Stanford Law Review

Volume 73 May 2021

NOTE

Reviewing Extraditions to Torture

Nitisha Baronia*

Abstract. In 1990, the United States ratified the Convention Against Torture (CAT), codifying a global commitment to refrain from transferring any person to a country where she may face torture. While the United States has steadfastly implemented the convention's prohibition on *deportations* that result in foreign torture, American courts have failed to enforce CAT in cases involving international *extradition*, in which the United States transfers an American to a foreign country for criminal prosecution. In these cases, the Secretary of State alone decides, subject to little or no judicial review, whether the foreign country is likely to torture the American.

This Note assesses the three-way split that has developed across American courts in the thirty-one years since the United States signed CAT. It asks whether, how, and when courts should review the Secretary's decision to extradite an individual who claims the extradition would violate the convention. In doing so, this Note identifies two concerning government practices it terms *extradition shopping* and *extradition shuffling*. It also connects habeas review in extradition to the immigration context, arguing that the Supreme Court's recent interpretations of the habeas writ in *Department of Homeland Security v. Thuraissigiam* and *Nasrallah v. Barr* may bolster the case for substantive habeas review of extradition claims. It concludes that habeas courts can, and should, review extradition decisions for compliance with CAT, offering a three-pronged theory of habeas jurisdiction rooted in the common law writ of habeas, in extradition statutes, and in CAT itself.

* J.D. Candidate, Stanford Law School, 2021. My deepest gratitude to Professors Beth Van Schaack, Daniel Birk, Diego Zambrano, Jayashri Srikantiah, David Sklansky, and Stephen Vladeck for their guidance and comments, and to Charles Tyler and Amanda Zerbe for their feedback. I am also immensely grateful to the *Stanford Law Review* editorial team: Ariella Park, Samuel Ward-Packard, William Janover, Azeezat Adeleke, Sarah DeYoung, Danielle Roybal, Daniel Khalessi, Schuyler Atkins, Tim Rosenberger, Leslie Bruce, Christian Soler, Samantha Noh, and Jenn Teitell.

Table of Contents

Introduction

In 1994, Rwandan pastor Elizaphan Ntakirutimana received a letter from a group of Tutsi pastors reading, "[w]e wish to inform you that tomorrow we will be killed with our families."[1] Instead of sheltering the pastors, Ntakirutimana summoned Hutu militants to kill them in one of the worst massacres of the Rwandan genocide.[2] Then Ntakirutimana fled to Texas.[3] The United States then extradited Ntakirutimana to the International Criminal Tribunal for Rwanda (International Tribunal).[4]

In 2008, Lithuanian judge Neringa Venckiene discovered that Lithuanian government officials had sexually abused her niece.[5] After she publicized her niece's story, the Lithuanian government retaliated against Venckiene, filing criminal charges against her, revoking her judicial and parliamentary immunity, and seizing her niece in a violent exchange.[6] Venckiene fled to the United States, which extradited her to Lithuania.[7]

In the 1980s, Kulvir Singh Barapind became an active leader in a Sikh separatist student group in India, leading protests in the midst of widespread political unrest and violent government counterinsurgency efforts.[8] Facing police harassment and fearing political persecution, Barapind fled to the United States, which extradited him to India.[9]

---

1. Rory Carroll, *Pastor Who Led Tutsis to Slaughter Is Jailed*, GUARDIAN (Feb. 19, 2003, 9:38 PM EST), https://perma.cc/YD22-M6UW. This line from the letter sent to Pastor Ntakirutimana eventually became the title of a classic account of the Rwandan genocide. *See* PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA (1998).
2. Carroll, *supra* note 1.
3. *Id.*
4. *See* Press Release, U.N. Int'l Crim. Tribunal for Rwanda, Pastor Ntakirutimana Transferred to the Tribunal's Custody (Mar. 25, 2000), https://perma.cc/QZ85-Q825 ("[T]he American Secretary of State, Ms[.] Madeleine Albright signed the decision authorising Ntakirutimana's transfer earlier this month.").
5. *See* Venckiene v. United States, 929 F.3d 843, 850 (7th Cir.), *cert. denied*, 140 S. Ct. 379 (2019).
6. *See id.* at 850-51.
7. *See* Katie Smith, *"I Instantly Understood That I Will Be Extradited That Day": Former Lithuanian Judge Describes Life After Extradition from U.S.*, NW. HERALD (Feb. 2, 2020, 5:00 AM CST), https://perma.cc/U3YT-Z2WB.
8. *See* Barapind v. Enomoto, 360 F.3d 1061, 1065 (9th Cir. 2004), *aff'd in part, rev'd in part en banc*, 400 F.3d 744 (9th Cir. 2005).
9. *See Barapind*, 360 F.3d at 1065-67 ("Despite personal harassment by the police and the killing of fellow Federation members, Barapind continued his protest activities."); *India: Punjab Case Shows Need for Anti-Torture Law*, HUM. RTS. WATCH (Sept. 27, 2012, 6:00 PM EDT), https://perma.cc/W29M-586X.

Under well-established immigration law, noncitizens like Ntakirutimana, Venckiene, and Barapind can invoke the Convention Against Torture (CAT)[10] to avoid deportation.[11] The torture determinations that courts make in those immigration proceedings are well-defined. But in extradition proceedings, individuals seeking to remain in the United States for fear they will be tortured abroad face an uphill battle. Extradition raises complex questions of international law and foreign policy, and courts have struggled to determine whether, how, and when to hear claims under CAT.[12] As a result, courts often decline to review CAT claims altogether, leaving the Secretary of State free to extradite individuals to countries that may torture them, with little to no judicial oversight of that decision.[13]

The stakes are high for both the individual and the U.S. government. In the immigration context, an individual seeking to avoid deportation may claim that the foreign government is likely to torture her based primarily on her *past* experiences in that country.[14] But individuals facing extradition often find themselves in a more precarious situation: The foreign country has summoned them for criminal prosecution. In addition to any past experiences that may have led them to flee the foreign country, these individuals will often point to the *future* torture they expect to undergo as a consequence of that country's criminal proceedings.

Extradition requests place American government actors, too, in a difficult position. Each request asks the government to transfer a person in the United States to the legal protection of a foreign criminal-justice system subject to foreign legal standards. Each request also implicates unique diplomatic and political considerations. Some, like the International Tribunal's request for Ntakirutimana, concern sensational and tragic atrocities, requiring governments to collaborate on highly visible global investigations.[15] Others, like Lithuania's request to extradite Venckiene, may implicate the requesting

10. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Convention Against Torture].

11. *See, e.g.*, Nasrallah v. Barr, 140 S. Ct. 1683, 1687 (2020) (considering a CAT claim as a defense to deportation).

12. *See infra* Part II.

13. *See infra* Part II.C.

14. *See, e.g.*, *Nasrallah*, 140 S. Ct. at 1687, 1693 (explaining how CAT claims work in the immigration context).

15. Ntakirutimana's highly public extradition also set international precedent. He became "the first person handed over by the United States to an international tribunal" and "the first clergyman to be convicted of genocide by an international tribunal." Marlise Simons, *Rwandan Pastor and His Son Are Convicted of Genocide*, N.Y. TIMES (Feb. 20, 2003), https://perma.cc/477P-QLH8.

country's acrimonious internal politics.[16] Still others, like India's request to extradite Barapind, require evaluating complex webs of foreign evidence.[17] Extradition implicates due process and diplomacy.

While an individual's fear of torture upon extradition may sometimes lack support, that fear is often well-founded. For example, Ntakirutimana was lawfully tried and sentenced by the International Tribunal,[18] the kind of multilateral judicial body unlikely to violate international law. But Venckiene's fate remains uncertain—she has maintained her innocence and continues to face serious charges under an expired statute of limitations and despite American legislators' efforts to advocate on her behalf.[19] Barapind's story is even more tragic: Despite the Indian government's assurance that it would not torture him, and despite a court in India acquitting Barapind of all charges and releasing him, the Punjab police subsequently arrested Barapind and subjected him to beatings, electric shocks, and other forms of prolonged torture.[20] His is a story that CAT was designed to prevent.

This Note proposes that when reviewing challenges to extradition orders, habeas courts can and should consider claims that extradition of the alleged fugitive, or "relator,"[21] would violate CAT. Part I presents an overview of modern extradition law and the questions that it leaves unanswered. It unpacks the relator's predicament and identifies two government practices—which this Note terms *extradition shopping* and *extradition shuffling*—that scholars and courts have often overlooked but may strengthen the case for substantive habeas review of the Secretary of State's extradition determinations. By extradition shopping, the U.S. government can repeatedly file new extradition-certification requests until one is granted. By extradition shuffling, it can

16. *See* Venckiene v. United States, 929 F.3d 843, 850-51 (7th Cir.), *cert. denied*, 140 S. Ct. 379 (2019).

17. *See* Barapind v. Enomoto, 360 F.3d 1061, 1065-66 (9th Cir. 2004), *aff'd in part, rev'd in part en banc*, 400 F.3d 744 (9th Cir. 2005).

18. Prosecutor v. Ntakirutimana, Case Nos. ICTR-96-10-A & ICTR-96-17-A, Judgment, ¶¶ 565-570 (Dec. 13, 2004), https://perma.cc/JA7H-Q4Z3.

19. *See* Give Judge Venckiene Her Day in Court Act, H.R. 1107, 116th Cong. (2019); Smith, *supra* note 7; Rebecca Hughes, *Former Lithuanian Judge, Crystal Lake Resident Released on Bail*, PATCH: CRYSTAL LAKE–CARY, IL (May 26, 2020, 4:36 PM CT), https://perma.cc/VXG4-E6MN.

20. *See India: Punjab Case Shows Need for Anti-torture Law*, *supra* note 9. For a detailed analysis of Barapind's story, see generally Hansdeep Singh, Comment, *Bringing Fairness to Extradition Hearings: Proposing a Revised Evidentiary Bar for Political Dissidents*, 38 CAL. W. INT'L L.J. 177 (2007).

21. The term "relator" refers both to an alleged fugitive sought by a foreign country and to a petitioner for habeas corpus. *See* John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. REV. 1973, 1974 (2010); *Relator*, BLACK'S LAW DICTIONARY (11th ed. 2019).

freeze a relator's ongoing immigration proceedings to kick her into the more procedurally limited extradition process. Both practices undermine the procedural safeguards of due process and highlight the need for meaningful habeas relief in extradition cases.

Part II enumerates the competing approaches that courts have taken when addressing torture claims in the extradition context. Part III then applies habeas case law to examine whether and how habeas courts should review CAT challenges to the Secretary's extradition decisions. Part III.A first considers the Supreme Court's recent habeas jurisprudence, including the Court's June 2020 opinions in *Nasrallah v. Barr* and *Department of Homeland Security v. Thuraissigiam*. Parts III.B and III.C then argue that, in light of these recent decisions, habeas courts have jurisdiction based on common law, statutory, and treaty authority to meaningfully entertain claims that extradition would result in torture. Part III.D explains how meaningful habeas review could harmonize judicial review of CAT claims in the extradition and immigration contexts, mitigating extradition shopping and shuffling—particularly for noncitizens undergoing parallel proceedings. Part III.E concludes by identifying some troubling government practices that strengthen the case for meaningful habeas review and call for broader statutory and regulatory reform.

I. Extradition and Torture

This Part offers an overview of fear of torture as a defense to extradition. Subpart A begins with an overview of the legal basis for extradition and walks through the American extradition process, from a foreign nation's initial extradition request through judicial review and the Secretary's ultimate extradition determination. Subpart B illustrates with a historical example the separation-of-powers dispute that arises when a relator challenges her extradition. Subpart C introduces CAT and its implementing statutes, which formally prohibit extraditions that may lead to torture but leave unclear how and when courts may review alleged violations of this treaty commitment. Subpart D explains how the American extradition process stacks the deck against relators who raise a CAT claim.[22] It then highlights two government practices that take advantage of this lack of meaningful judicial review: (1) extradition shopping, by which the U.S. government files repeated

22. This Note uses the phrase *CAT claim* to refer to a relator's claim that her extradition would result in torture by the requesting country in violation of CAT and the FARR Act. *See infra* notes 81-85 and accompanying text. The broader phrase *torture claim* describes claims, such as those raised before the advent of CAT, that an extradition would result in inhumane treatment and therefore violate constitutional, common law, or other statutory protections.

extradition requests until a judge agrees to certify the extradition, and (2) extradition shuffling, by which the government shuffles noncitizen relators out of ongoing immigration proceedings and into extradition proceedings. These practices, together with the perfunctory judicial review that relators' CAT claims receive in the first instance, put the need for meaningful habeas review into stark relief.

A. An Overview of the American Extradition Process

Extradition, which has roots extending back to at least the twelfth century,[23] is "the formal process by which a fugitive found in one country is surrendered to another country for trial or punishment."[24] Each year, the United States receives hundreds of requests for extradition, including over 500 requests in 2019 alone.[25] These extraditions operate in a gray area—part criminal proceeding and part foreign policy.[26] They are also governed by a set of piecemeal common law doctrines that, in the words of one extradition scholar, "essentially ceased developing at the turn of the [twentieth] century."[27] Unlike in the immigration context, where the executive branch evaluates

23. *See* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 994 & n.200, 995 & n.202 (1998) (describing the origins of extradition).

24. EVALUATION & INSPECTIONS DIV., OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., NO. I-2002-008, REVIEW OF THE OFFICE OF INTERNATIONAL AFFAIRS' ROLE IN THE INTERNATIONAL EXTRADITION OF FUGITIVES 1 (2002), https://perma.cc/6DYV-3ES8 (defining extradition); *see also Extradition*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[t]he official surrender of an alleged criminal by one state or country to another having jurisdiction over the crime charged").

25. *See* U.S. DEP'T OF JUST., FY 2019 ANNUAL PERFORMANCE REPORT / FY 2021 ANNUAL PERFORMANCE PLAN 58, https://perma.cc/QF4F-2HPX (archived Mar. 23, 2021) (explaining that approximately one-fifth of the more than 500 requests received were for fugitives wanted for violent crimes). The Department of Justice has over the past few years struggled with its backlog of extradition cases, and it is unclear whether the annual extradition requests it reports incorporate this larger backlog, which in 2015 included an additional 500 requests. *See* CRIM. DIV., U.S. DEP'T OF JUST., FY 2016 PRESIDENT'S BUDGET 25, https://perma.cc/ZD8T-U2GR (archived Mar. 23, 2021) (explaining that approximately 500 of the Department of Justice's pending 5,300 requests for fugitives and evidence constituted requests for fugitives). At a minimum, the Department of Justice receives hundreds of requests per year. *See* John T. Parry, *The Lost History of International Extradition Litigation*, 43 VA. J. INT'L L. 93, 104 n.53 (2002) (citing multiple sources providing statistics on extraditions going as far back as 1842).

26. As one court has described, extradition is a "bifurcated process" because it concerns issues "particularly suited for judicial resolution" while also implicating "questions of foreign policy, which are better answered by the Executive Branch." Juarez-Saldana v. United States, 700 F. Supp. 2d 953, 956 (W.D. Tenn. 2010).

27. Parry, *supra* note 25, at 102 (alteration in original) (quoting Steven Lubet, *Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists*, 15 CORNELL INT'L L. REV. 247, 253-54 (1982)).

whether to remove noncitizens based on statutory entry requirements, extradition places the executive in a delicate responsive posture that caters to a foreign country's request to prosecute an alleged fugitive. Extradition calls for the government to demonstrate comity to foreign nations and their criminal-justice systems, in part to maintain diplomatic relationships and in part to ensure that foreign countries reciprocate. At the same time, the government must protect individuals in the United States from abusive foreign governments.

A web of treaties governs most extradition procedures.[28] Extradition treaties establish a reciprocal commitment that each signing country will extradite those residents the other seeks to prosecute. Each treaty lists exceptions to this general commitment and outlines the procedures that extraditions must follow.[29] The extradition treaty between Lithuania and the United States, for example, includes the type of "political offense" exception that is common to many treaties, which prohibits either country from extraditing individuals on charges of a political nature.[30] Among other procedures, the treaty with Lithuania requires that the requesting country attach a copy of the official warrant seeking the alleged fugitive and enough information to support "a reasonable basis to believe that the person sought committed the offense."[31]

Domestic extradition statutes standardize the procedures that the U.S. government must follow when responding to a treaty-based extradition request.[32] Typically, the country requesting an extradition will direct its

28. In addition to the Extradition Convention Between the United States of America and Other American Republics, Dec. 26, 1933, 49 Stat. 3111 (entered into force Jan. 25, 1935), the United States has signed independently negotiated extradition treaties with 113 countries. 18 U.S.C. § 3181 note (Extradition Agreements). The government may also occasionally extradite individuals pursuant to an executive agreement or as a matter of comity. *See, e.g.*, Ntakirutimana v. Reno, 184 F.3d 419, 422 (5th Cir. 1999) (approving extradition to an international tribunal with which the United States had an executive agreement but no treaty); Parry, *supra* note 25, at 117-18, 117 n.136 (discussing extraditions conducted without a treaty).

29. MICHAEL JOHN GARCIA & CHARLES DOYLE, CONG. RSCH. SERV., No. 98-958, EXTRADITION TO AND FROM THE UNITED STATES: OVERVIEW OF THE LAW AND CONTEMPORARY TREATIES 1 (rev. 2016), https://perma.cc/N3BA-ENYM.

30. Extradition Treaty, Lith.–U.S., art. IV, § 1, Oct. 23, 2001, T.I.A.S. No. 13,166 (entered into force Mar. 31, 2003) (providing that "[e]xtradition shall not be granted if the offense for which extradition is requested is a political offense"). Nearly every extradition treaty contains such an exception, which "is and has been a common feature of extradition treaties for almost a century and a half." GARCIA & DOYLE, *supra* note 29, at 7 & nn.33-37, 8 nn.38-40 (listing extradition treaties with Egypt, Hungary, Poland, Costa Rica, and France as examples).

31. Extradition Treaty, *supra* note 30, art. VIII, § 3.

32. *See* 18 U.S.C. §§ 3181-3196.

request to the Department of State or the Department of Justice's Office of International Affairs.[33] These executive departments review the extradition request and transfer it to the relevant U.S. Attorney's Office, which then files a petition for extradition on behalf of the requesting country with any competent judge or magistrate in the venue where the relator is "found."[34]

Acting under the authority of the domestic extradition statute, the judge may then summon and detain the relator.[35] The judge then calls the detained relator forth for a fact-intensive extradition-certification hearing that proceeds like a preliminary evidentiary hearing.[36] Courts determine whether an individual *can* be extradited according to domestic law and the governing treaty or convention, but the Secretary of State ultimately determines whether the relator whose extradition a court has certified *should* and *will* be extradited.[37] The court applies the provisions of the relevant extradition treaty, asking questions such as whether the relator is being charged with a political offense,[38] whether the requesting country has presented probable

33. *See* Artemio Rivera, *Probable Cause and Due Process in International Extradition*, 54 AM. CRIM. L. REV. 131, 134-35 (2017).

34. *Id.*; RONALD J. HEDGES, FED. JUD. CTR., INTERNATIONAL EXTRADITION: A GUIDE FOR JUDGES 4 (2014). Venue thus typically lies where the relator resides or is arrested, and challenges to venue are uncommon. HEDGES, *supra*, at 4 & n.12.

35. 18 U.S.C. § 3184.

36. Benson v. McMahon, 127 U.S. 457, 463 (1888) (explaining that the proceeding resembles "those preliminary examinations which take place every day in this country before an examining or committing magistrate"); HEDGES, *supra* note 34, at 10-11 (likening the proceedings to preliminary hearings under Federal Rule of Criminal Procedure 5.1); *see also* Noeller v. Wojdylo, 922 F.3d 797, 804 (7th Cir. 2019) ("[W]hat is at issue in the proceeding . . . is not punishability but *prosecutability*." (alteration in original) (quoting Skaftouros v. United States, 667 F.3d 144, 155 (2d Cir. 2011))). Once the judge "deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention," he may certify the extradition. 18 U.S.C. § 3184; *see also* RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE UNITED STATES § 478 cmt. a (AM. L. INST. 1987). Scholars and courts have articulated this general inquiry differently. *Compare* Rivera, *supra* note 33, at 135-36 (five-pronged test), *with* Parry, *supra* note 25, at 97 (three-pronged test), *and* Juarez-Saldana v. United States, 700 F. Supp. 2d 953, 956 (W.D. Tenn. 2010) (different three-pronged test).

37. *See infra* note 47 and accompanying text; *see also* Mendoza Perez v. Mims, No. 16-cv-00447, 2016 WL 3254036, at *2 (E.D. Cal. June 14, 2016) ("[A] fugitive fearing torture does not have a ripe habeas claim unless and until the Secretary of State makes a final decision to surrender the fugitive to the requesting party.").

38. *See, e.g.*, Venckiene v. United States, 929 F.3d 843, 854-55 (7th Cir.) (explaining the political-offense exception in the context of the Lithuanian extradition treaty), *cert. denied*, 140 S. Ct. 379 (2019).

cause to sustain the charge,[39] and whether the relevant statute of limitations prevents extradition.[40]

Although the probable-cause determination can require considering the facts of the alleged crime, it is limited by the Rule of Non-Contradiction. This common law rule prohibits relators from introducing evidence that affirmatively contradicts the foreign government's claims.[41] Courts also apply the common law Rule of Non-Inquiry to limit the challenges they may consider, including a relator's CAT claims.[42] This rule prohibits courts from assessing the merits of the criminal case or evaluating the "modes of trial and . . . punishment as the laws of [another] country may prescribe for its own people."[43] Although the Supreme Court has never explicitly acknowledged the Rule of Non-Inquiry by name,[44] the Court has affirmed its basic premise: "[I]t is for the political branches, not the Judiciary, to assess practices in foreign countries . . . ."[45] Courts cannot and do not consider a relator's claims that the extradition might violate CAT at the initial certification stage, both because

39. *See, e.g.*, *id.* at 858; Hoxha v. Levi, 465 F.3d 554, 560 (3d Cir. 2006).

40. *See, e.g.*, De La Rosa Pena v. Daniels, No. 13-cv-00708, 2015 WL 13730935, at *6 (E.D. Tex. Dec. 11, 2015), *report and recommendation adopted by* Nos. 13-cv-00708 & 16-cv-00027, 2016 WL 463251 (E.D. Tex. Feb. 8, 2016) (assessing the statute of limitations in the treaty).

41. *See, e.g.*, *Noeller*, 922 F.3d at 807 (explaining that the relator may not claim that the evidence against him is "unreliable" at the extradition-certification hearing because "an accused in an extradition hearing cannot offer contradictory evidence but only 'explanatory' evidence" and that "[e]vidence that contradicts the demanding country's proof or poses questions of credibility . . . is off-limits" (quoting Santos v. Thomas, 830 F.3d 987, 992 (9th Cir. 2016) (en banc))). For an argument that the Rule of Non-Contradiction may be unconstitutional, see Rivera, *supra* note 33, at 146-47.

42. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 978 (9th Cir. 2012) (en banc) (Tallman, J., dissenting). For a history of the Rule of Non-Inquiry, see *Mironescu v. Costner*, 480 F.3d 664, 669-70 (4th Cir. 2007).

43. Neely v. Henkel, 180 U.S. 109, 123 (1901) (describing generally the limitations of the inquiry without using the "Rule of Non-Inquiry" language). Courts do recognize occasional treaty-based exceptions to the Rule of Non-Inquiry. *See, e.g.*, *Venckiene*, 929 F.3d at 854 (assessing whether Venckiene's extradition fell under the treaty's political-offense provision, an exception to the Rule of Non-Inquiry).

44. *See* Ke Gang, *Federal Courts' Habeas Corpus Jurisdiction on a Secretary of State's Extradition Decision in the Context of a Convention Against Torture Challenge*, 22 U. PA. J.L. & SOC. CHANGE 95, 111 (2019).

45. Munaf v. Geren, 553 U.S. 674, 700-01 (2008); *see also Neely*, 180 U.S. at 123 ("[Relators] cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.").

that question falls outside the scope of the certification and because the Rule of Non-Inquiry prohibits it.[46]

Because the Secretary of State makes the final extradition determination, the court's initial extradition certification cannot be appealed.[47] Nor are the certifications subject to common law doctrines of double jeopardy and res judicata[48] or to rules of evidence and criminal procedure.[49] If the court refuses to certify an extradition, the Secretary's only remedy is to start over and refile the request.[50] If the court certifies the extradition, the relator may raise her CAT claims by submitting evidence to the Secretary of State, who does not need to provide an administrative hearing or even a reason for his ultimate decision to

46. *See, e.g.*, Hoxha v. Levi, 465 F.3d 554, 563-64 (3d Cir. 2006) (collecting cases to explain that the Rule of Non-Inquiry prohibits courts from entertaining CAT claims at the certification hearing).

47. *See* Gang, *supra* note 44, at 104 (explaining that certifications cannot be appealed). Judge Friendly's opinions in *United States v. Mackin (In re Mackin)*, 668 F.2d 122, 125-30 (2d Cir. 1981), and *United States v. Doherty*, 786 F.2d 491, 495 (2d Cir. 1986), are often cited to support this common law rule. While most courts and practitioners have treated extradition certifications as nonappealable under the theory that they are not formal judicial proceedings, some scholars disagree. They claim that extradition certifications are formal judicial proceedings under the authority of Article III and should thus be held subject to the same system of appellate review as other Article III proceedings. *Compare Doherty*, 786 F.2d at 494-97, 499 n.10 (explaining that extradition proceedings are not Article III proceedings and are not appealable, and discussing legislative attempts to fill this gap), *with* DeSilva v. DiLeonardi, 125 F.3d 1110, 1113 (7th Cir. 1997) (finding that a certificate of extradition is an Article III "case" because it "is no different from a search warrant or an order approving a deportation: it authorizes, but does not compel, the executive branch of government to act in a certain way"), *and* James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-contentious Jurisdiction*, 124 YALE L.J. 1346, 1458, 1461-62 (2015) (arguing that extradition determinations are an exercise of "non-contentious" Article III power). This Note, like courts that have considered the issue, operates under the long-standing assumption that appellate review is not available, and it does not wade into the debate concerning the particular theory of jurisdiction that has led to this result. *See, e.g.*, Parry, *supra* note 25, at 97 ("Most courts hold that the hearing is outside Article III . . . ."); Arias Leiva v. Warden, 928 F.3d 1281, 1292 (11th Cir. 2019) ("We have not staked out a definitive position, remarking only that an 'extradition proceeding is not an ordinary Article III case or controversy,' but one in which 'the judiciary serves an independent review function delegated to it by the Executive and defined by statute.'" (quoting Martin v. Warden, 993 F.2d 824, 828 (11th Cir. 1993))).

48. Rivera, *supra* note 33, at 136.

49. For a description of these limitations, see *id.* at 138; Parry, *supra* note 25, at 95; *Venckiene v. United States*, 929 F.3d 843, 858-59 (7th Cir.), *cert. denied*, 140 S. Ct. 379 (2019); and *Avila-Ramos v. Kammerzell*, 893 F.3d 1243, 1247 (10th Cir. 2018).

50. As explained in Part I.D.1 below, it remains unclear whether the original certification has any res judicata effect at all. Nevertheless, prosecutors typically seek out a different judge or magistrate when they refile an extradition request. For sample cases, see notes 109-12 below. *See also* 15B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3918.3 & n.20 (West 2021).

extradite her.[51] Various executive departments might inform the Secretary's decision.[52] The Secretary may either surrender the relator to the requesting country,[53] deny extradition on discretionary grounds including humanitarian or foreign-policy reasons, or extradite under terms negotiated with the requesting country, such as by obtaining an "assurance" that the requesting country will not torture the relator.[54] These assurances are, as in Barapind's case, sometimes futile.[55] In the words of one scholar, they are "legally worthless."[56] As a growing body of evidence from the rendition context demonstrates, some countries are more likely than not to subject transferees to extreme forms of torture, diplomatic assurances notwithstanding.[57]

The relator may challenge the Secretary's decision to extradite her only by way of habeas petition.[58] The Figure below summarizes the extradition process and options for appeal.[59]

51. *See* 22 C.F.R. § 95.3(a) (2020) (listing no hearing requirement); *see also Venckiene*, 929 F.3d at 852, 862 (explaining that "[t]he Secretary did not provide specific reasons for his choice" to extradite Venckiene despite State Department reports noting that some Lithuanian prisons violated international standards); Juarez-Saldana v. United States, 700 F. Supp. 2d 953, 961-62 (W.D. Tenn. 2010) (finding that the relator was not entitled to an administrative hearing).

52. These include "(1) the [State] Department's Bureau of Democracy, Human Rights, and Labor; (2) the relevant regional bureau and country desk; and (3) the applicable U.S. Embassy." Gang, *supra* note 44, at 105.

53. 18 U.S.C. § 3184.

54. Gang, *supra* note 44, at 105.

55. *See supra* note 20 and accompanying text.

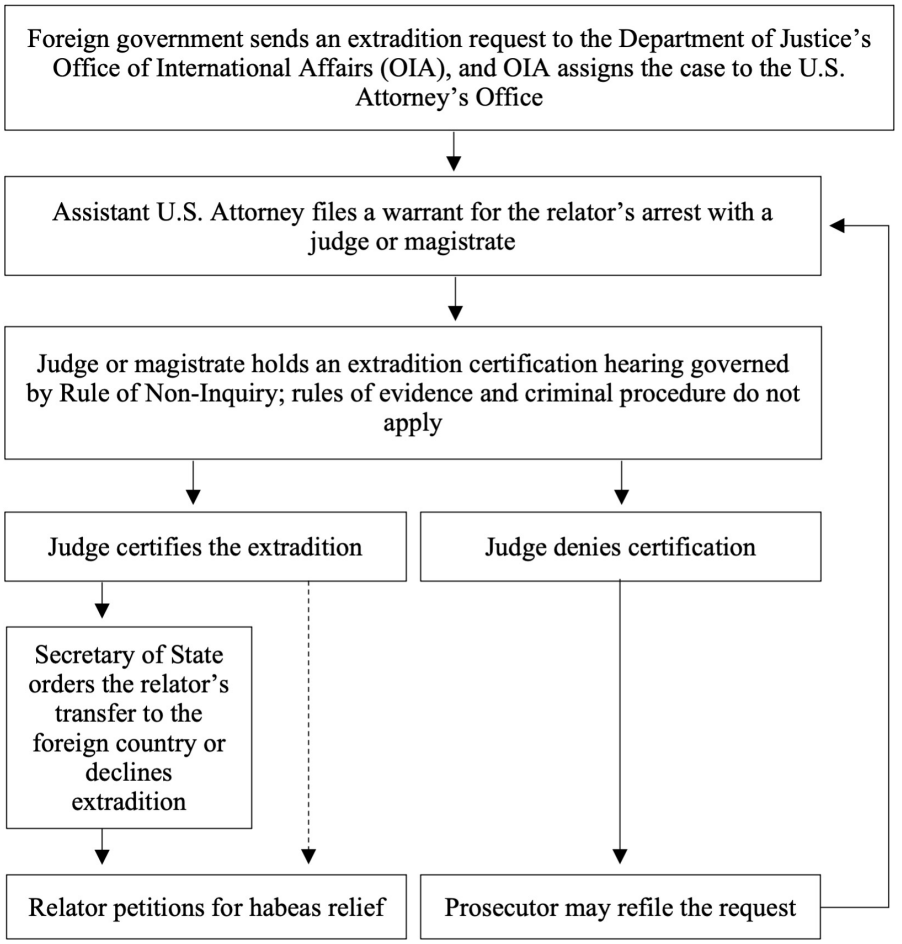
56. Katherine R. Hawkins, Note, *The Promises of Torturers: Diplomatic Assurances and the Legality of "Rendition,"* 20 GEO. IMMIGR. L.J. 213, 217 (2006). Please note that this source contains graphic descriptions of torture, including sexual abuse.

57. For a detailed account of the treatment that individuals subjected to extraordinary rendition receive in foreign countries that assure the United States they will not commit torture, see *id.* at 267 ("No reasonable factfinder could determine that unverified promises not to torture, which [Egypt, Syria, and Uzbekistan] have violated in the past and which many CIA officers say are worthless, reduce the odds of torture to less than fifty percent.").

58. *See* 15B WRIGHT & MILLER, *supra* note 50, § 3918.3; *see also infra* note 132.

59. *See supra* text accompanying notes 32-57; *see also* U.S. DEP'T OF JUST., JUSTICE MANUAL 9-15.700 (2018), https://perma.cc/E6UZ-JU85 (offering a step-by-step overview of the process). While relators sometimes request habeas relief before the Secretary has made a final determination, habeas arguments invoking CAT are not ripe until the Secretary has made a CAT determination and are hence represented in the Figure with a dotted line[RCC fig loc]. *See infra* note 132.

Figure
The Extradition Process



Given the limited nature of extradition-certification proceedings, it is only when a relator petitions for habeas relief from the Secretary's extradition decision that she can argue before a court that her extradition will result in torture. Treating habeas review as a stand-in for appellate review, courts have over time applied doctrines like the Rule of Non-Inquiry to limit the questions relators can raise at the habeas stage.[60] But habeas corpus has traditionally

60. *See infra* Part I.C.

served as an independent hearing to assess the legality of detention,[61] and this Note argues that it should serve as a mechanism for reviewing the legality of the Secretary's extradition decision under CAT.

B. Historical Understandings of the Judicial Role in Extraditions

The writ of habeas corpus originated in English common law and served as one of the fundamental guarantees of the Magna Carta.[62] The writ provides a judicial guarantee against unlawful detention, ensuring the legality of detention by requiring an officer to bring forth the detained individual.[63] The writ's scope is defined in 28 U.S.C. § 2241, and the Constitution's Suspension Clause prohibits Congress from abrogating the writ in times of peace.[64]

In 1799, the British Crown issued to the United States a summons for Jonathan Robbins, an American citizen charged for his involvement in a murderous mutiny on a British ship.[65] In doing so, it invoked the Jay Treaty between Great Britain and the newly formed Union, which included a vaguely worded extradition provision that failed to delineate any formal processes for removal.[66] After the district judge presiding over the extradition request expressed reluctance to transfer Robbins to Great Britain, the Secretary of State encouraged President John Adams to direct the judge to deliver the transfer anyway.[67] Wary of presidential involvement in what he considered a judicial function, President Adams reluctantly moved to "advise and request" that the court deliver Robbins, and the judge ultimately acquiesced by ordering

61. Artemio Rivera, *The Consideration of Factual Issues in Extradition Habeas*, 83 U. CIN. L. REV. 809, 845 (2015).

62. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1983-84 (2020) (Thomas, J., concurring) (explaining that habeas relief "was associated with the guarantee in Magna Carta that '[n]o free person (*Nullus liber homo*) shall be taken or imprisoned, or disseised or outlawed or exiled'" (alteration in original) (quoting JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 506 (5th ed. 2019))). For scholarly accounts of the writ's history in the extradition context, see generally Parry, *supra* note 25; and Stephen I. Vladeck, Comment, *Habeas Corpus, Due Process, and Extradition*, 98 CORNELL L. REV. ONLINE 20 (2013). *See also* Pfander & Birk, *supra* note 47, at 1459-62.

63. *Habeas Corpus*, BLACK'S LAW DICTIONARY (11th ed. 2019).

64. *See* 28 U.S.C. § 2241; U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

65. *See* United States v. Robins, 27 F. Cas. 825, 826 (D.S.C. 1799) (No. 16,175); Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 286-88 (1990) (providing the date of the summons). The opinion uses the alternative spelling of Robbins's name; thus, this Note uses "Robbins" to refer to the individual and "Robins" to refer to the case.

66. *See* Parry, *supra* note 25, at 108-09.

67. *Id.* at 109.

the marshal to surrender Robbins to Great Britain, where he was promptly executed.[68] Controversy ensued: Had President Adams improperly interfered in a judicial function? Did the president or the judiciary have the final say over Robbins's fate?[69]

Two competing theories regarding the proper distribution of power in an extradition determination emerged from the Robbins affair. Adherents to the first theory—including President Adams—believed that the judiciary played an independent role in the extradition process.[70] The alternative theory, as then-Congressman John Marshall articulated on the House floor, was that extradition lay in "the executive authority of the President alone."[71]

More than fifty years later, Congress enacted an extradition statute embracing a hybrid model—and that statute remains largely unchanged today.[72] The extradition statute established a role for courts in certifying extraditions as compliant with the relevant country-specific extradition treaty, which would in turn enable the Secretary to extradite the requested individual.[73] But the statute stops short of invoking the full power of the judiciary; it is silent on the scope of habeas review to which the extradition decision is subject. The competing theories of extradition that animated the Robbins affair continue to inform modern understandings of habeas petitions in relation to extradition decisions.

C. Implementing the Convention Against Torture

While scholars continue to debate the judiciary's role in extradition, modern understandings of criminal justice and torture have evolved significantly since 1794. Campaigns against torture gained steam in the 1970s, when news broke that western democracies like Greece and Northern Ireland

68. *Id.* at 109, 111 (quoting a contemporaneous letter from President Adams to the Secretary of State).

69. *Id.* at 111-12.

70. *See id.* at 111, 114 (describing the debate and explaining that President Adams envisioned greater judicial involvement). Indeed, partly in response to public outcry, the United States' next treaty with the United Kingdom "specifically provided for judicial involvement" in extradition by establishing a judicial certification process to assess the legality of any proposed extradition. Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1207-08 (1991) (quoting Webster–Ashburton Treaty, U.K.–U.S., art. X, Aug. 9, 1842, 8 Stat. 572, T.S. No. 119 (entered into force Oct. 13, 1842)).

71. Fong Yue Ting v. United States, 149 U.S. 698, 714 (1893); Parry, *supra* note 25, at 111-13.

72. *Compare* An Act for Giving Effect to Certain Treaty Stipulations Between This and Foreign Governments, for the Apprehension and Delivering Up of Certain Offenders, ch. 167, § 1, 9 Stat. 302, 302 (1848), *with* 18 U.S.C. §§ 3184-3185.

73. 18 U.S.C. § 3184.

had been subjecting prisoners to prolonged torture.[74] Often operating in close cooperation with one another, governments were subjecting political prisoners to practices like prolonged beatings, electrical shocks, and sexual and verbal humiliation.[75] The public outcry mobilized a diverse coalition to propose a unified, international commitment to end torture.[76] After more than a decade, the United Nations General Assembly finally adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[77] at its 1984 New York session.[78] In addition to establishing an affirmative commitment not to employ or permit torture, CAT also committed state parties not to "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."[79]

The U.S. Senate ratified CAT in 1990.[80] Since then, the United States has codified CAT's requirements in its domestic immigration, detention, and extradition procedures.[81] As explained below, CAT claims thus arise both in the immigration context, where an individual facing removal by immigration authorities may argue that her removal would result in torture, and in the extradition context, where a relator may argue her extradition would result in torture.

---

74. *See* Rosemary Foot, *Torture: The Struggle over a Peremptory Norm in a Counter-Terrorist Era*, 20 INT'L RELS. 131, 135-36 (2006) (describing incidents of torture in Greece). *See generally* AMNESTY INT'L, CAMPAIGN FOR THE ABOLITION OF TORTURE (1973), https://perma.cc/2DP4-6YFU (describing torture in various countries, including Northern Ireland, Chile, Brazil, Mozambique, and Namibia, and encouraging international action). Please note that the sources cited here and in surrounding footnotes contain graphic descriptions of torture, including sexual abuse.

75. *See* AMNESTY INT'L, *supra* note 74 (quoting various victim statements describing electrocution, beatings, and suspension using chains).

76. *See* HURST HANNUM, DINAH L. SHELTON, S. JAMES ANAYA & ROSA CELORIO, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 83 (6th ed. 2018) (describing the coalition of organizations behind CAT).

77. Convention Against Torture, *supra* note 10.

78. Hans Danelius, *Introductory Note: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. AUDIOVISUAL LIBR. INT'L L. (2008), https://perma.cc/896K-4NKV.

79. Convention Against Torture, *supra* note 10, art. 3, ¶ 1.

80. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CONGRESS.GOV, https://perma.cc/6FSX-S2P5 (archived Mar. 25, 2021).

81. *See, e.g.*, Foreign Affairs Reform and Restructuring Act of 1998 (FARR Act), Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-761, -822 (codified at 8 U.S.C. § 1231 note (United States Policy with Respect to Involuntary Return of Persons in Danger of Subjection to Torture)) (codifying CAT's requirements in the extradition and immigration contexts).

CAT is not self-executing[82]—its obligations are spelled out in domestic statutes implementing the treaty. Key among those statutes is the Foreign Affairs Reform and Restructuring Act of 1998 (FARR Act), section 2242(a) of which reiterates CAT's commitment:

> 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.[83]

Implementing regulations promulgated by the State Department require the Secretary of State to evaluate CAT claims based on whether a relator is "'more likely than not' to be tortured in the State requesting extradition."[84] But section 2242(d) of the FARR Act arguably restricts judicial review of that determination, stating that "nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section . . . except as part of the review of a final order of removal" issued by an immigration judge.[85] Noncitizens undergoing removal proceedings may thus raise CAT claims to obtain asylum or defend against a removal order.[86] But courts are divided on whether section 2242(d) forecloses even habeas review of the Secretary's CAT determinations in extradition cases.[87]

Three years after Congress enacted the FARR Act, the Supreme Court offered some guidance on how the Act should be interpreted in immigration proceedings. In *INS v. St. Cyr*, the Court held that Congress must provide a "clear, unambiguous, and express statement of congressional intent" any time it purports to strip courts of jurisdiction over habeas petitions.[88] As the Supreme Court would later explain in *Nasrallah v. Barr*, *St. Cyr* held that an immigration statute that purported "to eliminate district court review of final orders of removal" over some removal cases did not necessarily eliminate "district court review *via habeas corpus*."[89] For the Immigration and Naturalization Service (INS)

82. *See* Nasrallah v. Barr, 140 S. Ct. 1683, 1694 (2020) (Thomas, J., dissenting) (explaining that the CAT is not self-executing); Stephen I. Vladeck, Case Comment, *Non-Self-Executing Treaties and the Suspension Clause After* St. Cyr, 113 YALE L.J. 2007, 2008 (2004) (same).

83. FARR Act § 2242(a).

84. 22 C.F.R. § 95.2(b) (2020) (referring to article 3 of CAT).

85. FARR Act § 2242(d).

86. *See Nasrallah*, 140 S. Ct. at 1687 ("During removal proceedings . . . [i]f the noncitizen demonstrates that he likely would be tortured if removed to the designated country of removal, then he is entitled to CAT relief and may not be removed to that country (although he still may be removed to other countries).").

87. *See infra* Part II.

88. INS v. St. Cyr, 533 U.S. 289, 314 (2001).

89. *Nasrallah*, 140 S. Ct. at 1690 (citing *St. Cyr*, 533 U.S. at 312-13).

to strip courts of habeas jurisdiction over even a narrow class of removal orders, it would have to "overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction."[90] The Court explained that "some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution,'"[91] and that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'"[92] Applying *St. Cyr*'s narrow reading of the FARR Act to the extradition context, circuit courts began to agree that the Act lacked the clear statement necessary to bar habeas review of relators' CAT claims, just as it did in the removal context.[93]

But soon after, Congress passed new legislation that, unlike the ambiguous FARR Act, contained an explicit reference to the writ of habeas. The new REAL ID Act of 2005[94] clarified that CAT orders "may not be reviewed in district courts, *even via habeas corpus*, and may be reviewed only in the courts of appeals," along with final removal orders.[95] Meant to consolidate judicial review of immigration decisions, the REAL ID Act makes CAT decisions by the Board of Immigration Appeals (BIA) reviewable in appellate courts only when bundled together with final orders of removal.[96] Given the REAL ID Act's explicit reference to habeas review, courts began interpreting the Act as prohibiting them from exercising habeas jurisdiction over relators' CAT claims even in extradition proceedings.[97] But the FARR and REAL ID Acts' implications for extradition proceedings remain open to interpretation. Although the Supreme Court in *Nasrallah v. Barr* recently clarified the Acts' consequences for immigration proceedings,[98] it has yet to consider the statutes in the extradition context.

D. The Relator's Dilemma

The upshot of the proceedings described above is that relators have a minimal chance of success in their opposition to an extradition order. Under

90. *St. Cyr*, 533 U.S. at 298 (citation omitted).

91. *Id.* at 300 (quoting Heikkila v. Barber, 345 U.S. 229, 235 (1953)).

92. *Id.* at 301 (quoting Felker v. Turpin, 518 U.S. 651, 664 (1996)). The Suspension Clause states, "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

93. *See* Vladeck, *supra* note 82, at 2008 & n.11 (collecting cases).

94. REAL ID Act of 2005, Pub. L. No. 109-13, § 106, 119 Stat. 302, 310-11 (codified as amended at 8 U.S.C. § 1252).

95. Nasrallah v. Barr, 140 S. Ct. 1683, 1690 (emphasis added) (citing REAL ID Act § 106).

96. *See id.*

97. *See, e.g.*, *infra* note 234 and accompanying text.

98. 140 S. Ct. at 1689.

the Rules of Non-Contradiction and Non-Inquiry, relators cannot contradict the evidence for extradition at certification proceedings.[99] They cannot confront witnesses.[100] They cannot argue violations of rules of evidence or criminal procedure.[101] Thus, little prevents a judge from certifying an extradition. If relators do have viable claims under CAT, they can raise them only with the Secretary, who makes his final extradition determination without providing an administrative hearing.[102] And when a relator petitions for habeas relief, the government often stalls its decision or argues her petition is either too early or too late.[103] Ultimately, most courts refuse to review the Secretary's determination that a relator is unlikely to be tortured.[104]

In the twenty years since the ratification of CAT, courts have failed to develop a coherent approach to habeas review of CAT claims in the extradition context.[105] What has emerged are two government practices—both of which courts and scholars have often overlooked—that create further procedural inequities and highlight the need for meaningful habeas review of the Secretary's decision. First, government prosecutors can file as many repeat extradition-certification requests as they like, a practice this Note terms *extradition shopping*. Second, when a relator is a noncitizen, the government can freeze her ongoing immigration proceedings until it orders her extradition, in a practice this Note terms *extradition shuffling*. As Part III demonstrates, providing meaningful review of the Secretary's CAT determination can help mitigate the procedural inequities these practices create.

---

99. *See supra* notes 41-46.

100. This limitation follows from the Rule of Non-Contradiction. *See* Roberto Iraola, *Foreign Extradition, Provisional Arrest Warrants, and Probable Cause*, 43 SAN DIEGO L. REV. 347, 358 & n.58 (2006) (citing Messina v. United States, 728 F.2d 77, 80 (2d Cir. 1984)).

101. *See supra* note 49.

102. *See supra* note 51 and accompanying text.

103. In some cases, the government has argued that the relator filed her habeas petition too early, but, in others, the government argues that it is too late. The Secretary may also respond to the relator's habeas filing by delaying his extradition determination until the judicial process has concluded, which can place relators in procedural limbo. For an overview of these and other concerning emerging government practices, see Part III.E below.

104. As explained in Part II below, those courts that have recognized a right to habeas review have (a) recognized only a narrow procedural right that gives substantial deference to the Secretary's CAT determination, (b) recognized a substantive right to habeas review of CAT claims in theory but not in practice, or (c) denied substantive habeas review of CAT claims altogether.

105. As one treatise observes, extradition habeas procedure is an area of law "less certain than a Star Trek venture to a place where no man or woman 'has ever gone before.'" 2 VED P. NANDA, DAVID K. PANSIUS & BRYAN NEIHART, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 10:25 (West 2021).

1. Extradition shopping

Because the extradition-certification proceeding is treated as a preliminary, non–Article III hearing, the U.S. government can extradition shop by taking its certification request from judge to judge until it is granted.[106] Rules of finality, after all, do not attach to preliminary hearings.[107] Although scholars have identified the risk of extradition shopping, few have recognized it as a common practice that highlights the need for robust habeas review.[108]

The government has repeatedly employed this "striking feature of extradition practice,"[109] even in high-profile cases like Rwandan pastor

106. *See* HEDGES, *supra* note 34, at 3-4 (explaining that denials of extradition certifications are not final); Hooker v. Klein, 573 F.2d 1360, 1367 & n.7 (9th Cir. 1978) (same).

107. *See* Collins v. Loisel, 262 U.S. 426, 429-30 (1923) ("The preliminary examination of one arrested on suspicion of a crime is not a trial; and his discharge by the magistrate upon such examination is not an acquittal."); *see also* Bassing v. Cady, 208 U.S. 386, 391 (1908) ("The accused had not been put in jeopardy when the first indictment was dismissed.").

108. *See, e.g.*, Rivera, *supra* note 61, at 819 (explaining that the government may refile its extradition request); Michael P. Shea, *Expanding Judicial Scrutiny of Human Rights in Extradition Cases After* Soering, 17 YALE J. INT'L L. 85, 89 n.19 (1992) (listing cases acknowledging the practice). While both habeas and extradition scholars recognize that the government may refile its extradition request, *see infra* note 122, those that see this practice as cause for concern have focused on reforming extradition-certification proceedings rather than on expanding the scope of habeas review, *see infra* note 125.

109. Mirela v. United States, 416 F. Supp. 3d 98, 104 (D. Conn. 2019), *appeal dismissed*, No. 19-3366, 2020 WL 1873386 (2d Cir. Feb. 25, 2020). Extradition shopping is an underexplored phenomenon that merits scholarly attention. One district court described the astonishing consequence of extradition shopping, explaining that "[i]n this District, where there are fourteen district judges and six magistrate judges," the U.S. government, "if initially disappointed, could have filed nineteen additional requests, one by one." *Id.* Scholars have expressed similar alarm. *See, e.g.*, Kevin S. Rosen, Note, *Toward Direct Appellate Review in U.S. Extradition Procedures*, 25 COLUM. J. TRANSNAT'L L. 433, 450 (1987) ("The practical implications which result are indeed astonishing. . . . [T]he requesting party may theoretically refile its extradition request before every justice, judge, magistrate, or state judge of general jurisdiction . . . ."). The frequency of this practice is difficult to determine because extradition certifications are not always published, and it is unclear how often certifications are denied in the first instance. Even so, examples like Nkatirutimana's abound. Prosecutors have on various occasions successfully obtained extradition certifications by refiling their request with a different judge—often without bothering to incorporate any new information. *See, e.g.*, Sandhu v. Burke, No. 97-cv-04608, 2000 WL 191707, at *3 (S.D.N.Y. Feb. 10, 2000) ("The charges filed against Mr. Gill in the second complaint were identical to those charged in the original complaint . . . ."); Ahmad v. Wigen, 910 F.2d 1063, 1065 (2d Cir. 1990) ("Magistrate Caden denied the extradition request . . . . The Government then brought a new extradition proceeding that was heard by Judge Korman. Judge Korman granted certification . . . ."); *In re* Extradition of Tafoya, 572 F. Supp. 95, 98, 100 (W.D. Tex. 1983) ("The government is merely taking a second bite at the extradition apple . . . . This Court is not faced with a fourth or even a third bite at the apple."); Hooker v. Klein, 573 F.2d 1360, 1366, 1369 (9th Cir. 1978) (holding that the government may file multiple extradition requests "irrespective of whether earlier requests were denied on the merits or on procedural grounds" and denying habeas relief from extradition).

Elizaphan Ntakirutimana's. In that case, the first magistrate judge to review the extradition refused to certify it, in part because the evidence failed to support a finding of probable cause.[110] The government simply filed a nearly identical extradition request with a different judge—a request that the new judge granted.[111] Ntakirutimana then filed a habeas petition to challenge the extradition-certification ruling, which the same judge that had certified the extradition swiftly denied in a two-page order.[112] Without meaningful habeas review that can offer some sense of finality, relators may have no choice but to endure multiple proceedings as the government shops for the judge that will grant its certification request.

Moreover, the government can extradition shop by refiling an extradition request even after a relator has obtained habeas relief.[113] The Supreme Court's unanimous opinion in *Collins v. Loisel* sanctioned this move, at least where the first habeas court grants relief due to procedural defects, despite the "vexation and harassment" the move causes relators.[114] In that case, the district court had granted Collins habeas relief with respect to two of the three charges the British government sought to extradite him for, because the United Kingdom had "abandoned" the prosecution.[115] The British Consul General then filed a new extradition request "in form and substance identical" with the previous request, and "before the same committing magistrate."[116] This time, the

110. *In re* Surrender of Ntakirutimana, 988 F. Supp. 1038, 1044 (S.D. Tex. 1997); *see also* Ntakirutimana v. Reno, 184 F.3d 419, 423 (5th Cir. 1999).

111. *In re* Surrender of Ntakirutimana, No. 98-cv-00043, 1998 WL 655708, at *2 (S.D. Tex. Aug. 6, 1998). The government in the renewed motion submitted no new evidence. *See* Complaint at 12, *In re Surrender of Ntakirutimana*, 1998 WL 655708 (No. 98-cv-00043), ECF No. 1.

112. Order Denying Petition for Writ of Habeas Corpus at 1, 3, Ntakirutimana v. Reno, No. 98-cv-00076 (S.D. Tex. Nov. 30, 1998), ECF No. 15. This was after Ntakirutimana requested that his habeas appeal be randomly assigned to a different judge. *See* Order Denying Petitioner's Motion for Random Assignment at 2, *Ntakirutimana*, No. 98-cv-00076 (Sept. 3, 1998), ECF No. 3.

113. This maneuver is rarer, but courts have entertained it. *See, e.g.*, *Sandhu*, 2000 WL 191707, at *3 ("The United States filed a second extradition complaint . . . after Judge Sweet entered a stay to permit an appeal of the writ's issuance or the filing of a new extradition complaint."); *In re* Extradition of Muñoz Santos, 228 F. Supp. 3d 1034, 1036, 1056 (C.D. Cal. 2017) (hearing but ultimately denying the government's request to recertify a relator's extradition after the Ninth Circuit had granted him habeas relief from his initial extradition certification).

114. *See* Collins v. Loisel, 262 U.S. 426, 429-30 (1923) ("Protection against unjustifiable vexation and harassment incident to repeated arrests for the same alleged crime must ordinarily be sought, not in constitutional limitations or treaty provisions, but in a high sense of responsibility on the part of the public officials charged with duties in this connection.").

115. *See id.* at 427-28; Collins v. Loisel, 259 U.S. 309, 311 (1922).

116. *Collins*, 262 U.S. at 428.

magistrate certified the extradition.[117] Collins again filed for habeas relief, which the district court denied.[118]

The Supreme Court affirmed the denial of habeas relief.[119] It explained that although Collins had obtained habeas relief to his extradition on the same charges, he was never entitled to the Fifth Amendment's double-jeopardy protection in the first place because the extradition proceeding was a "preliminary examination . . . not a trial."[120] The Court further held that res judicata did not preclude the new extradition request either:

> It is true that . . . a judgment in habeas corpus proceedings discharging a prisoner held for preliminary examination may operate as res judicata. But the judgment is res judicata only that he was at the time illegally in custody, and of the issues of law and fact necessarily involved in that result. The discharge here in question did not go to the right to have Collins held for extradition. It was granted because the proceedings on which he was then held had been irregular and the British Consul General, instead of undertaking to correct them, had concluded to abandon them, and to file the charges anew by another set of affidavits.[121]

Bolstered in part by this decision and in part by the longstanding presumption that extradition certifications are not Article III proceedings, the vast majority of scholars and courts have recognized that extradition shopping is permissible.[122]

Although it has yet to be comprehensively studied, extradition shopping highlights the need for uniformity and procedural fairness in extradition-habeas law. Extradition-certification hearings offer relators limited process and only temporary relief, making it easy for the government to extradite and nearly impossible for the relator to obtain permanent relief. The proceedings bind the executive only in name: Although the Secretary cannot directly appeal a judge's refusal to certify the extradition, she remains free to take her extradition request to the judge next door.

---

117. *Id.*

118. *See id.*

119. *Id.*

120. *Id.* at 429.

121. *Id.* at 430 (emphasis omitted).

122. *See, e.g.*, Roberto Iraola, *Second Bites and International Extradition*, 44 CREIGHTON L. REV. 953, 961 (2011) ("[T]he lower courts uniformly have held that there is no legal bar to a renewed request for a fugitive's extradition if the first request was denied."); Parry, *supra* note 25, at 155 n.322 (explaining that relators "cannot argue res judicata at a second extradition proceeding after having once been found non-extraditable"); Rivera, *supra* note 33, at 136 ("Extradition certificates are considered preliminary orders and thus they are not subject to the doctrines of double jeopardy or res judicata."); Joshua J. Fougere, *Let's Try This Again: Reassessing the Right to Bail in Cases of International Extradition*, 42 COLUM. J.L. & SOC. PROBS. 177, 184 (2008) ("[T]he government is not precluded from initiating subsequent [extradition] proceedings.").

Habeas claims in this context serve two crucial functions: as a constitutional avenue of relief for a relator being held unlawfully and as a relator's only avenue of appeal in a system that forecloses direct appeal and strictly limits the claims the relator may raise at each procedural juncture. If stripped of the opportunity to challenge the Secretary's evaluation of their CAT claims at the habeas stage, relators have little recourse but to endure repeated extradition proceedings. The lack of guardrails on this practice should give pause even to those who support a strictly limited certification proceeding. Judge Chambers of the Ninth Circuit, for example, explained in one concurring opinion that it was fair to "give the government a second judge" with whom to file a renewed extradition request.[123] But he continued, "I do not mean to suggest that we should permit the government in the Central District of California (the Ninth Circuit's largest district) to try out seriatim four magistrates, four retired judges and sixteen active judges. There has to be a point to say, 'Lay off, Macduff.'"[124]

Those few scholars who have commented on extradition shopping argue that the solution is to expand extradition certifications or treat them as Article III proceedings subject to appellate review.[125] Doctrinally, that solution may well seem the more elegant one. It would subject certification proceedings to the same principles of res judicata that govern Article III cases, prohibiting extradition shopping.[126] And it would permit direct appellate review of the extradition certification, enabling the relator to challenge the certification while avoiding the procedural acrobatics of filing a collateral habeas

123. Hooker v. Klein, 573 F.2d 1360, 1369 (9th Cir. 1978) (Chambers, J., concurring).

124. *Id.* at 1369-70.

125. *See, e.g.*, Rosen, *supra* note 109, at 474-75 (listing the various benefits of direct appellate review of extradition certifications, including putting an end to what this Note terms extradition shopping). Scholars have advanced various jurisdictional theories for extradition-certification proceedings. *Compare* Pfander & Birk, *supra* note 47, at 1459-62 (proposing that extradition certifications are exercises of Article III "non-contentious jurisdiction"), *with* Rivera, *supra* note 61, at 814 & n.30, 816 (proposing that certifications are exercises of Article II executive power and listing cases adopting this theory). For further discussion of possible jurisdictional theories, see Allison Marston, Comment, *Innocents Abroad: An Analysis of the Constitutionality of the International Extradition Statute*, 33 STAN. J. INT'L L. 343, 357-63 (1997) (evaluating various jurisdictional bases for extradition certifications); and Parry, *supra* note 25, at 97 (explaining that while "[m]ost courts hold that the hearing is outside Article III," some "believe that the entire process takes place within Article III, while at least one judge has suggested Article II as a possible source of jurisdiction"). These theories may also have different consequences for the scope of any subsequent habeas review. Parry, for example, points out that "if the extradition hearing is not an Article III proceeding, then habeas is the only federal court hearing available to a citizen prior to extradition." Parry, *supra* note 25, at 158. He argues that this factor tilts the balance in favor of a thorough habeas process resembling direct review. *Id.*

126. *See* Rosen, *supra* note 109, at 475.

petition.[127] But even then, appellate review would remain limited to the narrow treaty-based evidentiary questions that limit extradition certifications. So appellate review of extradition certifications is unlikely to obviate habeas petitions that raise collateral legal challenges beyond the scope of the specific extradition treaty, including CAT claims.

More importantly, this proposal faces an uphill battle against existing extradition doctrine. While the scope of habeas review is up for doctrinal debate, it remains textbook extradition law that certification involves a narrow inquiry not subject to appeal.[128] The Supreme Court has confirmed this, even if it has never articulated a clear theory of jurisdiction.[129] Lower courts have overwhelmingly agreed,[130] and legislative attempts to do anything about it have failed.[131]

In any case, courts cannot rule on a relator's CAT claims at the certification proceeding because at that stage the Secretary has yet to decide whether to extradite the relator. The relator's CAT claim is not ripe for review until the Secretary has rejected it, so a court's CAT determination at this early

127. *See* Pfander & Birk, *supra* note 47, at 1462 ("[A]ppellate review would follow as a matter of course (thereby lessening the need for a second round of habeas review).").

128. *See supra* notes 47-50 and accompanying text; *see also* 15B WRIGHT & MILLER, *supra* note 50, § 3918.3 & n.20 ("Orders granting or denying a certificate of extraditability to another country cannot be appealed.").

129. *See* Collins v. Loisel, 262 U.S. 426, 430-31 (1923) (describing the narrow res judicata effect of the extradition proceeding given the circumscribed nature of the inquiry). Of course, as scholars and courts have suggested, the Court may be wrong on this point. Justice Brennan seemed to think so. Dissenting from a denial of certiorari in a case concerning *Collins*'s application, he explained that "failure to give *res judicata* effect to habeas judgments . . . may seriously undermine the writ: a State would have no incentive fully to litigate a question in the habeas proceeding if it could always relitigate the question on retrial." Chambers v. Cox, 400 U.S. 870, 872 (1970) (Brennan, J., dissenting from the denial of certiorari).

130. *See, e.g.*, Hooker v. Klein, 573 F.2d 1360, 1365-66 (9th Cir. 1978) (collecting cases and holding that "where the government in good faith determines that extradition is warranted, it is not barred from pursuing multiple extradition requests irrespective of whether earlier requests were denied on the merits or on procedural grounds"); *see also, e.g.*, Lingad v. Napolitano, 313 F. App'x 72, 74 (9th Cir. 2009) ("[T]he government's ability to bring a new extradition request if initially unsuccessful does not abridge the magistrate judge's authority to grant a motion to reopen in an extradition proceeding." (citations omitted)); Lo Duca v. United States, 93 F.3d 1100, 1105 (2d Cir. 1996) (explaining that extradition decisions are "non-appealable"); *In re* Extradition of Tafoya, 572 F. Supp. 95, 98 (W.D. Tex. 1983) (opining that the government may be able to take "even a third bite at the apple").

131. Although "[a]llowing direct appeals in extradition cases was a centerpiece of the early and mid-1980's effort to revise the extradition statutes," Parry, *supra* note 25, at 158 n.336, those efforts failed, Rosen, *supra* note 109, at 476.

stage would be treated as an advisory opinion.[132] By contrast, courts conducting habeas review of the Secretary's extradition decision recognize that they are being called upon to assess the "legality" of the detention; they are divided only as to the scope of this review.[133]

Thus, for two reasons, this Note focuses on habeas review rather than appellate review of extradition-certification decisions as a solution to extradition shopping. First, in contrast with the general consensus that extradition-certification decisions cannot be appealed, the scope of habeas review is a narrow area of active doctrinal disagreement in which lower courts have occupied a range of positions.[134] Second, recent shifts in the Supreme Court's habeas jurisprudence make substantive habeas review a more promising avenue for extradition reform when it comes to CAT claims.[135]

2. Extradition shuffling

When the government receives an extradition request for a detained noncitizen in immigration proceedings, the BIA generally pauses its review of the noncitizen's case until the Secretary has completed his extradition determination, holding the immigration proceedings in abeyance pending that decision.[136] This move stops any existing immigration proceedings in their

132. Relators sometimes file habeas petitions after a magistrate's extradition certification but before the Secretary of State has made his extradition determination—and courts will often grant habeas-like relief. *See, e.g.*, United States v. Porumb, 420 F. Supp. 3d 517, 521 (W.D. La. 2019) (considering the legality of the extradition at the certification stage and finding "no valid reason that it cannot make the legality determination in certification proceedings . . . just as it can in subsequent *habeas corpus* proceedings . . . all to obtain the same end which can be properly had at the beginning"). But the habeas claim cannot be ripe before the Secretary has made his decision, and a court granting a writ of habeas at that stage would present its own separation-of-powers concerns. In the rare case in which a relator brings such premature claims, they are generally dismissed as unripe. *See, e.g.*, Hoxha v. Levi, 465 F.3d 554, 564-65 (3d Cir. 2006) (dismissing such a claim as unripe); Yacaman Meza v. U.S. Att'y Gen., 693 F.3d 1350, 1356 (11th Cir. 2012) (same). The government has, however, taken inconsistent positions on the proper time to raise a habeas petition. *See infra* Part III.E.

133. *See infra* Part II.

134. Many of the cases that try to answer this question are relatively recent. *See, e.g.*, Mirela v. United States, 416 F. Supp. 3d 98, 118-19 (D. Conn. 2019) (recognizing the possibility of habeas relief from extradition and collecting cases), *appeal dismissed*, No. 19-3366, 2020 WL 1873386 (2d Cir. Feb. 25, 2020).

135. Part II provides an overview of the dueling approaches, and Part III connects these approaches with the Supreme Court's habeas jurisprudence.

136. *See* RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE UNITED STATES § 478 reporter's note 6 (AM. L. INST. 1987). This practice originates in BIA case law. *See, e.g.*, *In re* Perez-Jimenez, 10 I & N Dec. 309, 314-16 (B.I.A. 1963). As with extradition shopping, instances of extradition shuffling are difficult to quantify, although the dearth of case law on this subject may suggest that the practice is relatively rare.

tracks and ropes the relator into extradition-certification proceedings, which provide fewer procedural protections. The few courts that have encountered such extradition shuffling have mostly held that the BIA has broad discretion to hold immigration proceedings in abeyance.[137] Scholars have commented on this phenomenon only in passing, treating it as the default rule.[138] None have questioned the practice.

Barapind v. Reno—the case involving the Sikh student leader who was eventually extradited to India and tortured—is the leading case illustrating this phenomenon.[139] Fleeing the Indian government, Barapind entered the United States in 1993 and was held upon his arrival as excludable.[140] He sought asylum on the basis of political persecution under CAT, which an immigration judge denied.[141] While his asylum adjudication was pending, India requested Barapind's extradition.[142] In response to a request from the INS, the BIA held Barapind's asylum claim in abeyance pending resolution of the Secretary's extradition decision.[143] Barapind then filed a habeas petition challenging the BIA's decision to freeze his asylum proceedings.[144]

The Ninth Circuit permitted the abeyance as a temporary measure, explaining that "if Barapind is determined not to be extraditable, the BIA may lift the stay on his exclusion proceedings, consider his asylum application, and complete adjudication of his excludability."[145] But the court declined to address the flipside: whether a decision by the Secretary to *extradite* Barapind would terminate his ongoing asylum proceedings altogether.[146] Indeed, the court acknowledged that the BIA may have been attempting not only to avoid

137. *See, e.g.*, Noeller v. Wojdylo, 922 F.3d 797, 809 (7th Cir. 2019). *But see In re* Extradition of Blasko, No. 17-mc-00067, 2018 WL 3691859, at *10 (E.D. Cal. Aug. 1, 2018) (noting that the immigration judge "denied the Department of Homeland Security's motion to hold the removal proceedings in abeyance").

138. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE UNITED STATES § 478 reporter's note 6 (AM. L. INST. 1987) (citing the rule); Parry, *supra* note 25, at 99 n.28 (same); Singh, *supra* note 20, at 195 (describing a proceeding held in abeyance without further comment on the practice).

139. Barapind v. Reno, 225 F.3d 1100 (9th Cir. 2000). Barapind raised his CAT claim in his asylum proceedings and then again submitted this claim for the Secretary's consideration after the judge certified his extradition. *See infra* notes 141, 150.

140. *Barapind*, 225 F.3d at 1103.

141. *Id.*; Barapind v. Reno, 72 F. Supp. 2d 1132, 1148 (E.D. Cal. 1999) (discussing Barapind's CAT claim before the immigration judge).

142. *Barapind*, 225 F.3d at 1103.

143. *Id.* at 1104.

144. *Id.* Barapind also sought to freeze the extradition proceedings, which the Ninth Circuit held it did not have jurisdiction to do. *Id.* at 1104, 1108-09.

145. *Id.* at 1114-15.

146. *Id.* at 1114 n.7.

pursuing both processes simultaneously but also to allow the Secretary's extradition determination to *override* Barapind's claim to asylum altogether.[147] Leaning in part on circuit precedent allowing courts to conduct a substantive habeas review of the Secretary's extradition determination,[148] the court declined to consider that issue until the Secretary made his extradition decision, and Barapind never renewed the claim.[149] Barapind then raised his CAT claim before the Secretary, who decided to extradite him.[150]

Most courts have, as in *Barapind*, deferred to the BIA and permitted extradition shuffling.[151] Only the First Circuit has come out the other way, and that was in a case in which the BIA itself rejected the State Department's request to freeze a relator's asylum proceedings.[152] Emphasizing that the relator's asylum claims had been pending for eighteen years (taking a particularly difficult toll on his wife and daughter), and that asylum and extradition are independent proceedings, the First Circuit refused to permit extradition shuffling.[153]

Extradition shuffling makes sense only where, as in the Ninth Circuit at the time *Barapind* was decided, habeas courts can review a relator's challenge to the Secretary's CAT determination. Under circuit precedent, Barapind would have been able to raise his CAT claim at the extradition stage, regardless of the outcome of the BIA proceedings.[154] Without substantive habeas review, though, extradition shuffling pushes a noncitizen out of an immigration process and into an extradition proceeding with fewer procedural guardrails and no opportunity for direct appeal.

* * *

Extradition shopping and shuffling expose holes in extradition law that a patchwork of statutes, treaties, and common law have been unable to stitch closed. They illustrate why the extradition system is in serious need of habeas reform. If American courts are to take claims of torture and their international nonrefoulment obligations seriously, they must move beyond "patching the

147. *See id.*

148. *Id.* at 1106, 1109.

149. *Id.* at 1115.

150. *See* Barapind v. Government of Republic of India, 844 F.3d 824, 827-28 (9th Cir. 2016).

151. *See, e.g.*, Noeller v. Wojdylo, 922 F.3d 797, 809 (7th Cir. 2019) (recognizing the government's authority to extradition shuffle); Fejfar v. United States, 724 F. App'x 621, 622 (9th Cir. 2018) (same); *In re* Extradition of Rios Sarellano, 142 F. Supp. 3d 1182, 1190 (W.D. Okla. 2015) (same); Masopust v. Fitzgerald, No. 09-cv-01495, 2010 WL 324378, at *2 (W.D. Pa. Jan. 21, 2010) (same); *In re* Extradition of Mironescu, 296 F. Supp. 2d 632, 638 n.6 (M.D.N.C. 2003) (same).

152. Castañeda-Castillo v. Holder, 638 F.3d 354, 359-60 (1st Cir. 2011).

153. *Id.* at 361-62, 367.

154. *See Barapind*, 225 F.3d at 1106, 1109 (explaining that under then-existing Ninth Circuit precedent, courts could review the Secretary's CAT determination via habeas petition).

flaws" in extradition law and rethink extradition "from the ground up."[155] The next Parts of this Note map out how courts can begin to do so.

II. Competing Interpretations of the Role of Courts

Although scholars have discussed the puzzle this Note addresses—whether habeas courts can and should consider a relator's claims that her extradition would violate CAT—few have mapped out the different solutions courts have adopted. District courts have employed different theories of jurisdiction to grant or deny substantive habeas relief, but circuit courts have been more cautious and have declined to exercise substantive habeas review of the Secretary's CAT determinations even where they recognize the theoretical right. They have, nevertheless, staked out differing positions on the level of deference due to the Secretary's determinations. Courts have taken conflicting approaches over the past thirty years to determining not only *whether* courts should review CAT claims but also *how* and *when.*[156] As described below, some courts hold that the Secretary's extradition decision is subject to procedural review, through which the habeas court reviews only whether the Secretary met minimal procedural requirements in reaching his decision. Others hold that the Secretary's decision is subject to substantive review, allowing habeas courts to deferentially consider the evidence a relator presents to support the claim that her extradition would result in torture. A third group of courts hold that the Secretary's CAT determination is not subject to any judicial review.

The fractured opinions in one Ninth Circuit case offer an apt illustration of these different approaches. In *Trinidad y Garcia v. Thomas*, the government sought to extradite Hedelito Trinidad y Garcia to the Philippines on charges of kidnapping.[157] Citing the torture to which the Philippine government had subjected his co-accused, Trinidad y Garcia argued that his extradition would result in his torture in violation of CAT.[158] After a magistrate judge determined

155. Parry, *supra* note 25, at 164.

156. Stephen I. Vladeck has mapped out the main approaches, focusing primarily on the Ninth and D.C. Circuits. *See generally* Vladeck, *supra* note 62; Steve Vladeck, *Habeas, Due Process, and . . . Extradition?*, LAWFARE (Mar. 4, 2013, 6:48 PM), https://perma.cc/H9ZB-4X6L; Steve Vladeck, *Why the "Munaf Sequels" Matter: A Primer on FARRA, REAL ID, and the Role of the Courts in Transfer/Extradition Cases*, LAWFARE (June 12, 2012, 9:00 AM), https://perma.cc/U8W3-9X45.

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

158. Among other acts of torture, Philippine government officials had allegedly abducted, suffocated, electrically shocked, and shot Trinidad y Garcia's co-accused companions. *Id.* at 1002-04 (Pregerson, J., concurring in part and dissenting in part). The State Department's own report on the Philippines had documented routine government practices constituting torture. *Id.* at 1004.

that Trinidad y Garcia could be extradited, the Secretary denied him CAT relief.[159] Trinidad y Garcia petitioned for habeas review, arguing that the Secretary had failed to adequately consider his CAT claims.[160] The Ninth Circuit heard the case en banc and issued a short per curiam opinion holding that habeas courts can review CAT claims to address only narrow procedural violations in the Secretary's CAT determination.[161] Members of the en banc panel issued five lengthy separate opinions.

Courts have generally fallen somewhere along the spectrum that *Trinidad y Garcia*'s dueling opinions laid out. As the following Subparts discuss, courts have (a) recognized a narrow procedural right resembling the *Trinidad y Garcia* per curiam opinion,[162] (b) recognized a broader substantive right resembling that identified in Judge Berzon's *Trinidad y Garcia* concurrence,[163] or (c) foreclosed review of CAT claims altogether, in line with then–Chief Judge Kozinski's dissent.[164] Some have adopted a combination of these approaches,[165] and others have issued divided opinions.[166]

---

159. Trinidad y Garcia v. Benov, No. 08-cv-07719, 2009 WL 4250694, at *1-2 (C.D. Cal. Nov. 17, 2009), *aff'd*, 395 F. App'x 329 (9th Cir. 2010), *vacated sub nom. Trinidad y Garcia v. Thomas*, 683 F.3d 952.

160. *Trinidad y Garcia*, 683 F.3d at 955-56.

161. *Id.* at 955-57.

162. Three circuits—the Fifth, Seventh, and Ninth—have recognized a due process right to review the Secretary's extradition determinations, though only the Ninth Circuit has outlined what process is due. *See infra* Part II.A.

163. Four circuits—the First, Second, Fourth, and Seventh—have implied or claimed jurisdiction over the Secretary's substantive CAT determination but have yet to grant habeas on those grounds. *See infra* Part II.B. District courts in some of those and other circuits have also exercised such substantive review. *See, e.g.*, Aguasvivas v. Pompeo, 405 F. Supp. 3d 347, 357-60 (D.R.I. 2019), *aff'd in part, rev'd in part*, 984 F.3d 1047 (1st Cir. 2021); Mirela v. United States, 416 F. Supp. 3d 98, 103-05 (D. Conn. 2019), *appeal dismissed*, No. 19-3366, 2020 WL 1873386 (2d Cir. Feb. 25, 2020).

164. The D.C. Circuit and district courts in the Sixth and Tenth Circuits have held that courts do not have jurisdiction to review any aspect of the Secretary's CAT determination. *See infra* notes 223-26 and accompanying text.

165. The Seventh Circuit, for example, has recognized jurisdiction to conduct both a due process and broader substantive review, but it has yet to grant habeas relief on either ground. *See infra* notes 168, 193 and accompanying text. A district court in the Third Circuit, which has yet to take a side in the circuit split, recently analyzed a petition under each of the approaches taken by the Ninth, D.C., and Fourth Circuits to deny review. *See* Ferdinando G. v. Sessions, No. 18-cv-11359, 2021 WL 321406, at *6-7 (D.N.J. Feb. 1, 2021) ("Accordingly, I do not find that Petitioner's claims, whether reviewed under the standard set forth by the Ninth, Fourth, or D.C. Circuit, warrant habeas relief."), *appeal filed*, No. 21-1220 (3d Cir. Feb. 5, 2021).

166. *See, e.g.*, *Trinidad y Garcia*, 683 F.3d 952 (issuing one per curiam and five separate opinions); Omar v. McHugh, 646 F.3d 13 (D.C. Cir. 2011) (issuing one opinion and one concurring in the judgment).

A. The Procedural Right

At least three circuits, including the Fifth,[167] Seventh,[168] and Ninth,[169] have recognized a relator's right to habeas review of the Secretary's CAT determinations for procedural violations. Although these courts have failed to define the precise contours of such review, they have construed their roles narrowly. The per curiam opinion in *Trinidad y Garcia* is illustrative. That court explained that the FARR Act generated a cognizable "narrow liberty interest" under the Fifth Amendment's Due Process Clause: "strict compliance by the Secretary of State with the procedure outlined" in State Department regulations implementing the FARR Act.[170] And the court refused to find that the REAL ID Act or section 2242(d) of the FARR Act stripped the district court of its jurisdiction to review Trinidad y Garcia's CAT claims.[171] Under the narrow statutory construction the Supreme Court demands for statutes purporting to repeal habeas jurisdiction, neither could prohibit habeas review.[172] Nor did the Rule of Non-Inquiry preclude habeas jurisdiction, because the Rule "implicates only the *scope* of habeas review; it does not affect federal habeas *jurisdiction*."[173] Thus, although the Rule of Non-Inquiry precluded "any inquiry into the *substance* of the Secretary's declaration," it could not preclude habeas review of the Secretary's *procedural* violations.[174]

According to the Ninth Circuit, the "process due" to Trinidad y Garcia was the process the FARR Act and its implementing regulations prescribed.[175] Yet the State Department had offered only "a generic declaration outlining the basics of how extradition operate[d] at the Department and acknowledging the Department's obligations," without providing any "indication that it actually

167. *See* Bauer v. United States (*In re* Geisser), 627 F.2d 745, 750 (5th Cir. 1980) ("[A] purported [extradition] treaty obligation of the United States government cannot override an individual constitutional right.").

168. Venckiene v. United States, 929 F.3d 843, 861 (7th Cir.) ("[A] federal court exercising its habeas corpus power can at least consider a petitioner's argument challenging the executive branch's extradition process on due process grounds."), *cert. denied*, 140 S. Ct. 379 (2019). Although Venckiene did not explicitly raise a CAT claim, she raised similar arguments concerning the prison conditions in Lithuania that informed the Seventh Circuit's broader assessment of its habeas power. *Id.* at 862 (discussing Venckiene's prison-conditions claim and noting that other countries have refused to extradite individuals to Lithuania due to its prison conditions).

169. *Trinidad y Garcia*, 683 F.3d at 957 (recognizing a right to procedural review).

170. *Id.* at 956-57.

171. *Id.* at 956.

172. *Id.* (citing Demore v. Kim, 538 U.S. 510, 517 (2003); and INS v. St. Cyr, 533 U.S. 289, 299-300 (2001)).

173. *Id.*

174. *Id.* at 957 (emphasis added).

175. *Id.* (citing 22 C.F.R. § 95.2).

complied with those obligations in [that] case."[176] Because the State Department had failed to show whether it had considered Trinidad y Garcia's CAT claim, the Ninth Circuit remanded for the Secretary of State to provide a declaration confirming her compliance with the regulatory obligation to consider Trinidad y Garcia's CAT claim.[177] The district court could then ask whether the declaration "has been signed by the Secretary or a senior official properly designated by the Secretary," at which point "the court's inquiry shall have reached its end."[178]

Only the Ninth Circuit has clearly delineated the source and scope of this procedural habeas review. Other courts that recognize the relator's right to procedural habeas review of CAT claims have considered but rejected more robust procedural safeguards, including a right to a hearing,[179] a right to identifiable standards to guide the Secretary's discretion,[180] and a right to a decision by the Secretary himself.[181] One district court, for example, recently found that a letter signed by the Deputy Secretary of State met *Trinidad y Garcia*'s minimal procedural standard.[182] In evaluating the extent of the due process right, no court has engaged in the full balancing of individual and government interests that the Supreme Court's seminal due process case

176. *Id.* at 957.

177. *Id.*

178. *Id.*

179. In *Juarez-Saldana v. United States*, for example, the district court cited Fourth and Fifth Circuit precedent to explain that a relator "exercised his right to submit evidence to the Secretary of State in support of his allegations of torture, thereby receiving all the process he was due." 700 F. Supp. 2d 953, 961-62 (W.D. Tenn. 2010) (citing Peroff v. Hylton, 563 F.2d 1099, 1102 (4th Cir. 1977) (per curiam); and Escobedo v. United States, 623 F.2d 1098, 1105-06 (5th Cir. 1980)). *Juarez-Saldana* and the cases it refers to do not cite to leading due process cases like *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), or *Mathews v. Eldridge*, 424 U.S. 319 (1976), instead explaining that relators are due only the minimal process guaranteed in the State Department regulations and are not entitled to any hearing beyond that which the Secretary provides. *Juarez-Saldana*, 700 F. Supp. 2d at 961-62; *see also* De La Rosa Pena v. Daniels, No. 13-cv-00708, 2015 WL 13730935, at *3 (E.D. Tex. Dec. 11, 2015) (adopting the same cursory approach and denying a relator's due process claims), *report and recommendation adopted by* Nos. 13-cv-00708 & 16-cv-00027, 2016 WL 463251 (E.D. Tex. Feb. 8, 2016).

180. *See Escobedo*, 623 F.2d at 1104-06 (rejecting the petitioner's argument "that the discretion given the Executive under [an extradition treaty] violates due process because no standards are provided to guide the exercise of this discretion").

181. *See* Zhenli Ye Gon v. Dyer, No. 15-cv-00462, 2015 WL 6026278, at *11 (W.D. Va. Oct. 9, 2015) (explaining that the Secretary may delegate authority to other State Department representatives).

182. Ferdinando G. v. Sessions, No. 18-cv-11359, 2021 WL 321406, at *7 (D.N.J. Feb. 1, 2021) ("The letter reiterates the Secretary's obligations under the CAT and states that the Deputy Secretary of State has reviewed 'all pertinent information . . . .'" (quoting the record)), *appeal filed*, No. 21-1220 (3d Cir. Feb. 5, 2021).

Mathews v. Eldridge requires.[183] This is striking when compared to immigration cases involving CAT claims, where courts often apply the *Mathews* balancing test to assess individuals' due process claims.[184] One explanation might be that courts generally view the procedural due process right as merging with the Suspension Clause's guarantee of meaningful habeas review.[185] This theory might partially explain why then-Judge Kavanaugh denied a relator's due process claim entirely, noting in *Omar v. McHugh* that "the protections of due process and habeas corpus are inextricably intertwined and overlapping."[186]

Whatever their underlying reasoning, courts in this category generally conclude that the Secretary's regulations governing extradition already provide whatever process is due to the relator, and they differ only with respect to the formal motions the Secretary must go through to verify that he followed those regulations. They remain divided on whether the Secretary must explain his reasoning or certify that he considered the evidence the relator presented.[187]

---

183. In *Mathews*, the Supreme Court established a balancing test for determining the process due to individuals under the Due Process Clause of the Fifth Amendment. 424 U.S. at 334-35. Under the *Mathews* test, courts assessing what process is due must weigh (1) "the private interest that will be affected by the official action," (2) the risk that existing procedures would erroneously deprive that interest along with the probable value of the added procedural safeguards, and (3) the government interest at stake. *Id. Trinidad y Garcia* cites the *Mathews* balancing test only briefly. 683 F.3d at 956-57. For an application of the *Mathews* balancing test to relators' CAT claims, see generally Artemio Rivera, *A Case for the Due Process Right to a Speedy Extradition*, 50 CREIGHTON L. REV. 249 (2017).

184. *See, e.g.*, Jian Hui Shao v. Mukasey, 546 F.3d 138, 166-67 (2d Cir. 2008) (applying the *Mathews* balancing test to assess whether the BIA's lack of notice regarding its reliance on certain evidence concerning a noncitizen's CAT claim violated his due process right); Soto v. Sessions, No. 18-cv-02891, 2018 WL 3619727, at *3-5 (N.D. Cal. July 30, 2018) (applying the *Mathews* balancing test to assess whether continued detention without a government bond hearing concerning the noncitizen's CAT claim violated her right to due process).

185. *See* Vladeck, *supra* note 62, at 33 (arguing that Judge Thomas's concurrence and Judge Tallman's dissent in *Trinidad y Garcia* conflated the requirements of the Due Process Clause with that of the Suspension Clause); *see also* Taylor v. McDermott, No. 20-cv-11272, 2021 WL 298732, at *12 (D. Mass. Jan. 28, 2021) ("If the Due Process Clause, alone, governed habeas review, the Ninth Circuit's approach in *Trinidad y Garcia* would suffice."), *appeal filed*, No. 21-1083 (1st Cir. Feb. 2, 2021).

186. 646 F.3d 13, 20 n.5 (D.C. Cir. 2011). A divided panel in *Omar* held that habeas courts cannot conduct substantive or procedural review of a relator's CAT claims. *Id.* at 20-21; *see also infra* Part II.C.

187. In the Ninth Circuit, lower courts remain willing to evaluate "evidence the Secretary of State had failed to comply with his obligations to review and analyze information relevant" to a relator's case. *See, e.g.*, Mendoza Perez v. Mims, No. 16-cv-00447, 2016 WL 3254036, at *3 (E.D. Cal. June 14, 2016). *But see* Venckiene v. United States, 929 F.3d 843, 859, 861, 863-64 (7th Cir.) (recognizing Venckiene's right to raise a due process challenge to her extradition by way of habeas petition but ultimately deferring to

footnote continued on next page

B. The Substantive Right

The First,[188] Second,[189] Fourth,[190] and Seventh Circuits,[191] along with a district court in the Fifth Circuit,[192] have recognized a further right to habeas review of the substance of the Secretary's extradition determination. But they do so only in theory.

The First, Second, and Seventh Circuits have recognized a broad "humanitarian exception" to the Rule of Non-Inquiry that would enable habeas courts to prohibit extradition where it would subject a relator to human rights abuses.[193] This could, in theory, enable habeas courts to review the Secretary's CAT determination, but the scope of such review "has yet to be clearly defined or invoked."[194] The Fourth Circuit, for example, has declined to review CAT

executive discretion to extradite and declining to provide relief), *cert. denied*, 140 S. Ct. 379 (2019).

188. *See* Aguasvivas v. Pompeo, 984 F.3d 1047, 1052 n.6 (1st Cir. 2021) (recognizing that the Rule of Non-Inquiry does not pose an absolute bar to habeas review of CAT claims but declining to address that issue directly and granting habeas relief on evidentiary grounds).

189. *See* Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960) (reserving discretion to review extradition decisions in cases where the relator may be subjected to treatment "antipathetic to a federal court's sense of decency"); Mirela v. United States, 416 F. Supp. 3d 98, 117, 126 (D. Conn. 2019) (reviewing detention conditions in Romania and requiring the Secretary to consider these conditions in his extradition determination), *appeal dismissed*, No. 19-3366, 2020 WL 1873386 (2d Cir. Feb. 25, 2020). *But see* Ahmad v. Wigen, 910 F.2d 1063, 1066 (2d Cir. 1990) (questioning *Gallina*'s continued relevance).

190. *See* Mironescu v. Costner, 480 F.3d 664, 670-77, 677 n.15 (4th Cir. 2007) (acknowledging the theoretical possibility of substantive review but declining to provide such review due in part to a lack of briefing on the issue).

191. *See In re* Extradition of Burt, 737 F.2d 1477, 1484, 1487 (7th Cir. 1984) (recognizing a theoretical humanitarian exception).

192. *See* United States v. Porumb, 420 F. Supp. 3d 517, 523 (W.D. La. 2019).

193. The rule originates from a Second Circuit decision from 1960, in which the court denied a relator's writ of habeas but opined that it could "imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination" of the Secretary's decision to extradite. *Gallina*, 278 F.2d at 79; *see also In re Extradition of Burt*, 737 F.2d at 1484 (holding that despite their limited scope of review, habeas courts "have the authority to consider not only procedural defects in the extradition procedures that are of constitutional dimension, but also the *substantive conduct of the United States* in undertaking its decision to extradite if such conduct violates constitutional rights" (emphasis added)); *Aguasvivas*, 984 F.3d at 1052 n.6 (quoting but not invoking *Gallina*'s theoretical exception). *But see* Venckiene v. United States, 929 F.3d 843, 862-63 (7th Cir.) (questioning the continued validity of *Burt*'s atrocious-procedures exception), *cert. denied*, 140 S. Ct. 379 (2019).

194. NANDA ET AL., *supra* note 105, § 10:25; *see, e.g.*, Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976) ("A denial of extradition by the Executive may be appropriate when strong humanitarian grounds are present, but such grounds exist only when it appears that, if extradited, the individual will be persecuted, not prosecuted, or subjected to grave

footnote continued on next page

claims on habeas review but recognizes the importance of such review and remains open to finding that the denial of such review violates the Suspension Clause. In *Mironescu v. Costner*, the Fourth Circuit acknowledged, but declined to apply, pre–FARR Act circuit precedent recognizing a humanitarian exception that would allow courts to substantively review the Secretary's torture determination.[195]

More promising and relevant to modern habeas law is a theory of "meaningful review" rooted in the Suspension Clause and advanced by several district courts and separate opinions of circuit courts.[196] Under this theory, relators facing extradition to torture can bring habeas petitions to challenge their detention as a violation of section 2242(a) of the FARR Act because any interpretation of section 2242(d) of the FARR Act, the REAL ID Act, or the Rule of Non-Inquiry prohibiting that review would violate the Suspension Clause.[197]

As Judge Berzon explained in her *Trinidad y Garcia* concurrence, this is because the FARR Act makes it unlawful for the Secretary to extradite a relator who may be tortured.[198] Judge Berzon recognized a relator's right to

injustice."); Hoxha v. Levi, 465 F.3d 554, 564 n.14 (3d Cir. 2006) ("The exception remains theoretical, however, because no federal court has applied it to grant habeas relief in an extradition case."); *In re Extradition of Burt*, 737 F.2d at 1487 ("[S]o long as the United States . . . bases its extradition decisions . . . in accordance with such other exceptional constitutional limitations as may exist because of particularly attrocious [sic] procedures or punishments employed by the foreign jurisdiction, those decisions will not be disturbed." (citations omitted)); Trinidad y Garcia v. Thomas, 683 F.3d 952, 994 n.7 (9th Cir. 2012) (en banc) (Berzon, J., concurring in part and dissenting in part) (mentioning but not addressing the humanitarian exception); Lopez-Smith v. Hood, 121 F.3d 1322, 1327 (9th Cir. 1997) (same); Mainero v. Gregg, 164 F.3d 1199, 1210 (9th Cir. 1999) (same).

195. *See* 480 F.3d 664, 670, 672 n.10 (4th Cir. 2007).

196. Although no circuit court has so held, various separate opinions have adopted this theory, as have scholars and lower courts. *See, e.g.*, Omar v. McHugh, 646 F.3d 13, 29 (D.C. Cir. 2011) (Griffith, J., concurring in the judgment) ("Because Congress has neither suspended the writ nor repealed the statutory basis for Omar's cause of action, we must consider the merits of his claim."); Vladeck, *supra* note 62, at 34; *infra* note 197 and accompanying text. The Fourth Circuit has left this avenue for relief open. *See infra* notes 217-21.

197. *See* Aguasvivas v. Pompeo, 405 F. Supp. 3d 347, 358 (D.R.I. 2019) ("Thus, because the Suspension Clause of the Constitution has been interpreted to guarantee this Court's habeas jurisdiction, any attempt to remove such jurisdiction over Mr. Aguasvivas' CAT claim would violate the Suspension Clause."), *aff'd in part, rev'd in part*, 984 F.3d 1047; *Porumb*, 420 F. Supp. 3d at 523 ("No known precedent limits the Court's review of extradition legality . . . . Indeed, a contrary holding would raise serious constitutional concerns.").

198. *See Trinidad y Garcia*, 683 F.3d at 986 (Berzon, J., concurring in part and dissenting in part) ("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. . . ."

footnote continued on next page

challenge not just the procedures that the Secretary followed in making an extradition determination but also the "*legality* of the Secretary's decision" itself.[199] To Judge Berzon, the Secretary's duty extended "beyond simply *considering* whether Trinidad is more likely than not to face torture"; the law instead *required* the Secretary "not to extradite him if there are substantial grounds to believe that he is more likely than not to face torture."[200] Because Trinidad y Garcia's habeas petition challenged "the legality of the Secretary's decision" under the FARR Act and CAT, "*not*[] whether or not Trinidad [would] actually be tortured if extradited," it lay "at the 'historical core' of habeas review."[201]

Judge Berzon proposed a "limited inquiry" into the CAT record on habeas review, "designed to ensure against blatant violations of the Secretary's CAT obligations as implemented by the FARR Act."[202]

> [A]t most, we would reverse the decision of the Secretary of State "only if the evidence is so compelling that no reasonable fact finder could have failed to find the requisite likelihood of torture." The detainee would bear the burden of demonstrating through strong, credible, and specific evidence that torture is more likely than not, and that no reasonable factfinder could find otherwise. If, and only if, such a prima facie case is made, must the Secretary submit evidence, should she so choose and *in camera* where appropriate, demonstrating the basis for her determination that torture is not more likely than not.[203]

The Secretary could, under this flexible test, argue for an exception where the circumstances of a particular case implicated national security or diplomacy, requiring the court to decline review.[204]

Judge Berzon's argument for more robust habeas review of the Secretary's CAT determination relied in part on the guarantee of a "meaningful opportunity" for habeas review of the legality of detention that the Supreme Court articulated in *Boumediene v. Bush*.[205] Because the Suspension Clause prohibits Congress from denying that meaningful review in times of peace, the FARR and REAL ID Acts could not abrogate this right without violating the

---

(quoting FARR Act, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-761, -822 (codified at 8 U.S.C. § 1231 note (United States Policy with Respect to Involuntary Return of Persons in Danger of Subjection to Torture))).

199. *Trinidad y Garcia*, 683 F.3d at 986 (Berzon, J., concurring in part and dissenting in part) (emphasis added).

200. *Id.* at 996.

201. *Id.* at 986 (quoting INS v. St. Cyr, 533 U.S. 289, 301 (2001)).

202. *Id.* at 997.

203. *Id.* at 1001 (citation omitted) (quoting Lanza v. Ashcroft, 389 F.3d 917, 936 (9th Cir. 2004)).

204. *See id.* at 999.

205. 553 U.S. 723, 779 (2008).

Suspension Clause.[206] The canon of constitutional avoidance thus required courts to refrain from reading either statute to bar the habeas claim.[207] Judge Berzon's concurrence found the Rule of Non-Inquiry applicable only to initial extradition hearings before a magistrate, not to the ultimate legal determination of whether the FARR Act makes a particular extradition unlawful.[208] And because CAT and the FARR Act "affirmatively denie[d]" the executive the power "to extradite those likely to face torture," habeas courts had to review the Secretary's CAT determination despite the Rule of Non-Inquiry. In other words, the statutory provisions of the FARR Act overcame the judge-made Rule of Non-Inquiry.[209]

In *Taylor v. McDermott*, a district court in the First Circuit adopted Judge Berzon's approach and in so doing illustrated what substantive but deferential habeas review of CAT claims might look like.[210] After reviewing reports

206. *See Trinidad y Garcia*, 683 F.3d at 997-98 (Berzon, J., concurring in part and dissenting in part) (quoting *Boumediene*, 553 U.S. at 779) (applying to Trinidad y Garcia's case *Boumediene*'s requirement that detainees be granted the "meaningful opportunity" for review that the Suspension Clause requires). Judge Pregerson's separate opinion further clarifies this link. *See Trinidad y Garcia*, 683 F.3d. at 1003, 1005-07 (Pregerson, J., concurring in part and dissenting in part) (citing *Boumediene*, 553 U.S. at 728-29, 783, 786); *see also* Vladeck, *supra* note 62, at 30-31 (explaining and endorsing the concurrence's "meaningful review" theory of jurisdiction). For a discussion of this case and its implications for extradition, see Part III.A.1 below.

207. Even the dissent in *Trinidad y Garcia*, for example, acknowledged that the FARR Act and REAL ID Act cannot strip the court's jurisdiction without violating the Suspension Clause; that opinion relied instead on the Rule of Non-Inquiry to emphasize the limited nature of that habeas jurisdiction. 683 F.3d at 970-72, 984 (Tallman, J., dissenting); *see also* Omar v. McHugh, 646 F.3d 13, 26-29 (D.C. Cir. 2011) (Griffith, J., concurring in the judgment) (finding a Suspension Clause violation); Aguasvivas v. Pompeo, 405 F. Supp. 3d 347, 358 (D.R.I. 2019) ("[B]ecause the Suspension Clause of the Constitution has been interpreted to guarantee this Court's habeas jurisdiction, any attempt to remove such jurisdiction over Mr. Aguasvivas' CAT claim would violate the Suspension Clause."), *aff'd in part, rev'd in part*, 984 F.3d 1047 (1st Cir. 2021).

208. *See Trinidad y Garcia*, 683 F.3d at 996 (Berzon, J., concurring in part and dissenting in part).

209. *Id.*; *see* Vladeck, *supra* note 62, at 29 n.61; Kristin E. Slawter, Note, *Torturous Transfers: Examining Detainee Habeas Jurisdiction for Nonremoval Challenges and Deference to Diplomatic Assurances*, 70 WASH. & LEE L. REV. 2487, 2529 (2013); *see also* E.O.H.C. v. Sec'y U.S. Dep't of Homeland Sec., 950 F.3d 177, 189 (3d Cir. 2020) (making this argument in the deportation context).

210. Taylor v. McDermott, No. 20-cv-11272, 2021 WL 298732, at *14 (D. Mass. Jan. 28, 2021) (adopting Judge Berzon's deferential standard of review), *appeal filed*, No. 21-1083 (1st Cir. Feb. 2, 2021). The court reviewed

> (1) whether the Secretary considered the Taylors' claim and determined that it is not "more likely than not" that they will face torture if extradited to Japan, and, if so, (2) whether the Taylors have demonstrated that no reasonable factfinder could find other than that they are more likely to face torture than not.

Id.

submitted by the relators, the court noted that conditions in the receiving country's prisons did not constitute the kind of severe circumstances that the FARR Act and its enacting regulations envisioned.[211] It denied the relators' habeas petition, permitting their extradition.[212] In *Mirela v. United States*, a district court in the Second Circuit adopted a similar test.[213] Because relator Manea had filed his habeas petition after a judge certified his extradition but before the Secretary decided to extradite him, the court refrained from granting formal habeas relief in advance of the Secretary's decision.[214] But the decision illustrated what a substantive review of Manea's CAT claim would look like, evaluating the record to conclude that Manea could face torture or at least mistreatment in Romanian prisons, which per the State Department's own annual reports had for six consecutive years engaged in abuse and violated international standards.[215] The court urged the Secretary to consider this evidence and suggested that Manea could renew a habeas claim if the Secretary decided to extradite him.[216]

At the appellate level, the Fourth Circuit came close to embracing this line of reasoning in *Mironescu v. Costner*.[217] In that case, the court recognized a substantive right to judicial review and explained that the judge-made Rule of Non-Inquiry could not swallow this right to review.[218] It, did, however, find that section 2242(d) of the FARR Act precluded courts from reviewing Mironescu's CAT claims and could not be interpreted to avoid that potentially unconstitutional result.[219] Yet the court stopped short of considering whether section 2242(d)'s denial of habeas relief would violate the Suspension Clause, because the parties had not briefed that issue.[220] The opinion's discussion of a theory of substantive habeas review, and its refusal to invoke constitutional avoidance, indicates that in a properly briefed case, the Fourth Circuit *could* find that section 2242(d) of the FARR Act violates the Suspension Clause. But it

211. *Id.* at *15.

212. *Id.*

213. Mirela v. United States, 416 F. Supp. 3d 98, 121, 124 (D. Conn. 2019), *appeal dismissed*, No. 19-3366, 2020 WL 1873386 (2d Cir. Feb. 25, 2020).

214. *Id.* at 125.

215. *Id.* at 115-17.

216. *See id.* at 126.

217. 480 F.3d 664 (4th Cir. 2007).

218. *Id.* at 672.

219. *Id.* at 674, 676.

220. *Id.* at 677 n.15. A district court case in the Third Circuit, which has yet to take a clear position in the circuit split, similarly declined to rule on a relator's claim that foreclosing meaningful habeas review would violate the Suspension Clause, because the issue had not been properly briefed. Ferdinando G. v. Sessions, No. 18-cv-11359, 2021 WL 321406, at *7 & n.4 (D.N.J. Feb. 1, 2021), *appeal filed*, No. 21-1220 (3d Cir. Feb. 5, 2021).

has yet to do so, and it ultimately denied substantive habeas relief to Mironescu.[221]

D.C. Circuit Judge Griffith came similarly close to embracing substantive habeas review in his concurring opinion in *Omar v. McHugh*, discussed in Subpart C below.[222] Although he defended relators' entitlement to a substantive review of the Secretary's CAT determination, he found no Suspension Clause violation in Omar's case because Omar was already located in the requesting country and sought shelter rather than release.[223]

C. Denial and Deference

Chief Judge Kozinski, dissenting separately in *Trinidad y Garcia*, would have dismissed Trinidad y Garcia's CAT claim outright, refusing to review the Secretary's CAT determination for either procedural or substantive violations.[224] He saw no Suspension Clause problem at all, explaining that "there's no statutory jurisdiction for Trinidad's challenge to begin with" and that Trinidad's treatment "by the government of another country after he leaves the United States doesn't implicate any of his rights under the United States Constitution."[225] The D.C. Circuit has agreed, as have district courts in the Sixth and Tenth Circuits.[226]

Courts that have denied habeas review of the Secretary's CAT determination have done so for some combination of three reasons. First, they interpret the FARR Act as establishing merely a policy rather than creating a right to substantive or procedural review of the Secretary's decision.[227] Second, even if the FARR Act does confer a substantive right, either the REAL ID Act or section 2242(d) of the FARR Act strips courts of habeas jurisdiction to

221. *Mironescu*, 480 F.3d at 677.

222. *See infra* notes 242-47.

223. Omar v. McHugh, 646 F.3d 13, 29 (D.C. Cir. 2011) (Griffith, J., concurring in the judgment).

224. Trinidad y Garcia v. Thomas, 683 F.3d 952, 1010 (9th Cir. 2012) (en banc) (Kozinski, C.J., dissenting in part).

225. *Id.* at 1010-11.

226. *See Omar*, 646 F.3d at 20-24 (denying both procedural and substantive habeas review); Juarez-Saldana v. United States, 700 F. Supp. 2d 953, 958 (W.D. Tenn. 2010) (Sixth Circuit); *In re* Extradition of Rios Sarellano, 142 F. Supp. 3d 1182, 1189 (W.D. Okla. 2015) (Tenth Circuit).

227. *Omar*, 646 F.3d at 18; *see also id.* at 22 n.7 ("Congress's use of the word 'policy' . . . reinforces the conclusion that Congress did not intend to create an 'entitlement' . . . .").

review CAT claims.[228] Third, the Rule of Non-Inquiry prohibits courts from assessing the foreign conduct that awaits a relator abroad.[229]

Citing all three of these reasons, the D.C. Circuit in *Omar v. McHugh* declined to review the Secretary's CAT determination for even procedural violations.[230] Although *Omar* concerned the transfer of a detainee held by the United States on foreign soil, the court did not cabin its analysis to that context, applying its reasoning to extraditions as well.[231] Writing for a divided panel and relying in part on circuit precedent, Judge Kavanaugh held first that the FARR Act states only "a broad 'policy' that the Executive Branch presumably has a responsibility to follow with respect to all transfers" and therefore does not guarantee any substantive right to individuals facing possible torture.[232]

Second, Judge Kavanaugh explained that in any case, the REAL ID Act and section 2242(d) of the FARR Act stripped the court of jurisdiction to consider CAT claims outside of the immigration context.[233] Because Omar was "a military transferee, not an alien seeking review of a final order of removal under the immigration laws," the REAL ID Act prohibited him from bringing a CAT claim on habeas appeal.[234] Although this reading selectively prohibited military transferees from bringing the same CAT claims that noncitizens in removal proceedings could bring, this was, to Judge Kavanaugh, a permissible legislative choice.[235] Judge Kavanaugh explained that because, under his reading, the FARR Act *expanded* habeas jurisdiction, Congress could revoke that jurisdiction without violating the Suspension Clause:

> [T]he REAL ID Act merely confirmed what the FARR Act said—that only immigration transferees may obtain judicial review of conditions in the receiving country. But even if the REAL ID Act took away a statutory right that the FARR Act had previously granted, that scenario poses no constitutional problem. . . .

228. *See, e.g.*, *Juarez-Saldana*, 700 F. Supp. 2d at 958 (explaining that the FARR Act forecloses habeas review of CAT claims).

229. *See id.* at 957 (explaining that the Rule of Non-Inquiry forecloses review).

230. *See Omar*, 646 F.3d at 17-24.

231. Judge Griffith disagreed with this characterization, arguing that relators in extradition cases should receive habeas review even where military transferees do not. *See id.* at 29 (Griffith, J., concurring in the judgment).

232. *Id.* at 18 (majority opinion) (citing Kiyemba v. Obama, 561 F.3d 509, 514-15 (D.C. Cir. 2009)); *see also id.* at 15, 22 n.7.

233. *Id.* at 17-18.

234. *Id.*

235. *Id.* at 21 (explaining that there is "no constitutional reason Congress cannot incrementally or selectively create new rights for transferees beyond the rights guaranteed by the Constitution").

> Congress . . . remains generally free to undo a statute that applies in habeas cases, just as it can undo other statutory rights that it has created.[236]

Third, Judge Kavanaugh explained that the historical habeas writ never provided relief from torture in foreign jurisdictions and that the Rule of Non-Inquiry, in any case, required courts to look the other way.[237] Judge Kavanaugh questioned whether *St. Cyr*'s habeas guarantee applied beyond the narrow immigration context in which that case was decided.[238] To the extent *St. Cyr* did apply, it merely "protected and enforced what [the Court] determined to be the historical scope of the writ" and could not sweep in a statutorily invented right like that conferred by the FARR Act's implementation of CAT.[239] Because CAT has no historical analog, it could not overcome the common law Rule of Non-Inquiry, under which courts had historically "refused to inquire into conditions an extradited individual might face in the receiving country."[240] Judge Kavanaugh also declined to conduct a procedural review under the Due Process Clause. He noted instead that "the protections of due process and habeas corpus are inextricably intertwined and overlapping," such that the reasons for denying substantive review under the Suspension Clause carried over to any relevant due process inquiry.[241]

Judge Griffith, writing separately, would have found a viable habeas claim but would have denied habeas in Omar's case because Omar was already in Iraqi territory.[242] Omar was thus asking the United States not to prohibit his extradition *to* a foreign country but to shelter him from its criminal jurisdiction once he was already there.[243] Judge Griffith laid out a historical basis for the writ rooted in the Suspension Clause, explaining that the writ of habeas "has always been available to review the legality of Executive detention," even when that claim does not have a constitutional basis.[244] Judge Griffith understood *St. Cyr* to recognize that "a prisoner in executive detention could make any argument that his detention was unlawful, regardless of whether that claim was based on Magna Carta or the most recent innovation

---

236. *Id.* at 22.

237. *See id.* at 19, 23 n.10. Judge Tallman, in a separate dissent in *Trinidad y Garcia v. Thomas*, would have denied habeas review solely on the basis of the Rule of Non-Inquiry. 683 F.3d 952, 962-63 (9th Cir. 2012) (en banc) (Tallman, J., dissenting).

238. *Omar*, 646 F.3d at 23 n.10.

239. *Id.*

240. *Id.* at 19. For an explanation of the Rule of Non-Inquiry and its operation in extradition cases, see notes 42-46 and accompanying text above.

241. *Omar*, 646 F.3d at 20 & n.5.

242. *Id.* at 29 (Griffith, J., concurring in the judgment).

243. *Id.*

244. *Id.* at 27 (quoting INS v. St. Cyr, 533 U.S. 289, 305 (2001)).

of Parliament."[245] He would have held that although section 2242(d) of the FARR Act did not strip habeas jurisdiction, the REAL ID Act included the sort of "clear, unambiguous, and express statement of congressional intent" that *St. Cyr* requires for a court to find a congressional violation of the Suspension Clause.[246] Congress could repeal habeas jurisdiction over the FARR Act's prohibition on extraditions to torture only by repealing the statute itself—anything short of that would serve as an unlawful suspension of the writ.[247]

* * *

As this Part demonstrates, most lower courts have construed habeas review of CAT claims narrowly. But they differ widely on the scope and source of habeas review of relators' CAT claims. The disarray in the federal circuits and lack of Supreme Court guidance has led some district judges to conduct a full habeas-like review of a relator's constitutional and statutory claims at the initial extradition-certification stage.[248] But as the next Part explains, courts need not bend over backwards to uphold American treaty obligations under CAT. They can do so by providing a meaningful habeas review of the Secretary's CAT determination.

III. A Path to Meaningful Habeas Review

This Part forges a path forward for litigators and courts seeking to understand the scope of habeas review of the Secretary's torture determinations. Subpart A begins to build a theory of extradition habeas review based on relevant Supreme Court habeas decisions, including the Supreme Court's recent decisions in *Nasrallah v. Barr* and *Department of Homeland Security v. Thuraissigiam*. Subpart B argues that, at least for relators who are legal residents, courts can and should review the Secretary's CAT determinations in the extradition context, and it offers a three-pronged theory of substantive habeas review. Subpart C explains why the Constitution's Suspension Clause requires such review. Subpart D briefly explains how meaningful habeas review of CAT determinations could harmonize habeas review of CAT claims in the extradition and immigration contexts, especially for noncitizen relators. Subpart E concludes by calling for broader statutory

245. *Id.* at 28.

246. *Id.* at 26 (quoting *St. Cyr*, 533 U.S. at 314).

247. *Id.* at 29 ("A core premise of the Suspension Clause is that the form of legislative action can make a great deal of difference in terms of political accountability: repealing a right tends to focus the public's attention in a way that the lawyerly maneuver of jurisdiction stripping does not.").

248. For examples, see note 132 above.

and regulatory reform and by identifying two concerning government practices that strengthen the case for reform.

A. The Supreme Court's Habeas Jurisprudence

The Supreme Court's habeas jurisprudence has shifted significantly since the United States ratified CAT. Although it has yet to define the reach of habeas in the extradition context, the Court has in its military-detainee and immigration cases offered the blueprints for a theory of meaningful review of the Secretary's CAT determinations.

1. The military-detainee cases: *Boumediene* and *Munaf*

In two key cases involving detainees in the war on terror—*Boumediene v. Bush* and *Munaf v. Geren*—the Court affirmed that the writ of habeas guarantees meaningful review of the legal basis for executive detention, even to aliens detained abroad. In *Boumediene*, the Court established that noncitizens designated as enemy combatants and held in U.S. territory at Guantanamo Bay may challenge their detention through habeas, striking down a statute that prohibited such review as an "unconstitutional suspension of the writ."[249] Justice Kennedy's majority opinion described the writ's origins in English common law, its importance to the Framers, and the rare circumstances in which it could lawfully be denied.[250] Relying on this history, the Court held that Congress must leave the habeas court "sufficient authority to conduct a *meaningful review* of both the cause for detention and the Executive's power to detain."[251] It also explained that the Constitution's Suspension Clause entitles the relator to "a *meaningful opportunity* to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law."[252]

The Court explained that the need for meaningful review is "most pressing" where "a person is detained by executive order, rather than, say, after being tried and convicted in a court."[253] Especially in those cases, the "habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain," including "some authority to assess the sufficiency of the Government's evidence against the detainee."[254] By establishing a military-commission system that "intended to circumscribe habeas review" without formally suspending the writ, Congress

249. Boumediene v. Bush, 553 U.S. 723, 732-33 (2008).

250. *Id.* at 739-45.

251. *Id.* at 783 (emphasis added).

252. *Id.* at 779 (emphasis added) (quoting INS v. St. Cyr, 533 U.S. 289, 302 (2001)).

253. *Id.* at 783.

254. *Id.* at 783, 786.

had violated the Suspension Clause without providing a constitutionally adequate substitute.[255]

In *Munaf*, a companion case to *Boumediene* concerning a detainee transfer, the Supreme Court deferred to the executive branch's assessment of the treatment the receiving country might afford a detainee.[256] But it expressly reserved any judgment on whether CAT and the FARR Act establish a substantive right against transfer to torture that relators can raise at the habeas stage.[257] Munaf, an American citizen held in Iraqi territory by American forces acting as part of a multinational coalition, sought a writ of habeas to enjoin his transfer to Iraqi custody.[258] The Court unanimously held that the habeas statute, and its meaningful opportunity for review, "extends to American citizens held overseas by American forces."[259] But Chief Justice Roberts's majority opinion declined to consider Munaf's torture claim, explaining that "it is for the political branches, not the Judiciary, to assess practices in foreign countries."[260] Citing the State Department's conclusion that Iraq would not torture Munaf, the Chief Justice distinguished Munaf's facts from "a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway."[261]

Because it was not fully briefed below, the Court declined to address whether the FARR Act's specific prohibition on "transfer when torture may result" would alter this deferential result.[262] In a footnote, however, the Court did opine on the FARR Act, identifying two obstacles to its application in Munaf's case.[263] First, it noted that section 2242(d) of the FARR Act, which requires that CAT claims be consolidated with and limited to immigration proceedings, might limit CAT relief in detainee-transfer cases like Munaf's.[264] Second, it explained that the FARR Act was unlikely to apply because Munaf faced transfer not "to another state"[265] but as "an individual located in Iraq to

255. *Id.* at 776, 786.

256. Munaf v. Geren, 553 U.S. 674, 700-02 (2008).

257. *Id.* at 703 n.6.

258. *See id.* at 679-80. Although *Munaf* consolidated two cases involving two similarly situated petitioners, only Munaf claimed that his transfer would result in torture. *Id.* at 681-85, 700. This Note thus focuses on Munaf rather than on co-petitioner Omar.

259. *Id.* at 680.

260. *Id.* at 700-01.

261. *Id.* at 702.

262. *See id.* at 703.

263. *See id.* at 703 n.6.

264. *See id.*

265. *Id.* (emphasis omitted) (quoting Convention Against Torture, *supra* note 10, art. 3, ¶ 1).

the Government of Iraq."[266] According to the Court, "such an individual is not being 'returned' to 'a country'—he is already there."[267] In a further factual complication, Munaf's habeas petition had raised his fear of torture but failed to formally claim that the prospect of torture would make his transfer to Iraqi custody *unlawful* under CAT and the FARR Act.[268]

In a concurrence, Justice Souter, joined by Justices Ginsburg and Breyer, pushed back against the Court's dismissive treatment of Munaf's torture claim. Justice Souter addressed the "extreme case" that Chief Justice Roberts's majority opinion reserved judgment on, adding that "nothing in today's opinion should be read as foreclosing relief for a citizen of the United States who resists transfer" where the Secretary decides to transfer a detainee he *knows* will be tortured.[269] Justice Souter also extended that "caveat to a case in which the probability of torture is well documented, even if the Executive fails to acknowledge it."[270]

Munaf's application to extradition is unclear. The decision answered a narrow question concerning whether courts could "enjoin our Armed Forces from transferring individuals detained within another sovereign's territory to that sovereign's government for criminal prosecution."[271] As Stephen Vladeck argues, the case "at most settles whether *due process* requires more than the Secretary of State's assurances that a detainee will not be transferred to torture."[272] But the Court reserved judgment on whether CAT and the FARR Act created a separate legal obligation protected by the Suspension Clause, thus declining to "address the possibility that the Suspension Clause might require more" than bare due process does.[273]

Boumediene's guarantee to a "meaningful opportunity" for review based on the Suspension Clause is independent of, and in some cases protects more than, due process.[274] Habeas corpus guarantees a substantive review of the

266. *Id.*

267. *Id.*

268. *See id.* at 700, 703 n.6.

269. *See id.* at 706 (Souter, J., concurring).

270. *Id.*

271. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 2003 (2020) (Sotomayor, J., dissenting) (quoting *Munaf*, 553 U.S. at 689).

272. Vladeck, *supra* note 62, at 33. The D.C. Circuit rejected this distinction in *Omar*, characterizing the Suspension Clause and the Due Process Clause of the Fifth Amendment as coextensive with one another. Omar v. McHugh, 646 F.3d 13, 20 n.5 (2011).

273. Vladeck, *supra* note 62, at 33.

274. *See* Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 111-17 (2012) (explaining that because habeas corpus guarantees a substantive factual and legal

footnote continued on next page

executive's legal authority to detain.[275] But the Court's cursory treatment of Munaf's torture claim left unclear whether that commitment to meaningful review extends to CAT claims in extradition cases. On the one hand, CAT claims challenge the Secretary's extradition determination as unlawful under the FARR Act and international law, just like any other challenge to the legality of detention. On the other hand, CAT claims may be unique in that they call on courts to "assess practices in foreign countries," an inquiry *Munaf* characterized as more political than judicial.[276] Although they described the scope of habeas review, neither *Boumediene* nor *Munaf* directly addressed the CAT claims of an individual seeking to prevent his transfer out of the United States and to a foreign country. More than a decade later, the Supreme Court addressed just that kind of transfer in two immigration decisions.

2. The immigration cases: *Nasrallah* and *Thuraissigiam*

In June 2020, the Supreme Court embraced judicial review of CAT claims in one immigration context and then denied it in another. In *Nasrallah v. Barr*, the Court held that courts of appeals can and should review factual challenges to an immigration judge's denial of CAT relief in cases concerning noncitizens with predicate offenses.[277] Then, in *Department of Homeland Security v. Thuraissigiam*, the Court held that neither the Suspension Clause nor the Fifth Amendment's Due Process Clause guarantees a right to habeas review when an immigration judge determines that there is no "credible fear" in expedited-removal cases.[278] Though they did not explicitly address extradition proceedings, these cases may together support habeas review for CAT claims in the extradition context.

In *Nasrallah*, the Supreme Court held that when the BIA denies a noncitizen's CAT defense to the government's removal order, a federal appellate court may review the factual challenges to the BIA's CAT determination.[279] Nasrallah, a member of the minority Druze religion, fled to the United States as a teenager after Hezbollah allegedly tortured him.[280] He lived in the United States as a lawful permanent resident for six years until he was sentenced to time in prison for receiving stolen property.[281] When the

review of the executive's authority to detain, it "sometimes provide[s] access to process unavailable under the Due Process Clause").

275. Boumediene v. Bush, 553 U.S. 723, 783 (2008).

276. *Munaf*, 553 U.S. at 700-01.

277. Nasrallah v. Barr, 140 S. Ct. 1683, 1688 (2020).

278. 140 S. Ct. 1959, 1964-65 (2020).

279. *Nasrallah*, 140 S. Ct. at 1687-88 (citing 8 U.S.C. § 1252(a)(2)(C)).

280. *Id.* at 1688.

281. *Id.*

government initiated deportation proceedings against him, Nasrallah applied for relief under CAT, alleging that he would face torture if returned to Lebanon.[282] The BIA denied Nasrallah CAT relief and ordered his removal to Lebanon.[283] On appeal, the government argued that certain provisions of the FARR and REAL ID Acts limited judicial review of the BIA's CAT determination when the noncitizen had committed a predicate crime.[284]

The Supreme Court, in an opinion by Justice Kavanaugh, disagreed. The Court explained that the FARR and REAL ID Acts "simply establish[ed] that a CAT order may be reviewed *together* with the final order of removal, not that a CAT order is the same as, or affects the validity of, a final order of removal."[285] Because the REAL ID Act "now provides for direct review of CAT orders in the courts of appeals" in removal cases, the appellate court had independent authority to review Nasrallah's CAT claim.[286] That independent review made sense because "the factual components of CAT orders will not previously have been litigated in court."[287]

Less than a month later, the Supreme Court held in *Thuraissigiam* that Congress may constitutionally limit courts' jurisdiction to hear habeas challenges to an individual's *expedited*-removal order.[288] The Court held that while the writ of habeas protects against *detention*, it cannot be used to secure legal *entry* to the United States.[289] Thuraissigiam, a Sri Lankan victim of ethnic violence, arrived in the United States without documentation.[290] After being detained upon arrival, Thuraissigiam applied for asylum, citing "a fear of returning to Sri Lanka because a group of men had once abducted and severely beaten him."[291] The Department of Homeland Security (DHS) soon flagged him for expedited removal under a statutory scheme permitting DHS to remove from the country those asylum applicants who fail to show a "credible fear of persecution."[292] Thuraissigiam filed a habeas petition, arguing that

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 1691 (emphasis added).

286. *Id.* at 1693 (citing 8 U.S.C. § 1252(a)(4)).

287. *Id.*

288. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1967 (2020).

289. *See id.*

290. *Id.* at 1967-68.

291. *Id.* Thuraissigiam also claimed eligibility for withholding of removal under CAT and its implementing statute in the immigration context. The Court declined to entertain this claim in part because Thuraissigiam had failed to adequately plead it. *Id.* at 1965 n.5.

292. *Id.* at 1965-66, 1968. The Illegal Immigration Reform and Immigrant Responsibility Act allows the government to expeditiously remove those detained asylum seekers who lack valid entry documents, have not been continuously present in the United States

footnote continued on next page

immigration officials had applied the wrong legal standard in assessing his fear of persecution and requesting "a new opportunity to apply for asylum."[293] But the expedited-removal scheme limits habeas review of the immigration judge's decision to a narrow set of procedural questions, prohibiting the habeas court from asking whether the asylum seeker may be entitled to CAT relief from removal.[294]

Thus, while the Supreme Court's opinion in *St. Cyr* sets the floor for habeas, *Thuraissigiam* sets the ceiling—limiting the writ's protection to its scope "when the Constitution was drafted and ratified."[295] Because "[t]he writ simply provided a means of contesting the lawfulness of restraint and securing release," Thuraissigiam could not use habeas review to "claim the right to *enter or remain*" in the United States.[296] Like the American citizens in *Munaf*, who were being detained abroad and sought a writ of habeas "requiring them to be brought" to the United States, Thuraissigiam sought a form of administrative relief that lay "far outside the 'core' of habeas."[297]

Among other early cases, *Thuraissigiam* cited to *Somerset v. Stewart*, in which a British judge famously invoked British prohibitions on the slave trade to order the release of a slave detained on a ship bound for Jamaica.[298] Nowhere in that history, as the Court interpreted it, did the writ of habeas guarantee "authorization for an alien to remain in a country other than his own or to obtain administrative or judicial review leading to that result."[299] Such authorization was absent in part because U.S. immigration law had no equivalent at the time of the founding—an "open door to the immigrant was the . . . federal policy," and there was no administrative immigration relief to guarantee.[300] The Court also denied Thuraissigiam relief on due process

---

for two or more years, and whom the Secretary of Homeland Security designates for expedited removal. *See id.* at 1963, 1965 (citing 8 U.S.C. § 1225(b)(1)(A)(i), (iii)(I)-(II)).

293. *Id.* at 1968 (quoting the record).

294. *See id.* at 1966 (quoting 8 U.S.C. § 1252(e)).

295. *Id.* at 1963 (quoting Boumediene v. Bush, 553 U.S. 723, 746 (2008)); *see also id.* at 1969. Justice Thomas, in a concurring opinion, adopted an even narrower view of the Suspension Clause and its protections and indicated his willingness to depart from *Boumediene* and *St. Cyr* altogether. *See id.* at 1988 (Thomas, J., concurring).

296. *Id.* at 1969 (majority opinion) (emphasis added). The government could, according to the Court, release Thuraissigiam only "in the cabin of a plane bound for Sri Lanka." *Id.* at 1970.

297. *Id.* at 1970-71 (citing Munaf v. Geren, 553 U.S. 674, 693 (2008)).

298. *See id.* at 1971-73 (citing Somerset v. Stewart (1772) 98 Eng. Rep. 499, 510; Lofft. 1, 19).

299. *Id.* at 1971.

300. *Id.* at 1973-74 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588 n.15 (1952)). An unfortunate irony in the Court's opinion is its reliance on the founding era's open-door policy to *restrict* entry to the United States. *See id.* at 1997-98 (Sotomayor, J., dissenting) (noting that requiring Thuraissigiam to show habeas cases from this period that

footnote continued on next page

grounds,[301] explaining that as applied to nonresident aliens detained immediately upon entry, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, *are* due process of law."[302]

In a concurring opinion, Justice Breyer sought to cabin the Court's sweeping opinion. Rather than centering the availability of habeas on whether an individual is seeking release from detention, Justice Breyer's concurrence relied on the more narrow premise that Congress can preclude habeas review of specific *factual* questions like those Thuraissigiam's appeal presented.[303] But with respect to legal or procedural questions—for example, where "immigration officials failed entirely to take obligatory procedural steps"—the writ would issue.[304] This articulation mirrors the bare-bones procedural review that courts have proposed when reviewing CAT claims in the extradition context.[305]

B. The Case for Substantive Habeas Review

Relators have a common law, statutory, and treaty-based right to habeas review of their extradition claims. First, and at a minimum, *Thuraissigiam*'s focus on habeas protection for those seeking release from executive detention makes clear that the common law writ guarantees a meaningful review of a relator's CAT claims. Second, section 2242(a) of the FARR Act makes extradition to torture unlawful. Third, extraditions to torture violate American treaty obligations under CAT. Together, these sources support substantive habeas review of the Secretary's CAT determination. While such meaningful review may be narrow and deferential, Congress cannot scale it back without violating the Suspension Clause.

---

permitted entry asked him "to engage in an exercise in futility" because no laws barred entry in the first place).

301. *Id.* at 1982-83 (majority opinion). Justices Breyer and Ginsburg declined to join this part of the opinion on the ground that the Court need not address broader due process arguments not properly before it. *Id.* at 1989 (Breyer, J., concurring in the judgment).

302. *Id.* at 1982 (majority opinion) (emphasis added) (quoting Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892)).

303. *Id.* at 1991 (Breyer, J., concurring in the judgment).

304. *Id.* at 1992. As Justice Sotomayor pointed out in her dissenting opinion, the types of determinations Thuraissigiam was challenging could just as easily be characterized as legal rather than factual. *See id.* at 1994-95 (Sotomayor, J., dissenting). Thuraissigiam also challenged procedural defects "that violate, or at least call into question, the 'efficacy of process prescribed by law' and the Constitution." *Id.* at 1996 (quoting *id.* at 1992 (Breyer, J., concurring in the judgment)).

305. For a discussion of this approach, see Part II.A above.

1. *Thuraissigiam* and the common law case for habeas review

Courts' habeas jurisdiction over relators' CAT claims is rooted first and foremost in the writ of habeas as it stood in 1789. In *Thuraissigiam*, the Court shifted from its earlier focus on the *location* of the individual seeking habeas, in *Munaf* and *Boumediene*, to a focus on the *type* of relief she seeks. In doing so, it clarified the scope of the writ: Individuals may challenge their executive detention, so long as they do not demand some broader administrative remedy like asylum and seek only release. Relators like Ntakirutimana, Venckiene, and Barapind ask for just that: release.

Justice Alito's majority opinion held that Thuraissigiam's request for a new asylum hearing fell "outside the scope of the common-law habeas writ."[306] The opinion emphasized that the common law writ offered only release from detention, not the further opportunity to "apply for asylum."[307] But in most extradition cases, a relator is not seeking entry to the United States—she is, for legal purposes, already here.[308] Once she is arrested pending extradition, she seeks nothing more than release from detention.[309] This request for release, *Thuraissigiam* has confirmed, lies at the core of the writ's protections.[310] Indeed, Thuraissigiam attempted to analogize his own case to that of a relator seeking relief from extradition.[311] The Court rejected this argument and, in doing so, drew a line separating expedited removal decisions from extraditions, locating the latter within the purview of the writ:

> [E]xtradition cases, similar to the deserter cases, illustrate nothing more than the use of habeas to secure release from custody *when not in compliance with the extradition statute and relevant treaties*. As noted by a scholar on whose work respondent relies, these cases "examine[d] the lawfulness of magistrates' decisions

306. *Thuraissigiam*, 140 S. Ct. at 1970.

307. *Id.* at 1969-70.

308. Ntakirutimana, for example, was a legal resident when he was arrested. Ntakirutimana v. Reno, 184 F.3d 419, 423 (5th Cir. 1999). Barapind and Venckiene had been undergoing separate asylum proceedings while living in the United States. *See* Barapind v. Reno, 225 F.3d 1100, 1103 (9th Cir. 2000); Venckiene v. United States, 929 F.3d 843, 864 (7th Cir.), *cert. denied*, 140 S. Ct. 379 (2019).

309. The government requests arrest warrants for the individuals it seeks to extradite. *See* RESTATEMENT (FOURTH) OF FOREIGN RELS. L. OF THE UNITED STATES § 428 (AM. L. INST. 2018) ("[T]he Department of Justice applies to a federal court for an arrest warrant for the person subject to the request. Following arrest, the court will hold a hearing to determine whether the person is extraditable."). The United States detains those relators considered a flight risk during the proceedings and transfers them to foreign custody after the Secretary of State signs a surrender warrant. *See* U.S. DEP'T OF JUST., CRIMINAL RESOURCE MANUAL 615, 617, 621, https://perma.cc/6PMP-2UR7 (last updated Jan. 22, 2020) (to locate, click "View the live page," then select the chapter number).

310. *Thuraissigiam*, 140 S. Ct. at 1969.

311. *Id.* at 1974 ("Respondent's final examples involve international extradition . . . .").

> permitting the executive to detain aliens." In these cases, as in all the others noted above, habeas was used "simply" to seek release from allegedly unlawful detention.[312]

In limiting habeas review to those cases where an individual simply seeks release, *Thuraissigiam* has forged a path forward for relators seeking habeas relief and courts navigating the circuit split. Though *Thuraissigiam* excludes certain torture-based defenses to expedited removal from habeas review, litigators can and should argue that it makes clear that claims of torture upon extradition have always been entitled to substantive review at the habeas stage. Far from seeking "to remain in a country other than their own," those facing extradition seek only to remain in their own country: the United States.[313] Relators who are already legal residents fall squarely in this category, as do relators who are lawfully undergoing asylum or other parallel immigration proceedings, so long as they seek only release from detention and not some further resolution of their immigration claims.[314]

Justice Alito's majority opinion explained in the alternative that the extradition cases Thuraissigiam cited might be inapplicable because they "post-date the founding era."[315] But habeas relief from extradition was available far earlier. Indeed, in an article the Court cited, Gerald Neuman explains that while the lack of formal habeas treaties meant that common law "provided only general principles, and not specific doctrines, for habeas practice regarding international extradition,"[316] England formed treaty-like extradition agreements at least as early as in the twelfth century.[317] The traditional common law habeas writ extended to claims of torture or mistreatment in the receiving jurisdiction.[318] Legal historians have meticulously documented this practice.[319]

---

312. *Id.* (second alteration in original) (emphasis added) (citation omitted) (quoting Neuman, *supra* note 23, at 1003).

313. *Id.*

314. For a discussion on how this argument applies to noncitizens undergoing parallel immigration proceedings, see Part III.D.2 below.

315. *Thuraissigiam*, 140 S. Ct. at 1974.

316. Neuman, *supra* note 23, at 995; *see also Thuraissigiam*, 140 S. Ct. at 1974 (quoting the article to support a different proposition).

317. Neuman, *supra* note 23, at 995 & n.202.

318. Indeed, America's earliest extradition debate concerned the treatment to which Great Britain would subject Jonathan Robbins, and it was in part in response to Great Britain's prompt execution of Robbins that Congress delineated a role for courts in extradition-certification proceedings in the first place. *See supra* notes 65-73 and accompanying text.

319. This Note focuses on modern extradition law and its interplay with *Thuraissigiam* and immigration jurisprudence. For a detailed historical account of the writ of habeas and

footnote continued on next page

As scholars have recognized, habeas courts regularly reviewed individuals' claims that they anticipate mistreatment in the receiving jurisdiction.[320] The majority opinion in *Thuriassigiam* relies heavily on one eighteenth-century British habeas case that illustrates this very practice.[321] In *Somerset v. Stewart*, the King's Bench issued a writ of habeas to release Somerset, a slave from a ship bound for Jamaica.[322] The majority opinion in *Thuraissigiam* recognized that Somerset sought "release from custody," which "fell within the historic core of habeas."[323] But it distinguished Somerset's claim from Thuraissigiam's, stressing that the habeas relief Somerset obtained merely allowed him to "remain in England" and did not grant the kind of legal "entitlement to reside in the country" that Thuraissigiam sought under modern immigration laws.[324] To a relator seeking to prevent an unlawful extradition, that distinction makes little difference. Like Somerset, the relator seeks release from detention, not formal naturalization. And she is entitled to that relief when, as in *Somerset*, sending her abroad would violate domestic law and subject her to "odious" treatment.[325] Lord Mansfield's judgment in *Somerset* acknowledged as much, explaining that although "the laws and opinions of Virginia and Jamaica" authorized slavery, "the law of England" demanded the slave's release.[326]

In addition to this habeas jurisdiction at common law, the federal habeas statute has since the Reconstruction extended the writ to individuals "in custody in violation of the Constitution or *laws* or *treaties* of the United States."[327] As the subsequent sections explain, the writ applies twice over to a

---

its application to extraditions resulting in torture, see the sources cited in note 62 above.

320. Historical habeas scholars, such as John Parry, offer a comprehensive historical account. *See* sources cited *supra* note 62.

321. *Thuraissigiam*, 140 S. Ct. at 1973.

322. *See id.*; Somerset v. Stewart (1772) 98 Eng. Rep. 499, 510; Lofft. 1, 19.

323. *Thuraissigiam*, 140 S. Ct. at 1973.

324. *Id.*

325. *Somerset*, 98 Eng. Rep. at 510, Lofft. at 19. One advocate before the *Somerset* court, for example, argued that habeas relief was necessary to avoid sanctioning the "horrid cruelties" of slavery "perpetrated in America." *Id.* at 503, Lofft. at 8 (argument of John Alleyne).

326. *Id.* at 510, Lofft. at 19.

327. 28 U.S.C. § 2241(c)(3) (emphasis added). This language has been modified little since 1867, when Congress first extended the writ to protect "any person [who] may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." CONG. RSCH. SERV., RL33391, FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW 4 & n.15 (2010) (quoting Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385 (codified as amended at 28 U.S.C. §§ 2241-2243, 2251)).

relator being held "in violation of" both a law (the protective provisions of the FARR Act) and a treaty (CAT).[328]

2. The statutory case for habeas review

Section 2242(a) of the FARR Act states: "It shall be the policy of the United States" not to extradite an individual "to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture."[329] Although the D.C. Circuit in *Omar* pointed out that this "policy" may not rise to the level of a substantive "right,"[330] that semantic difference does not dictate the scope of the FARR Act's applicability. Indeed, in *Medellín v. Texas*, a case concerning the reach of non-self-executing treaties, the Supreme Court listed the FARR Act as an example of a statute by which Congress has elected to give "wholesale effect" to CAT rather than taking a "judgment-by-judgment approach" to its applicability.[331] The FARR Act's implementing regulations, too, reiterate CAT's absolute command: "*No State party shall* . . . extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[332] Section 2242(a) and its implementing regulations make it unlawful to extradite relators where they may be tortured. A relator who argues she will be tortured upon her extradition, then, argues that she is being detained in violation of law—a claim entitled to habeas review.[333]

3. The treaty-based case for habeas review

CAT itself also guarantees habeas review. Because CAT is an international treaty, an extradition order that might violate CAT deserves habeas review as a "violation of [a] . . . treat[y]."[334] Some courts focus only on the FARR Act and fail to recognize American obligations under CAT itself, reasoning that because CAT is not self-executing, it imposes no positive obligations beyond those its implementing statute establishes.[335] But the habeas statute's text

328. 28 U.S.C. § 2241(c)(3).

329. FARR Act, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-761, -822 (codified at 8 U.S.C. § 1231 note (United States Policy with Respect to Involuntary Return of Persons in Danger of Subjection to Torture)).

330. Omar v. McHugh, 646 F.3d 13, 22 n.7 (D.C. Cir. 2011).

331. Medellín v. Texas, 552 U.S. 491, 520 (2008).

332. 22 C.F.R. § 95.2(a)(1) (2020) (emphasis added).

333. *See* 28 U.S.C. § 2241(c)(3).

334. *Id.*

335. *See, e.g.*, *Omar*, 646 F.3d at 17 ("This multilateral treaty is non-self-executing and thus does not itself create any rights enforceable in U.S. courts."); Juarez-Saldana v. United States, 700 F. Supp. 2d 953, 958 (W.D. Tenn. 2010) ("[T]he extent to which the United

footnote continued on next page

requires habeas courts to consider violations of treaties, not just their implementing statutes. In restricting CAT's independent legal obligation, courts rely in part on the Supreme Court's decision in *Medellín v. Texas*, which confirmed that treaties that are not self-executing and lack implementing legislation cannot bind state criminal judgments.[336] Although *Medellín* certainly narrowed the role treaties play in domestic litigation, it likely stands for a narrower proposition than courts have attributed to it.

In *Medellín*, the Supreme Court held that federal courts cannot apply non-self-executing treaties to nullify state judgments under the Constitution's Supremacy Clause.[337] After the State of Texas sentenced American noncitizen José Ernesto Medellín to death, Medellín claimed in a habeas petition that law enforcement had denied him his Vienna Convention right to notify the Mexican consulate that he had been arrested.[338] The federal habeas court denied Medellín's Vienna Convention claim because Medellín had failed to meet state procedural-default rules by showing in state court that this failure to notify Mexico had prejudiced him.[339] The International Court of Justice (ICJ) then entered the fray, publishing a decision holding that the United States had violated Medellín's Vienna Convention right to consular notice and was obligated "to provide, by means of its own choosing," reconsideration of Medellín's sentence.[340] President George W. Bush issued a memorandum recognizing the ICJ's judgment and claiming that state courts would "give effect to" its decision "in accordance with general principles of comity."[341]

Despite the ICJ's decision and the presidential memorandum implementing it, the Texas state court rejected Medellín's second habeas petition.[342] To the Texas court, the ICJ's judgment and the presidential memorandum did not constitute "'binding federal law' that could displace the State's limitations on the filing of successive habeas applications."[343] The

States' obligations pursuant to Article 3 of the CAT are domestically enforceable depends entirely on the provisions of the FARR Act . . . .").

336. *See Omar*, 646 F.3d at 17 (citing *Medellín*, 552 U.S. at 505 n.2); *Medellín*, 552 U.S. at 504-05.

337. *Medellín*, 552 U.S. at 504-06. The Court also implied that CAT is a non-self-executing treaty by mentioning it as an example of a treaty that appellate courts have found to be non-self-executing, obviating the need for the Supreme Court to confirm this classification. *See id.* at 522 n.12 (citing a Second Circuit case that held CAT to be "non-self-executing").

338. *Id.* at 501-02.

339. *Id.* at 502.

340. *Id.* (quoting Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12, ¶ 153(9) (Mar. 31)).

341. Memorandum from President George W. Bush to the Attorney General (Feb. 28, 2005), https://perma.cc/ZK7L-J8R2.

342. *Medellín*, 552 U.S. at 503-04.

343. *Id.* at 504.

Supreme Court agreed, holding that the ICJ's judgment could not have "automatic domestic legal effect such that the judgment of its own force applies in state and federal courts" to displace state procedural rules.[344] The Court explained that non-self-executing treaties, such as the international treaty requiring the United States to submit to the ICJ's "compulsory jurisdiction" over disputes concerning the Vienna Convention, "do not by themselves function as binding federal law" upon the states.[345]

Lower courts have applied dicta in *Medellín* to conclude that treaties do not presumptively create private rights of action.[346] They also typically assume that a treaty must be self-executing to serve as the basis for habeas relief.[347] But while *Medellín* may have made broad pronouncements about the force of international treaties, the case itself involved a specific set of concerns that CAT does not necessarily implicate. Two structural concerns drove the *Medellín* decision. First, the case threatened the vertical relationship between the federal government and the states. Allowing the ICJ's decision to override state procedural-default rules would "transform[] an international obligation into domestic law and thereby *displac[e] state law*."[348] Second, the presidential memorandum promising to implement the ICJ decision tested the limits of executive authority as wielded against the courts.[349] The Court was unwilling to adopt the expansive interpretation of executive power and the Supremacy Clause that would be necessary to permit an international court and a sweeping presidential memorandum to override state criminal procedural-default rules.[350]

Viewed in this context, *Medellín* does not necessarily prohibit habeas courts from recognizing CAT as an independent jurisdictional basis to review the Secretary's extradition decisions.[351] The Court's constrained reading of the

344. *Id.* at 504-06 (emphasis omitted).

345. *Id.* at 504, 507.

346. *See* Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 70-72 (2012) (describing this pattern and listing cases).

347. *See id.* at 80-83 (listing cases).

348. *Medellín*, 552 U.S. at 528 (emphasis added); *see also* HANNUM ET AL., *supra* note 76, at 505-06 (explaining that, in *Medellín*, "federalism concerns competed with any policy that would have allowed for executive discretion," and that, "[t]hroughout the opinion, the Court made references to concerns about the imposition of an international judgment on state courts").

349. *Medellín*, 552 U.S. at 524-26 (assessing presidential authority to implement the ICJ decision).

350. *See id.* at 510-11 ("[T]here is no reason to believe that the President and Senate signed up for such a result.").

351. At least one federal circuit has recognized this possibility. *See, e.g.*, Atuar v. United States, 156 F. App'x 555, 563 n.12 (4th Cir. 2005) ("Accordingly, we recognize the
footnote continued on next page

Supremacy Clause's treaty provision need not compel a similar reading of the habeas statute's treaty provision, particularly with respect to CAT claims. Extradition is a distinctly federal procedure that does not implicate the relationship between the federal government and the states in the way that Medellín's state criminal conviction did. And unlike the treaty-based relief requested in *Medellín*, substantive habeas review of CAT claims would buttress rather than diminish relative judicial authority.[352] Far from requiring habeas courts to acquiesce to the judgments of foreign courts or unilateral presidential memoranda, habeas review of CAT claims may serve as a necessary judicial check on executive extradition power.

That CAT is not self-executing should be of no import where the habeas statute provides the kind of right of action that any other domestic implementing statute would establish.[353] An individual may claim on habeas that her extradition would violate the terms of the extradition treaty—say, for example, if the government attempted to extradite her for a political crime.[354] So, too, she should be able to file a habeas petition claiming that her extradition would violate the terms of CAT. In both cases, courts must consider whether the extradition would violate a U.S. treaty and thereby violate the habeas statute's prohibition on detention in violation of treaties.[355] Detention in anticipation of extradition to torture is hence unlawful detention twice over, both under section 2242(a) of the FARR Act and under CAT itself, notwithstanding *Medellín*.

4. Addressing concerns of judicial overreach

The common law, statutory, and treaty-based sources of habeas review provide a clear jurisdictional basis to review the Secretary's CAT determination. While courts that hesitate to exercise jurisdiction over claims

possibility that a habeas corpus petition may require a court to review a particular detention in light of a non-self-executing but constitutionally ratified treaty.").

352. There remains, of course, the possibility that habeas review of CAT claims could interfere with executive independence and create the opposite separation-of-powers problem. For a brief discussion of these concerns, see Part III.B.4 below.

353. *See* Hathaway et al., *supra* note 346, at 81 ("Although most courts have not focused explicitly on private rights or private rights of action in the habeas context, there is support for the proposition that a habeas petition obviates the need for an independent treaty-specific private right of action."); Vladeck, *supra* note 82, at 2011, 2013 ("[T]hat a treaty is ratified by the Senate in the first place is all the Constitution requires for the Supremacy Clause to attach.").

354. *See* Hathaway et al., *supra* note 346, at 81 ("Courts have, for example, allowed petitioners to allege violations of extradition treaties in habeas petitions."); *see also, e.g.*, Venckiene v. United States, 929 F.3d 843, 848, 854-58 (7th Cir.) (considering a violation of the extradition treaty's political-offense exception), *cert. denied*, 140 S. Ct. 379 (2019).

355. 28 U.S.C. § 2241(c)(3).

of torture express concern about judicial overreach,[356] these concerns do not warrant stripping courts of jurisdiction to hear CAT claims. That is particularly true in extradition proceedings subject to little statutory or administrative guidance and in which the executive enjoys nearly unchecked discretion.[357]

The Rule of Non-Inquiry does not prohibit such meaningful review.[358] That rule developed as a limitation on the inquiry that courts make when determining whether to certify an extradition under the relevant treaty.[359] It originates in part from a set of cases decided at the turn of the twentieth century in which the Supreme Court refrained from holding countries requesting extradition to American procedural standards, including due process and evidentiary rules.[360] The Supreme Court has never invoked the rule to deny the kind of substantive statutory or treaty-based habeas claims that relators bring when they claim a fear of torture. Before CAT, extraditions to torture may have been unwise as a matter of policy, but they were judicially unreviewable under the Rule of Non-Inquiry.

However, once CAT made extradition to torture unlawful, it brought CAT claims within the judiciary's purview to determine the *legality* of the

356. *See, e.g.*, Trinidad y Garcia v. Thomas, 683 F.3d 952, 957 (9th Cir. 2012) (en banc) (per curiam) (citing "[t]he doctrine of separation of powers" as a reason to refrain from reviewing "the substance of the Secretary's declaration"); Venckiene, 929 F.3d at 863-64 (holding that "[t]he judiciary has no authority to impose requirements" on the Secretary's decision); Arias Leiva v. Warden, 928 F.3d 1281, 1296 (11th Cir. 2019) ("[W]e do not consider or decide whether the United States should extradite Arias. Indeed, we cannot; that judgment rests with the Executive Branch alone. Mindful of our modest role, we hold simply that the law does not preclude it." (emphasis omitted)).

357. For a summary of the discretion that the executive wields in extradition proceedings, see Part I.D above.

358. Though it is an alternative obstacle perhaps worth exploring in future scholarship, the political-question doctrine is likely unhelpful for similar reasons, including the fact that in extradition cases, the Rule of Non-Inquiry arguably serves as its stand-in. *See* Parry, *supra* note 21, at 1993 & n.78 (mentioning both doctrines but focusing on the extradition-specific Rule of Non-Inquiry); *see also* Semmelman, *supra* note 70, at 1239-40 (discussing the Rule of Non-Inquiry as possibly "mandated by the 'political question' doctrine").

359. *See* Parry, *supra* note 21, at 1979 (explaining that some argue that the Rule of Non-Inquiry arose as a way to limit the matters that federal courts assessing extradition requests could consider); *see also supra* note 42.

360. For a brief overview of these cases, see *Mironescu v. Costner*, 480 F.3d 664, 669-70 (4th Cir. 2007) (citing Benson v. McMahon, 127 U.S. 457 (1888); Neely v. Henkel, 180 U.S. 109 (1901); and Glucksman v. Henkel, 221 U.S. 508 (1911)). For a more detailed critique of the Rule of Non-Inquiry and lower courts' expansive interpretation of the rule, see Parry, *supra* note 21, at 1978-96; Gang, *supra* note 44, at 111; Vladeck, *supra* note 62, at 29 n.61; and Slawter, *supra* note 209, at 2529. *But see* Semmelman, *supra* note 70, at 1201, 1229-34 (arguing that, for reasons of comity, the Rule of Non-Inquiry should be interpreted broadly).

Secretary's action.[361] As one district court summarized, the Rule of Non-Inquiry applies "when the petitioner questions the *wisdom* of the Secretary of State's decision to extradite" as a matter of policy but not when she "questions the *legality* of the extradition" under CAT.[362] And to the extent that it does apply, the Rule of Non-Inquiry is a creature of common law that cannot prohibit review mandated thrice over by the historical office of the writ, a statutory right, and an international treaty obligation.[363] Judges frequently pierce the Rule of Non-Inquiry's veil to consider thorny questions implicating foreign policy that the extradition statute and individual extradition treaties call for, such as whether the offense the requesting country has charged the relator with constitutes a political crime.[364]

Reviewing a relator's CAT claims merely requires the kind of deferential hearing that meets the minimum standards *Boumediene* prescribes.[365] Courts are well equipped to evaluate relators' CAT claims, as they have been applying CAT in immigration cases for decades under the familiar and deferential substantial-evidence standard.[366] Habeas courts must, as the Court explained in *Boumediene*, "have the means to correct errors that occurred during the [administrative] proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee" and "to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding."[367]

---

361. *See Trinidad y Garcia*, 683 F.3d at 995 (Berzon, J., concurring in part and dissenting in part) (dismissing separation-of-powers concerns because allowing meaningful habeas review would "prevent[] the inappropriate concentration of power" within the executive branch and allow courts to assess "claims that the Executive has acted unlawfully").

362. Aguasvivas v. Pompeo, 405 F. Supp. 3d 347, 358 (D.R.I. 2019), *aff'd in part, rev'd in part*, 984 F.3d 1047 (1st Cir. 2021).

363. *See* Vladeck, *supra* note 62, at 29 n.61; Gang, *supra* note 44, at 111.

364. *See, e.g.*, Venckiene v. United States, 929 F.3d 843, 855 (7th Cir.) ("Despite the general rule of non-inquiry, treaties and 18 U.S.C. § 3184 effectively require courts to consider at least some political issues related to extradition."), *cert. denied*, 140 S. Ct. 379 (2019).

365. *See supra* text accompanying notes 249-50. Requiring at a minimum that the Secretary show his work and document the reasons for an adverse CAT determination would at least prevent the kind of case that Justice Souter warned of in his concurrence in *Munaf*, in which the relator shows clear evidence of possible torture that the Secretary either refuses to consider or overlooks. *See* Munaf v. Geren, 553 U.S. 674, 706 (2008) (Souter, J., concurring).

366. *See* Nasrallah v. Barr, 140 S. Ct. 1683, 1693 (2020) ("For many years, the Seventh and Ninth Circuits have allowed factual challenges to CAT orders, and the Government has not informed this Court of any significant problems stemming from review in those Circuits."). A relator has urged the Third Circuit to adopt the substantial-evidence review standard mentioned in the FARR Act, but the court declined to do so in that case. *See* Hoxha v. Levi, 465 F.3d 554, 564-65 (3d Cir. 2006).

367. Boumediene v. Bush, 553 U.S. 723, 786 (2008). The deferential "no reasonable factfinder" standard Judge Berzon and some scholars have proposed meets these requirements. *See*

footnote continued on next page

Nasrallah affirmed courts' power to review factual challenges to CAT orders, pointing out that courts regularly and successfully review CAT claims.[368] CAT claims require a court to determine whether the Government has provided substantial evidence to demonstrate that the foreign jurisdiction will not torture the petitioner. It makes no meaningful difference to this inquiry whether the petitioner is a detainee facing deportation or a relator facing extradition.[369] And because relators often raise habeas appeals to the Secretary's extradition decisions on various other non-CAT grounds, allowing a habeas court to also review the Secretary's CAT determination as part of those proceedings will rarely produce delays.[370]

C. An Unconstitutional Suspension

If there is any basis for a meaningful habeas review of CAT claims—rooted in the common law, statutes, or CAT itself—Congress cannot eliminate such habeas review without violating the Suspension Clause.[371] Several circuits have cautiously avoided that result, invoking constitutional avoidance to read the REAL ID Act and section 2242(d) of the FARR Act as permitting habeas review.[372] On the other end of the spectrum, the Secretary of State and those courts that do not see the writ of habeas as guaranteeing any review in the first place have read these statutes to leave all discretion to the Secretary and strip courts of habeas jurisdiction over relators' CAT claims.[373] This latter theory

---

supra note 203 and accompanying text; Slawter, *supra* note 209, at 2536-37. So does the highly deferential "substantial-evidence standard" that *Nasrallah* requires. *See* 140 S. Ct. at 1692.

368. *See Nasrallah*, 140 S. Ct. at 1693.

369. As Judge Berzon explained in her opinion in *Trinidad y Garcia*, courts that have been reviewing CAT claims in the immigration context do not "suddenly become less competent in reviewing torture determinations simply because they were made in the context of extradition rather than immigration." Trinidad y Garcia v. Thomas, 683 F.3d 952, 1000 (9th Cir. 2012) (en banc) (Berzon, J., concurring in part and dissenting in part).

370. The Court rejected similar concerns about delay in *Nasrallah*, explaining that far from "add[ing] a new layer of judicial review," its decision "means only that, in that same [challenge to the removal order] in the court of appeals, the court may also review the noncitizen's factual challenges to the CAT order." *Nasrallah*, 140 S. Ct. at 1693.

371. *See generally* INS v. St. Cyr, 533 U.S. 289 (2001) (establishing a clear-statement rule); Boumediene v. Bush, 553 U.S. 723 (2008) (finding a Suspension Clause violation).

372. *See, e.g.*, *Trinidad y Garcia*, 683 F.3d at 956 ("Neither the REAL ID Act nor [the FARR Act] repeals all federal habeas jurisdiction over Trinidad y Garcia's claims, as the government asserts." (citations omitted)); *see also supra* note 207 and accompanying text (illustrating various approaches to constitutional avoidance on this question).

373. *See* 22 C.F.R. § 95.4 (2020) ("Decisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review."); Omar v. McHugh, 646 F.3d 13, 17-18 (D.C. Cir. 2011); Mironescu v. Costner, 480 F.3d

footnote continued on next page

may be wrong about the scope of the writ, but it is likely right about the statutes.

Section 2242(d) of the FARR Act states that "no court shall have jurisdiction to review" the Secretary's FARR Act regulations, "and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section . . . except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act."[374] Most courts that recognize the availability of procedural or substantive habeas review agree that this language fails *St. Cyr*'s clear statement test because it does not explicitly mention habeas relief.[375]

That may be so. But the REAL ID Act states that "[n]otwithstanding any other provision of law (statutory or non-statutory) . . . *or any other habeas corpus provision* . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under [CAT]."[376] As Judge Griffith's concurrence in *Omar* admits, the REAL ID Act explicitly bars habeas jurisdiction over the Secretary's extradition decisions, whether or not Congress so intended.[377] This violates the Suspension Clause.

It is entirely plausible that, as some courts have found, these statutory provisions have little import in the extradition context.[378] As the Supreme Court recently explained in *Nasrallah*, these statutory provisions were meant to consolidate "judicial review of CAT claims together with the review of final orders of removal" to avoid duplicative habeas appeals in the immigration context, where CAT determination is already part of the direct appeal.[379] The

664, 674 (4th Cir. 2007); Juarez-Saldana v. United States, 700 F. Supp. 2d 953, 958 (W.D. Tenn. 2010).

374. FARR Act, Pub. L. No. 105-277, § 2242(d), 112 Stat. 2681-761, -822 (codified at 8 U.S.C. § 1231 note (United States Policy with Respect to Involuntary Return of Persons in Danger of Subjection to Torture)).

375. *See, e.g.*, *Trinidad y Garcia*, 683 F.3d at 956 ("FARRA lacks sufficient clarity to survive the 'particularly clear statement' requirement." (quoting Saint Fort v. Ashcroft, 329 F.3d 191, 200-02 (1st Cir. 2003))).

376. 8 U.S.C. § 1252(a)(4) (emphasis added).

377. *See Omar*, 646 F.3d at 26 (Griffith, J., concurring in the judgment) ("While section 2242(d) does not purport to deprive us of jurisdiction to consider Omar's claim against transfer-to-torture, section 106 of the REAL ID Act does.").

378. *See, e.g.*, *Trinidad y Garcia*, 683 F.3d at 956 ("[The FARR Act] lacks sufficient clarity to survive the 'particularly clear statement' requirement. The REAL ID Act can be construed as being confined to addressing final orders of removal, without affecting federal habeas jurisdiction." (citations omitted) (quoting *Saint Fort*, 329 F.3d at 200-02)).

379. Nasrallah v. Barr, 140 S. Ct. 1683, 1693 (2020); *see also* Aguasvivas v. Pompeo, 405 F. Supp. 3d 347, 359 (D.R.I. 2019) (finding section 2242(d) of the FARR Act ambiguous in the extradition context), *aff'd in part, rev'd in part*, 984 F.3d 1047 (1st Cir. 2021).

REAL ID Act does not mention extradition, and the FARR Act refers to it only in implementing CAT's prohibition on extradition to torture.[380] Nothing in the legislative history for either statute indicates that Congress was seriously considering the impact they would have on relators.[381] But these arguments are unlikely to sway a textualist court, particularly where the statutory text imposes a broad prohibition. The REAL ID Act's failure to explicitly mention extradition cases is all the more reason to find that it imposes a categorical prohibition on habeas review and threatens a violation of the Suspension Clause. And in any case, the conflicting opinions on these statutes' applicability in the extradition context means the Secretary's interpretation that the statutes preclude review may deserve some level of administrative deference.[382]

If the "meaningful opportunity" that *Boumediene* guarantees is to mean something, it must at a minimum require that courts hear a relator's claim that her extradition would violate CAT. And to the extent that the REAL ID Act precludes that opportunity, it may violate the Suspension Clause.

---

380. *See* 8 U.S.C. § 1231 note (United States Policy with Respect to Involuntary Return of Persons in Danger of Subjection to Torture); 8 U.S.C. § 1252(a)(4); *Omar*, 646 F.3d at 25 (Griffith, J., concurring in the judgment) (explaining that section 2242(d) of the FARR Act does not provide a "particularly clear statement" that would strip courts of habeas jurisdiction (quoting Demore v. Kim, 538 U.S. 510, 517 (2003)); *see also* Stephen I. Vladeck, *Normalizing Guantánamo*, 48 AM. CRIM. L. REV. 1547, 1567 (2011).

381. Save for a few passing references, neither statute's legislative history discusses extradition. For the legislative history of the REAL ID Act, see generally H.R. REP. NO. 108-724, pt. 1 (2004) (no mention of extradition). *See also id.* pt. 5, at 191, 249 (mentioning extradition only as part of a list of processes CAT governs); *id.* pt. 6, at 192, 648, 650, 651, 653, 815 (same); *Emergency Supplemental Appropriations for Fiscal Year 2005: Hearings Before the S. Comm. on Appropriations*, 109th Cong. 166 (2005) (questions submitted by Sen. Patrick J. Leahy) (mentioning extradition only in the context of American extradition requests). For the legislative history of the FARR Act, see 141 CONG. REC. 13,954 (1995) (withholding certain funding for extraditions to torture); 144 CONG. REC. 26,694-95 (1998) (mentioning extradition only in the context of American extradition requests); H.R. REP. NO. 104-128, pt. 1, at 254, 259 (1995) (same); *id.* at 343-44 (mentioning extradition in a list of items to consider in international antiterrorism efforts); H.R REP. NO. 105-825, at 224 (1998) (Conf. Rep.) (same); and *id.* at 851. *See generally Foreign Operations, Export Financing, and Related Programs Appropriations for 1999: Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 105th Cong. (1998) (no mention of extradition); H.R. REP. NO. 105-432, at 67, 145, 150 (1998) (Conf. Rep.) (listing the policy against extraditions to torture ultimately codified in the FARR Act but mentioning extradition only in the context of waivers of diplomatic immunity).

382. Given the Supreme Court's shifting administrative law jurisprudence, it remains unclear what level of deference is due. If these statutes are indeed ambiguous in their application to extradition cases—and the confusion in lower courts suggests that they may be—then the agency's interpretation may be a permissible construction of the statute. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (describing various levels of deference under which courts may review agency determinations). The presumption of reviewability for constitutional questions, however, cuts the other way. *See* INS v. St. Cyr, 533 U.S. 289, 298 (2001); Johnson v. Robison, 415 U.S. 361, 367-68 (1974).

D. Harmonizing Habeas

Guaranteeing habeas review of the Secretary's CAT determination does not just make good constitutional sense. It may also mitigate extradition shopping and lessen the impact of extradition shuffling, harmonizing CAT review in extradition proceedings with the review of CAT claims in the immigration context.[383]

1. Harmonizing shopping

Substantive habeas review may partially limit extradition shopping. As described above, courts and scholars agree that there are no legal barriers to extradition shopping, at least before a habeas court has stepped in to grant the relator habeas relief.[384] But whether the government can refile the same extradition request after a court has granted *habeas* relief may not be as clear. The Supreme Court in *Collins v. Loisel* permitted the government to refile an identical extradition request after Collins obtained just such relief.[385] But a closer reading of that opinion reveals that its holding may have been limited to cases where the relator obtains habeas relief on *procedural* grounds. In *Collins*, the Court explained that a prior judgment granting Collins habeas relief did not have res judicata effect because the habeas relief "did not go to the right to have Collins held for extradition. It was granted because the proceedings on which he was then held had been irregular."[386] The habeas court had granted Collins relief because the British Crown had failed to provide adequate evidence and had seemingly abandoned the extradition request—not because the extradition would violate the terms of the extradition treaty or some other substantive law.[387]

Collins, then, governs at least purely procedural habeas review: When a habeas court holds that the Secretary failed to provide the necessary process, the government may, as in *Collins*, correct the procedural defect and file a new extradition request. But when a habeas court determines upon substantive review that extradition would violate CAT, there is no procedural defect the government can correct. A meaningful review of the relator's CAT claim could, when combined with this narrow reading of *Collins*, prevent extradition shopping.

383. For an overview of extradition shopping and shuffling, see Part I.D above.

384. *See supra* notes 114-22 and accompanying text.

385. Collins v. Loisel, 262 U.S. 426, 427-28 (1923). For a description of the case, see notes 114-21 and accompanying text above.

386. *Collins*, 262 U.S. at 430.

387. *See id.* at 427-28, 430.

2. Harmonizing shuffling

Substantive habeas review of CAT claims can also mitigate the procedural harm that extradition shuffling imposes on noncitizen relators undergoing parallel immigration proceedings. Under *Nasrallah*, a noncitizen seeking to avoid removal may raise a CAT claim and have her claim of fear of torture heard by the BIA and then again on appeal.[388] Yet, at the same time, an American citizen facing extradition can present her fear of torture only to the Secretary, whose decision is in most circuits shielded from any meaningful judicial review. While that result is odd enough, it creates an additional wrinkle. A noncitizen undergoing *both* sets of proceedings is, due to the BIA's practice of extradition shuffling, unlikely to receive judicial review in either forum if the BIA freezes her asylum proceedings and shuffles her into extradition proceedings.[389] Yet as *Nasrallah* has confirmed, the REAL ID Act does not preclude appellate review in most removal cases.[390] Without meaningful review of CAT claims at the extradition stage, then, extradition shuffling risks violating statutory protections and CAT obligations in both the immigration and removal context. Whatever the notions of executive uniformity and comity that may justify it, this state of affairs leaves the availability of the writ of habeas up to executive whim.

Guaranteeing habeas review of the substance of the Secretary's extradition determination restores the same opportunity to challenge the government's CAT determination that *Nasrallah* would have guaranteed had the noncitizen relators not been subject to extradition. Likewise, it ensures that relators who are legal residents receive at least some semblance of the appellate review that undocumented individuals receive for their CAT claims in immigration proceedings.

Nor does extending meaningful habeas review to noncitizen relators pose a *Thuraissigiam* problem. Unlike noncitizens in expedited removal proceedings, noncitizen relators seeking habeas review of the Secretary's extradition decision are not asking to have a second bite at the apple after they have exhausted immigration proceedings—they are simply asking to be released so that their ongoing immigration proceedings may continue. That petition, if successful, would simply spell an end to the extradition and allow the BIA to continue whatever proceedings it may have previously paused.[391]

388. *See supra* notes 280-87.

389. *See supra* Part I.D.2.

390. *See* Nasrallah v. Barr, 140 S. Ct. 1683, 1693 (2020).

391. This relief is likely to survive *Thuraissigiam*, because Thuraissigiam was requesting an additional layer of administrative review that those flagged for expedited removal are not otherwise entitled to. *See supra* notes 296-97. Here, a relator's extant asylum proceedings would automatically continue once the extradition proceedings were

footnote continued on next page

Of course, most relators would prefer not to be shuffled into extradition proceedings at all. An order requiring the asylum proceedings to be held in abeyance strips relators of their only meaningful opportunity to develop an administrative record supporting their CAT claims. A successful CAT determination by the BIA—with all of its procedural checks—can make it harder for the Secretary to justify extradition and easier for a habeas court to prevent it. Yet after *Thuraissigiam*, a relator seeking habeas review of the BIA's decision to hold her asylum claim in abeyance is unlikely to succeed. Under *Thuraissigiam*, habeas enables nothing more than release from detention, and it cannot confer any greater legal privileges.[392] A relator that challenges the BIA's decision to hold her immigration proceedings in abeyance would be seeking the writ to obtain not release, but an administrative remedy that would reopen her immigration proceedings. Such a petition would strain *Thuraissigiam*'s cramped reading of what habeas allows.

It is also unclear whether prior BIA CAT determinations would bind or otherwise control the Secretary's subsequent extradition decisions. In January 2021, the First Circuit confronted a case in which the Secretary sought to extradite a relator to whom the BIA had *already* granted CAT relief. In *Aguasvivas v. Pompeo*, the relator Aguasvivas requested habeas relief from his extradition to the Dominican Republic on the grounds that the BIA's former determination that the Dominican government would torture him precluded his extradition.[393] The district court granted Aguasvivas habeas relief before the Secretary could make a CAT determination, explaining that his extradition would pose "precisely that extreme case" that *Munaf* anticipated—one where "the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway."[394] The First Circuit reversed, holding that the BIA's determination could not collaterally estop the Secretary from extraditing Aguasvivas four years later, for two primary reasons.[395]

The First Circuit explained, first, that the BIA had determined only that Aguasvivas was more likely than not to be tortured if *removed* by immigration authorities in 2016, while the Secretary would make a separate determination as to whether Aguasvivas would be tortured if *extradited*—or handed directly to Dominican criminal custody—four years later.[396] Second, the court pointed out

---

complete. *See* Barapind v. Reno, 255 F.3d 1100, 1114 n.7 (9th Cir. 2000) (describing concurrent but temporarily frozen immigration proceedings).

392. *See supra* notes 306-07 and accompanying text.

393. Aguasvivas v. Pompeo, 984 F.3d 1047, 1049 (1st Cir. 2021).

394. Aguasvivas v. Pompeo, 405 F. Supp. 3d 347, 357, 359 (D.R.I. 2019) (emphasis omitted) (quoting Munaf v. Geren, 533 U.S. 674, 702 (2008)), *aff'd in part, rev'd in part*, 984 F.3d 1047.

395. *Aguasvivas*, 984 F.3d at 1053.

396. *Id.*

that the Secretary, unlike immigration authorities, could presumably "use the normal tools of diplomacy to assure certain treatment for Aguasvivas upon surrender."[397] The court also noted that the CAT relief the BIA had granted Aguasvivas in the removal context did not constitute an official legal status protecting him from extradition, but rather served as a temporary prohibition on deportation.[398] Nevertheless, the court affirmed the grant of habeas relief because the government failed to support its extradition request with the documents required by the extradition treaty.[399]

Because Aguasvivas filed his habeas petition before the Secretary made his extradition determination, the court did not reach the merits of Aguasvivas's CAT claim, deciding only that the BIA's prior CAT determination did not preclude the Secretary from extraditing Aguasvivas and remanding for further proceedings.[400] The decision leaves two major questions unanswered. Must the Secretary consider the BIA's prior grant of CAT relief in making his own CAT determination? And will the Secretary's decision to extradite be subject to a more searching substantive habeas review because the BIA has granted prior CAT relief?

In another case that may help flesh out these issues, the State Department's controversial effort to extradite Sacramento mechanic Omar Ameen to Iraq has been winding its way through the California courts, garnering media coverage along the way.[401] Ameen has already been granted refugee status in the United States and is now facing extradition to the very country that the BIA determined would persecute him.[402] The case is still at the initial extradition certification stage, and Ameen's lawyers argue that "[i]t cannot be clearer that Omar Ameen will be tortured and executed if returned to Iraq."[403] His story offers another compelling case for substantive habeas review of CAT

397. *Id.*

398. *Id.* at 1054 n.9.

399. *Id.* at 1059, 1060.

400. *See id.* at 1054 (declining "to bind the government preemptively by collateral estoppel in these extradition proceedings" before the Secretary can make an extradition decision).

401. *See, e.g.*, Ben Taub, *The Fight to Save an Innocent Refugee from Almost Certain Death*, NEW YORKER (Jan. 20, 2020), https://perma.cc/7AZ5-ZKQM; Audrey McNamara, *Facebook, Twitter Withheld Data That Could Prove Refugee's Innocence in Murder Case, Attorneys Say*, CBS NEWS (updated Jan. 23, 2020, 11:19 AM), https://perma.cc/N4M8-DYS3; Ben Taub, *The Evidence That Could Save Omar Ameen's Life*, NEW YORKER (Jan. 27, 2020), https://perma.cc/5HXQ-9L9M; Ben Taub, *Omar Ameen's Cell-Phone Records Reveal That He Was Framed*, NEW YORKER (Jan. 13, 2021), https://perma.cc/WMR9-PGBN.

402. *See* Second Supplemental Extradition Hearing Brief at 22-23, United States v. Ameen, No. 18-mj-00152 (E.D. Cal. Jan. 29, 2020), ECF No. 258 (explaining that because the BIA's refugee finding recognized that Ameen would be persecuted by the same country that now seeks his extradition, Ameen's case squarely raises the question *Barapind* left open).

403. *Id.* at 24.

claims, particularly where the government has already recognized in a prior immigration proceeding that the requesting country is likely to torture the relator.

E. Reforming Review

Built on a foundation of complex common law doctrine and a set of cryptic statutes, American extradition law stacks the deck against relators in ways that are difficult for courts to sort out alone. This Note proposes that, at a minimum, habeas courts should review the substance of the Secretary's CAT determinations and release relators who are likely to face torture upon extradition. But this solution is at best an inelegant fix that only begins to align judicial review in extradition cases with review in immigration and detainee cases. Offering relators a meaningful opportunity for judicial review of their CAT claims partially addresses extradition shopping and shuffling. But without meaningful legislative or regulatory reform, courts can only do so much to uphold the United States' international obligations under CAT. There is little guarantee courts would apply substantive habeas review consistently. And as the prevalence of extradition shopping and shuffling demonstrates, without clear judicial, statutory, or executive guidelines, prosecutors and the State Department can evade CAT review in practice.

Recent extradition cases reveal some emerging and inconsistent government practices that evade CAT review, place relators in procedural limbo, and further strengthen the case for broad reform. For example, the State Department often notifies relators that it will review their CAT claims only after habeas review is complete, effectively stalling the Secretary's extradition decision until after the relator has exhausted all judicial remedies. Venckiene's case is illustrative. After a magistrate judge granted the government's initial extradition request, the government sent Venckiene a letter informing her that were she to seek habeas review, the Secretary of State would automatically suspend his extradition determination.[404] He would "resume only if and after the district court denied" Venckiene's subsequent habeas petition.[405] It is unclear if the government issues such letters as standard practice, but it has done so in other extradition cases.[406] If the Secretary of State, as in Venckiene's case, simply refuses to conduct a final extradition determination until after

404. Venckiene v. United States, 929 F.3d 843, 852 (7th Cir.) (describing the government's letter to Venckiene), *cert. denied*, 140 S. Ct. 379 (2019).

405. *Id.*

406. *See, e.g.*, Attachment A to Notice by United States at 2, *In re* Extradition of Rios Sarellano, No. 15-mj-00075 (W.D. Okla. Oct. 21, 2015), ECF No. 34-1 ("If a habeas petition is filed, the Secretary will suspend review of the extradition matter, and will resume review only when and if the district court denies the petition.").

habeas review, he insulates his CAT determination from judicial review in a legal standoff that is likely to result in procedural delays.[407]

This practice of pausing the extradition determination until the completion of habeas review becomes particularly concerning when viewed together with the government's often contradictory litigation positions. The government has taken diametrically opposed positions on when a relator can raise her CAT claims. In one recent case, the government argued that a relator should have waited to raise his CAT claim until after the Secretary's determination because the claim would not be ripe until the Secretary decided to extradite him.[408] But when a different relator did just that, the government argued that he had moved too late and had "abuse[d]" the writ of habeas corpus by failing to file his petition before the Secretary's decision.[409] In the face of legal uncertainty around the availability and scope of habeas review, government practice implies there may be no point at which a relator can viably raise her CAT claim in court—if she brings her petition before the Secretary's decision, it is too early; if she brings it after, it is too late.

Given this legal disarray, Congress should revise the FARR and REAL ID Acts to clarify CAT's applicability in American courts generally and in extradition cases specifically. It also should enact legislation to directly address practices like extradition shopping and shuffling, which can seriously threaten the procedural integrity of the extradition process. And the Department of Justice and the State Department should develop uniform guidelines that facilitate rather than impede substantive habeas review—for example, by ensuring that CAT determinations are made in a timely manner and that the government takes consistent and transparent legal positions concerning the timing and scope of habeas review.[410]

---

407. As described above, habeas courts cannot rule on CAT claims *before* the Secretary has decided whether to extradite the relator because the relator's claim that his extradition violates CAT is not yet ripe. *See supra* note 132 and accompanying text.

408. *See* Aguasvivas v. Pompeo, 405 F. Supp. 3d 347, 357 (D.R.I. 2019) ("In arguing against application of the CAT, the Government first presses that the claims are not ripe for review because the Secretary of State has not yet decided whether to extradite Mr. Aguasvivas."), *aff'd in part, rev'd in part*, 984 F.3d 1047 (1st Cir. 2021).

409. Taylor v. McDermott, No. 20-cv-11272, 2021 WL 298732, at *5 (D. Mass. Jan. 28, 2021) ("The government argues that the filing of the Second Habeas Petition is an abuse of the writ of habeas corpus; that review of the Magistrate Judge's decision should have been sought when that decision issued, rather than after the Secretary made his determination . . . ." (citation omitted)), *appeal filed*, No. 21-1083 (1st Cir. Feb. 2, 2021).

410. The Department of Justice could, for example, update the relevant provisions of its Justice Manual, U.S. DEP'T OF JUST., JUSTICE MANUAL 9-15.700 (2018), https://perma.cc/E6UZ-JU85, to clarify that extradition orders may be subject to substantive, and not just procedural, habeas review.

Conclusion

Extradition poses complicated normative questions. As Ntakirutimana's, Venckiene's, and Barapind's stories illustrate, it can target perpetrators of genocide, victims of state violence, and subjects of political persecution. The extradition cases currently winding their way through the federal courts—such as Omar Ameen's highly publicized proceedings—implicate conflicting doctrinal, human rights, and due process concerns. If nothing else, these cases make clear that the procedures surrounding extradition to torture are ripe for Supreme Court review and for congressional action. Until then, relators can and should continue to seek meaningful habeas review of their CAT claims.