEY J. INT’L

of the importance of the federal courts in international extradition proceedings, as evidenced by the complexities of UNCAT compliance.²¹⁴ One of the ways to do this is to observe the rationale that led to the outcome in the relevant habeas decisions, specifically Justice Kennedy's remarks in *Boumediene*,²¹⁵ and ask how that rationale can be applied in the present cases.²¹⁶ The main principle that drove the Court to make its decision in *Boumediene* was the recognition of the need for an avenue through which noncitizen detainees could seek relief.²¹⁷ This cannot be lost moving forward.

B. THE INTERNATIONAL LAW AND THE FEDERAL COURTS

1. A Rule of Some Inquiry?

Judge Thomas almost had us fooled in his *Trinidad y Garcia* concurrence: for a moment, it appeared that he might have a few choice words for the absence of review in alien extradition cases.²¹⁸ But we are inevitably reminded that it is solely within the Executive's discretion to conduct foreign affairs.²¹⁹ Judge Thomas'

L. 94, 94–95 (2011) (discussing not only the complexity of contemporary wartime jurisprudence with respect to complex constitutional principles, but explaining the link to and impact of indiscriminate executive power on the implementation of U.S. international policies).

214. See generally *Trinidad y Garcia*, 683 F.3d at 955–56 (exemplifying the inherent connection between successful implementation of justice in international proceedings and the role of the federal courts).

215. *Boumediene*, 553 U.S. at 783.

216. See *id.* at 723 (rationalizing that the Executive could not have limitless power at the expense of fundamental constitutional rights). But see *Trinidad y Garcia*, 683 F.3d at 957 (remanding petitioner's case to lower court to give the Secretary of State the opportunity to assert whether it is more likely than not, upon extradition, that the petitioner will be subject to torture or other cruel treatment, thus creating the precedent that "meaningful review," contrary to *Boumediene*, means the executive signing a slip of paper that serves as an assurance).

217. *Boumediene*, 553 U.S. at 783.

218. *Trinidad y Garcia*, 683 F.3d at 958–60 (Thomas, J., concurring) (opining, in the face of a skewed statutory interpretation, that neither REAL ID nor FARRA divest courts of their jurisdiction to grant habeas relief in extradition cases, and that detainees subject to extradition possess the right to judicial review under the Suspension Clause).

219. *Id.* at 961 (arguing instead that the doctrine of separation of powers prevents the court from questioning the Secretary of State's internal extradition review, but adding that courts have the right to assess whether the Secretary of State is meeting her binding obligations under FARRA to conduct her review with due diligence).

concurring commentary effectively summarizes the general sentiment with respect to the relationship between the doctrine of separation of powers and nonrefoulement obligations. Because the Executive “possesses significant diplomatic tools and leverage the judiciary lacks,”²²⁰ the judiciary may not second-guess the merits of an extradition decision.²²¹

Circuit judges should seek a more functional balance between a necessary level of Executive deference in light of legitimate national security concerns and constitutionally required judicial review. Allowing *some* review in support of an anti-torture effort will not undermine the “Government’s ability to speak with one voice” on matters of international concern.²²² As Judge Berzon proposed in her *Trinidad y Garcia* concurrence, a rule of “limited inquiry” would protect “against blatant violations of the Secretary’s [UN]CAT obligations as implemented by [FARRA].”²²³

“The scope of habeas review is . . . not fixed. Rather, its proper application depends upon the circumstances in which it is to be applied.”²²⁴ Using *Boumediene* as a foundation, it is clear that meaningful review applies in extradition cases; thus, Judge Berzon’s suggestion that a rule of limited inquiry, which maintains a healthy level of Executive deference, is not only a viable balance,²²⁵ but also reflects that “the Executive’s authority to extradite is neither inherent

220. *Id.* (citing *Munaf*, 533 U.S. at 702). See generally Jennifer L. Milko, *Separation of Powers and Guantanamo Detainees: Defining the Proper Roles of the Executive and Judiciary in Habeas Cases and the Need for Supreme Guidance*, 50 DUQ. L. REV. 173, 196 (2012) (supporting the need to strike a balance between the authority of the executive and the role of the judiciary in habeas proceedings).

221. *Trinidad y Garcia*, 683 F.3d at 961 (Thomas, J., concurring) (recognizing the need for deference in extradition cases because of the Executive’s sole right to conduct foreign affairs).

222. *Id.* at 979 (Berzon, concurring) (Tallman, J., dissenting) (quoting *Munaf*, 533 U.S. at 702).

223. *Id.* at 997, 989 (Berzon, J., concurring) (explaining that the *Trinidad y Garcia* majority makes the mistake of thinking that FARRA confers a purely procedural right, and further that a holding which merely “nudged the Executive toward refraining from sending persons abroad to face torture” would be “contradicting the view expressed—albeit in dicta—by the Supreme Court”).

224. *Id.* at 997.

225. See *id.* (comparing the closed proceedings in *Boumediene* to the torture determination in extradition cases, and explaining that the determination falls into the category of what *Boumediene* held required “more searching review”).

nor unlimited.”²²⁶ A rule of some inquiry would solve a twofold problem: first, it would put the United States in line with other countries that subject diplomatic assurances to at least some form of judicial review, and solve the UNCAT compliance problem by making an otherwise opaque process more transparent.²²⁷ Second, it would undo *Trinidad y Garcia*'s definition of “meaningful review” under *Boumediene*, and avoid collision with an extremely important precedent for noncitizen rights.

2. Of Legislation: Amend FARRA

Legislation regarding extradition and transfer is a contemporary tale told by the United States Courts of Appeals.²²⁸ The difficulties concerning REAL ID and FARRA could be solved if FARRA was amended to embody a clear avenue for recourse, to reflect the operable practices of other countries,²²⁹ and to be rid of any provision that might be interpreted to counter the statute's very function.²³⁰ Specifically, the statute should include a provision explicitly separating it from the streamlining provisions in REAL ID so that moving forward, detainees outside of the removal context will not be at the mercy of a material statutory misreading.²³¹

226. *Id.* at 995.

227. *See id.* at 998 (supporting an inquiry into the substance of the Secretary's extradition determination and an opportunity to assess her evidence and conclusions). *See generally War, Terror, and the Federal Courts*, *supra* note 66, at 1269 (supporting the Supreme Court's use of international law when interpreting the Constitution and legislation).

228. *See generally* Vladeck, *D.C. Circuit Court Vitiates the Suspension Clause*, *supra* note 54 (criticizing the D.C. Circuit's recent rationale in *Omar*, specifically noting its apparent willingness to undermine *Boumediene* and in so doing, violate the Suspension Clause).

229. *War, Terror, and the Federal Courts*, *supra* note 66, at 1272 (“The difficult question comes when . . . a court is presented with the question whether to restrain the Executive in the conduct of war, and Congress has not done what it's done so many times, which is to take the international law principle and put it into a statute, or to refer generally to international laws.”).

230. *See Trinidad y Garcia*, 683 F.3d at 975 (Tallman, J., dissenting) (asserting that FARRA forecloses relief for detainees facing extradition and that the statute is not “an implementing tool” but rather “the mandate directing the promulgation of regulations that would implement the [UNCAT],” and, as such, does not impose a binding obligation on the Secretary of State).

231. *See supra* note 52 and accompanying text; *see also Trinidad y Garcia*, 683 F.3d at 998 (discounting arguments for the disallowance of rights under FARRA, including any role of REAL ID in the inquiry, and stating that petitioners seeking

V. CONCLUSION

The unavoidable realm of intersection between international and constitutional law demonstrates UNCAT noncompliance, as well as the dangerous tendency of our federal judiciary to defer to the Executive in the extradition context.²³² Upon recognizing that a right to habeas relief is necessary under FARRA, and that such relief conclusively entails a right to meaningful review of the Executive's extradition or transfer determination, it becomes clear that current practice has put the United States in derogation of its absolute nonrefoulement obligation under UNCAT as enforced through FARRA. Unfortunately, until a "congressional invitation"²³³ is extended to the judiciary, the Secretary's signature will just have to suffice.

review of the Secretary's final extradition decision are entitled to a review of whether that decision is justified under UNCAT).

232. See discussion *supra* Part III.B.

233. *Trinidad y Garcia*, 683 F.3d at 967 (Tallman, J., dissenting).