CAT, FARR, AND REAL ID: THE ALPHABET SOUP OF NON-REFOULEMENT IN THE UNITED STATES

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I. INTRODUCTION

In a line of cases beginning with *Munaf v. Geren*,[1] federal courts have struggled to determine the rights of military transferees and extradited persons, or "relators," when they allege torture in the receiving country. Despite the United States' ratification of the United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT),[2] U.S. courts have continually limited the transferees' and relators' ability to obtain relief for such claims. In order to respect the non-refoulement principle of CAT, courts should exercise limited judicial review of the Secretary of State's transfer and extradition authorizations and follow the Ninth Circuit's interpretation of CAT's domestic implementing legislation.

In *Munaf*, the Supreme Court showed deference to the executive branch's decision and relied on assurances and findings that the petitioners would not face torture once returned to Iraqi custody.[3] However, the Court reserved judgment on two potential methods for detainees to challenge their transfers.[4]

These two methods were considered by the United States Court of Appeals for the District of Columbia Circuit in *Kiyemba v. Obama*.[5] The D.C. Circuit interpreted the Supreme Court's deference to the executive branch in *Munaf* as a complete bar on judicial review of such decisions.[6] However, *Kiyemba* lacked the factual background and specific guarantees from the State Department central to the *Munaf* holding. Most importantly, *Kiyemba* determined the two potential methods left open in *Munaf*, the Foreign Affairs Reform and Restructuring Act

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1. 553 U.S. 674 (2008).

2. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 855 [hereinafter CAT].

3. *See Munaf*, 553 U.S. at 678 (noting that addressing allegations of torture is best left to the executive branch rather than the judiciary).

4. *See id*. at 692 (holding that addressing these two methods would interfere with Iraq's sovereign right to address offenses committed within its borders).

5. 561 F.3d 509 (D.C. Cir. 2009).

6. *See id*. at 514–15 (holding that since the petitioners in *Kiyemba* were not challenging a final order of removal, *Munaf* controlled and judicial review of the detainees' claim was barred).

(FARR Act)[7] and more serious allegations of torture, did not provide detainees with relief.[8]

In *Omar v. McHugh*, the D.C. Circuit affirmed *Kiyemba*'s limitation of the FARR Act to immigration proceedings and bar on judicial review of decisions regarding petitioners' claims of torture.[9] However, *Omar* presented the court with a new question—whether the REAL ID Act[10] can take habeas corpus jurisdiction over FARR Act claims away from federal courts and still comply with the Suspension Clause.[11]

In a rather short per curiam opinion, the United States Court of Appeals for the Ninth Circuit faced similar challenges to the FARR Act and the REAL ID Act, except in the context of extradition, in *Trinidad y Garcia v. Thomas*.[12] The Ninth Circuit held that neither the REAL ID Act nor the FARR Act divested the court of habeas corpus jurisdiction, and therefore, the court could consider the petitioner's claims.[13] This created a circuit split with the D.C. Circuit. The opinion's language made it seem as if the court was going to review the substance of the Secretary's extradition authorization.[14] However, the Ninth Circuit refused to review the Secretary's extradition authorization, citing *Munaf* for support.[15]

Under CAT Article 3 and its domestic implementing legislation known as the FARR Act, the United States is prohibited from transferring or extraditing a person to another country when he or she could face torture in the receiving country.[16] This line of cases—*Munaf*, *Kiyemba*, *Omar*, and *Trinidad y Garcia*—has eroded the rights granted in CAT Article 3 by limiting the FARR Act and REAL ID Act to immigration claims and by adopting a strict bar on judicial review of the Secretary of State's determinations. This comment begins with background information on the doctrines, statutes, and treaties underlying the courts' decisions in these cases. Part II more thoroughly discusses each case, exploring the petitioners' arguments, each court's individual reasoning, and dissenting and concurring opinions. Each section closes with an analysis of the courts' reasoning in light of the prior cases and law. This comment considers the ramifications of the courts' decisions in the

7. 18 U.S.C. §§ 2340–2340B.

8. *See id*. (holding that detainees' claims under the FARR act could not succeed).

9. 646 F.3d 13 (D.C. Cir. 2011).

10. 8 U.S.C. § 1252.

11. *Omar*, 646 F.3d at 22; *see also* Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 41 SETON HALL L. REV. 1451, 1481–82 (2011) [hereinafter, Vladeck, *The D.C. Circuit After* Boumediene] (noting that the *Omar* court faced this issue after the courts in *Munaf* and *Kiyemba* had not). The Suspension Clause of the Constitution—Article I, Section 9, Clause 2—prohibits the suspension of the writ of habeas corpus. See *infra* notes 65–66 and accompanying text for a discussion of the Suspension Clause.

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

13. *Id*. at 958–59 (holding that the FARR Act and REAL ID Act do not preclude habeas corpus jurisdiction).

14. *See id*. at 957 (remanding so that the Secretary of State could provide the record with a declaration that the Secretary complied with the procedure for extradition).

15. *Id*. ("The doctrine of separation of powers and the rule of non-inquiry block any inquiry into the substance of the Secretary's declaration.").

16. CAT, *supra* note 2, art. 3.

arena of international law and offers alternatives for dealing with issues presented in the cases.

II. OVERVIEW OF THE LAW

U.S. military transfers are regulated by two treaties, CAT and the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW).[17] All of the cases examined in this article occurred in the aftermath of the September 11th terrorist attacks on the United States.[18] However, GPW requirements do not apply to the post-September 11th situation because terrorist organizations are not High Contracting Parties to the treaty.[19] CAT, on the other hand, is not so limited and therefore applies to petitioners in *Munaf v. Geren*, *Kiyemba v. Obama*, and *Omar v. McHugh*, who were military transferees, just as it applies to relators, like the party in *Trinidad y Garcia v. Thomas*.[20]

In contrast, an international extradition proceeding in the United States is controlled by the applicable treaty, fifteen statutes, and case law.[21] As defined in the United States Attorneys' Manual, international extradition is "the formal process by which a person found in one country is surrendered to another country for trial or punishment."[22] If a foreign government requests the extradition, then that government must submit a formal request to the State Department including any documents required by the controlling treaty.[23] The State Department then reviews the request and if approved, forwards it to the U.S. Attorney's Office in the district in which the defendant is located.[24]

The defendant has a statutory right to a hearing in front of an extradition magistrate.[25] In this hearing the magistrate must determine whether the evidence supports the charge under the relevant treaty or under 18 U.S.C. § 3181(b).[26] The

17. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW]; CAT, *supra* note 2.

18. *Munaf* was decided in 2008, *Kiyemba* in 2009, *Omar* in 2011, and *Trinidad y Garcia* in 2012.

19. GPW, *supra* note 17. Article 2 limits the GPW to "cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties . . . ." A High Contracting Party is a state party to the Geneva Conventions. *See id*. (describing provisions required of these parties).

20. CAT, *supra* note 2, at pmbl.

21. *See* Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1201 (1991) (listing the authorities that govern international extradition proceedings in the United States).

22. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-15.100.

23. Eain v. Wilkes, 641 F.2d 504, 508 (7th Cir. 1981) ("The procedure in the United States for extradition is governed by 18 U.S.C. §§ 3181–3195 [1958]. In brief, the statutes require that a country seeking extradition of an individual submit to our government through proper diplomatic channels a request for extradition.").

24. *Id*.

25. 18 U.S.C. § 3184.

26. *Id*.; *see* 18 U.S.C. § 3181(b) (permitting the surrender of persons who are not citizens or permanent residents of the United States who have committed acts of violence against Americans

defendant may offer limited affirmative defenses at this hearing.[27]

If the magistrate finds the defendant is extraditable, then the magistrate certifies the case to the Secretary of State.[28] The Secretary of State independently reviews the case to decide whether to issue a warrant of surrender.[29] However, the defendant may challenge the finding of extraditability by filing a petition for a writ of habeas corpus in district court.[30] If the magistrate finds the defendant is not extraditable, then the government can file a second extradition complaint with the district court and begin a de novo proceeding.[31]

A. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CAT was adopted by the U.N. General Assembly on December 10, 1984.[32] The United States Senate ratified the treaty on October 27, 1990.[33] CAT, a non-self-executing treaty, was implemented in 18 U.S.C. § 2340–2340B.[34]

Under non-refoulement, a state party cannot "expel, return ('refouler') or extradite" a person when there is substantial evidence that the person would face torture in the receiving state.[35] Non-refoulement is considered a *jus cogens*, a fundamental principle of international law.[36] As a *jus cogens*, the international community expects states to abide by the non-refoulement obligation with no

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in foreign countries in the absence of a treaty between the United States and such foreign country's government, provided that the Attorney General can certify that the foreign government has presented evidence that, had the crime occurred in the United States, it would constitute a crime of violence and evidence that the offenses are not political in nature).

27. Defenses of alibi or insanity or facts disputing the requesting country's proof are not considered by the magistrate. Hooker v. Klein, 573 F.2d 1360, 1368 (9th Cir. 1978) (citing Shapiro v. Ferradina, 478 F.2d 894, 901 (2d Cir. 1973)) ("Thus, the extraditing court properly may exclude evidence of alibi, of facts contradicting the government's proof, or of a defense such as insanity.").

28. 18 U.S.C. § 3184.

29. Eain v. Wilkes, 641 F.2d 504, 508 (7th Cir. 1981) ("If the case is certified to the Secretary for completion of the extradition process it is in the Secretary's sole discretion to determine whether or not extradition should proceed further with the issuance of a warrant of surrender.").

30. *Shapiro*, 478 F.2d at 901.

31. *Hooker*, 573 F.2d at 1365–66; Matter of Extradition of Atta, 706 F.Supp. 1032, 1036 (E.D.N.Y. 1989).

32. CAT, *supra* note 2.

33. Omar v. McHugh, 646 F.3d 13, 17 (D.C. Cir. 2011).

34. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 305 n. 113 (2007); 18 U.S.C. § 2340–2340B.

35. CAT, *supra* note 2, art. 3(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.").

36. Steve Vladeck, *Why the "*Munaf *Sequels" Matter*, LAWFARE (June 12, 2012, 9:00 AM), http://www.lawfareblog.com/2012/06/why-the-munaf-sequels-matter/#.Uu_9ofldWSo [hereinafter Vladeck, *Why the "*Munaf *Sequels" Matter*]; *see also* David Kretzmer, *Prohibition of Torture*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW para. 6 (Dec. 2010), http://opil.ouplaw.com/home/epil.

exceptions.[37]

Examining CAT's specific definition of torture is key to understanding what the non-refoulement principle prohibits. CAT defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . ."[38] CAT has three main limitations: the torture's purpose, inflictor, and severity. The torture must be inflicted for a specific purpose—including, but not limited to, obtaining a confession or information, punishing the tortured party for his or a third party's act, intimidating or coercing the tortured or a third party, or discriminating against the victim.[39] Additionally, the acts must be "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" to qualify as torture.[40] Finally, the torture must be severe.[41] Severity is objectively determined, but subjective considerations, like the treatment's effect, or the victim's age, sex, or health, are also considered.[42] However, pain or suffering "arising only from, inherent in or incidental to lawful sanctions" does not violate CAT.[43]

B. The Foreign Affairs Reform and Restructuring Act

The definition and offense of torture and remedies for such an offense are implemented in the FARR Act at 18 U.S.C. §§ 2340–2340B.[44] The FARR Act specifically adopted the exact text of Article 3 of CAT as a policy of the United States.[45]

Although the United States has implemented its responsibilities under CAT, the FARR Act's limitation on judicial review of the executive branch's decisions under this act has made it increasingly difficult for petitioners to assert rights under CAT, as exemplified in the cases following *Munaf*.[46] Additionally, the FARR Act prohibits judicial review or consideration of "claims raised under the Convention

37. *See* Vladeck, *Why the "*Munaf *Sequels" Matter*, *supra* note 36 (noting that there are no exceptions to the non-refoulment principle of Article 3).

38. CAT, *supra* note 2, art. 1(1).

39. *Id*. ("is intentionally inflicted on a person for such purposes as"); *see also* Kretzmer, *supra* note 36, at para. 12 (discussing the use of the phrase "purposes such as" in CAT).

40. CAT, *supra* note 2, art. 1(1); *see also* Kretzmer, *supra* note 36, at para. 14 (discussing the definition of torture in CAT).

41. CAT, *supra* note 2, art. 1(1).

42. *Id*.; *see also* Kretzmer, *supra* note 36, at para. 16 (discussing objective and subjective factors considered when determining whether an act causes severe pain or suffering under CAT).

43. CAT, *supra* note 2, art. 1(1); Kretzmer, *supra* note 36, at para. 22.

44. 18 U.S.C. §§ 2340–2340B (2012).

45. 8 U.S.C. § 1231 note (1998) (United States Policy with Respect to Involuntary Return of Persons in Danger of Subjection to Torture) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.").

46. *See* § 1231(d) note (prohibiting courts from reviewing regulations adopted to implement subsection (d) or determinations made with respect to the application of policy in subsection (a)).

[Against Torture] . . . ."[47] However, judicial review is permitted when it is part of a review of a final order of removal.[48]

These limits on judicial review presented several questions regarding the court's jurisdiction over extradition and transfer claims. Cases have addressed whether the FARR Act strips the courts of habeas corpus jurisdiction in cases raising the FARR Act and CAT.[49] Each concluded the FARR Act did not repeal habeas jurisdiction.[50]

C. The REAL ID Act

Congress passed the REAL ID Act in May of 2005 as part of an emergency supplemental appropriations bill.[51] The REAL ID Act revised several facets of immigration law to streamline immigration claims.[52] Subsection (a)(4) of the act concerns claims arising under CAT. A strict reading of that subsection limits judicial review of claims arising under CAT to petitions challenging a final order of removal.[53] As the D.C. Circuit tightened restrictions on claims arising under CAT pursuant to the FARR Act, petitioners increasingly invoked the REAL ID Act as an alternative method of exercising rights under CAT.[54]

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47. *Id*.

48. *Id*.

49. *See* Vladeck, *Why the "*Munaf *Sequels" Matter*, *supra* note 36 (discussing the cases after *Munaf* and their impact on habeas corpus jurisdiction); Stephen I. Vladeck, *Non-Self-Executing Treaties and the Suspension Clause After* St. Cyr, 113 YALE L.J. 2007, 2008 (2004) (discussing the impact of I.N.S. v. St. Cyr, 533 U.S. 289 (2001) on self-executing treaties).

50. *See* Saint Fort v. Ashcroft, 329 F.3d 191, 200–01 (1st Cir. 2003) (holding that the FARR Act does not repeal habeas jurisdiction for CAT claims and explaining several statutory and constitutional reasons for such holding); Wang v. Ashcroft, 320 F.3d 130, 140–42 (2d Cir. 2003) (finding that the FARR Act does not repeal habeas jurisdiction because it does not meet the requirements of *INS v. St. Cyr*, 533 U.S. 289 (2001), which requires that a statute must minimally explicitly mention habeas corpus or 28 U.S.C. § 2241 (2012) to restrict or limit § 2241 jurisdiction).

51. 8 U.S.C. § 1252 (2012); *see also* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 136 (2006–2007) (noting that the legislative history of the REAL ID Act is sparse because the act was passed as a part of an emergency supplemental appropriations bill).

52. 8 U.S.C. § 1252; *see also* Neuman, *supra* note 51, at 136 (discussing the process of direct review after the REAL ID Act); Vladeck, *Why the "*Munaf *Sequels" Matter*, *supra* note 36 (discussing the role of the courts after the REAL ID Act).

53. 8 U.S.C. § 1252(a)(4) ("Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, 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 the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.").

54. *See, e.g.*, Omar v. McHugh, 646 F.3d 13, 15 (D.C. Cir. 2011) (arguing that the REAL ID Act gave court the duty to review conditions in the receiving country before petitioner is transferred).

D. The Rule of Non-Inquiry

Additionally, the courts in the following cases rely on the rule of non-inquiry to support their refusal to review the conditions in the receiving country despite petitioners' allegations of torture. Under the rule of non-inquiry, U.S. courts refuse to analyze "the institutions and processes of foreign governments" in determining the procedural rights and protections provided by a receiving country to a relator.[55] Neither the Constitution nor statute requires the rule of non-inquiry; the judiciary created it.[56] At its core, the rule of non-inquiry requires the judiciary show deference to the executive branch's decision.[57]

The rule of non-inquiry originated in *Neely v. Henkel*.[58] The case concerned amendments to extradition statutes that allowed fugitives in the United States to be extradited if they committed any of a number of specified crimes in a foreign country or territory occupied by or under U.S. control.[59] In reaching its holding, the Court considered treaties and congressional judgment.[60] However, the Court did not discuss the need for judicial deference to the executive branch on foreign policy issues.[61] Rather, the Court focused on whether a relator, who was an American citizen, could prevent extradition if the receiving country's laws did not protect rights recognized in the U.S. Constitution.[62] In its original form, the rule of non-inquiry prevents courts from blocking extradition solely because of differences in trial protections and rights between the receiving country and the United States.[63]

E. The Writ of Habeas Corpus

Parties, alleging torture in the receiving country, most often challenge transfer or extradition by petitioning for a writ of habeas corpus. The courts have used the writ of habeas corpus to check the executive branch's power to detain prisoners.[64] The Suspension Clause of the Constitution—Article I, Section 9, Clause 2—

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55. Aaron S.J. Zelinsky, Khouzam v. Chertoff*: Torture, Removal, and the Rule of Noninquiry*, 28 YALE L. & POL'Y REV. 233, 233 (2009).

56. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 992 (9th Cir. 2012) (en banc) (Berzon, J., concurring in part and dissenting in part) (discussing the judge-made rule of non-inquiry).

57. Khouzam v. Chertoff, 549 F.3d 235, 253 (3d Cir. 2008).

58. Neely v. Henkel, 180 U.S. 109 (1901); *see also* John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U.L. REV. 1973, 1980–85 (2010) (discussing the issues addressed by the Supreme Court in *Neely v. Henkel*).

59. *Neely*, 180 U.S. at 109–11.

60. *See* Parry, *supra* note 58, at 1981 ("*Neely* referred to treaties and 'the judgment of Congress . . . . ").

61. *Neely*, 180 U.S. at 122–23.

62. *Id*. at 123.

63. Trinidad y Garcia v. Thomas, 683 F.3d 952, 994 (9th Cir. 2012) (en banc).

64. Munaf v. Geren, 553 U.S. 674, 676 (2008); *see also* Samuel Chow, *The* Kiyemba *Paradox*, 19 CARDOZO J. INT'L & COMP. L. 775, 786–87 (2011) (explaining that the right to habeas corpus derives from both the Supreme Court's interpretation of the Suspension Clause of the U.S. Constitution and Section 14 of the Judiciary Act of 1789).

prohibits the suspension of the writ of habeas corpus except "in Cases of Rebellion or Invasion the public safety may require it."[65] Additionally, the Supreme Court has consistently required a "clear statement of congressional intent to repeal habeas jurisdiction."[66]

The Supreme Court uses a two-step test, discussed in *I.N.S. v. St. Cyr*, to determine whether a statute divests the court of habeas jurisdiction.[67] First, the statute must have a clear statement that Congress intended to repeal habeas jurisdiction.[68] Second, the Court analyzes the statute to determine if "an alternative interpretation . . . is 'fairly possible.'"[69] If so, the Court must adopt that alternative interpretation to avoid constitutional issues.[70]

In the aftermath of the September 11th terrorist attacks, military detainees, like the parties in *Munaf*, *Kiyemba*, and *Omar*, had difficulty asserting the right to habeas corpus as the political branches and the judiciary struggled to define how the writ should apply to such parties.[71] Beginning with *Rasul v. Bush*,[72] the Supreme Court found that detainees at Guantanamo Bay Naval Base were entitled to petition for habeas corpus.[73] This set off an exchange between the Supreme Court and Congress. Congress responded with legislation stripping the courts of jurisdiction over habeas corpus petitions from military detainees, and, in response, the Supreme Court interpreted any new legislation so that habeas jurisdiction was preserved.[74] This culminated in *Boumediene v. Bush*.[75] In *Boumediene*, the Supreme Court held that Guantanamo detainees had a right to challenge their detention with

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65. U.S. CONST. art. I, § 9, cl. 2; *see also* Chow, *supra* note 64, at 786 (describing the writ of habeas corpus as included in the Suspension Clause); Kristin E. Slawter, *Torturous Transfers: Examining Detainee Habeas Jurisdiction for Nonremoval Challenges and Deference to Diplomatic Assurances*, 70 WASH. & LEE L. REV. 2487, 2496 (2013) (describing the historical roots of habeas corpus).

66. I.N.S. v. St. Cyr, 533 U.S. 289, 298 (2001) (citing *Ex parte Yerger*, 8 Wall. 85, 102 (1869)).

67. *Id*. at 289–90.

68. *Id*. at 298.

69. *Id*. at 299–300.

70. *Id*. at 300.

71. *See generally* Chow, *supra* note 64, at 788–91 (discussing the legislation and cases delineating the rights of Guantanamo detainees to habeas corpus); Jonathan Hafetz, *Calling the Government to Account: Habeas Corpus in the Aftermath of* Boumediene, 57 WAYNE L. REV. 99 (2011) (analyzing the effect of *Boumediene v. Bush*, 553 U.S. 723 (2008), on detainee habeas corpus cases and providing a summary of habeas corpus litigation prior to *Boumediene*).

72. 542 U.S. 466 (2004).

73. *Id*. at 485; *see also* Chow, *supra* note 64, at 788 (reciting the facts and holding of the Rasul case).

74. *See* Detainee Treatment Act (DTA), Pub. L. No. 109–148, § 1005(e), 119 Stat. 2680 (Dec. 5, 2005) (divesting courts of jurisdiction over Guantanamo detainees' habeas petitions and delegating jurisdiction to Combatant Status Review Tribunals); Military Commissions Act of 2006, 10 U.S.C. § 948b (2012) (explaining that the DTA applies to all unlawful alien enemy combatants); Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding that the DTA only applied to future habeas petitions, which effectively voided the DTA because all Guantanamo detainees had filed their petitions).

75. 553 U.S. 723 (2008).

a petition for habeas corpus.[76] The right to habeas corpus could apply to detainees in U.S. detention centers abroad, subject to a three part balancing test.[77] The Court instructed that legislation affecting the right and access to the writ of habeas corpus must be an "adequate substitute" for the writ itself.[78] As a result of this holding, parties in *Munaf*, *Kiyemba*, and *Omar* alleged that restrictions on claims raised under CAT violated the right to habeas corpus granted to military detainees.[79]

III. INTERPRETATION AND APPLICATION THROUGH CASE LAW

A. Munaf v. Geren

The Supreme Court in *Munaf* determined petitioners could not block their transfer to Iraqi custody despite their allegations of torture.[80] The Court relied on the specific factual circumstances of the case and the determinations of the State Department in reaching this conclusion.[81] The two issues left unanswered by the Court, whether more serious allegations of torture could trigger judicial review and whether the FARR Act could provide relief,[82] and its framing of those issues are central to understanding the succeeding cases' interpretation and application of *Munaf*.

The two petitioners in this case voluntarily traveled to Iraq and were arrested by the Multi-National Force (MNF-I), a multinational coalition involving American forces.[83] The MNF-I held Iraqi prisoners at the request of the Iraqi government because many prisons had been destroyed.[84] At the time of this case, the MNF-I held 24,000 detainees.[85] One petitioner was Shawqi Omar, an American-Jordanian citizen, who traveled to Iraq in 2002.[86] He was arrested in 2004 for supporting Abu Musab al-Zarqawi, facilitating connections with other terrorist groups, bringing other terrorists into Iraq, and planning and executing kidnappings.[87] Sworn statements by other insurgents implicated Omar in these acts.[88] The MNF-I classified him as an enemy combatant, and the Combined

76. *Id*. at 795.

77. *Id*. at 766.

78. *Id*. at 790–92 ("Although we do not hold that an adequate substitute must duplicate § 2241 in all respects, it suffices that the Government has not established that the detainees' access to the statutory review provisions at issue is an adequate substitute for the writ of habeas corpus.").

79. Munaf v. Geren, 553 U.S. 674 (2008); Omar v. McHugh, 646 F.3d 13 (D.C. Cir. 2011); Kiyemba v. Obama, 561 F.3d 509 (D.C. Cir. 2009).

80. *Munaf*, 553 U.S. at 705.

81. *Id*. at 702.

82. *Id*. at 702–03.

83. *Id*. at 680–83.

84. *Id*. at 680.

85. *Id*.

86. *Munaf*, 553 U.S. at 681.

87. *Id*.

88. *Id*.

Review and Release Board found continued detention was necessary.[89]

Omar's wife and son filed a next-friend petition for writ of habeas corpus in the D.C. Circuit.[90] The Department of the Judiciary referred Omar to the Central Criminal Court of Iraq (CCCI).[91] Omar's lawyer obtained an injunction to prohibit his transfer.[92] Following an appeal of the injunction by the government, the D.C. Circuit affirmed, but interpreted the injunction as barring his transfer to Iraqi custody.[93]

The second petitioner was Munaf, an American-Iraqi citizen, who voluntarily traveled to Iraq with Romanian journalists to serve as their translator.[94] After the group was kidnapped and held for two months, the MNF-I detained Munaf for coordinating the kidnappings.[95] Like it did for Omar, the MNF-I determined Munaf was a serious threat to Iraqi security, and his case was referred to the CCCI.[96] During his case, Munaf admitted to the charges and testified against his co-conspirators.[97] He later recanted, but the CCCI found him guilty.[98] The Iraqi Court of Cassation vacated the decision and remanded the case, but instructed that Munaf remain in custody until his case concluded.[99]

Munaf's sister filed a next-friend petition for a writ of habeas corpus in the D.C. Circuit.[100] Unlike in Omar's case, the court dismissed the petition for lack of jurisdiction.[101] The D.C. Circuit affirmed the dismissal, albeit on different grounds.[102]

1. The Court Cannot Prevent Omar and Munaf's Transfer to Iraq

In analyzing whether the Supreme Court could enjoin the MNF-I from transferring Omar and Munaf, the Court looked to the case's factual circumstances and the State Department's submissions.[103] First, any release would violate Iraqi

89. *Id*. at 681–82.

90. *Id*. at 682. Next-friend petitions are cases brought on behalf of others who are unable to bring suit themselves. Tracy B. Farrell, *Next-Friend Standing for Purposes of Bringing Federal Habeas Corpus Petition*, 5 A.L.R. FED. 2D 427, 427 (2005) (explaining the elements that a "next friend" must establish in order to have standing to file a federal habeas corpus petition on a prisoner's behalf).

91. *Munaf*, 553 U.S. at 682.

92. *Id*.

93. *Id*. at 683.

94. *Id*.

95. *Id*.

96. *Id*.

97. *Munaf*, 553 U.S. at 684.

98. *Id*.

99. *Id*.

100. *Id*.

101. *Id*.

102. *Id*.

103. *See Munaf*, 553 U.S. at 686–703 (analyzing whether the Court could exercise jurisdiction over habeas corpus petitions filed by Omar and Munaf and holding habeas corpus extends to American citizens held by a multinational coalition involving American forces).

sovereignty, especially because the petitioners were being held at Iraq's request.[104] Second, the State Department's findings discredited petitioners' allegations of potential torture.[105] The Court deferred to the State Department's findings because the political branches are better suited to make determinations about possible torture.[106] According to the decision, "[t]he Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the government's ability to speak with one voice in this area."[107] The Court relied on the Solicitor General's assurances that the United States does not transfer individuals to a country where torture is likely.[108] Additionally, the Court cited the State Department's determination that the Iraqi Justice Ministry and Iraqi prisons complied with international standards on basic prisoner needs.[109] In light of the Court's concerns about Iraqi sovereignty and reliance on the State Department's findings, the Court held the petitioners could not prevent their transfer to Iraqi custody.[110]

Importantly, the Court left open two possible avenues for petitioners to explore in subsequent similar cases. The Court insinuated torture allegations more serious than the prison mistreatment alleged here could trigger judicial review of the Executive's decision to transfer.[111] Additionally, the Court refused to consider whether the FARR Act entitled petitioners to relief.[112]

2. The Concurrence Echoes the Importance of the Factual Circumstances

The concurrence, written by Justice Souter and joined by Justice Ginsburg and Justice Breyer, explicitly stated that the Court could more thoroughly examine the executive branch's decision to transfer a prisoner when torture is likely to occur.[113] The concurrence also highlighted the importance of the facts of the case to the majority's decision:

> (1) Omar and Munaf voluntarily traveled to Iraq. They are being held (2) in the territory of (3) an all[y] of the United States, (4) by our troops, (5) during ongoing hostilities that (6) involv[e] our troops. (7) The government of a foreign sovereign, Iraq, has decided to prosecute them

104. *Id*. at 697.

105. *Id*. at 702.

106. *Id*.

107. *Id*.

108. *Id*.

109. *Munaf*, 553 U.S. at 702; *see also* Vladeck, *Why the "*Munaf *Sequels" Matter*, *supra* note 36.

110. *Munaf*, 553 U.S. at 680.

111. *See id*. at 702 ("[T]his 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 anyways."); *see also* Vladeck, *Why the "*Munaf *Sequels" Matter*, *supra* note 36; Zelinsky, *supra* note 55, at 237.

112. *Munaf*, 553 U.S. at 703; *see also* Vladeck, *Why the "*Munaf *Sequels" Matter*, *supra* note 36.

113. *Munaf*, 553 U.S. at 706 (Souter, J., concurring).

> for crimes committed on its soil. And (8) the State Department has determined that . . . the department that would have authority over Munaf and Omar . . . as well as its prison and detention facilities have generally met internationally accepted standards for basic prisoner needs.[114]

3. The Key Points of the Majority Opinion[115]

First, the factual circumstances surrounding the case influenced the Court's decision, which the concurrence highlighted.[116] The petitioners voluntarily traveled to Iraq.[117] The case took place during war time.[118] The MNF-I, at the request of the Iraqi government, held the petitioners.[119] Iraq has the sovereign right to prosecute crimes occurring on its soil.[120] Taken together, these facts persuaded the Court that it could not prevent the petitioners' transfer to Iraqi custody. Second, the Court relied on the Executive's assurances that the Iraqi Justice Ministry and its prisons met international standards.[121] The Court noted it is "not suited" to make determinations regarding potential torture.[122]

However, the Court explicitly reserved judgment on two important questions going forward. First, the Court left open the possibility for a more thorough review of the Secretary's judgment when presented with serious allegations of torture.[123] Second, the Court did not determine whether the FARR Act may provide relief for petitioners.[124]

B. Kiyemba v. Obama

The first case to examine the *Munaf* holding was *Kiyemba*.[125] As more thoroughly discussed below, the D.C. Circuit's application of and reliance on *Munaf* was flawed. The *Kiyemba* court disregarded the important role of the facts in the *Munaf* holding and deferred almost completely to the executive branch's decisions. Most importantly for cases following *Kiyemba*, the court failed to consider the two avenues for relief for CAT claims left open by *Munaf*—the FARR Act and more serious allegations of torture.

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114. *Id*. (citations and quotations omitted).

115. There were several points that formed the basis of the Court's holding in *Munaf*. Attention is drawn to these key underpinnings to highlight succeeding cases' misinterpretation of the *Munaf* holding.

116. *Munaf*, 553 U.S. at 680, 706 ("Under circumstances such as those presented here, however, habeas corpus provides petitioners with no relief.").

117. *Id*. at 680–83.

118. *Id*. at 680.

119. *Id*.

120. *Id*. at 697.

121. *Id*. at 702.

122. *Munaf*, 553 U.S. at 702; Parry, *supra* note 58, at 2015–16.

123. *Munaf*, 553 U.S. at 702; Parry, *supra* note 58, at 2016.

124. *Munaf*, 553 U.S. at 703; *see also* Vladeck, *Why the "*Munaf *Sequels" Matter*, *supra* note 36.

125. 561 F.3d 509 (D.C. Cir. 2009).

The petitioners in *Kiyemba* were nine Uighurs, which is a Muslim, minority ethnic group, from western China.[126] The petitioners fled to Afghanistan and were taken into U.S. military custody in 2002.[127] The petitioners filed for a writ of habeas corpus challenging their detention at Guantanamo Bay.[128] Primarily, they cited fear of transfer to a country where they may be tortured or further detained.[129] They wanted the U.S. government to provide thirty days' notice to the district court and access to counsel prior to transfer from Guantanamo.[130] The district court granted the request for thirty days' notice, and the government appealed.[131]

1. *Munaf* Bars Relief for the Petitioners

The D.C. Circuit, relying on *Munaf*, rejected all of the petitioners' arguments. First, the court interpreted *Munaf* as barring relief for petitioners' claims that they could be subjected to torture or further detainment in a receiving country.[132] The court agreed with the *Munaf* holding that fear of torture is "a matter of serious concern . . ." but such concerns are an issue for the political branches.[133] The court agreed that judicial inquiry into the executive branch's decision regarding the likelihood of torture was inappropriate.[134] The court, once again, relied on the government's policy prohibiting "transfer [of] a detainee to a country where he is likely to be tortured" as an adequate assurance that these petitioners would not be tortured.[135]

Second, the court analyzed petitioners' requests to prevent a receiving country from detaining or prosecuting them.[136] As in *Munaf*, the court refused to issue a writ of habeas corpus to protect detainees from prosecution or detention by a sovereign state pursuant to that state's laws.[137] Additionally, the court cautioned against judicial inquiry into the receiving country's judicial processes because it "would implicate . . . norms of international comity . . . ."[138]

Finally, the court dismissed petitioners' request for notice. Requiring the government to provide detainees with notice prior to transfer would interfere with "the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for detainees."[139]

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126. Petition for Certiorari at 4, Kiyemba v. Obama, 561 F.3d 509 (2009) (No. 09-581), 2009 WL 3810569, at 4.

127. *Id*.

128. *Kiyemba*, 561 F.3d at 511.

129. *Id*.

130. *Id*.

131. *Id*.

132. *Id*. at 514.

133. *Id*. (citing *Munaf*, 553 U.S. at 700).

134. *Kiyemba*, 561 F.3d at 515.

135. *Id*. at 514 (citing *Munaf*, 553 U.S. at 702).

136. *Id*. at 515.

137. *Id*.

138. *Id*.

139. *Id*.

The petitioners argued their case was distinguishable from *Munaf* because they raised a claim under CAT, as implemented by the FARR Act, while the parties in *Munaf* did not.[140] The court rejected this difference.[141] According to the court, Congress limited judicial review under CAT to "claims raised in a challenge to a final order of removal" and cited to the REAL ID Act, although not specifically naming the act, for support.[142] Because the detainees were not challenging a final order of removal, the court determined it did not have the authority to review their claims.[143]

2. The Dissent Agrees This Case Is Distinguishable

The dissenting opinion, written by Judge Griffith, focused on *Munaf*'s effect on this case and the petitioners' right to challenge the government's assurances.[144] *Boumediene v. Bush*[145] requires the court carefully review the government's arguments in favor of continued detention.[146] Detainees must be afforded an opportunity to challenge the government's position.[147] In this case, the government's arguments, submitted in a sworn declaration, were insufficient.[148] According to the declaration, the detainees will be released from the physical custody of the United States.[149] However, the declaration did not address whether the receiving nation will continue to detain the petitioners.[150]

Judge Griffith also distinguished the present case from *Munaf*. First, he pointed out that Munaf and Omar knew the government intended to transfer them to Iraq.[151] Judge Griffith argued knowledge of the specific transfer location was central to the Supreme Court's decision as well as to the parties' arguments.[152] Second, the *Munaf* Court focused on protecting Iraqi sovereignty, which was not an issue in *Kiyemba*.[153] Third, Munaf and Omar voluntarily traveled to Iraq during war hostilities, but the actions of these petitioners did not take place during war

140. *Kiyemba*, 561 F.3d at 514.

141. *Id*.

142. *Id*. at 514–15 ("'Notwithstanding any other provision of law . . . including section 2241 of Title 28, or any other habeas corpus provision, . . . a petition for review [of an order of removal] shall be the sole and exclusive means for judicial review of any cause or claim' arising under the Convention.").

143. *Id*. at 515.

144. *Id*. at 523 (Griffith, B., dissenting).

145. 533 U.S. 723 (2008).

146. *Kiyemba*, 561 F.3d at 523.

147. *Id*.

148. *Id*. at 525.

149. *Id*.

150. *See id*. (holding that the majority failed to address the important issue of the possibility of the continued detention by a foreign nation on behalf of the United States).

151. *See id*. ("There was no need for the *Munaf* Court to consider an issue at the center of this dispute: whether notice is required to prevent an unlawful transfer.").

152. *See Kiyemba*, 561 F.3d at 526 ("Although the Supreme Court rightly gave substantial weight to the government's determination that the proposed transfer was lawful, the petitioners were at least permitted to argue otherwise.").

153. *Id*.

hostilities.[154] Finally, Munaf and Omar sought a distinctive kind of relief.[155] Specifically, they wanted the United States to protect them from Iraqi prosecution.[156] A writ of habeas corpus does not offer such protection; rather, the writ usually results in the detainee's release from custody.[157] In contrast to the relief sought by Munaf and Omar, the petitioners in *Kiyemba* sought thirty days' notice prior to transfer.[158] Therefore, the dissent concluded *Munaf* and *Omar* could be distinguished based on the factual circumstances and the relief sought by the petitioners.

3. The Majority's Discussion of the FARR Act

In *Munaf*, the Supreme Court specifically left open the option of challenging a decision to transfer, under the FARR Act, when torture is possible.[159] However, Chief Justice Roberts noted some obstacles to succeeding on this claim. First, the FARR Act applies where a detainee is being returned to a country.[160] Second, the FARR Act may only apply to immigration proceedings.[161] Chief Justice Roberts's conclusion that the FARR Act was limited to final orders of removal was confirmed by the language of the REAL ID Act.[162] The *Kiyemba* decision only provided a cursory analysis of the petitioners' FARR Act claims.[163] This short analysis is somewhat surprising in light of Chief Justice Roberts's earlier discussion in *Munaf* and the *Munaf* Court's deliberate decision to leave the FARR Act issue open.[164] However, it appears that the *Kiyemba* court agreed with, and arguably adopted, Chief Justice Roberts's reasoning on the issue. As previously discussed, the *Kiyemba* court dismissed petitioners' FARR Act claims because they were not challenging a final order of removal.[165]

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154. *Id*.

155. *Id*.

156. *Id*. (citing *Munaf*, 553 U.S. at 700).

157. *Id*.

158. *See Kiyemba*, 561 F.3d at 511.

159. *See Munaf*, 553 U.S. at 703 (holding that the Court would not consider the FARR Act issue because the petitioners did not assert the claim in their petition).

160. *Id*. at 707 n. 6.

161. *See id*. (showing that the habeas petitions do not raise a claim for relief under the FARR Act because claims raised under this act are limited to certain immigration proceedings); *see also* Stephen I. Vladeck, *Normalizing Guantanamo*, 48 AM. CRIM. L. REV. 1547, 1555 (2011) [hereinafter Vladeck, *Normalizing Guantanamo*] (discussing the *Munaf* case's limitation on the application of the FARR Act).

162. *See* 8 U.S.C. § 1252 (a)(4) (2012) (stating that notwithstanding other provisions of law, a petition for review is the sole means for judicial review of claims under CAT); Vladeck, *Normalizing Guantanamo*, *supra* note 161, at 1555–56 (discussing the implications of the REAL ID Act for the petitioners in the *Munaf* case).

163. *See Kiyemba*, 561 F.3d at 203–04 (showing that the petitioners in this case sough to distinguish their claims from those in *Munaf* on the ground that the *Munaf* petitioners did not raise a claim under CAT).

164. *Munaf*, 553 U.S. at 703.

165. *Kiyemba*, 561 F.3d at 203–04 ("Here the detainees are not challenging a final order of

The *Kiyemba* decision on the FARR Act issue appears to follow directly from the *Munaf* precedent,[166] although one can argue Chief Justice Roberts's analysis of the FARR Act and its relationship to transfer challenges was dicta.[167] The majority opinion explicitly refused to consider whether the FARR Act could provide relief because petitioners did not assert such a claim nor raise it in any of their certiorari filings.[168] The *Kiyemba* opinion, and future cases, would have benefitted from a more thorough analysis of the FARR Act issue. The *Kiyemba* opinion did not address whether limiting the FARR Act to immigration proceedings affected the United States' obligations under the non-refoulement principle of CAT, considered a *jus cogens* in international law.[169] Additionally, the opinion did not consider whether this limitation contradicted the holding in *Boumediene*, which requires the government to provide an adequate substitute for habeas corpus if legislation affects the right and access to the writ.[170]

4. Analyzing the Majority's Interpretation and Application of *Munaf*

Considering the facts underlying the *Munaf* decision, the court here improperly interpreted and extended the Supreme Court's holding in *Munaf*. The Court in *Munaf* relied on several key factual circumstances in reaching its decision.[171] The facts of the *Kiyemba* decision differ in several key respects. Pakistanis handed the *Kiyemba* petitioners over to the U.S. military, which then imprisoned them.[172] In contrast, the Iraqis captured the *Munaf* petitioners and requested the MNF-I hold them.[173] Additionally, the MNF-I classified the *Munaf*

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removal. As a consequence, they cannot succeed on their claims under the FARR Act, and *Munaf* controls.")

166. *Compare id*. (showing that the petitioners' claims fail under the FARR Act because they are not challenging a final order of removal), *with Munaf*, 553 U.S. at 703 n. 6 (showing that the court did not consider a claim under the FARR Act because the petitioners did not assert a FARR Act claim in their petition for habeas).

167. *See* Jeffery H. Fisher, *Detainee Transfers After* Munaf*: Executive Deference and the Convention Against Torture*, 43 GA. L. REV. 953, 977 (2009) (discussing the Court's discussion of the FARR Act claim as dicta and that the Court did not address the FARR Act claim on its merits).

168. *See Munaf*, 553 U.S. at 703 ("Neither petitioner asserted a FARR Act claim in his petition for habeas, and the Act was not raised in any of the certiorari filings before this Court . . . . Under such circumstances we will not consider the question.").

169. *See supra* Part I.B.

170. Boumediene v. Bush, 533 U.S. 723, 790–92 (2008).

171. *See Munaf*, 553 U.S. at 697 ("That [release] claim fails for the same reasons the transfer claim fails, given that the release petitioners seek is release in a form that would avoid transfer.").

172. *See* Hafetz, *supra* note 71, at 138 (discussing that *Kiyemba* dealt with prisoners seized by the United States and under its total and exclusive control and who faced transfer to another country); *see also* Parhat v. Gates, 532 F.3d 834, 837 (D.C. Cir. 2008) (concerning another occasion in which Pakistani officials turned over the petitioner to the U.S. military who then imprisoned them); *In re* Guantanamo Bay Detainee Litigation, 581 F.Supp.2d 33, 35 (D.C. Cir. 2008) (showing that the petitioners were also handed over to the U.S. military by Pakistani officials).

173. *Munaf*, 553 U.S. at 681, 683.

petitioners.[174] In *Kiyemba*, the Combatant Status Review Tribunals dealt with petitioners' classifications, which were dropped or overturned prior to the *Kiyemba* decision.[175] Therefore, the *Kiyemba* petitioners were no longer considered a threat to national security at the time of their case.

The most important difference between the two cases is that the *Munaf* petitioners knew they would be transferred to Iraq, but the *Kiyemba* petitioners did not know if they would be transferred or to where.[176] The D.C. Circuit's reliance on the government's assurances regarding the likelihood of torture distorted the *Munaf* holding. In *Munaf*, the Court cited the State Department's specific analysis of the Iraqi Justice Ministry and prisons and conclusion that these facilities met international standards.[177] The *Kiyemba* decision did not include any analysis of the receiving country's government or facilities. Rather, the *Kiyemba* court relied on a general State Department policy statement.[178] In accepting this policy statement, the *Kiyemba* decision stated, "*Munaf* concerned a specific transfer, but the transferee sovereign's likely treatment of the petitioners was not material to its holding."[179] This directly contradicts the *Munaf* holding. The *Munaf* opinion described petitioners' torture allegations as "a matter of serious concern."[180] The Court then discussed the State Department policy not to transfer an individual where torture is likely and the findings of the State Department specifically regarding the Iraqi Justice Ministry, prisons, and detention facilities.[181] In *Kiyemba*, the court lacked these specific assurances but nevertheless dismissed the

174. *See id*. at 681–84 (showing that after a tribunal reviewed the evidence and the facts surrounding Munaf's capture, the tribunal classified him as a serious threat to Iraqi security).

175. *See Parhat*, 532 F.3d at 838, 854 (holding that the Combatant Status Review Tribunal's determination that Parhat was an enemy combatant was inconsistent with specified standards); *In re Guantanamo Bay Detainee Litigation*, 581 F.Supp.2d at 35 (explaining the government independently determined it would no longer treat the Uighurs in question as enemy combatants); Petition for Certiorari at 32 n. 4, Kiyemba v. Obama, 561 F.3d 509 (D.C. Cir. 2009) (No. 09-581), 2009 WL 3810569, at 32 n. 4 (explaining that in Abdul Semet, et al. v. Gates, Nos. 07–1509 through 07–1512 (D.C. Cir. Sept. 12, 2008), the petitioners' imprisonment was declared unlawful).

176. *See Munaf*, 553 U.S. at 682, 684 (showing that Munaf was to be held in custody pending the outcome of criminal proceedings in Iraq); *Kiyemba*, 561 F.3d at 511 (discussing the fear of the petitioners that they would be transferred to a country where they would be tortured, so they sought relief requiring the government to provide them with notice if they were being transferred); *see also* Stephen I. Vladeck, *The Unreviewable Executive:* Kiyemba, Maqaleh, *and the Obama Administration*, 26 Const. Comment. 603, 620–21 (2010) (showing that because the petitioner knew he was to be transferred to Iraq, the *Munaf* court had the benefit of competing arguments from the petitioners and the government for each transfer).

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

178. *See Kiyemba*, 561 F.3d at 514 ("Indeed, as the present record shows, the Government does everything in its power to determine whether a particular country is likely to torture a particular detainee.").

179. *Id*. at 515 n.6.

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

181. *See id*. ("Indeed, the Solicitor General states that it is the policy of the United States not to transfer an individual in circumstances where torture is likely to result.").

petitioners' torture allegations.

The *Kiyemba* court showed extraordinary deference to the executive branch, for which it cited to *Munaf* for support.[182] However, the *Kiyemba* court adopted an expansive interpretation of the *Munaf* decision's discussion on deference. *Munaf* required deference to executive branch decisions when the case concerns analysis of foreign justice systems and diplomacy.[183] The *Munaf* decision left open the possibility of challenging transfer where "the probability of torture is well documented" and the "detainee is likely to be tortured."[184] Because the decision intentionally left open these two possibilities, *Munaf* does not stand for complete deference to the executive branch.[185] The *Kiyemba* court's reading of the *Munaf* decision turned this rule of limited deference, where the Supreme Court was presented with specific factual findings regarding the receiving country's conditions, into a bar on judicial review of transfer decisions when presented with only general statements of State Department policy.[186]

The *Kiyemba* court failed to recognize a key issue unanswered by the *Munaf* court—the possibility of judicial review where the allegations of torture were serious. The *Kiyemba* court's deference is especially concerning in light of the treatment of the Uighurs by the Chinese government. Ethnic tension has grown in the region since 1949, when the government encouraged Han people to move there.[187] The influx of Han people has led to a decrease in jobs for ethnic minorities, restrictions on the practice of Islam, and a preference for Mandarin over minority languages.[188] In 2007, Uighurs were required to surrender their passports and those not handed over were voided.[189] The U.S. Commission on International

182. *See Kiyemba*, 561 F.3d at 514 ("Under Munaf, however, the district court may not question the Government's determination that a potential recipient country is not likely to torture a detainee.").

183. *See Munaf*, 553 U.S. at 702 (holding that the judiciary is not suited to second guess these types of determinations made by the executive branch).

184. *Id*.

185. *See id*. at 702 ("Petitioners here allege only the possibility of mistreatment in a prison facility; 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."), 706 (showing in Justice Souter's concurrence that the Court reserves judgment on such extreme cases); *see also* Vladeck, *The D.C. Circuit After* Boumediene, *supra* note 11, at 1480 ("And even *Munaf* reserved the possibility of judicial review in a case where the detainee could prove that the government's assertions about conditions in the receiving country were incorrect.").

186. *See* Fisher, *supra* note 167, at 976 (discussing the *Kiyemba* court's reading of *Munaf* to mandate complete executive deference); *see also* Vladeck, *The D.C. Circuit After* Boumediene, *supra* note 11, at 1480 (discussing that the petitioners in *Kiyemba* could not credibly fear mistreatment upon being transferred).

187. Edward Wong, *Rumbles on the Rim of China's Empire*, N.Y. TIMES, July 11, 2009, at WK1.

188. *See id*. ("[A] need to subsume their own language to Mandarin in order to get ahead economically.").

189. *See* Associated Press Worldstream, *Activist: members of Muslim minority group in China forced to surrender their passports*, ASSOCIATED PRESS NEWSROOM, July 20, 2007, *available at* http://forum.uyghuramerican.org/forum/showthread.php?6502-Activist-members-of-Muslim-minority-group-in-China-forced-to> (discussing the discriminatory actions being taken

Religious Freedom has condemned the Chinese government's treatment of Uighurs, most recently in its 2014 annual report.[190]

In 2009, several Uighurs marched on the capital of Xianjiang, which is considered the Uighurs' homeland, to protest a case of judicial discrimination.[191] The protest led to clashes with riot police and waves of ethnic violence and reprisals.[192] According to the Chinese government, 184 people were killed and 1,100 were injured.[193]

Human Rights Watch has detailed more extreme cases of Chinese torture of Uighurs. Ismail Semed was forcibly repatriated from Pakistan and was executed after being charged with "attempting to split the motherland."[194] Huessein Celil, a dual citizen of Canada who had been granted refugee status by the United Nations, was deported and sentenced to life in prison on terrorism charges.[195] His family maintains he was coerced into signing a confession.[196]

The *Kiyemba* petitioners' requests for notice of transfer seem well-founded in light of the treatment of Uighurs in China. However, the D.C. Circuit quickly dismissed the petitioners' request for notice.[197] According to the court, requiring the government to provide notice would disrupt "the Executive's ability to conduct sensitive diplomatic negotiations."[198] The only support cited for this conclusion came from the declaration submitted by Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues.[199] Therefore, the *Kiyemba* court closed off the two avenues for relief explicitly left open by *Munaf*—FARR Act claims and more serious torture allegations.

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against Muslim groups in China).

190. *See* U.S. COMM'N ON INT'L FREEDOM, 2014 ANNUAL REPORT 6–7, 47–49 ("For Tibetan Buddhists and Uighur Muslims, conditions are worse now than at any time in the past decade.")

191. *See* Wong, *supra* note 187 (discussing the Uighur march on the capital that exploded into clashes with riot police and Uighurs killing Han civilians).

192. *Id*.

193. *See id*. (noting that the majority of those killed during the ethnic clash were Han).

194. *China: Account for Uighur Refugees Forcibly Repatriated to China*, HUMAN RIGHTS WATCH (Jan. 28, 2010), http://www.hrw.org/news/2010/01/28/china-account-uighur-refugees-forcibly-repatriated-china; *China 'executes' Uighur activist*, BBC NEWS (Feb. 9, 2007, 11:06 AM), http://news.bbc.co.uk/2/hi/asia-pacific/6345879.stm.

195. *China: Account for Uighur Refugees Forcibly Repatriated to China*, *supra* note 194; Adam Miller, *Huseyin Celil, Serving Life Sentence In China, 'Forgotten' By Canada, Says His Wife*, THE HUFFINGTON POST: CANADA (July 5, 2012, 4:00 AM), http://www.huffingtonpost.ca/2012/07/05/huseyin-celil-china-life-sentence-uighur-minority_n_1650283.html.

196. *See China: Account for Uighur Refugees Forcibly Repatriated to China*, *supra* note 194 (noting that Celil was held on terrorism charges after being coerced into signing a confession).

197. Kiyemba v. Obama, 561 F.3d 509, 511 (D.C. Cir. 2009).

198. *Id*.

199. *See id*. at 514–15 ("Later review in a public forum of the Department's dealings with a particular foreign government regarding transfer matters would seriously undermine our ability to investigate allegations of mistreatment or torture . . . and to reach acceptable accommodations with other governments to address those important concerns.").

C. Omar v. McHugh

In *Omar v. McHugh*, the D.C. Circuit adopted its holding in *Kiyemba* limiting the right to challenge transfer under the FARR Act, and therefore CAT, to immigration proceedings and relied on the language of the REAL ID Act for support.[200]

Omar revisited the claims of Shawqi Omar, one of the petitioners in *Munaf*.[201] In this case, Omar claimed the FARR Act gave him a right to judicial review of the conditions in a receiving country prior to his transfer.[202] The Court did not evaluate Omar's FARR Act claim in *Munaf*, because he did not argue it in his initial petition for habeas corpus.[203]

1. Omar Does Not Have a Right to Judicial Review

First, the D.C. Circuit considered whether it could reach the merits of Omar's claims under the FARR Act. The court relied on *Kiyemba* in holding the FARR Act, as supported by the REAL ID Act, does not provide military transferees a right to judicial review of treatment in a receiving country.[204] The court discussed the relationship between the FARR Act and CAT, specifically that the FARR Act implements CAT.[205] However, according to the court, the FARR Act limits review to the immigration context.[206] Because Omar was not subject to a removal order, he could not make a claim under the FARR Act.[207]

The court determined that the REAL ID Act supports this conclusion, because the REAL ID Act limits "judicial review of conditions in the receiving country" to immigration transferees.[208] In order to obtain judicial review under the REAL ID Act, the petition for review must be filed "in accordance with this section [§ 242 of the Immigration and Nationality Act] . . . ."[209] Omar was not eligible to file a petition under § 242 of the Immigration and Nationality Act because he was neither subject to a removal order nor an immigrant.[210] Therefore, Omar was not entitled to relief.

The court next considered whether constitutional guarantees of habeas corpus

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200. 646 F.3d 13, 15 (D.C. Cir. 2011).

201. *See id*. at 14 ("But since 2005, Omar has pursued a habeas corpus petition in the U.S. court system seeking to block his transfer.").

202. *Id*. at 15.

203. *Id*. at 16 (showing that in *Munaf*, Omar did not state a claim for which habeas corpus relief could be granted).

204. *Id*. (citing *Kiyemba*, 561 F.3d at 514–15).

205. *See id*. at 17 ("The Foreign Affairs Reform and Restructuring Act of 1998 implements Article 3 of the Convention Against Torture.").

206. *See Omar*, 646 F.3d at 17 (holding that, by its terms, the FARR Act does not give extradition or military transferees judicial review of the conditions in receiving countries).

207. *See id*. at 17–18 (citing that because Omar is a transferee, he does not have the right to judicial review of the receiving country under the FARR Act).

208. *Id*.

209. *Id*.

210. *See id*. ("Omar is a military transferee, not an alien seeking review of a final order of removal under the immigration laws.").

and due process provide for judicial review of the conditions in Iraq prior to Omar's transfer.[211] The court heavily relied on *Munaf* in reaching its decision.

The court interpreted *Munaf* as holding that the Constitution does not give military transferees a right to judicial review of a receiving country under the writ of habeas corpus or due process.[212] The court agreed with *Munaf* that the political branches, not the judicial branch, should analyze conditions faced by potential relators or transferees in foreign countries.[213] The court also looked to *Munaf* in determining that transferees do not have a habeas or due process right to this judicial review.[214] The court specifically acknowledged the application of the rule of non-inquiry in such cases.[215] The court's final reason for dismissing Omar's habeas corpus and due process argument was based in history. According to the majority, at the end of hostilities, wartime detainees have been "routinely transferred" without any judicial review of the receiving country's conditions.[216] Therefore, Omar as a transferee had no right to judicial review.[217]

Omar made several arguments regarding the interaction between the constitutional guarantee of habeas corpus and the FARR Act.[218] First, according to Omar, Congress cannot limit judicial review to immigration transferees and exclude relators and military transferees from that right.[219] The court rejected the argument, stating that Congress is permitted to create such rights as long as there is no equal protection violation.[220]

Second, Omar argued the FARR Act violates the Constitution "by declaring a statutory 'policy' against transfer to torture for all transferees" but limiting the right to judicial review of a receiving country's conditions to immigration

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211. *See id*. at 18 (holding that the Constitution's guarantees of habeas corpus and due process do not grant Omar a right to judicial review of Iraqi prison conditions).

212. *See Omar*, 646 F.3d at 18–19 ("The Supreme Court ruled in *Munaf* . . . that the Constitution does not grant extradition or military transferees such as Omar a habeas corpus or due process right to judicial review of conditions in the receiving country before they are transferred.").

213. *See id*. at 19 (upholding the point of view that courts historically have refused to inquire into conditions an extradited individual might face).

214. *See id*. at 20 ("Historically, a would-be transferee such as Omar has possessed no right to judicial review of conditions the transferee might face in another country.").

215. *Id*. at 19.

216. *Id*. at 20 ("Since the Founding, the United States has routinely transferred wartime detainees at the end of hostilities or as part of an exchange, without judicial review of conditions the transferees would face in the other nation.").

217. *See id*. at 19 (holding that Omar's situation is like that of an extradition transferee since he is a military detainee captured during war who is now facing transfer into the custody of another country).

218. *See Omar*, 646 F.3d at 21 (disagreeing with Omar's claim that the Constitution's habeas corpus guarantee and the FARR Act combine to give him a right of judicial review of conditions in the receiving country).

219. *Id*.

220. *Id*.

transferees.[221] The court disagreed. Congress is not required to allow judicial review for all transferees.[222] Congress can "impose broader responsibilities on the Executive," but Congress does not have to permit judicial review of the "the Executive's compliance with those additional statutory responsibilities."[223] Therefore, habeas corpus, on its own, does not grant Omar such a right.[224]

Second, Omar argued that his present claim relies on substantive due process, whereas his claim in *Munaf* rested on procedural due process.[225] However, the court responded that the *Munaf* decision rejected both procedural and substantive due process claims.[226]

2. The Court Follows in *Kiyemba*'s Footsteps

Omar only compounded the holding in *Kiyemba*—the FARR Act does not provide relief to detainees challenging their transfer with allegations of torture.[227] This holding is problematic for U.S. obligations under CAT. CAT is a non-self-executing treaty that requires domestic legislation to make obligations under the treaty, like non-refoulement, binding U.S. law.[228] The FARR Act was passed for exactly that purpose: to implement CAT obligations.[229] However, in *Omar*, the court held that the FARR Act—which implements U.S. obligations required by CAT—does not apply to cases outside of the limitations of the REAL ID Act or cases outside of the immigration context.[230]

The holdings in *Omar* and *Kiyemba* contradicted several previous circuit court decisions addressing the question of whether the FARR Act could be used in habeas proceedings.[231] In these previous cases, the circuit courts acknowledged the limitations of judicial review set forth in the FARR Act.[232] However, the courts held that the FARR Act did not pass the test set out in *I.N.S. v. St. Cyr* used to determine whether the statute repealed habeas jurisdiction.[233] In each of the cases,

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221. *Id.*

222. *Id.*

223. *Id.* at 21–22.

224. *Omar*, 646 F.3d at 21–22.

225. *Id.*

226. *Id.* at 21.

227. *Id.* at 17.

228. *Id.*

229. *Id.*

230. *Omar*, 646 F.3d at 17–18 (limiting judicial review of conditions in a receiving country to the immigration context and describing the procedural obstacles a military transferee would have to access of such review under the REAL ID Act).

231. *See* Vladeck, *The D.C. Circuit After* Boumediene, *supra* note 11, at 1482–83 ("Virtually every circuit court to consider the question had held, prior to the REAL ID Act, that FARRA *could* be invoked in habeas petitions . . . .").

232. Cadet v. Bulger, 377 F.3d 1173, 1181 (11th Cir. 2004); Ogbudimkpa v. Ashcroft, 342 F.3d 207, 215–21 (3d Cir. 2003), *superseded by statute*, the REAL ID Act; Saint Fort v. Ashcroft, 329 F.3d 191, 200–02 (1st Cir. 2003), *superseded by statute*, the REAL ID Act; Wang v. Ashcroft, 320 F.3d 130, 142 (2d Cir. 2003), *superseded by statute*, the REAL ID Act.

233. *E.g.*, *Cadet*, 377 F.3d at 1182–83. See *infra* Part I, Section F(1), which discussed the two-part *St. Cyr* analysis.

the courts upheld the petitioners' rights to challenge removal or transfer orders based on CAT.[234]

The *Omar* court also looked to history to buttress its holding that military transferees do not have a right to judicial review. Specifically, the court stated that since the founding of the United States, military transferees have been transferred at the end of hostilities without judicial review of conditions in the receiving country.[235] While this historical argument is likely correct, it is irrelevant to Omar's claims. The signing of CAT and the passage of the FARR Act created new responsibilities for the U.S. government prior to transferring military detainees or immigration transferees.[236] Therefore, the court's historical analysis should have begun at least at 1998 with the enactment of the FARR Act, if not 1984, with the U.S. signing of CAT.[237]

In analyzing Omar's argument that the REAL ID Act cannot take away rights created by the FARR Act, the court concluded that Congress was free "to undo a statute that applies in habeas cases."[238] Supreme Court precedent requires Congress to either repeal the statutory right or suspend the writ of habeas corpus.[239] As Judge Griffith noted in his concurrence, Congress did not repeal the FARR Act, but rather limited Omar's ability to bring his claim in federal court.[240] The REAL ID Act affected jurisdiction, but not rights, granted in the FARR Act.[241] The rights under the FARR Act, and consequently under CAT, remain, and Congress must provide an alternative method for detainees to vindicate their habeas rights.[242] In light of the *Omar* court's holding, those not challenging a final order of removal are wholly prevented from obtaining judicial review of their rights under CAT, specifically the right not to be transferred to a country when torture is likely.

D. Trinidad y Garcia v. Thomas

The Philippines sought extradition of Hedelito Trinidad y Garcia, a Philippine citizen, on charges of kidnapping for ransom.[243] The State Department reviewed

234. *E.g.*, Cadet, 377 F.3d at 1183.

235. *Omar*, 646 F.3d at 19.

236. CAT, *supra* note 2, art. 3; 8 U.S.C. § 1231 note (2013) (United States Policy with Respect to the Involuntary Return of Persons in Danger of Subjection to Torture).

237. 8 U.S.C. § 1231 note (1998) (United States Policy with Respect to the Involuntary Return of Persons in Danger of Subjection to Torture).

238. *Omar*, 646 F.3d at 22.

239. *See* Steve Vladeck, *The D.C. Circuit Vitiates the Suspension Clause (in a Non-Guantanamo Case, to Boot)*, PrawfsBlog (June 22, 2011, 9:19 AM), http://prawfsblawg.blogs.com/prawfsblawg/2011/06/the-dc-circuit-vitiates-the-suspension-clause.html [hereinafter Vladeck, *The D.C. Circuit Vitiates the Suspension Clause*] (indicating that *Boumedienne* requires repealing the statute and quoting Judge Griffith's *Omar* concurrence in support).

240. *Omar*, 646 F.3d at 29 (Griffith, J., concurring); Vladeck, *The D.C. Circuit After* Boumediene, *supra* note 11, at 1483–84.

241. Vladeck, *The D.C. Circuit Vitiates the Suspension Clause*, *supra* note 239.

242. *Id.*

243. Trinidad y Garcia v. Thomas, 683 F.3d 952, 962 (9th Cir. 2012) (en banc).

and approved the extradition request.[244] Trinidad y Garcia was arrested in Los Angeles.[245] He filed a petition for writ of habeas corpus, which the court granted.[246] The government appealed, and the court of appeals found the district court did not err in granting the writ of habeas corpus.[247] A rehearing en banc was granted.[248]

Trinidad y Garcia brought two claims for relief. First, he argued that extradition to the Philippines would violate CAT.[249] Second, he claimed that his extradition was prohibited by substantive due process under the Fifth Amendment.[250]

1. The FARR Act and REAL ID Act Do Not Repeal Jurisdiction

The Ninth Circuit rejected the government's argument that the REAL ID Act and the FARR Act removed federal habeas jurisdiction over Trinidad y Garcia's claims.[251] The court determined that the REAL ID Act and the FARR Act failed the two-part test set forth in *St. Cyr*.[252] Under that test, a statute only repeals habeas jurisdiction if, first, Congress has clearly stated the intent to do so in the statute. Second, the Court must adopt any alternative interpretation where needed to avoid constitutional problems.[253] The FARR Act did not contain the necessary clear statement.[254] While the REAL ID Act did contain a clear statement, the act could be construed as applying only to final orders of removal.[255] Therefore, the court held that neither the REAL ID Act nor the FARR Act repealed federal habeas jurisdiction over the petitioner's claims.[256]

The court also rejected the government's argument that the rule of non-inquiry prevented the court from reviewing Trinidad y Garcia's habeas claims.[257] According to the court, the rule of non-inquiry applies only to the scope of habeas review—"it does not affect federal habeas jurisdiction."[258]

2. The Court Can Provide Partial Relief to Trinidad y Garcia

The court found no evidence that the Secretary of State complied with her responsibility under CAT and the FARR Act in determining whether Trinidad y

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244. *Id*.
245. *Id*.
246. Trinidad y Garcia v. Benov, 395 F. App'x 329, 330 (9th Cir. 2010).
247. *Id*. at 332.
248. Garcia v. Benov, 636 F.3d 1174, 1175 (9th Cir. 2011).
249. *Trinidad y Garcia*, 683 F.3d at 955.
250. *Id*.
251. *Id*. at 956.
252. *Id*.
253. I.N.S. v. St. Cyr, 533 U.S. 289, 299–300 (2001). See also *infra* Part I, Section F(1) and accompanying footnotes which discuss the two-part *St. Cyr* test.
254. *Trinidad y Garcia*, 683 F.3d at 956.
255. *Id*.
256. *Id*.
257. *Id*.
258. *Id*.

Garcia was "more likely than not" to face torture in the receiving country.[259] The State Department's declaration discussed the basics of the Department's extradition procedures, but failed to prove that the Department complied with the applicable law in reviewing the Philippines' extradition request.[260] Therefore, the court remanded the case to the district court so the Secretary of State could amend the declaration.[261] The Ninth Circuit did defer to the Secretary by limiting the district court's review of the declaration to whether it had been signed by the Secretary or an appointed senior official.[262] After making that determination, "the court's inquiry shall have reached its end and Trinidad y Garcia's liberty interest shall be fully vindicated."[263]

In stark contrast, the court found that Trinidad y Garcia's substantive due process claim was barred by *Munaf*.[264] According to the court, the doctrine of separation of powers and the rule of non-inquiry prohibited the court from examining the basis of the Secretary's torture determination.[265] The court overruled any precedent that "implied greater judicial review of the substance of the Secretary's extradition decision," aside from compliance with domestic law.[266]

3. Concurrences and Dissents

The case resulted in one dissent, one partial dissent, two partial concurrences and partial dissents, and one concurrence.[267] Although the reasoning and analysis in each individual opinion is particularly interesting, the following highlights the major points of agreement and dissonance in the Ninth Circuit. The purpose is to facilitate analysis of this case in the wider context of U.S. compliance with CAT non-refoulement obligations.

Judge Tallman's dissent was joined by Judges Clifton, M. Smith, and Ikuta.[268] Judge Tallman agreed with the majority's analysis of the FARR Act and the REAL ID Act under the *St. Cyr* framework.[269] Judge Tallman's primary disagreement centered on the analysis of *Munaf* and application of the rule of non-inquiry.[270] Judge Tallman would have exercised full deference to the Secretary of State in her

259. *Id*. at 957 (citing 22 C.F.R. § 95.2).

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

261. *Id*.

262. *Id*.

263. *Id*.

264. *Id*.

265. *Id*.

266. *Trinidad y Garcia*, 683 F.3d at 957 (overruling Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1012 (9th Cir. 2000)).

267. *Id*. at 955.

268. *Id*. at 962 (Tallman, J., dissenting).

269. *See id*. at 969–72 (assessing the constitutional problems raised by the REAL ID Act more thoroughly, but arriving at the same conclusion as the majority as to each prong and each act).

270. *Id*. at 978.

determinations regarding the possibility of torture.[271] Judge Tallman advocated for the application of a very strict rule of non-inquiry in this case.[272] "Thus, just as Trinidad cannot ask that we second-guess the Secretary's ultimate discretionary decision, he cannot ask us to peek into those internal processes employed by the Secretary in making her determination. Non-inquiry means just that, non-inquiry . . . ."[273]

Judge Pregerson's partial concurrence and partial dissent was joined by Judge W. Fletcher.[274] While Judge Tallman believed that the opinion went too far in allowing judicial review of the Secretary's decision, Judge Pregerson believed the opinion did not go far enough. Judge Pregerson pointed to the evidence presented by Trinidad y Garcia regarding the Philippine government's torture of his co-accused and law enforcement's use of torture and abuse.[275] He contended that only requiring the Secretary of State to file an affidavit that Trinidad y Garcia is not "more likely that not" to face torture prevents the district court from conducting a sufficient habeas review.[276] He then continued to distinguish *Munaf* from the present case. Judge Pregerson pointed out that the Supreme Court limited its holding in *Munaf* to the specific factual circumstances of that case.[277] Additionally, the *Munaf* court did not decide whether a petitioner was entitled to relief if he challenged his extradition under the FARR Act.[278] Judge Pregerson looked at the historical significance of the rule of non-inquiry, particularly that it was implemented by the courts to "preserve 'Executive discretion.'"[279] However, he explained that the Secretary of State's responsibility in this case, ensuring that a detainee is not likely to face torture in a receiving country, is a non-discretionary duty.[280] Therefore, the rule of non-inquiry does not apply.[281] Judge Pregerson tempered this argument by requiring more than mere disagreement with the Secretary's decision in order to overturn it.[282] Judge Pregerson contended that review of the Secretary's decisions in such cases will only strengthen "the constitutional system of checks and balances."[283]

Judge Berzon, who concurred in part and dissented in part, joined by Judge

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271. *Id*. at 984.

272. *See Trinidad y Garcia*, 683 F.3d at 984 (arguing remand is unnecessary due to non-inquiry).

273. *Id*. (footnote and citation omitted)

274. *Id*. at 1002 (Pregerson, J., concurring in part and dissenting in part).

275. *Id*. at 1003.

276. *Id*. at 1005.

277. *Id*. at 1006.

278. *Trinidad y Garcia*, 683 F.3d at 1007.

279. *Id*.

280. *Id*.

281. *Id*.

282. *Id*. at 1007 ("However, the underlying principles of *Munaf* and the Rule of Non-Inquiry at least suggest that we do not have the sweeping authority to overturn the Secretary's decision simply because we disagree with it.").

283. *Id*. at 1008.

W. Fletcher, disagreed with the majority on this same point.[284] Judge Berzon argued that the court should have remanded the case after determining that there was insufficient evidence for the majority to review the district court order releasing Trinidad y Garcia.[285] Judge Berzon criticized the per curiam opinion's application of *Munaf* to the present case. In her opinion, *Munaf* should not apply to Trinidad y Garcia's claims because *Munaf* left open the possibility that the FARR Act or more serious torture allegations would provide a basis for judicial review.[286] Additionally, Judge Berzon differed with the court's use of the rule of non-inquiry. In her interpretation, the rule of non-inquiry barred judicial review only after a court found that the extradition order was legal.[287] "It does not hold that we must refrain from reviewing claims that an extradition is, in fact, unlawful."[288] In cases like *Trinidad y Garcia*, the court should evaluate the substance of the Secretary of State's declaration as to the likelihood of torture.[289] The declaration required by the majority may be sufficient for such evaluation, but that determination depends on other evidence of the likelihood of torture.[290]

4. Analyzing the Ninth Circuit Split

In an article preceding the *Trinidad y Garcia* opinion, Professor Stephen I. Vladeck, who has written extensively on *Munaf* and its succeeding cases, wrote that if *Omar* "is correct, then the same result should necessarily follow [in *Trinidad y Garcia v. Thomas*]—and thereby bar any individual in extradition proceedings from invoking [the FARR Act] as a basis for relief."[291] What occurred in *Trinidad y Garcia* has put the line of cases following *Munaf* into serious dispute.[292] *Trinidad y Garcia* followed and disagreed with various points of *Munaf*, *Kiyemba*, and *Omar*.[293]

Trinidad y Garcia created a circuit split between the Ninth Circuit and the D.C. Circuit. To refresh, the D.C. Circuit held in *Omar* that the REAL ID Act deprived federal courts of jurisdiction in cases where the petitioner challenges transfer or extradition under the FARR Act.[294] The court in *Trinidad y Garcia* reached the opposite holding—that courts retained jurisdiction over such claims, and only the REAL ID Act was limited to final orders of removal.[295]

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284. *Trinidad y Garcia*, 683 F.3d at 984 (Berzon, J., concurring in part and dissenting in part).

285. *Id*. at 985.

286. *Id*. at 990.

287. *Id*. at 996 ("The rule bars judicial examination of extraditions once it is determined that they are not contrary to the Constitution, laws, or treaties of the United States.").

288. *Id*.

289. *Id*. at 998–99.

290. *Trinidad y Garcia*, 683 F.3d at 998.

291. Vladeck, *Normalizing Guantanamo*, *supra* note 161, at 1571.

292. Vladeck, *Why the "*Munaf *Sequels" Matter*, *supra* note 36.

293. *Id*.

294. *See* Omar v. McHugh, 646 F.3d 13, 15 (D.C. Cir. 2011).

295. *Trinidad y Garcia*, 683 F.3d at 956; *see also* Slawter, *supra* note 65, at 2515–16, 2520;

The *Trinidad y Garcia* court's analysis of whether the FARR Act and the REAL ID Act repealed federal habeas corpus jurisdiction was sound for two main reasons. First, the court interpreted the FARR Act consistent with the reasons for its passage, namely to implement U.S. obligations under CAT.[296] If the court interpreted the FARR Act in relation to the REAL ID Act, as the *Kiyemba* and *Omar* courts did, the doctrine would maintain a loophole, which would allow petitioners to challenge transfer or extradition decisions under CAT, but then prohibit those petitioners from exercising that right.[297] Under *Trinidad y Garcia*, that loophole is closed—petitioners not challenging a final order of removal can still challenge their extradition or transfer under CAT.

In addition to bringing the FARR Act in line with CAT, the *Trinidad y Garcia* court's interpretation more fully respects Suspension Clause jurisprudence. As discussed in Judge Griffith's concurrence in *Omar*, Congress must either repeal the statutory basis for Trinidad y Garcia's claim, the FARR Act, or suspend the writ of habeas corpus in order to divest the court of jurisdiction over such claims.[298] Neither occurred in these cases.[299] Additionally, as pointed out in *Trinidad y Garcia*, the REAL ID Act does not repeal habeas jurisdiction because it can be limited to final orders of removal, which the Court must adopt as the alternative interpretation per the second part of the *St. Cyr* test.[300] Finally, the court's decision complies with the holding of *Boumediene*. Congress had not provided an adequate substitute for habeas corpus for those excluded by the REAL ID Act's limitations. Therefore, the *Trinidad y Garcia* opinion on the FARR Act and REAL ID Act more fully complies with Suspension Clause precedent than the *Kiyemba* or *Omar* decisions.[301]

While the Ninth Circuit made strides on the FARR Act and REAL ID Act issue, the court disregarded the exception carved out in *Munaf* for cases of serious allegations of torture.[302] Trinidad y Garcia presented significantly more and very specific evidence regarding his potential torture if returned to the Philippines. In total, Trinidad y Garcia had six volumes of exhibits including court documents, police reports, sworn testimony, and human rights reports.[303] The Appellee Brief

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Vladeck, *Why the "*Munaf *Sequels" Matter*, *supra* note 36.

296. Slawter, *supra* note 65, at 2520–21.

297. *Id*. at 2521; *see also* Kiyemba v. Obama, 561 F.3d 509, 514 (D.C. Cir. 2009) ("'Notwithstanding any other provision of law . . . including section 2241 of Title 28, or any other habeas corpus provision, . . . a petition for review [of an order of removal] shall be the sole and exclusive means for judicial review of any cause or claim' arising under the Convention."); Omar v. McHugh, 646 F.3d 13, 17 (D.C. Cir. 2011).

298. *Omar*, 646 F.3d at 29 (Griffith, J., concurring); *see also* Slawter, *supra* note 65, at 2523; Vladeck, *The D.C. Circuit Vitiates the Suspension Clause*, *supra* note 239, at 1479–84 (discussing Judge Griffith's concurrence in *Omar*).

299. Slawter, *supra* note 65, at 2523.

300. *Trinidad y Garcia*, 683 F.3d at 956.

301. Slawter, *supra* note 65, at 2524.

302. Munaf v. Geren, 553 U.S. 674, 702 (2008); Parry, *supra* note 58, at 2015–17 (discussing the small exception seemingly created by the Court in *Munaf*).

303. Appellee's Brief at 14, Trinidad y Garcia v. Benov, 683 F.3d 952 (9th Cir. 2012) (No. 09-56999), 2010 WL 4199736, at *3) [hereinafter Appellee's Brief].

described the treatment of his co-accused.[304] Philippine police officers suffocated his co-accused with plastic bags, induced them to vomit, electrocuted them with wires attached to their inner thighs, and threatened their family members.[305] The National Anti-Kidnapping Task Force engaged in particularly gruesome acts to force one of Trinidad y Garcia's co-accused to confess. The officers took the co-accused to a remote rice paddy.[306] After they removed his blindfold and untied his hands, they encouraged him to try to escape.[307] The officers shot him in the back as he attempted to do so.[308] A local Sheriff arrived on the scene and requested the officers take him to the hospital.[309] The officers attempted to suffocate him with a plastic bag before arriving at the hospital.[310] Trinidad y Garcia's torture allegations also relied on reports from the State Department. A State Department report released in 2007 stated that, "[a]rbitrary, unlawful, and extrajudicial killings by elements of the security services . . . continued to be a major problem" in the Philippines.[311]

Additionally, the *Trinidad y Garcia* opinion followed the *Kiyemba* court in showing deference to the executive branch. At first glance, it appears the Ninth Circuit took a stricter position than the D.C. Circuit. The court pointed to a lack of "evidence that the Secretary has complied with the procedure in Trinidad y Garcia's case."[312] The court also found this lack of evidence prohibited the court from adequately reviewing Trinidad y Garcia's claims.[313] Therefore, the court required the Secretary of State to file a declaration that she complied with her obligations.[314] However, these seemingly stricter requirements are deceiving. The district court's review is limited to determining if the declaration was signed by the Secretary. If so, "the court's inquiry shall have reached its end and Trinidad y Garcia's liberty interest shall be fully vindicated."[315] In essence, this is no different than the holdings in *Kiyemba* and *Omar*. All the Secretary needs to do is sign and file a statement that she complied with her duties, and this "judicial review" ends.[316]

The court cited to *Munaf* for this point, but *Munaf* does not require such a

304. *Id*. at 15–24.

305. *Id*. at 7–10, 15–17.

306. *Id*. at 16.

307. *Id*. at 16–17.

308. *Id*. at 17.

309. Appellee's Brief, *supra* note 303, at 17–18.

310. *Id*.

311. U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2007, 944 (2008), *available at* http://www.state.gov/j/drl/rls/hrrpt/2007/100535.htm; *see also* Appellee's Brief, *supra* note 303, at 23.

312. Trinidad y Garcia v. Thomas, 683 F.3d 952, 957 (9th Cir. 2012) (en banc).

313. *Id*.

314. *Id*.

315. *Id*.

316. Lyle Denniston, Munaf's *Impact Widens Again*, SCOTUSBLOG (June 10, 2012, 8:18 AM), http://www.scotusblog.com/2012/06/munafs-impact-widens-again/.

holding. The *Munaf* Court specifically left open the possibility of judicial review in cases of serious torture allegations.[317] However, under *Trinidad y Garcia*, the Secretary of State only has to certify the petitioner was not "more likely than not" to face torture, despite the petitioner's evidence to the contrary.[318] The Ninth Circuit also relied on the rule of non-inquiry in this holding. Specifically, the court wrote the rule of non-inquiry prevented the court from reviewing the "substance of the Secretary's declaration."[319] The court is partially correct in this holding. Historically, the rule of non-inquiry prevented courts from analyzing a foreign country's government, institutions, laws, or rights.[320] However, Trinidad y Garcia did not ask the court to analyze the Philippine judiciary or government. Trinidad y Garcia asked the court to analyze whether his extradition complied with U.S. law in light of his torture allegations.[321] The rule of non-inquiry has no bearing on this issue. Considering the definition of the rule of non-inquiry, it does not prevent the court from reviewing the Secretary's declaration. In light of its historic use, the rule of non-inquiry only would apply if the court became involved in negotiating the rights and judicial process Trinidad y Garcia would receive upon his return to the Philippines. Therefore, the court incorrectly relied on *Munaf* and the rule of non-inquiry in holding that the court could not review the substance of the Secretary's declaration.

IV. CONCLUSION

A. Reexamining Judicial Deference to the Executive Branch

Throughout these cases, judicial deference to the executive branch has been a key concept in the courts' decisions. The courts conclude they are not "suited to second-guess" determinations regarding a foreign country's judicial system.[322] This deference morphed from a somewhat limited form[323] to a complete bar on judicial

317. Munaf v. Geren, 553 U.S. 674, 702 (2008); *see also* Stephen Vladeck, *Habeas Corpus, Due Process, and Extradition*, 98 CORNELL L. REV. ONLINE 20, 32 (2013) [hereinafter Vladeck, *Habeas Corpus, Due Process, and Extradition*].

318. Vladeck, *Habeas Corpus, Due Process, and Extradition*, *supra* note 317, at 32.

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

320. *See* Zelinsky, *supra* note 55, at 233 ("The rule of noninquiry precludes U.S. courts from assessing to any degree the institutions and processes of foreign governments in extradition cases to determine 'the possibility that the [deportee] will be mistreated . . . in [the destination] country.'").

321. *See Trinidad y Garcia*, 683 F.3d at 955 ("Trinidad y Garcia alleges that his extradition to the Philippines would violate his rights under the Convention Against Torture (CAT) and the Fifth Amendment's Due Process Clause.").

322. Munaf v. Geren, 553 U.S. 674, 702 (2008); *see also* Trinidad y Garcia v. Thomas, 683 F.3d 952, 957, 979 (9th Cir. 2012) (en banc) (finding that the political branches and not the courts should determine whether a petitioner is likely to face torture in a receiving country); Omar v. McHugh, 646 F.3d 13, 19 (D.C. Cir. 2011); Kiyemba v. Obama, 561 F.3d 509, 515 (D.C. Cir. 2009).

323. *See Munaf*, 553 U.S. at 702 (inferring that a determination to extradite or transfer a petitioner could be reviewed in the face of more serious torture allegations than prisoner mistreatment).

review of the Secretary's determination to transfer or extradite.[324] However, this bar on judicial review does not adhere to the U.S. obligation under CAT not to "expel, return . . . or extradite another person" where he may be subjected to torture.[325]

In order to strike the appropriate balance between judicial review and deference, the concerns over a stricter review must be acknowledged. The major concern with allowing judicial review of these determinations is the potential effect on foreign policy.[326] Negotiating an extradition or transfer involves skilled diplomacy. Foreign countries may be less likely to negotiate and cooperate with the United States if the legality of the transfer or extradition decision is subject to strict oversight by the courts.[327] Strict oversight could disincentivize other nations from being upfront and forthright regarding what could happen to the relator or transferee.[328] Second, requiring the executive branch to disclose information regarding these negotiations and diplomatic assurances could pose a risk to national security.[329] Judicial review would hinder the efficient transfer or extradition of prisoners, which is a key interest of the State Department. Judicial review would add another authorization step to the process.[330] Third, the courts are not organized to carry out these functions properly. The State Department and Department of Defense have better investigatory and negotiating abilities than the courts.[331]

The concerns over too much judicial review must be balanced with the concerns over no judicial review. The State Department has argued for judicial deference because of the need for confidential diplomatic assurances. However, this argument can be flipped in favor of judicial review. These secretive agreements could benefit from judicial review to ensure they are trustworthy and ensure the safety of the detainee or transferee.[332] There is virtually no monitoring mechanism to ensure the foreign state complies with the diplomatic assurances.[333]

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324. *See Kiyemba*, 561 F.3d at 514 ("Under *Munaf*, however, the district court may not question the Government's determination that a potential recipient country is not likely to torture a detainee."); *Omar*, 646 F.3d at 19; *Trinidad y Garcia*, 683 F.3d at 957 (holding that once the Secretary of State filed the required declaration authorizing the petitioner's extradition, the court's inquiry shall end).

325. *See* CAT, *supra* note 2, art. 3; 8 U.S.C. § 1231 note (1998) (codifying the non-refoulement obligation in U.S. law).

326. Fisher, *supra* note 167, at 979–82 (discussing the effects of having excessive judicial review of the executive branch for foreign policy).

327. *Id*. at 981.

328. *Id*. at 980–81.

329. *Id*.

330. *Id*. at 981.

331. *Id*. at 980.

332. Fisher, *supra* note 167, at 979.

333. *Id*. at 984 ("There is little evidence of monitoring in the past, and there are strong incentives against monitoring for all parties involved. Any monitoring would have to be intrusive because 'torture and ill-treatment practices are usually clandestine and denied by states.'"). In 2004, the United States negotiated with Syria regarding the return of Maher Arar to Syrian custody. Zelinsky, *supra* note 55, at 242. Arar contends he was interrogated and tortured by Syria.

Judicial review could standardize the process of engaging in and negotiating these assurances.

Additionally, complete deference ignores relators' and detainees' rights under international law, specifically their right not to be tortured in the receiving country. Complete judicial deference allows the Secretary of State to single-handedly make this serious determination without any effective method of challenging it.[334] The lack of judicial review of the Secretary's determination can be seen as an abandonment of the checks and balances system of the U.S. government that prevents any one branch from gaining too much power. By deferring to the Executive's decision in such cases, the Secretary of State and the State Department have complete control over transfer and extradition decisions.

A rule of limited judicial review could strike the right balance between concerns over strict judicial review and strict judicial deference. Judge Berzon set out a structure for such limited judicial review in her opinion in *Trinidad y Garcia v. Thomas*. Under that structure, a court would only overturn the decision of the Secretary of State if "the evidence is so compelling that no reasonable fact finder could have failed to find the requisite likelihood of torture."[335] A petitioner would have the burden of proving that torture is more likely than not through "strong, credible, and specific evidence."[336] If the petitioner met this burden, then the Secretary would submit evidence, at his or her discretion and in camera, supporting the basis for the determination that torture is not "more likely than not."[337]

This process is appropriate for several reasons. First, the framework retains some level of judicial deference to the executive branch. The Secretary's determination would only be questioned if the petitioner presented compelling evidence of torture. Second, this process maintains the "more serious allegations of torture" exception created by the Supreme Court in *Munaf v. Geren*.[338] Third, it respects the concerns associated with divulging sensitive diplomatic and foreign policy information. The Secretary would have discretion as to whether to present evidence countering petitioner's evidence. This procedure also respects the confidentiality of this information by requiring the hearing be held in camera.[339] Finally, this framework places a heavy burden on the petitioner in order to overcome the presumed deference to the Secretary's determination. The petitioner must have "strong, credible, and specific" evidence that "is so compelling that no reasonable fact finder could have failed to find the requisite likelihood of

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Arar v. Ashcroft et al, CENTER FOR CONST. RTS., http://ccrjustice.org/ourcases/current-cases/arar-v-ashcroft (last visited Feb. 9, 2015). After a year of imprisonment and alleged torture, he was released without charge. *Id*.

334. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 957, 957 (9th Cir. 2012) (en banc) (holding that the rule of non-inquiry and separation of powers doctrine prohibits the court from inquiring into the substance of the Secretary's declaration permitting extradition).

335. *Id*. at 1001 (Berzon, J. concurring in part and dissenting in part).

336. *Id*.

337. See *supra* note 111 and accompanying text for a discussion of the *Munaf* exception.

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

339. *Trinidad y Garcia*, 683 F.3d at 1001 (Berzon, J. concurring in part and dissenting in part).

torture."[340]

B. Supporting Trinidad y Garcia's Interpretation of the FARR Act and REAL ID Act

The Supreme Court denied certiorari in *Trinidad y Garcia* on January 7, 2013.[341] This leaves a circuit split regarding whether the FARR Act and the REAL ID Act repeal federal habeas corpus jurisdiction for claims under CAT. The *Trinidad y Garcia* court's interpretation on this point should be followed in subsequent decisions, because that interpretation respected U.S. obligations under CAT, as implemented by the FARR Act, and U.S. jurisprudence on the Suspension Clause and habeas corpus.

If subsequent courts adopt the interpretation of *Omar v. McHugh* and *Kiyemba v. Obama*, then a large pool of detainees and relators cannot vindicate their rights under CAT. Under the D.C. Circuit's holding, courts can only hear habeas corpus petitions that raise the FARR Act if the petitioner is challenging a final order of removal.[342] Those not subject to a final order of removal, including Munaf, Omar, Kiyemba, and Trinidad y Garcia, cannot vindicate their rights under CAT and the FARR Act.[343]

Additionally, *Trinidad y Garcia*'s analysis of the FARR Act and the REAL ID Act meshes with Suspension Clause and habeas corpus precedent. Under *I.N.S. v. St. Cyr*, the Supreme Court requires a two-part test to determine whether a statute divests courts of federal habeas jurisdiction.[344] Neither *Kiyemba* nor *Omar* discussed whether the FARR Act or the REAL ID Act satisfied that test. The *Trinidad y Garcia* majority applied this test and held that the FARR Act failed the test,[345] and the REAL ID Act could be interpreted to avoid any constitutional issue.[346] Therefore, under the *St. Cyr* framework, neither act repeals federal habeas jurisdiction.[347] Lastly, the *Trinidad y Garcia* court's holding conforms to the holding in *Boumediene*, which requires an adequate substitute for the writ of habeas corpus when habeas jurisdiction is limited.[348] Congress has yet to provide any way for petitioners not covered by the REAL ID Act to raise FARR Act, and therefore CAT, claims.

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340. *Id*.

341. *Id*., *cert. denied*, 133 S.Ct. 845, 845 (2013).

342. Omar v. McHugh, 646 F.3d 13, 17 (D.C. Cir. 2011)

343. Slawter, *supra* note 65, at 2521; *see also* Kiyemba v. Obama, 561 F.3d 509, 514 (D.C. Cir. 2009) ("'Notwithstanding any other provision of law . . . including section 2241 of Title 28, or any other habeas corpus provision, . . . a petition for review [of an order of removal] shall be the sole and exclusive means for judicial review of any cause or claim' arising under the Convention."); *Omar*, 646 F.3d at 17.

344. See *supra* Part II, Section F(1) for a discussion of the test articulated by the Supreme Court in *St. Cyr*.

345. *Trinidad y Garcia*, 683 F.3d at 956.

346. *Id*.

347. *Id*.

348. Boumediene v. Bush, 533 U.S. 723, 790–92 (2008).

Until the Supreme Court becomes involved, the issues of detainee and relator rights are left to the lower courts. Although the lower courts may be far removed from the discussions on international obligations and responsibilities, these courts should not take lightly their ability to affect these obligations. By interpreting U.S. law with an eye towards CAT, these courts can protect the rights of petitioners and strengthen respect for international obligations.