

# *Fordham International Law Journal*

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*Volume 38, Issue 3*

2015

*Article 4*

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## The Effect of the United Nations Convention Against Torture on the Scope of Habeas Review in the Context of International Extradition

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# The Effect of the United Nations Convention Against Torture on the Scope of Habeas Review in the Context of International Extradition

Evan King

## Abstract

This Note considers the law underlying the question addressed in Trinidad: can habeas courts review an extraditee's Article Three claims? In turn, this Note considers how courts should interpret the CAT in the extradition context. Part I explores the important conceptual components of the question posed in Trinidad, including US extradition practice, habeas petitions in extradition proceedings, and the CAT's implementation in the United States. Building on this, Part II examines competing interpretations of Article Three claims in US courts, highlighting how these claims touch on much deeper issues that remain unsettled by several hundred years of habeas corpus jurisprudence. Finally, Part III posits a simple answer to the straightforward question posed in Trinidad. Neither the CAT, its implementing laws or regulations, nor the United States Constitution allows courts to hear an extraditee's Article Three claims. Therefore, unless Congress changes the current state of the law, Article Three claims are the exclusive purview of the Secretary.

**KEYWORDS:** International Law, UN Convention Against Torture, Cruel Punishment, international fugitives, Article Three, International Extradition, Habeas Protections, Suspension Clause, Habeas Corpus

NOTE

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### INTRODUCTION

In 1998, the United States implemented the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) and made a commitment not to extradite a person to a country where there was a substantial risk that the individual would face torture pursuant to Article Three of the CAT.<sup>1</sup>

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1. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT] (declaring, in Article Three: “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”); Comm. Against Torture, *Consideration of Repts. Submitted by States Parties Under Article 19 of the CAT, Addendum: United States of America*, ¶ 3, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) [hereinafter *United States Report to CAT*] (stating that the United States ratified the CAT in October of 1994 and that it entered into force on November 20, 1994). While the CAT entered into force in 1994, it took several years before it became law in the United States because it was not considered self-executing. See *United States Report to CAT, supra*, ¶¶ 59–60 (discussing the administrative regulations that discuss Article Three of the CAT); see also Foreign Affairs Reform and Restructuring (“FARR”) Act of 1998, Pub. L. 105-277, § 2242, 112 Stat. 2681, 882 (1998) (codified as amended at 8 U.S.C. § 1231 (2012)) (requiring the

Many international fugitives (“extraditees”) have claimed in US courts that their extradition would violate Article Three (“Article Three claims”).<sup>2</sup> This Note follows one extraditee’s case from beginning to end to examine the current state of the law in the United States. The law is clear: although Article Three claims are serious and substantial, Article Three determinations are the exclusive purview of the Secretary of State, not the Judiciary.

On October 8, 2004, Hedelito Trinidad y Garcia was arrested in the Central District of California pursuant to a federal complaint that sought his extradition to the Philippines for allegedly conspiring to kidnap for ransom.<sup>3</sup> After several years of litigation, a US magistrate judge certified his extradition.<sup>4</sup> Trinidad y Garcia fought his extradition on several fronts.<sup>5</sup> He petitioned then-Secretary of State, Condoleezza Rice, to deny the Philippines’ request on the grounds

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appropriate federal agencies to prescribe regulations to implement US obligations under Article Three of the CAT).

2. *See, e.g.,* Trinidad y Garcia v. Thomas, 683 F.3d 952, 955–57 (9th Cir. 2012) (rehearing en banc) (per curiam) (requesting judicial review, in habeas, of the Secretary of State’s Article Three determination); Mironescu v. Costner, 480 F.3d 664, 666, 676–77 (4th Cir. 2007) (same). For a video recording of the Ninth Circuit (en banc) oral arguments in *Trinidad*, see United States Court of Appeals for the Ninth Circuit, 09–56999 *Trinidad y Garcia v Benov* (June 23, 2011), <http://youtu.be/GdGzu--hfPU>.

3. *See* Garcia v. Benov, 715 F. Supp. 2d 974, 979 (C.D. Cal. 2009) (explaining that the complaint for Trinidad y Garcia’s arrest pursuant to the extradition request was sought on December 18, 2003, and that Trinidad y Garcia was ultimately arrested and arraigned on this complaint on October 8, 2004).

4. *See id.* (stating that a US Magistrate Judge filed Trinidad y Garcia’s Certification of Extraditability on September 7, 2007). After Trinidad y Garcia’s Certification of Extraditability was issued by a federal magistrate judge, his first habeas petition was heard and ultimately denied on July 16, 2008, by the District Court for the Central District of California. *See id.* at 980 (discussing the first habeas denial, No. CV 07-6387-MMM, dkt. no. 43). Subsequently, in September 2008, the Secretary of State issued a Surrender Warrant, authorizing Trinidad y Garcia’s extradition. *See id.* To fight the Secretary’s decision, Trinidad y Garcia filed a second habeas petition. *See* Garcia v. Benov, No. CV 08-07719-MMM (CW), 2009 WL 4250694, at \*2 (C.D. Cal. Nov. 17, 2009). The District Court granted this habeas petition, noting that because the Secretary of State refused to comply with court orders requiring the Secretary to disclose the evidence used by the State Department in the decision to issue a Surrender Warrant, the court had no way to find the Secretary’s decision was supported by any substantial evidence. *See id.* at \*6. The Government appealed this decision. *See* Brief for Appellee at 27–29, Trinidad y Garcia v. Benov, No. 09-56999 (9th Cir. Mar. 25, 2010). A panel of judges on the Ninth Circuit Court of Appeals upheld the District Court’s decision. *See* Trinidad y Garcia v. Benov, 395 F. App’x 329, 2010 U.S. App. LEXIS 17840, at \*332 (9th Cir. 2010), *vacated*, 683 F.3d 952 (9th Cir. 2012) (rehearing en banc) (per curiam).

5. *See* Brief for Appellee, *supra* note 4, at 24–25 (discussing Trinidad y Garcia’s submission to the Secretary of State, but noting that Trinidad y Garcia was denied the opportunity to appear before any decision making body at the State Department).

that he would face torture at the hands of Filipino officials upon his return, in violation of the United States' obligations under the CAT.<sup>6</sup> Under Article Three of the CAT, the United States may not extradite anyone who faces a "substantial risk" of torture at the hands of the country seeking extradition (the "requesting State").<sup>7</sup> In 2008, after reviewing Trinidad y Garcia's Article Three claim, Secretary Rice determined that Trinidad y Garcia did not face a substantial risk of torture upon his return and authorized his surrender to the Philippines.<sup>8</sup>

Trinidad y Garcia sought judicial review of the Secretary's Article Three determination by petitioning for a writ of habeas corpus.<sup>9</sup> A petition for a writ of habeas corpus is a form of collateral appeal that extraditees have used to challenge the legality of their detention by arguing that international law prevents the United States from extraditing the petitioner to the requesting State.<sup>10</sup> After the district court granted Trinidad y Garcia's habeas petition and ordered his release, the government appealed to the Ninth Circuit, which later heard the case en banc.<sup>11</sup> The Ninth Circuit addressed a straightforward, but significant question: should Trinidad y Garcia be able to demand judicial review, in habeas, of the Secretary's Article Three determination under the CAT?<sup>12</sup>

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6. *See id.* at 7–9, 26 (explaining that authorities in the Philippines obtained a confession by suffocating, electrocuting, and threatening the family of one of the co-defendants); *see also* Caroline Stover, Note, *Torture and Extradition: Using Trinidad y Garcia to Develop a New Role for the Courts*, 45 COLUM. HUM. RTS. L. REV. 325, 326 (2013–2014) (same).

7. *See* CAT, *supra* note 1, art. III.

8. *See* Brief for Appellee, *supra* note 4, at 24–25 (explaining that Trinidad y Garcia's counsel learned of the existence of his Surrender Warrant on September 12, 2008); *accord* 22 C.F.R. § 95.3 (requiring the Secretary of State to make an Article Three determination prior to issuing a Surrender Warrant).

9. *See* *Garcia v. Benov*, 715 F. Supp. 2d 974, 981 (C.D. Cal. 2009) (interpreting Trinidad y Garcia's habeas petition as arguing that his extradition would violate federal law and the CAT); *cf.* M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 930 (6th ed. 2014) (emphasizing that a certificate of extraditability is not a final order within the meaning 28 U.S.C. § 1291, and so the only available appeal is through a writ of habeas corpus).

10. *See* MICHAEL ABBELL, *EXTRADITION TO AND FROM THE UNITED STATES: 2010*, at 284 (2010) (emphasizing that habeas is the normal recourse to challenge a Certificate of Extraditability); *see also* BASSIOUNI, *supra* note 9, at 930 (explaining that a limited appeal is available to extraditees through habeas corpus); *id.* at 936–37 (listing the commonly understood issues reviewable in habeas review of extradition hearings).

11. *See supra* note 4 and accompanying text.

12. In the five separate opinions, the Ninth Circuit exemplified the existing discord and confusion surrounding a seemingly straightforward question. *See* *Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012) (rehearing en banc) (per curiam).

Trinidad y Garcia had asked the district court to examine all the evidence underlying the Secretary's decision regarding his claim.<sup>13</sup> In *Trinidad y Garcia v. Thomas*, the Ninth Circuit Court of Appeals held that the district court had jurisdiction to review Trinidad y Garcia's Article Three claim, splitting with every other circuit that had addressed this question.<sup>14</sup> The court also held, however, that the scope of the district court's habeas review was strictly limited.<sup>15</sup> Instead, the court held that the Executive was in a better position to review the underlying evidence, so the district court could only require the Secretary to submit a declaration to the court with her assurances that she had complied with her statutory duties and had "take[n] into account all relevant considerations . . . ."<sup>16</sup> Some scholars have argued that this outcome, which grants sweeping authority to the Executive, exemplifies problems with a lack of judicial review in extradition cases more broadly and demonstrates the need for a much broader judicial fact-finding role for Article Three claims.<sup>17</sup>

This Note considers the law underlying the question addressed in *Trinidad*: can habeas courts review an extraditee's Article Three

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13. See *id.* at 955–56 (explaining that Trinidad y Garcia argued his surrender would violate the CAT); Brief for Appellee at 25, *Garcia v. Benov*, 683 F.3d 952 (9th Cir. 2012) (No. 09-56999) (explaining that Trinidad y Garcia's second habeas petition challenged the validity of the Secretary's Article Three determination).

14. Compare *Trinidad*, 683 F.3d at 956 (holding that the district court had jurisdiction over Trinidad y Garcia's petition pursuant to 28 U.S.C. § 2241), with *id.* at 969 (Tallman, J., dissenting) (arguing that the court's per curiam ruling created a circuit split), and Stover, *supra* note 6, at 327 (pointing out that the *Trinidad* decision "for the first time extended judicial review of habeas corpus petitions in extradition cases to [the Article Three determinations] . . .").

15. See *Trinidad*, 683 F.3d at 956–57 (instructing the Secretary of State, upon remand, to provide a declaration that she "complied with her obligations"). But see Steve Vladeck, *Why the "Munaf Sequels" Matter: A Primer on FARRA, REAL ID, and the Role of the Courts in Transfer/Extradition Cases*, LAWFARE (June 12, 2012, 9:00 AM), <http://www.lawfareblog.com/2012/06/why-the-Munaf-sequels-matter> (dismissing the per curiam's proposed relief and saying that "merely by filing a piece of paper, the Executive Branch can make these cases go away . . .").

16. See *Trinidad*, 683 F.3d at 957 (holding that an extraditee possesses a narrow liberty interest and is entitled to no more than a judicial finding that the Secretary complied with her statutory and regulatory obligations). These relevant considerations include, "pattern[s] of gross, flagrant, or mass violations of humans rights." 22 C.F.R. § 95.2(a)(2) (2013).

17. See, e.g., Vladeck, *supra* note 15; Stover, *supra* note 6; Brenna D. Nelinson, Comment, *From Boumediene to Garcia: The United States' (Non)compliance with the United Nations Convention Against Torture and Its Movement Away from Meaningful Review*, 29 AM. U. INT'L L. REV. 209, 250–52 (2013) (concluding that the Ninth Circuit's decision in *Trinidad* gave too much discretion to the Executive Branch, and proposing a "Rule of Limited-Inquiry" like the one proposed in Judge Thomas's Concurrence, *Trinidad*, 683 F.3d at 958–61, [Thomas, J., concurring]).

claims? In turn, this Note considers how courts should interpret the CAT in the extradition context. Part I explores the important conceptual components of the question posed in *Trinidad*, including US extradition practice, habeas petitions in extradition proceedings, and the CAT's implementation in the United States. Building on this, Part II examines competing interpretations of Article Three claims in US courts, highlighting how these claims touch on much deeper issues that remain unsettled by several hundred years of habeas corpus jurisprudence. Finally, Part III posits a simple answer to the straightforward question posed in *Trinidad*. Neither the CAT, its implementing laws or regulations, nor the United States Constitution allows courts to hear an extraditee's Article Three claims. Therefore, unless Congress changes the current state of the law, Article Three claims are the exclusive purview of the Secretary.

#### I. *BACKGROUND ON US EXTRADITION LAW, THE CAT, AND HABEAS CORPUS*

In *Trinidad*, the Ninth Circuit considered many complex issues relating to the scope of habeas corpus protections, international extradition, and statutory interpretation.<sup>18</sup> Part I.A begins with a preliminary overview of US extradition practice, noting that it is a unique process in which extraditees have historically limited options to appeal the government's decision to extradite.<sup>19</sup> Subsequently, Part I.B discusses the CAT and its implementation in the United States, which formed the basis of *Trinidad y Garcia*'s amended habeas petition.<sup>20</sup> Finally, Part I.C provides a discussion of habeas corpus law in the United States and the relevant US Supreme Court cases that demonstrate how lower courts have attempted to apply the CAT in Article Three claims like *Trinidad y Garcia*'s.<sup>21</sup>

##### A. *Extradition Practice in the United States*

International extradition is the formal process by which States request the return of fugitives who have fled their jurisdiction, for the

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18. See *Trinidad*, 683 F.3d at 952.

19. See *infra* notes 22–33 and accompanying text.

20. See *Garcia v. Benov*, 715 F. Supp. 2d 974, 981 (C.D. Cal. 2009); see also *infra* notes 34–61 and accompanying text.

21. See *infra* Part I.C.



purpose of compelling their attendance in court.<sup>22</sup> If an extraditee is found in the United States, the requesting State submits a formal extradition request via diplomatic channels for the extraditee's surrender, and the Department of Justice and the Department of State review the request for compliance with applicable statutes and treaties.<sup>23</sup> If the extradition request survives this initial review, the Justice Department files a complaint in the appropriate US district court seeking a warrant for the extraditee's arrest.<sup>24</sup> Once apprehended, the extraditee is brought before an extradition magistrate for an extradition hearing pursuant to 18 U.S.C. § 3184.<sup>25</sup>

An extradition hearing is not a criminal trial on the merits but rather is a unique process unto itself.<sup>26</sup> Conducting a complete trial to approve extradition would be counterintuitive, and would require the requesting State to come to the United States to present its argument.<sup>27</sup> As a result, many familiar procedures in US criminal

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22. See BASSIOUNI, *supra* note 9, at 2 (summarizing that extradition is a formal process where an extraditee is surrendered by the requested State to the requesting State based upon an existing treaty, norms of international reciprocity and comity, or on the basis of a State's domestic laws); U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-15.700 (1999), available at <http://www.usdoj.gov> (describing international extradition as a process where a person found in country is surrendered to another for trial or punishment).

23. See ABBELL, *supra* note 10, at 186 (explaining that formal extradition requests are made through the diplomatic channels, from an embassy to the Department of State, and that Provisional Arrest Requests, which are made from the requesting State's Ministry of Justice Directly to the Justice Department are the product of "recent extradition treaties"); UNITED STATES ATTORNEYS' MANUAL, *supra* note 22, at 9-15.700 (outlining the review procedure for foreign extraditions requests within the Department of Justice).

24. See ABBELL, *supra* note 10, at 188 (establishing that, in practice, all extradition complaints today are filed by an Assistant United States Attorney in the district where the extraditee is found); UNITED STATES ATTORNEYS' MANUAL, *supra* note 22 at 9-15.700 (directing that once the extradition request is sent to the Assistant United States Attorney, he or she should then obtain a warrant for the extraditee's arrest).

25. See ABBELL, *supra* note 10, at 26-27 (footnotes omitted) (referring to the judges and magistrate judges who conduct extradition proceedings as "extradition magistrates"); 18 U.S.C. § 3184 (authorizing extradition magistrates to conduct hearings to examine the requesting State's "evidence of criminality" against the extraditee).

26. See ABBELL, *supra* note 10, at 189 (referring to the unique nature of extradition proceedings); BASSIOUNI, *supra* note 9, at 880 (explaining the *sui generis* nature of extradition hearings).

27. See, e.g., BASSIOUNI, *supra* note 9, at 906 (explaining that it is well-established that extradition proceedings are not meant to determine guilt or innocence); *id.* at 880 (noting that the scope of an extradition hearing is to determine that: a valid extradition treaty exists between the United States and the requesting State; the extraditee is the person sought; the charged offense is extraditable; the charge satisfies the dual criminality requirement; there is probable cause to believe the extraditee committed the charged offense; the evidence is sufficient to support probable cause; the required documents have been presented in

trials, such as the Federal Rules of Evidence or the Federal Rules of Criminal or Civil Procedure, are absent in extradition hearings.<sup>28</sup> Lastly, because extradition is not meant to be a full trial, the extradition magistrate must only find that there is probable cause that the fugitive committed the charged offenses, rather than the familiar “beyond a reasonable doubt” standard.<sup>29</sup>

After finding that the extraditee committed the charged offense(s), the extradition magistrate certifies the extradition to the Secretary, who undertakes a substantive review of the extradition request and the expected treatment of the extraditee in the requesting State.<sup>30</sup> If the Secretary approves extradition, she issues a Surrender Warrant, authorizing extradition to the requesting country.<sup>31</sup> An extradition magistrate’s Certificate of Extraditability is not considered a final order within the meaning of 28 U.S.C. § 1291 and therefore may not be directly appealed.<sup>32</sup> Instead, an extraditee may collaterally attack the Certificate by petitioning the district court for a writ of habeas corpus.<sup>33</sup> At issue in *Trinidad*, and many other extraditees’ habeas petitions, is the scope of habeas review under the CAT.

accordance with US law, any treaty requirements, duly translated, and authenticated by US consul); ABBELL, *supra* note 10, at 272–75 (same).

28. See ABBELL, *supra* note 10, at 189, 191 (noting that neither the United States extradition legislation, nor the Bail Reform Act of 1984, provides for bail of extraditees); BASSIOUNI, *supra* note 9, at 900 (explaining that hearings are not subject to the Federal Rules of Evidence or the Federal Rules of Civil or Criminal Procedure).

29. See ABBELL, *supra* note 10, at 96 (explaining that the level of proof in extradition hearings should not vary, “irrespective of the law of the state[s involved]”); BASSIOUNI, *supra* note 9, at 881 (quoting *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911)) (explaining that extradition magistrates are bound by treaty to presume the trial in the requesting State will be fair, and should therefore only look for reasonable grounds of guilt); *Miles v. United States*, 103 U.S. 304, 312 (1880) (articulating, for the first time, the requirement that the State must prove all elements of a crime “to the exclusion of all reasonable doubt” in criminal trials).

30. See 18 U.S.C. § 3184 (stating that upon the Extradition Magistrate’s certification, “a warrant *may* issue . . . for the surrender of such person” by the Secretary of State) (emphasis added); ABBELL, *supra* note 10, at 300–04 (pointing out that the Secretary’s review of the extradition *de novo* and the Department of State generally considers any submissions from the extraditee, although it consistently refuses to grant the extraditee any sort of oral hearing).

31. See ABBELL, *supra* note 10, at 295 (describing a surrender warrant as a required document, pursuant to 18 U.S.C. § 3186, needed to effectuate an extraditee’s extradition); BASSIOUNI, *supra* note 9, at 986 (same).

32. See ABBELL, *supra* note 10, at 45 (citing *In re Extradition of Mackin*, 668 F.2d 122, 127–28 (2d Cir. 1991)) (noting that decisions denying or granting extradition requests are not appealable pursuant to 28 U.S.C. § 1291); BASSIOUNI, *supra* note 9, at 930 (same); see also 28 U.S.C. § 1291 (“The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .”).

33. See *supra* note 10 and accompanying text.

### B. *United Nations Convention Against Torture*

The CAT has imposed significant legal obligations on the United States and has often been invoked by extraditees seeking to prevent their extradition to the requesting State.<sup>34</sup> The Convention was adopted by the UN General Assembly in 1984, and entered into force in 1987.<sup>35</sup> It is the only binding international convention exclusively concerned with eliminating torture.<sup>36</sup> The CAT's preamble expresses the desire of the State signatories to "make more effective the struggles against torture and other cruel, inhuman, or degrading treatment and punishment throughout the world."<sup>37</sup> Part I.B.1 provides background on Article Three, which expands the CAT's protections by preventing signatories from transferring individuals to any State where their torture is likely.<sup>38</sup> Next, Part I.B.2 discusses the CAT's implementation in the United States and provides the legislative history necessary to put US policy into perspective.

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34. See, e.g., 22 C.F.R. § 95.3 (requiring the Secretary to consider all allegations of torture in extradition cases); *Mironescu v. Costner*, 480 F.3d 664, 666–67 (4th Cir. 2007) (discussing the history of the CAT in the United States). In practice, however, the CAT's new legal obligations have not changed the practice of the US Government of refusing extradition if torture is likely. See *Convention Against Torture: Hearing Before the S. Comm. On Foreign Relations*, 101st Cong. 12–18 (1990) (statement of Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice, 18) [hereinafter Statement of Mark Richard] (explaining that the Secretary of State is the "competent authority" under existing law, and that the United States did not and would never extradite a person to a country where it was known he would be tortured).

35. Oona A. Hathaway, Aileen Nowlan & Julia Spiegel, *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, 52 VA. J. INT'L L. 791, 798 (2011–2012) (discussing the history of the CAT's creation); C.W. WOUTERS, INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULMENT: A LEGAL ANALYSIS ON THE PROHIBITIONS ON REFOULMENT CONTAINED IN THE REFUGEE CONVENTION, THE EUROPEAN ON HUMAN RIGHTS, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, AND THE CONVENTION AGAINST TORTURE 426 (2009) (same).

36. See LENE WENDLAND, ASSOCIATION FOR THE PREVENTION OF TORTURE, A HANDBOOK ON STATE OBLIGATIONS UNDER THE UN CONVENTION AGAINST TORTURE 66 (2002) (referring to the prohibition on torture as *jus cogens*, an indelible customary law that cannot be set aside by treaty or acquiescence); WOUTERS, *supra* note 35, at 30 (citations omitted) (same).

37. See CAT, *supra* note 1, pmb1.

38. See AHCENE BOULESBASS, THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT 219–20 (explaining that Article Three's protections extends to all persons); J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 126 (noting that Article Three's language was intended to cover all conceivable types of transfers of an individual between States).

## 1. Article Three of the CAT and Extradition

The CAT imposed several obligations on the ratifying States and, in the extradition context, Article Three is the most significant.<sup>39</sup> Not only does the CAT require States to penalize torture, but it also seeks to prevent instances of torture by prohibiting the transfer of individuals to States where they face a “substantial” risk of torture.<sup>40</sup> Article Three, Paragraph One of the CAT provides: “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing he would be in danger of being subjected to torture.”<sup>41</sup> This right is non-derogable, or absolute, and “competent authorities” within a State must ensure compliance.<sup>42</sup> By explicitly mentioning expulsion, refoulement, and extradition, Article Three was drafted to protect individuals from every conceivable type of physical transfer between States.<sup>43</sup>

During the CAT’s drafting, the drafters noted the importance of sufficiently clarifying who should be the “competent authorities.”<sup>44</sup> Even outside of the Article Three context, procedural guarantees and legal remedies such as habeas corpus were seen as a valuable tool to prevent torture.<sup>45</sup> Ultimately, however, the drafters recognized the

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39. See Statement of Mark Richard, *supra* note 34, at 14 (stating the Article Three will likely have the most day-to-day impact on US law enforcement); CHRIS INGLESE, THE UN COMMITTEE AGAINST TORTURE, AN ASSESSMENT 83 (discussing the CAT’s new obligation on States to prevent torture in addition to the already existing obligations not to torture).

40. See CAT *supra* note 1, art. 3, ¶ 1; WOUTERS, *supra* note 35, at 460 (citations omitted) (explaining that “substantial grounds” in Article Three means that the risk of torture must be assessed by the State party in question in a manner that requires more than mere suspicion, but less than a high probability); WENDLAND, *supra* note 36, at 33 (stating that a substantial ground for believing in the possibility of torture is a factual one).

41. See CAT, *supra* note 1, art. 3, ¶ 1.

42. See *id.* art. 3, ¶ 2 (discussing the role of “competent authorities”); see also MANFRED NOWAK & ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 147–48 (observing that the protections of Article Three are considered absolute, as demonstrated by the CAT’s lack of exclusion or derogation clauses); WENDLAND, *supra* note 36, at 33 (describing Article Three’s protections as absolute).

43. See BOULESBASS, *supra* note 38, at 219–20 (explaining that Article Three’s protections extends to all persons); BURGERS & DANIELIUS, *supra* note 38, at 126 (explaining the drafters’ intent regarding the types of physical transfers protected by the CAT).

44. See NOWAK & MCARTHUR, *supra* note 42, at 143 (discussing the deliberations of the drafting committee regarding Article Three, Paragraph Two of the CAT); U.N. Econ. and Soc. Council, Report of the Working Grp. on a Draft Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, ¶¶ 20–21, U.N. Doc. E/CN.4/1984/72, (Mar. 9, 1984) (same).

45. See U.N. Econ. and Soc. Council, Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment: Report by the Special Rapporteur, ¶ 44, U.N. Doc. E/CN.4/1986/15 (Feb. 19, 1986) (explaining the value of national procedural guarantees or legal remedies like

diverse set of national systems governed by the CAT, so the language was left broad.<sup>46</sup> When competent authorities make decisions within the meaning of Article Three, the drafters envisioned individualized determinations.<sup>47</sup> And while proposed versions of the text included lists of factors to consider, they were ultimately discarded for fear of appearing exhaustive.<sup>48</sup> The final version of the text requires competent authorities to take into account all *relevant* considerations when analyzing allegations of torture in the requesting State.<sup>49</sup>

## 2. United States Implementation of its Article Three Obligations

The CAT entered into force in the United States on November 20, 1994.<sup>50</sup> Before ratification, officials from George H.W. Bush's

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habeas corpus in preventing the torture of arrested individuals). Article Seventeen of the CAT created the Committee Against Torture, an autonomous treaty body in the UN System that monitors the implementation and enforcement of States' obligations under the CAT. *See* WOUTERS, *supra* note 35, at 426; *see also* WENDLAND, *supra* note 36, at 17. Article Twenty-two of the CAT allows the Committee to hear complaints from individuals alleging CAT violations against States. *See* CAT, *supra* note 1, art. 22; WENDLAND, *supra* note 36, at 18. The Committee's views are only declaratory, not binding, and the CAT does not provide the Committee any kind of enforcement mechanism. *See* WOUTERS, *supra* note 35, at 429–30. However, the views of the Committee provide valuable insight into the international community's current interpretation of the treaty. *See, e.g.*, WOUTERS, *supra* note 35, at 521 (explaining that, as of the date of publication, 2009, no case had been brought to the Committee alleging an Article Three violation based upon a single fact).

46. *See* NOWAK & MCARTHUR, *supra* note 42, at 228 (stating that "Competent Authorities" refers to administrative or judicial bodies, but given the gravity of the decision to surrender, judicial review of all determinations is preferable); WOUTERS, *supra* note 35, at 516 (citations omitted) (explaining that the United Nations has not specifically delineated what authorities may be competent within the meaning of Article Three, but has said that the authority, which need not be part of the Judiciary, should be independent and impartial).

47. *See* BURGERS & DANIELIUS, *supra* note 38, at 51 (recounting the importance of individualized torture determinations); CAT, *supra* note 1, art. 3, ¶ 2 ("For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights").

48. *See* BURGERS & DANIELIUS, *supra* note 38, at 54 (discussing the proposed text of the International Commission of Jurists, which listed patterns of gross violations of human rights, such as those resulting from genocide or discrimination, as factors to consider); *id.* at 56 (explaining that many State delegations on the drafting committee favored the deletion of proposed text providing specific examples of situations which may present a risk of torture, for fear of appearing to exclude non-listed factors).

49. *See* CAT, *supra* note 1, art. 3, ¶ 2 (emphasis added); WENDLAND, *supra* note 36, at 33 (explaining that the general human rights conditions of the requesting State should be considered, but that those general conditions, alone, cannot be sufficient to satisfy Article Three, as all determinations must be individualized).

50. *See United States Report to CAT*, *supra* note 1, ¶ 3 (discussing the CAT's ratification in the United States); Isaac A. Linnartz, Note, *The Siren Song of Interrogational Torture*:

administration recommended that the Senate formally adopt an understanding of Article Three that interpreted the “substantial risk” standard as preventing transfer whenever torture was “more likely than not,” which is the same standard employed in asylum proceedings.<sup>51</sup> Lawmakers explained Article Three would not change the current US practice whereby the Secretary of State was the “competent authority” to ensure that extradition never occurred whenever torture was more likely than not.<sup>52</sup> Lawmakers further noted that Article Three would not alter current practice of exempting the Secretary’s Article Three determinations from judicial review.<sup>53</sup>

Because the CAT was not considered self-executing, it would not be binding law in the United States without implementing legislation.<sup>54</sup> The United States implemented its CAT obligations on October 21, 1998, when the Foreign Affairs Reform and Restructuring Act (the “FARR Act”) was signed into law.<sup>55</sup> Section 2242(a) of the FARR Act declared that “it shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country where there are

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*Evaluating the U.S. Implementation of the U.N. Convention Against Torture*, 57 *DUKE L.J.* 1485, 1495–1503 (2008).

51. *See id.*; *see also* Statement of Mark Richard, *supra* note 34, at 18 (recommending that Article Three’s prohibitions apply where torture is “more likely than not,” the same standard applied in US asylum proceedings); Linnartz, *supra* note 50, at 1496 (noting the State Department’s “more likely than not” standard for Article Three determinations in extradition cases).

52. *See* Statement of Mark Richard, *supra* note 34, at 18 (reporting that the Secretary of State is the “competent authority” under existing law, and that the United States did not and would never extradite a person to a country where it was known he would be tortured); *Convention Against Torture: Hearing Before the Comm. On Foreign Relations*, 101st Cong. 69–72 (1990) (letter from Janet G. Mullins, Assistant Secretary for Legislative Affairs, U.S. Dept. of State, to Sen. Clairborne Pell) (clarifying that the Secretary will remain the competent authority in extradition).

53. *See* Statement of Mark Richard, *supra* note 34, at 18 (explaining that the Secretary of State’s Article Three decisions are not subject to judicial review); 22 C.F.R. § 95.4 (describing the Secretary’s Article Three Determinations as matters of Executive discretion, not subject to judicial review).

54. 136 Cong. Rec. S17486 (daily ed. Oct. 27, 1990) (Statement of Sen. Terry Sanford that “Articles 1 through 16 of the [CAT] are not self-executing”); *Cadet v. Bulger*, 377 F.3d 1173, 1180 n.3 (11th Cir. 2004) (citations omitted) (emphasizing that, because the CAT was not self-executing, it did not create any judicially-enforceable rights without some congressional legislation). *But see United States Report to CAT*, *supra* note 1, ¶ 57 (citations omitted) (explaining that US courts may take notice of US obligations under a non-self-executing treaty).

55. *See Francois v. Gonzales*, 448 F.3d 645, 648–49 (3d Cir. 2006) (“On October 21, 1998, the President signed into law the [FARR Act.]”); *United States Report to CAT*, *supra* note 1, ¶ 168 (discussing the FARR Act’s enactment).

substantial grounds for believing the person [would be subjected to] torture.”<sup>56</sup> Section 2242(d) discusses judicial review and explicitly states that the FARR Act did not provide courts with jurisdiction to hear Article Three claims outside the immigration context, which reaffirmed existing extradition practice.<sup>57</sup>

Pursuant to § 2242(b) of the FARR Act, several federal agencies implemented regulations setting forth how the broad statutory language would go into effect.<sup>58</sup> Those regulations stated that the Secretary was the official responsible for determining whether to surrender an individual in the extradition context, and that those determinations were not subject to judicial review.<sup>59</sup> While the regulations state that the Secretary’s Article Three determinations are not subject to judicial review, no Secretary has ever interpreted this to mean that he or she can surrender a fugitive who faces a substantial likelihood of torture, “[regardless of any] foreign policy interests . . . [that] would be served by an extradition.”<sup>60</sup> Subsequently, the United States’ Article Three obligations were further clarified in the REAL ID Act of 2005, which states, “notwithstanding any other provision of law . . . or habeas corpus provision . . . a petition for review filed with the appropriate court of appeals shall be the sole and exclusive means for judicial review of any [Immigration] cause or claim under the [CAT].”<sup>61</sup>

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56. See FARR Act, *supra* note 1.

57. See *id.*

58. See *id.* (requiring administrative agencies to prescribe regulations to implement Article Three’s obligations); *accord* 22 C.F.R. § 95.1-4 (implementing regulations).

59. See 95 C.F.R. § 95.2(b) (“ . . . the Secretary is the U.S. official responsible for determining whether to surrender a fugitive to a foreign country by means of extradition.”); 95 C.F.R. § 95.4 (“Decisions of the Secretary concerning surrender of fugitives for extradition are matters of Executive discretion not subject to judicial review.”).

60. *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 989 (9th Cir. 2012) (rehearing en banc) (Berzon, J., concurring in part and dissenting in part) (per curiam) (quoting State Department brief); *Mironescu v. Costner*, 480 F.3d 664, 671 (4th Cir. 2007). The *Mironescu* court stated:

Moreover, the Government concedes that the FARR Act precluded the Secretary from extraditing Mironescu to Romania . . . if he was likely to be tortured there. (citing Br. for the Appellants at 14) (noting that, in its argument before the district court “[t]he Government recognized that the Secretary of State is bound by the policy of the [CAT] as implemented by US domestic legislation and State Department regulations, and that Mironescu thus could not be extradited to Romania if it was likely he would indeed be tortured there”).

*Id.*

61. The REAL ID ACT of 2005, Pub. L. 109-13, div. B, § 106(a)(4), May 11, 2005, 119 Stat. 310–11, 8 U.S.C. § 1252 note.

*C. The Suspension Clause and the Scope of Habeas Corpus Protections*

Because a Certificate of Extraditability is not directly appealable, extraditees may challenge it only through a petition for a writ of habeas corpus.<sup>62</sup> The writ of habeas corpus—Latin for “that you have the body”—originated in England at common law and is one of the most fundamental methods for any prisoner to challenge their detention.<sup>63</sup> Extending habeas protections to the United States was so important to the nation’s founders that Article One of the Constitution explicitly protects habeas corpus in the Suspension Clause.<sup>64</sup> Today the protections of the writ also are codified in 28 U.S.C. § 2241, which grants courts jurisdiction to hear habeas petitions when the petitioner’s custody violates US laws, treaties, or the Constitution.<sup>65</sup> Scholars and jurists have struggled with the exact contours of the kinds of claims that implicate the Suspension Clause and therefore are protected by the Constitution.<sup>66</sup> As the fractured Ninth Circuit opinion in *Trinidad* demonstrates, the CAT adds another dimension to the puzzle.<sup>67</sup>

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62. See ABBELL, *supra* note 10 at 284 (emphasizing that habeas is the normal recourse to challenge a Certificate of Extraditability); BASSIOUNI, *supra* note 9, at 930 (explaining that a limited appeal is available to extraditees through habeas corpus); *supra* note 10 and accompanying text.

63. BLACK’S LAW DICTIONARY 611 (Abridged 9th ed. 2009); see Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 57–58 (2012) (arguing that the “traditional purpose of habeas corpus is elemental but powerful: to allow a judge to review the legality of a prisoner’s detention”). See generally Boumediene v. Bush, 553 U.S. 723, 739–46 (2008) (providing a historical account of the writ’s development at common law and its role in the US Constitution).

64. U.S. CONST. art. 1 § 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.”); see also *Boumediene*, 553 U.S. at 739 (explaining that habeas protections were one of the “few safeguards of liberty” in the original Constitution).

65. See 28 U.S.C. § 2241 (1949) (“The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States . . .”).

66. See Garrett, *supra* note 63, at 71–73 (discussing the varying scope of habeas corpus protections in various contexts); *Boumediene*, 553 U.S. at 773 (explaining that Supreme Court case law does not contain an extensive discussion of the standards defining suspension of the writ).

67. Compare *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 956–57 (9th Cir. 2012) (rehearing en banc) (per curiam) (holding that the district court had jurisdiction to hear *Trinidad y Garcia*’s Article Three Claim under 28 U.S.C. § 2241), *with id.* at 1009–15 (Kozinski, C.J., dissenting) (arguing that *Trinidad y Garcia*’s Article Three claim did not implicate the Suspension Clause and therefore that it was not cognizable under 28 U.S.C. § 2241).



Part I.C.1 describes and elaborates on the most common definition of the Suspension Clause's protections employed by the US Supreme Court: "[A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789."<sup>68</sup> Which rights of a detainee were protected by the writ in 1789 is up for debate and can vary widely depending on how a particular claim is framed.<sup>69</sup> This definition also demonstrates the Court's intent not to foreclose the possibility that the constitutional protections of the Suspension Clause can expand beyond what existed in 1789.<sup>70</sup> This Section uses two seminal Supreme Court cases, *St. Cyr* and *Boumediene*, to demonstrate how the Court has viewed the scope of Suspension Clause protections. Part I.C.2 builds off of this framework, returning to *St. Cyr* and *Boumediene* as evidence of the canon of constitutional avoidance the Court employs when reading a statute to alter the protections of the Suspension Clause.

### 1. Habeas Corpus as a Means of Challenging Executive Detention

In *I.N.S. v. St. Cyr*, the US Supreme Court discussed which kinds of claims implicate the Suspension Clause and therefore are protected by the US Constitution within the meaning of 28 U.S.C. § 2241.<sup>71</sup> It explained that habeas protections are generally considered strongest when the Executive Branch detains an individual with little to no judicial involvement.<sup>72</sup> As such, if a petitioner can successfully frame

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68. *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001) (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64) (internal quotation marks omitted); *see, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 746 (2008) (quoting *St. Cyr*, 533 U.S. at 301).

69. How the Court frame the petitioner's claim can be determinative. For example, in *St. Cyr*, the Court adopted the petitioner's framing of his claim, as requesting the Court's review of Executive detention, which was historically protected in habeas. By adopting this interpretation, the Court necessarily rejected the respondent's narrower definition of the claim, as seeking review of the Executive Branch's exercise of statutorily granted discretion. *See St. Cyr*, 533 U.S. at 301; *accord Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 220 (3d Cir. 2003) (explaining *St. Cyr*'s analysis of the writ did not have a narrow focus).

70. *See Boumediene*, 553 U.S. at 746 (2008) (emphasizing that "[t]he Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded . . ." since 1789); *see also*, Baher Azmy, *Executive Detention*, *Boumediene*, and *the New Common Law of Habeas*, 95 IOWA L. REV. 445, 462 n.89 (2010) (describing that Supreme Court case law makes it clear that the protections of the Suspension Clause may expand with time). *But see id.* at 467 (describing the criteria used by the Court to determine the reach of the Suspension Clause as "functional and highly subjective").

71. *St. Cyr*, 533 U.S. at 307–08 (summarizing the kinds of claims that were historically available in habeas).

72. *See id.* at 301 (citation omitted) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that

his habeas petition as asking for review of Executive detention, he has greatly increased the likelihood that a court will find it has jurisdiction to hear the claim.<sup>73</sup>

In *St. Cyr*, Enrico St. Cyr, a lawful permanent resident of the United States, pled guilty to selling a controlled substance, a deportable offense.<sup>74</sup> St. Cyr was ordered removable and petitioned for a writ of habeas corpus, arguing that the Attorney General improperly refused to exercise his discretion to waive his removal order.<sup>75</sup> The Immigration and Naturalization Service (“I.N.S.”) argued that, historically, habeas corpus was unavailable to review the Executive’s exercise of statutorily granted discretion and, as a result, St. Cyr had no basis to bring a habeas petition.<sup>76</sup> The Supreme Court found the I.N.S.’ historical argument “not insubstantial,” but held that even if it assumed the Suspension Clause protected the writ only as it existed in 1789, there was still ample evidence habeas review was appropriate.<sup>77</sup> The Court framed the issue more broadly than the narrow immigration question presented and instead focused on the scope of habeas review of Executive detention and held that, as such, St. Cyr presented an issue that common law habeas courts could have addressed in 1789, thus implicating the Suspension Clause.<sup>78</sup> The Court explained that because this was the kind of claim that implicated the Suspension Clause, reading a statute to strip courts of habeas jurisdiction would raise difficult constitutional questions,

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its protections have been strongest.”); *Boumediene*, 553 U.S. at 741 (noting that by the 1600’s in England, the writ was seen as a restraint upon the King’s power).

73. See *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 1010 (9th Cir. 2012) (rehearing en banc) (Kozinski, C.J., dissenting in part) (per curiam) (explaining that, by interpreting *Trinidad y Garcia*’s Article Three claim as a challenge on Executive detention, his colleagues in other jurisdictions viewed it “at too high a level of generality”).

74. See *St. Cyr*, 533 U.S. at 293; see also, *Lawful Permanent Resident (LPR)*, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/tools/glossary/lawful-permanent-resident-lpr> (last visited Jan. 5, 2015) (defining a lawful permanent resident as a non-US citizen with authorization to live and work in the United States on a permanent basis).

75. See *St. Cyr*, 533 U.S. at 293.

76. See *id.* at 303 (noting that the I.N.S. was arguing in the case at bar that St. Cyr’s claim fell outside the traditional scope of habeas).

77. *Id.* at 304 (discussing *Heikkila v. Barber*, 345 U.S. 229 (1953), where the Court held that a claim similar to St. Cyr’s was appropriate in habeas); *id.* (holding that “at the absolute minimum, the Suspension Clause protects the writ as it existed in 1789”).

78. See *id.* at 304 (challenging the I.N.S.’s proposed interpretation of St. Cyr’s claim); *Ogbudimkpa v. Asheroft*, 342 F.3d 207, 220 (3d Cir. 2003) (explaining *St. Cyr*’s analysis of the writ did not have a narrow focus).

which courts are compelled to avoid under the canon of constitutional avoidance.<sup>79</sup>

This issue of constitutional avoidance and habeas protection in the international context was raised several years later in *Boumediene v. Bush*.<sup>80</sup> After the terrorist attacks of September 11, 2001, the Department of Defense established Combatant Status Review Tribunals (“CSRTs”), which were charged with determining whether or not individuals detained in Guantanamo Bay, Cuba, were “enemy combatants.”<sup>81</sup> Petitioners were a group of aliens detained in Guantanamo Bay who claimed that they had a right to seek judicial review by petitioning for a writ of habeas corpus.<sup>82</sup> The Government countered that, as noncitizens detained abroad, the petitioners had no constitutional rights and therefore no privilege of habeas corpus.<sup>83</sup> The Government further argued that the Detainee Treatment Act of 2005 (“DTA”) and the Military Commissions Act of 2006 (“MCA”) provided adequate non-judicial procedures for review and stripped courts of their jurisdiction to hear petitioners’ claims in habeas.<sup>84</sup>

The Court began by determining whether the Suspension Clause, which protects habeas corpus rights, applied to the facts at hand.<sup>85</sup> According to the majority, the petitioners were essentially asking whether the Constitution permitted the indefinite detention of enemy

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79. *See St. Cyr*, 533 U.S. at 305 (“It necessarily follows that a serious Suspension Clause issue would be presented if we were to accept the I.N.S.’[s] submission that the 1996 statutes have withdrawn [habeas review] from federal judges and provided no adequate substitute for its exercise.”); *see also id.* at 336 (Scalia, J., dissenting) (explaining that the canon of constitutional avoidance requires judges to presume that Congress would not enact a statute that violates the Constitution).

80. *See Boumediene v. Bush*, 553 U.S. 723, 787–88 (2008).

81. *Id.* at 733–34 (2008) (describing the post-9/11 creation of CSTRs). Once an individual was labeled an “enemy combatant,” the US Department of Defense could detain that person “for the duration of the particular conflict in which they were captured . . . .” *Id.* at 733 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)).

82. *See id.* at 746 (providing factual background for the case); *id.* at 733 (describing the Authorization for Use of Military Force (“AUMF”)), § 2(a), 115 Stat. 224, 50 U.S.C. § 1541, which authorized the President to use a wide variety of tools to combat those who perpetrated the September 11, 2011 terrorist attacks).

83. *See id.* at 739.

84. *See* Detainee Treatment Act of 2005, Pub. L. 109-148 §1005(e)(1), 119 Stat. 2741, *amended by* the Military Commissions Act of 2006 (providing procedures for review of status of aliens detained as enemy combatants); Military Commissions Act, Pub. L. 109-366 §7(a), 120 Stat. 2600, 23 U.S.C.A. §2241(e), *invalidated by* *Boumediene v. Bush*, 553 U.S. 723 (2008) (granting habeas corpus jurisdiction to aliens detained and determined to be enemy combatants, or awaiting such determination); *Boumediene*, 553 U.S. at 732–33.

85. *Boumediene*, 553 U.S. at 739 (inquiring whether enemy combatants could invoke the protections of the Suspension Clause).

combatants, as defined solely by the Executive.<sup>86</sup> It explained that when the Constitution was drafted, the Suspension Clause was interpreted not only to protect against arbitrary suspensions of the writ, but also to “guarantee[] an affirmative right to judicial inquiry into the causes of detention,”<sup>87</sup> and to prevent the “practice of arbitrary imprisonments.”<sup>88</sup> The *Boumediene* Court held that the Suspension Clause was implicated by the petitioners’ claim, thus expanding the Suspension Clause and the right to judicial review in habeas to non-citizen enemy combatants detained in Guantanamo Bay.<sup>89</sup>

## 2. Congress May Alter the Scope of Habeas Protections

Once a court decides that a claim implicates the Suspension Clause, any law that strips a court’s jurisdiction to hear that claim would raise difficult constitutional questions.<sup>90</sup> This Section discusses the Supreme Court’s attempt to avoid such difficult constitutional questions, continuing to rely on *St. Cyr* and *Boumediene* as examples.<sup>91</sup> The language of the statutes at issue in *St. Cyr*—the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) and the Illegal Immigration Reform and Immigration Responsibility

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86. *See id.* at 788 (interpreting petitioners’ most basic claim as arguing “that the President has no authority under the AUMF to detain them indefinitely”)

87. *Id.* at 744 (citations omitted).

88. *Id.* (citing THE FEDERALIST NO. 84. (Alexander Hamilton))

89. This was because, although 1789 represented a bare minimum of the Suspension Clause’s protections, “[t]he Court ha[d] been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments . . . .” *Id.* at 746 (2008) (citing *I.N.S. v. St. Cyr*, 553 U.S. 289, 300–01 (2001)); *see* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 544 (2010) (arguing that *Boumediene* demonstrated that “the mandate of the Suspension Clause *does* go beyond the floor of 1789”).

90. *See St. Cyr*, 553 U.S. at 314 (explaining that reading the statutes at issue in *St. Cyr* to preclude habeas review of a pure question of law would “raise serious constitutional questions”); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After I.N.S. v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 558 n.17 (2002) (explaining that in a companion case, *Calcano-Martinez v. I.N.S.*, 533 U.S. 348 (2001), the Court held that no such serious constitutional questions were raised by a judicial review provision that which removed habeas jurisdiction from the courts of appeals, because habeas remained available in the district court).

91. *See St. Cyr*, 553 U.S. at 299 (explaining that multiple interpretations of a statute are possible, but one raises “serious constitutional problems” courts are obligated to interpret the statute “to avoid such problems”); *Boumediene*, 553 U.S. at 787 (articulating courts’ obligations to construe statutes to avoid constitutional problems).

Act of 1996 (“IIRIRA”)—was very similar to that of the FARR Act.<sup>92</sup> As such, many lower courts have considered *St. Cyr*’s analysis highly relevant to their analysis of Article Three claims.<sup>93</sup> By contrast, *Boumediene* marks the first and only time in US history where the Court held that Congress has passed a law stripping habeas jurisdiction in violation of the Suspension Clause.<sup>94</sup> Therefore, *Boumediene* provides a concrete example of how difficult it is for Congress to violate the Suspension Clause by merely stripping habeas jurisdiction.

The Court in *St. Cyr* explained that to avoid the constitutional problems that may arise when a petitioner’s claim implicates the Suspension Clause, courts should employ two rules of statutory interpretation.<sup>95</sup> First, Congress can only strip the courts’ jurisdiction to hear that claim with a sufficiently clear statement that “articulate[s] specific and unambiguous statutory directives to effect a repeal [of habeas jurisdiction].”<sup>96</sup> Second, even where a sufficiently clear statement of intent exists, a court will search for an alternative interpretation of the statute that would not raise these problems.<sup>97</sup>

In applying these two rules to the AEDPA and the IIRIRA, the *St. Cyr* Court held that neither statute removed United States district courts’ jurisdiction under 28 U.S.C. § 2241 because they failed to provide a sufficiently clear statement demonstrating Congress’ intent to strip habeas review.<sup>98</sup> Further, an alternative interpretation of the

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92. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending §212(c) of the Immigration and Nationality Act of 1952); Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996); see also *St. Cyr*, 533 U.S. 289.

93. See *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 955–957 (9th Cir. 2012) (rehearing en banc) (per curiam) (examining *St. Cyr* to adjudicate *Trinidad y Garcia*’s Article Three claim). But see *Mironescu v. Costner*, 480 F.3d 664, 676 (4th Cir. 2007) (concluding that *St. Cyr* was not dispositive on the Article Three Claim at issue because the FARR Act contained no plausible reading that would not strip habeas review, unlike the statutes analyzed in *St. Cyr*).

94. See Neuman, *supra* note 89, at 538 (explaining that, before *Boumediene*, the Court had never before found a violation of the Suspension Clause).

95. See *St. Cyr*, 533 U.S. at 299.

96. *Id.* at 289, 299 (citing *Ex parte Yenger*, 75 U.S. 85, 8 Wall. 85, 102, 19 L. Ed. 332 (1869), where the Court stated, “We are not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law.”).

97. See *id.* at 299 (explaining that multiple interpretations of a statute are possible, but one raises “serious constitutional problems” courts are obligated to interpret the statute “to avoid such problems”).

98. See *id.* at 312–13 (holding that neither statute “speaks with sufficient clarity” to bar habeas review).

statute that did not raise constitutional problems was available.<sup>99</sup> The Court considered the text of § 401(e) of the AEDPA, but concluded that the text did no more than amend provisions of the 1952 Immigration and Nationality Act, which made no mention of habeas or § 2241.<sup>100</sup> Because the text in the AEDPA did not contain a clear statement removing habeas jurisdiction, § 401(e)'s title, "Elimination of Custody Review by Habeas Corpus," was irrelevant.<sup>101</sup> Further, the Court analyzed three different sections of the IIRIRA, §§ 1252(a)(1), 1252(b)(9), and 1252(a)(2)(C).<sup>102</sup> The language in each of these sections failed to provide clear language effecting repeal of habeas jurisdiction, as they only discussed "judicial review" or "jurisdiction to review," which were "historically distinct" from habeas corpus in the immigration context.<sup>103</sup>

By contrast, in *Boumediene*, the Court held that the statutes at issue not only contained a sufficiently clear statement of Congress' intent to strip habeas jurisdiction, but also that there was no fair alternative interpretation of the statute that did not strip habeas jurisdiction.<sup>104</sup> After holding that the Constitution and, by extension, the Suspension Clause had "full effect" in Guantanamo Bay, the Court in *Boumediene* addressed the issue of whether or not § 7 of the MCA violated the Suspension Clause by stripping federal courts of

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99. *Id.* at 289, 314 (refusing to adopt the I.N.S.'s interpretation of the statutes, as doing so would raise serious constitutional questions).

100. Section 507(e) of the AEDPA that the Court analyzed read as follows:

(e) Elimination of Custody Review by Habeas Corpus.—Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) is amended—(1) in paragraph (8), by adding 'and' at the end; (2) in paragraph (9), by striking 'and' at the end and inserting a period; and (3) by striking paragraph (10).

*See St. Cyr*, 533 U.S. at 308 n.31.

101. *Id.* at 308–09 (explaining that a provision's title is not controlling, and since the text did not repeal habeas jurisdiction, the title could not either).

102. *See id.* at 309–12 (analyzing § 1252(a)(1), which stated that judicial review of final removal orders is governed only by the Hobb's Act); *id.* (analyzing § 1252(b)(9), which stated that "judicial review of all questions of law and fact and application of constitutional or statutory provisions" arising under the subchapter shall only be available in judicial review of a final order under this section); *id.* (analyzing § 1252(a)(2)(C), which stated "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" certain offenses).

103. *See id.* at 311. The Court cited several Supreme Court cases that differentiated judicial review from habeas corpus in immigration statutes. *Id.* (citing *Heikkila v. Barber*, 345 U.S. 226 (1953)) ("[I]t is the scope of inquiry on habeas corpus that differentiates" habeas review from "judicial review.>").

104. *See Boumediene v. Bush*, 553 U.S. 723, 736 (2008) (analyzing § 7 of the MCA).

jurisdiction to hear petitioners' habeas claims.<sup>105</sup> Because the Suspension Clause was implicated, the Court required a clear expression of Congressional intent to strip habeas and noted that the statutes at issue had such a clear intent as they were clearly enacted by Congress to "circumscribe habeas review."<sup>106</sup> Further, there was no fair alternative interpretation of the statutes that did not clearly remove petitioners' right to seek habeas relief.<sup>107</sup> Without habeas, the petitioners' claims could never be adequately heard, as the non-judicial review procedures that Congress implemented with the act were an inadequate substitute for the writ.<sup>108</sup> Absent some acceptable alternative forum that could adequately replace habeas review, the petitioners' constitutional rights, as guaranteed by the Suspension Clause, had been violated.<sup>109</sup> Because of these flaws, the Court held, for the first time in the nation's history, that a law passed by Congress improperly attempted to remove the Judiciary's ability to inquire into these traditional questions, and thus, violated the Suspension Clause.<sup>110</sup>

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105. Section 7 of the MCA amended 28 U.S.C. § 2241(e) to read:

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

*Boumediene*, 553 U.S. at 772 (2008).

106. *Boumediene*, 553 U.S. at 776–77 (noting that the DTA only allows the court of appeals to determine whether or not the CSRT complied with review procedure set out by the Secretary of Defense—not engage in any de novo review).

107. *See id.* at 723, 738–39 (noting that the statute's text was amended by Congress after the Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557, and that this legislative response made it even clearer that Congress intended a singular construction of this portion of the MCA).

108. *See id.* at 794 (explaining the existence of suitable alternative processes was a "relevant consideration in determining the courts' role"). The Court also explained that it was "troubled" by the fact that the statute did not explicitly allow the Court of Appeals to order the detainee released. *See id.* at 787–88 (assuming that congressional silence on the matter meant that the statute would permit release, as it was a "constitutionally required remedy").

109. *See id.* at 733 (holding that § 7 of the MCA was an unconstitutional suspension of the writ of habeas corpus).

110. *See id.* at 770 (recognizing that this decision marked the first time the Court had "held that noncitizens detained by our Government in territory over which another country maintains de jure sovereignty have any rights under our Constitution"); *id.* at 799 (Souter, J., concurring) ("Justice Scalia is thus correct that here, for the first time, this Court holds there is . . . constitutional habeas jurisdiction over aliens imprisoned by the military outside an area of de jure national sovereignty.").

The Court further explained that although there was little precedent that spoke directly to what constituted a removal of habeas rights, several factors to consider were: whether the statute at issue substantially departed from common law habeas procedures; whether the statute applied to proceedings with prior judicial involvement; whether the statute's purpose or effect was to restrict the writ; and whether the statute substituted a new collateral review procedure for pre-existing habeas corpus procedure.<sup>111</sup>

### 3. Habeas Review in Extradition is Governed by the Rule of Non-Inquiry

In contrast to the traditional scope of habeas review addressed in the enemy combatant context of *Boumediene* or the immigration context of *St. Cyr*, the scope of habeas review in the extradition context has traditionally been limited by the Rule of Non-Inquiry.<sup>112</sup> This common law doctrine bars habeas courts that review extradition decisions from considering the “procedures or treatment” that an extraditee may face upon surrender to the requesting State.<sup>113</sup> When the Supreme Court formally adopted the Rule of Non-Inquiry in the early twentieth century in *Neely v. Henkel*, it explained that even US citizens who commit crimes abroad cannot complain to US courts when they are “required to submit to such modes of trial and to such

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111. *See id.* at 774–76 (citations omitted) (setting forth factors that could be seen to constitute a removal of habeas protections, including: substantial departure from common law habeas procedure, whether the purpose and effect of a particular statute was to restrict the writ, and whether the statute substituted some new collateral process for habeas review).

112. *See* ABBELL, *supra* note 10, at 46–7 (describing the Rule of Non-Inquiry as a partial judicial delegation of decision making responsibility to the Secretary); *id.* at 267–69 (noting the near unanimous judicial acknowledgment that the Executive is better suited to inspect, monitor, and safeguard the conditions an extraditee may face in the requesting State); BASSIOUNI, *supra* note 9, at 940 (acknowledging that the Rule of Non-Inquiry generally prohibits habeas courts from inquiring into the treatment the extraditee is likely to receive in the requesting State).

113. *See The Supreme Court 2007 Term Leading Cases: II. Federal Jurisdiction and Procedure: B. Habeas Corpus: Jurisdiction over Americans Held Overseas*, 122 HARV. L. REV. 405, 415 (2008) (internal citation and quotation marks omitted) (citing *Hoxha v. Levi*, 465 F.3d 554, 563 (3d Cir. 2006)) [hereinafter *Jurisdiction over Americans Held Overseas*] (referring to the Rule of Non-Inquiry as a judge made doctrine limiting the scope of judicial review in extradition); *see also* David B. Sullivan, *Abandoning the Rule of Non-Inquiry in International Extradition*, 15 HASTINGS INT'L & COMP. L. REV. 111, 116 (stating the Rule of Non-Inquiry is often invoked when an extraditee challenges extradition on the basis of the expected treatment in the requesting State).



punishment as the laws of that country may prescribe . . . .”<sup>114</sup> Further, the Rule recognizes that some branches of the federal government are comparatively more able to address foreign policy questions than the courts.<sup>115</sup> As a result, the Rule of Non-Inquiry only restricts review by the Judiciary and does not prohibit the Executive Branch from examining the conditions in the requesting State.<sup>116</sup> The Executive Branch, through the Secretary of State, is thought to be in the best position to review Article Three claims regarding the potential for mistreatment in the requesting State and to potentially refuse extradition because they have the ability to investigate the conditions in a foreign country and precondition extradition on assurances by the foreign government regarding the specific conditions that await an extraditee.<sup>117</sup> Even prior to implementing obligations under the CAT, the Secretary of State had a clear policy of refusing extradition where torture was likely.<sup>118</sup>

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114. See *Neely v. Henkel*, 180 U.S. 109, 123 (1901); see also *Jurisdiction over Americans Held Overseas*, *supra* note 113, at 415. As a consequence, courts reviewing habeas petitions in extradition cases have historically been limited to reviewing questions related to the Executive’s authority to extradite, the validity of the applicable extradition treaty, and other narrow questions. See *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 1009 (9th Cir. 2012) (rehearing en banc) (Kozinski, C.J., dissenting in part) (per curiam) (enumerating the specific issues generally addressed in habeas).

115. See ABBELL, *supra* note 10, at 47 (observing that the Rule of Non-Inquiry’s decision making delegation to the Executive Branch is particularly evident in cases involving political or humanitarian concerns); Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1229–30 (1991) (arguing that US courts are less able to navigate foreign policy interests than the Secretary).

116. See BASSIOUNI, *supra* note 9, at 636 (stating that the Executive branch may inquire into the treatment facing an extraditee and refuse to surrender, at its discretion); *Peroff v. Hylton*, 563 F.2d 1099, 1102–03 (4th Cir. 1977) (noting, in dicta, the Rule of Non-Inquiry applies to the Judiciary while simultaneously allowing the Executive to be flexible). *But see* BASSIOUNI, *supra* note 9, at 638 (observing increasing dicta in US courts indicating a willingness to erode the Rule of Non-Inquiry if there is evidence that the extraditee will face torture in the requesting State).

117. See John Quigley, *The Rule of Non-Inquiry and Human Rights Treaties*, 45 CATH. U.L. REV. 1213, 1217 (1996) (noting the Rule of Non-Inquiry is premised upon the Secretary’s ability to exercise independent discretion to deny extradition); BASSIOUNI, *supra* note 9, at 611 (defining diplomatic assurances as formal representations from a competent representative of the requesting State regarding an individual’s extradition); ABBELL, *supra* note 10, at 300–04 (explaining that, as a matter of Executive discretion, the Secretary of State imposes conditions to which the requesting State must agree before extradition can occur); *Munaf v. Geren*, 553 U.S. 674, 701–02 (2008) (citations omitted) (explaining that the political branches are better suited to address issues affecting the ability of other sovereign nations to exercise jurisdiction over fugitives from their justice system).

118. See Statement of Mark Richard, *supra* note 34, at 18 (reporting, prior to US ratification of the CAT, that the United States did not and would never extradite a person to a

The Rule of Non-Inquiry was recently reaffirmed by a unanimous Supreme Court in *Munaf v. Geren*, which applied the Rule of Non-Inquiry within the military detainee context, holding that “habeas is not a means of compelling the United States to harbor fugitives from the criminal justice system with undoubted authority to prosecute them.”<sup>119</sup> The Court consolidated the habeas petitions of two individuals detained by the United States military, both men were dual US-Iraqi citizens who had voluntarily traveled to Iraq.<sup>120</sup> The petitioners challenged their transfer to Iraqi criminal custody on the grounds that they would face torture in Iraqi custody.<sup>121</sup> The Court noted that principles of international comity and respect for foreign States prohibit courts from shielding citizens from foreign prosecutions.<sup>122</sup>

The *Munaf* Court believed that the petitioners’ torture claims were best addressed by the political branches, not the Judiciary.<sup>123</sup> It explained that the Judiciary was not suited to second-guess the Executive’s determinations in this area, which would require courts not only to judge foreign justice systems but also to undermine the Government’s ability to speak with one voice in foreign relations.<sup>124</sup> According to the Court, the Judiciary lacked the significant diplomatic leverage and tools possessed by the political branches.<sup>125</sup> Further, the Court noted that denying habeas review did not end the

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country where it was known he would be tortured); *cf. Trinidad y Garcia v. Thomas*, 683 F.3d 952, 962–63 (rehearing en banc) (Tallman, J., dissenting) (per curiam) (“I cannot question so lightly the honor of the Secretary . . .”).

119. *Munaf v. Geren*, 553 U.S. 674, 697 (2008); *accord* John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. REV. 1973, 1976 (2010); *Juarez-Saldana v. United States*, 700 F. Supp. 2d 953, 957 (W.D. Tenn. 2010) (arguing that the Court, in *Munaf*, reaffirmed the principles supporting the Rule of Non-Inquiry).

120. *See Munaf*, 553 U.S. at 679 (describing the facts underlying the case).

121. *See id.* at 700.

122. *See id.* at 698–99 (quoting *Omar v. Harvey*, 479 F.3d 1, 17 (D.C. Cir. 2007)) (Brown, J., dissenting in part) *vacated by* 553 U.S. 674.

123. *See id.* at 700 (using the Rule of Non-Inquiry from extradition cases to limit the scope of habeas review in the military detainee context); *Id.* at 700–01 (citing *Neely v. Henkel*, 180 U.S. 109, 123 (1901)) (explaining how inter-branch comity had a long history in the Court’s jurisprudence).

124. *Id.* at 702. The Court also recognized that the Judiciary was not well suited to second-guess decisions of foreign justice systems. *See id.* (citing THE FEDERALIST NO. 42, (J. Madison) (“If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”)).

125. *Id.* at 703 (quoting *Omar v. Harvey*, 479 F.3d at 20 n.6 (Brown, J., dissenting in part) *vacated by* 553 U.S. 674).

petitioners' ability to advocate their position as the Executive retained discretionary power to decline to surrender them to Iraqi authorities.<sup>126</sup> Finally, the Court noted that US policy prevented transfer where torture was likely.<sup>127</sup>

Article Three claims like *Trinidad y Garcia*'s pose several unique issues, such as the CAT's effect on an extraditee's petition for review of the Secretary's Article Three determination.<sup>128</sup> Although *St. Cyr*, *Boumediene*, and *Munaf* do not involve the CAT or the FARR Act, like *Trinidad*, they did set the stage for Part II by explaining the difficulty courts have framing a petitioner's claims and interpreting statutes that affect a court's habeas jurisdiction. First, Part I discussed habeas corpus jurisprudence in the United States, using *St. Cyr* and *Boumediene* as examples to demonstrate the constitutional nature of habeas protections and the applicable canons of statutory interpretation needed to understand the arguments explored in subsequent Parts of this Note.<sup>129</sup> Second, Part I explained how the Court's unanimous opinion in *Munaf* reaffirmed the principal that international extradition is a unique process in the US legal system, with a historically limited scope of review.<sup>130</sup>

## II. THE CAT, THE FARR ACT, AND STATE DEPARTMENT REGULATIONS HAVE CAUSED TREMENDOUS CONFUSION AMONG US COURTS

The jurisprudence surrounding habeas review of extraditees' Article Three claims is inconsistent, and courts are split at several different levels of the analysis.<sup>131</sup> Some jurists differ on whether or not a cognizable claim exists on habeas, and even among those that

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126. *Id.* at 702 (describing the role of the Secretary).

127. *Id.* at 702 (explaining that the Solicitor General stated that it was US policy not to transfer if torture were likely and that while torture concerns remained in Iraq, torture was not believed to be practiced by Justice Ministry, to whom petitioners would be transferred).

128. Compare *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 955–57 (9th Cir. 2012) (rehearing en banc) (per curiam) (framing the Article Three claim requesting judicial review of the Secretary's Article Three determination as constitutional), with *Juarez-Saldana v. United States*, 700 F. Supp. 2d 953 (W.D. Tenn. 2010) (refusing to find a statutory grant of jurisdiction over Article Three claims from the FARR Act).

129. See *supra* notes 71–111 and accompanying text.

130. See *supra* notes 119–127 and accompanying text.

131. Compare *Trinidad*, 683 F.3d at 955–57 (comparing the Article Three claim to a petition for review of Executive detention), with *Wang v. Ashcroft*, 320 F.3d 130, 142–43 (2d Cir. 2003) (interpreting a foreign national's Article Three claim as asking for review of an erroneous statutory interpretation).

agree that the claim exists, there is disagreement about whether it is the type of claim that implicates the Suspension Clause or was created by subsequently enacted laws, namely the FARR Act.<sup>132</sup> Other courts believe that Congress has effectively stripped courts of jurisdiction to hear the claim.<sup>133</sup>

Part II examines these different points of view using the various opinions from *Trinidad* as a roadmap. Exploring the per curiam decision, Part II.A considers different arguments regarding whether Article Three claims are cognizable in habeas. Part II.A.1 examines the reasoning behind the per curiam opinion in *Trinidad* and other cases holding that Article Three claims implicate the Suspension Clause and thus require using the rules of statutory interpretation from *St. Cyr*. Part II.A.2 then considers the second part of the per curiam opinion in *Trinidad*, which says that the cause of action for Article Three claims has been created by statutes or regulations implementing the CAT. Part II.B then addresses the effect that various statutes, including the FARR Act and the REAL ID Act, discussed in *Trinidad*, have had on Article Three claims. Specifically, Part II.B examines whether Congress is free to take away from courts the habeas jurisdiction that is created in prior statutes.

#### A. *Finding the Source of Article Three Claims*

Twenty-eight U.S.C. § 2241 allows courts to hear habeas petitions when the petitioner's custody violates the US Constitution.<sup>134</sup> The Supreme Court, in turn, has explained that a habeas petitioner states a cognizable constitutional claim when the claim implicates the Suspension Clause, and that the Suspension Clause is implicated, at a minimum, when the claim is of the same type that a detainee could have brought in 1789.<sup>135</sup> Part II.A addresses these issues in the context of an extraditee's Article Three claim.

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132. See, e.g., *Trinidad*, 683 F.3d at 1009 (Kozinski, C.J., dissenting in part) (stating that *Trinidad y Garcia*'s Article Three claim was not cognizable on habeas); *Mironescu v. Costner*, 480 F.3d 664, 674 (4th Cir. 2007) (holding that § 2242(d) of the FARR Act only created habeas jurisdiction for Article Three claims in the immigration context).

133. See *Omar v. McHugh*, 646 F.3d 13, 18 (D.C. Cir. 2011) (holding that the language of the REAL ID Act effectively stripped courts of habeas jurisdiction, if any ever existed for military transferees).

134. See 28 U.S.C. § 2241(c)(3).

135. See *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001) (describing 1789 as the absolute minimum of the protections of the Suspension Clause); *Boumediene v. Bush*, 553 U.S. 723, 739 (2008) (characterizing legal precedents and commentaries regarding habeas corpus in

### 1. Article Three Claims and the Suspension Clause—Looking to History to Frame the Claim

The manner in which a court frames a petitioner's Article Three claim is crucial to its analysis.<sup>136</sup> Courts often look to historical precedent and examine whether the same general type of claim would have been available to the petitioner in 1789, and therefore whether it implicates the Suspension Clause.<sup>137</sup> In the extradition and detainee transfer context, there is disagreement among jurists and scholars about whether Article Three claims would have been cognizable in 1789.<sup>138</sup>

The Ninth Circuit's decision in *Trinidad* marked the first decision from a US Circuit Court of Appeals that "extended judicial review of habeas corpus petitions in extradition to [Article Three determinations]."<sup>139</sup> The court first considered whether it had jurisdiction to hear *Trinidad y Garcia*'s Article Three claim and held that, as a noncitizen challenging Executive detention, *Trinidad y Garcia*'s claim historically would have been protected in habeas.<sup>140</sup> In his concurrence, Judge Thomas went even further, arguing that even if jurisdiction had only been created by 28 U.S.C. § 2241, removing jurisdiction in this particular context would remove all forms of judicial review for *Trinidad y Garcia*'s claim, which was so contrary

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1789 as instructive). *But see id.* at 746 (recognizing that the Court has been careful not to say that the Suspension Clause protects only what it protected in 1789).

136. Compare *Trinidad*, 683 F.3d at 955–57 (9th Cir. 2012) (framing the Article Three claim as constitutional and finding habeas jurisdiction), and *Wang*, 320 F.3d at 142–43 (2d Cir. 2003) (same, in immigration context), with *Juarez-Saldana v. United States*, 700 F. Supp. 2d 953 (W.D. Tenn. 2010) (framing the Article Three claim as seeking review of the conditions in the foreign country and not finding habeas jurisdiction).

137. See *Omar*, 646 F.3d at 15, (D.C. Cir. 2011) (quoting *Boumediene*, 533 U.S. at 746) (arguing that the historical scope of habeas mattered, and guided the "question before [the court]"); *Mironescu v. Costner*, 480 F.3d 664, 676 (4th Cir. 2007) (recognizing 1789 as a benchmark for reviewing Article Three claims).

138. See *Vladeck*, *supra* note 15 (noting the split between US Circuit Courts regarding habeas jurisdiction over Article Three Claims); *Trinidad*, 683 F.3d at 969 (Tallman, J., dissenting) (arguing that the court's per curiam ruling created a circuit split). *But see, e.g.*, *Cadet v. Bulger*, 377 F.3d 1173, 1182, 1183 n. 8 (11th Cir. 2004) (demonstrating agreement in the immigration context of the effect of jurisdictional statutes on habeas proceedings).

139. *Stover*, *supra* note 6, at 327–28; see *Vladeck*, *supra* note 15 (noting the split between US Circuit Courts regarding habeas jurisdiction over Article Three Claims).

140. While the court was not explicit on this point, it seems that the court is arguing that by virtue of the Constitutional underpinning of *Trinidad y Garcia*'s Article Three Claim, jurisdiction was technically provided by 28 U.S.C. § 2241, as the per curiam decision based its holding on due process. See *Trinidad*, 683 F.3d at 956.

to the purpose of the Suspension Clause that such a result would violate the Constitution.<sup>141</sup>

While habeas protections are strongest in the context of Executive detention, some courts argue that Article Three claims in the extradition context do not seek review of the legality of Executive detention and therefore conclude that habeas review is improper.<sup>142</sup> For example, in his partial dissent in *Trinidad*, Chief Judge Alex Kozinski criticized the per curiam's authors for over-generalizing *Trinidad y Garcia's* claim.<sup>143</sup> In his view, *Trinidad y Garcia* did not challenge "the authority of the Executive to extradite him," but rather, he challenged the destination he would be extradited to: the Philippines.<sup>144</sup> As there was no support for the proposition that habeas courts had ever reviewed an extraditee's treatment abroad, there was no basis for jurisdiction under 28 U.S.C. § 2241.<sup>145</sup>

In Chief Judge Kozinski's view, *St. Cyr* was easily distinguishable because refusing to hear *Trinidad y Garcia's* claim could create no constitutional question.<sup>146</sup> This was because "[a] serious constitutional question would only arise if [the court] interpreted a statute to preclude the type of habeas review protected by the Constitution's Suspension Clause."<sup>147</sup> Instead, *Trinidad y Garcia's* claim was essentially one of statutory and regulatory interpretation, which did not fall under the category of claims that

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141. *See id.* at 959–60 (Thomas, J., concurring) (noting that Suspension Clause was intended to provide a judicial forum for inquiry into the causes of Executive detention, and reading the FARR Act to remove all judicial forums would violate the intent of the Suspension Clause); *see also* 28 U.S.C. § 2241(c) ("The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States . . .").

142. *Compare* *Saint Fort v. Ashcroft*, 329 F.3d 191, 199 (1st Cir. 2003) (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001)) (explaining that habeas protections are strongest in the context of Executive detention), *with* *Omar*, 646 F.3d at 25–29 (Griffith, J., concurring) (D.C. Cir. 2011) (explaining that the Article Three Claim of the petitioner, a military detainee, was not eligible for habeas review).

143. *See Trinidad*, 683 F.3d at 1010 (Kozinski, C.J., dissenting in part) (explaining that his colleagues characterized *Trinidad's* claim "at too high a level of generality . . .").

144. *Id.* at 1011 ("Trinidad y Garcia . . . challenges . . . the destination to which the Executive seeks to extradite him . . .").

145. *See id.* at 1009–11 (framing the history of extradition case law in terms of the Rule of Non-Inquiry). Chief Judge Kozinski elaborated on his statutory interpretation by noting that the FARR Act and the REAL ID Act "explicitly disavow any congressional intent to create jurisdiction for review of CAT claims outside a limited immigration context." *Id.* at 1010.

146. *See id.* at 1010 (explaining that *St. Cyr* did not apply because, unlike the case at bar, there was no historical evidence that *Trinidad y Garcia's* claim was cognizable on habeas).

147. *See id.* at 1010–11 (citing *St. Cyr*, 533 U.S. at 314).

implicate the Suspension Clause—*i.e.*, claims cognizable in 1789.<sup>148</sup> Because Trinidad y Garcia’s Article Three claim was narrower than his colleagues suggested, Chief Judge Kozinski would have dismissed Trinidad y Garcia’s claim for lack of jurisdiction.<sup>149</sup>

Similar to the discord regarding the application of *St. Cyr* to Article Three claims, jurists and scholars have disagreed on the applicability of *Munaf* to Article Three claims.<sup>150</sup> On remand from the Supreme Court in *Munaf*, the D.C. Circuit heard the amended habeas petition of Shawqi Omar, who asked the court to consider whether the FARR Act and Article Three of the CAT could be used to enjoin his transfer to Iraqi custody.<sup>151</sup> Omar argued that he was entitled to habeas review because his claim implicated the Suspension Clause.<sup>152</sup> The court read the *Munaf* decision as categorical and held that, as a military detainee, Omar was not in a class that possessed a right to judicial review of the conditions he might face upon transfer.<sup>153</sup> This was because “[h]abeas corpus [was] not a valid means of inquiry into the treatment the [petitioner] is anticipated to

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148. *See id.* at 1010 (contrasting *Munaf*, where the Court considered constitutional claims, to the current case).

149. *See id.* at 1011–12 (quoting Semmelman, *supra* note 115, at 1218 (“[n]o court has yet denied extradition based upon the defendant’s anticipated treatment in the requesting country.”)).

150. *Compare* Omar v. McHugh, 646 F.3d 13, 19–21 (D.C. Cir. 2011) (explaining that military transferees could not historically bring habeas petitions in these situations), *with* Vladeck, *supra* note 15 (arguing that *Munaf* was explicitly limited to its facts and should not control Article Three claims in the extradition context), *and* Parry, *supra* note 119, at 2015 (expressing surprise that the Court in *Munaf* did not go further to *expressly ban all* inquiry).

151. The Supreme Court in *Munaf* declined to reach Omar’s Article Three claim, as he had not advanced it in his initial habeas petition. Moreover, the Court expressed doubt that Omar could present a cognizable claim under the FARR Act. *See Omar*, 646 F.3d at 16–17 (citing *Munaf*, 553 U.S. at 703 n.6.). Omar was one of the petitions whose claim was heard by the Supreme Court in *Munaf*. His amended petition was brought before the D.C. Circuit on remand from *Munaf*. *See Omar*, 646 F.3d 13.

152. *See Munaf*, 553 U.S. at 704 (quoting Brief for Habeas Petitioners 54) (noting that the Petitioner argued that the Constitution prevented the Government from transferring him to Iraq “without legal authority”).

153. *See Omar*, 646 F.3d at 19–21 (explaining that military transferees could not historically bring habeas petitions in these situations). The court dispatched Omar’s Due Process argument quickly, noting that *Munaf* also foreclosed Omar, as a military transferee, from making this argument. *See id.* at 20 (“[T]he Supreme Court unanimously ruled in *Munaf* that transferees such as Omar (indeed, Omar himself) do not possess a habeas or due process right to judicial review of conditions in the receiving country.”); *cf.* Mironescu v. Costner, 480 F.3d 664, 671 (4th Cir. 2007) (explaining that extraditees could not claim constitutional entitlement to habeas review of post extradition treatment “prior to the CAT and the FARR Act”).

receive in the requesting state.”<sup>154</sup> By contrast, one scholar distinguishes the Article Three claim in *Trinidad* from *Munaf* by noting that the *Munaf* decision was expressly limited to its facts, as indicated by the Justices’ opinions.<sup>155</sup> First, Chief Justice Roberts, writing for a unanimous court, noted that the Secretary had already determined that the detainees in *Munaf* would not be tortured, a determination that was not reflected in the record before the court in *Trinidad*.<sup>156</sup> Second, Justice Souter explained in his concurrence that the result likely would be different in a situation where the probability of torture was well-documented but the Executive failed to acknowledge it.<sup>157</sup> The discord regarding the application of *Munaf* and *St. Cyr* squarely demonstrates the heart of the issue addressed in this Note and in *Trinidad*: whether extraditees have a constitutional right to habeas review for Article Three claims. Many jurists, however, would only consider this to be the first half of the analysis.

## 2. Article Three Claims and the FARR ACT—Looking to Statutes to Frame the Claim

If the right to habeas does not directly stem from § 2241’s jurisdictional grant over constitutional questions, habeas may be supported by reading the FARR Act in conjunction with a constitutional right.<sup>158</sup> For example, the per curiam opinion in *Trinidad* looked to the FARR Act’s implementing regulations and interpreted them to create an obligation on the Secretary to review the petitioner’s claim, thus creating a procedural due process interest reviewable in habeas.<sup>159</sup> That due process interest, however, was limited, and the per curiam would only require the Secretary to

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154. *Omar*, 646 F.3d at 19 (citing *Munaf*, 553 U.S. at 700).

155. *See* Vladeck, *supra* note 15.

156. *See id.* (explaining that the Court settled the merits of *Munaf*’s claim by looking to the Secretary of State’s assurance that the petitioners would not face torture, which had not occurred in *Trinidad*). Article Three in *Trinidad* claim was further distinguishable because *Munaf* explicitly chose not to address any issues related to the FARR Act, as they were not raised by the parties. *See id.*

157. *See* Vladeck, *supra* note 15 (discussing Justice Souter’s concurrence in *Munaf*).

158. *See* *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 956–57 (9th Cir. 2012) (rehearing en banc) (per curiam) (holding that the FARR Act and its implementing regulations, which are binding domestic law, require the Secretary to determine that an extraditee is not more likely to be tortured than not).

159. *See id.*



provide the court with a declaration confirming that she complied with her duties under Article Three of the CAT.<sup>160</sup>

In contrast, Judge Pregerson's concurrence in *Trinidad* argued that the Secretary's "closed" review process and the significant consequences of any error in her Article Three determination required courts to exercise habeas review of Article Three claims.<sup>161</sup> Although cognizant of the serious concerns surrounding classified information, Judge Pregerson argued that the district court, in camera, was able to review the underlying evidence of Trinidad y Garcia's Article Three claim.<sup>162</sup> Similarly, Judge Berzon read the FARR Act and the CAT to require some manner of habeas inquiry that accessed the sufficiency of the Secretary's evidence and conclusions.<sup>163</sup> According to Judge Berzon, habeas is, first and foremost, an adaptable remedy.<sup>164</sup> Because of this, he went on to propose a novel "Rule of Limited Inquiry," which would frame the scope and process of habeas review on a case by case basis, by balancing the severity of the Secretary's foreign policy concerns against the perceived risk of torture readily apparent from the preexisting extradition record.<sup>165</sup>

Limited judicial review of Article Three claims was also discussed by the Fourth Circuit in *Mironescu v. Costner*, where the court explained in dicta that a district court, in camera, is well-suited to deal with the real and substantial confidentiality concerns associated with Article Three claims.<sup>166</sup> In *Mironescu*, the Fourth Circuit held that the Rule of Non-Inquiry did not bar habeas review of

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160. See *id.* at 956–57 (instructing the Secretary of State, upon remand, to provide a declaration that she "complied with her obligations"); see also Nelinson, *supra* note 17, at 237–38 (referring to the lack of judicial oversight of the Secretary's Article Three determination as an "explicit derogation of [the CAT]"); Stover, *supra* note 6 (arguing that the lower courts should take a more proactive role in hearing Article Three claims in the first instance).

161. See *Trinidad*, 683 F.3d at 1008 (referring to the Secretary's declaration as "barebones"); cf. Vladeck, *supra* note 15 (criticizing this formulation for allowing the Secretary to make these petitions "go away" by "merely by filing a piece of paper").

162. See *Trinidad* 683 F.3d at 1008 (arguing for the district court to review Trinidad y Garcia's claim in camera).

163. See *id.* at 987 (Berzon, J., concurring) (arguing that if the Secretary approved extradition without making a determination regarding Trinidad y Garcia's Article Three claim, that would "illegal under positive, Congressionally enacted law").

164. See *id.* at 997 (citing *Boumediene v. Bush*, 553 U.S. 723, 779 (2008)).

165. See *id.* at 997–99 (proposing a Rule of Limited Inquiry); see also Nelinson, *supra* note 17, at 251–52 (supporting Judge Berzon's formulation of judicial review).

166. See *Mironescu v. Costner*, 480 F.3d 664, 673 (4th Cir. 2007) (expressing confidence in the ability of the district court to protect the confidentiality of communications between the Executive and foreign governments).

the extraditee's Article Three claims because the CAT and FARR Act created a due process right to have his extradition preceded by an Article Three determination.<sup>167</sup> The Rule of Non-Inquiry could not bypass the court's duty to ensure that the Executive complied with its constitutional duties.<sup>168</sup> The *Mironescu* court reasoned that a district court could only ensure this compliance by examining the evidence underlying the Secretary's Article Three determination.<sup>169</sup>

Other jurists have adopted a different reading of the FARR Act and the REAL ID Act to conclude that because the statutes say nothing about creating jurisdiction in the extradition context, they should not be read to do so in conjunction with either the Suspension Clause or § 2241.<sup>170</sup> For example, both Chief Judge Kozinski, in his dissent in *Trinidad*, and the D.C. Circuit, in *Omar*, have noted that the FARR Act only addresses habeas review in the immigration context, and therefore it cannot be read to create a cause of action for Article Three claims in any other context.<sup>171</sup> Similarly, Judge Tallman's dissent in *Trinidad* argued that the FARR Act's policy statement created no individual rights, and was mere policy, not law.<sup>172</sup> Lastly, the D.C. Circuit explained that since the FARR Act, the REAL ID Act of 2005 had been enacted, which contained explicit language limiting habeas review to the immigration context.<sup>173</sup> Because Article Three claims do not implicate the Suspension Clause, the D.C. Circuit

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167. Although *Mironescu* was decided before *Munaf*, it reaches the same conclusion as *Vladeck*, *supra* note 15, by similarly arguing that the Rule of Non-Inquiry does not apply to Article Three claims. *Mironescu*, 480 F.3d at 673 (holding that the Rule of Non-Inquiry did not bar review of the Secretary's Article Three determination).

168. *See Mironescu*, 480 F.3d at 673 (acknowledging the Constitution as the supreme law of the land).

169. *See id.* (contending that the Secretary's compliance must be subject to judicial review).

170. *See, e.g., Jaurez-Saldana v. U.S.*, 700 F. Supp. 2d 953, 960 (holding that the text of the FARR Act cannot be read to create habeas jurisdiction for an extraditee's Article Three claim).

171. *See, e.g., Trinidad y Garcia v. Thomas*, 683 F.3d 952, 1010 (9th Cir. 2012) (rehearing en banc) (Kozinski, C.J., dissenting in part) (per curiam) (concluding that the FARR Act and REAL ID Act confirm the absence of habeas jurisdiction); *Omar v. McHugh*, 646 F.3d 13, 17 (D.C. Cir. 2011) (stating that the FARR Act's language only provides for judicial review in the immigration context).

172. *See Trinidad*, 683 F.3d at 975–77 (explaining that the FARR Act did not create binding law, but was an example of Congress legislating “by innuendo,” or guiding the Secretary in making the ultimate regulations that would have the force of law).

173. *See Omar*, 646 F.3d at 18 (holding that, even if some source of habeas jurisdiction could be found for petitioners, the language of the REAL ID Act effectively stripped courts of habeas jurisdiction outside the immigration context).

did not apply *St. Cyr*'s statutory canons to the REAL ID Act, further bolstering its argument against finding a statutory basis for Article Three claims in habeas.<sup>174</sup>

Because 28 U.S.C. § 2241 allows courts to hear habeas petitions when the petitioner's custody violates US laws, treaties, or the Constitution, courts addressing Article Three claims must first decide whether an extraditee presents a cognizable habeas claim.<sup>175</sup> Part II.A.1 began by considering whether Article Three claims implicate the Suspension Clause, therefore supporting a constitutional basis for habeas jurisdiction.<sup>176</sup> Part II.A.2 examined whether these claims could have been created after 1789 by the CAT, the FARR Act, or its implementing regulations.<sup>177</sup> Part II.B continues by discussing the next issue courts address in Article Three claims—whether Congressionally-enacted statutes have stripped courts of jurisdiction to hear the petitioner's claim.

#### *B. Has Congress Stripped Courts of Habeas Jurisdiction Over Article Three Claims?*

Even among those that find some basis to support a petition for the writ, there is disagreement regarding whether the CAT's implementing legislation (the FARR Act) and regulations strip courts' habeas jurisdiction to hear Article Three claims.<sup>178</sup> Some courts, in comparing the text of the FARR Act with the statutes analyzed in *St. Cyr*, note the near identical language and hold that the FARR Act does not effectively strip jurisdiction, however this holding requiring the application of *St. Cyr*'s canons of statutory interpretation.<sup>179</sup> For

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174. *Id.* at 24 n.11 (stating that the Article Three claim brought by a military detainee or an extraditee did not state a constitutional claim).

175. *See* 28 U.S.C. § 2241(c)(3).

176. *See supra* notes 136–157 and accompanying text.

177. *See supra* notes 158–1774 and accompanying text.

178. *Compare* *Mironescu v. Costner*, 480 F.3d 664 (4th Cir. 2007) (interpreting the FARR Act to prohibit habeas review of Article Three claims outside the immigration context), *with* *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 956 (9th Cir. 2012) (rehearing en banc per curiam) (explaining that the FARR Act didn't have a sufficiently clear statement to strip habeas jurisdiction).

179. *See* *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 217 (3d Cir. 2006) *superseded by statute*, REAL ID ACT of 2005, Pub. L. 109-13, div. B, § 106(a)(4), May 11, 2005, 119 Stat. 310–11, 8 U.S.C. § 1252 note, *as recognized in* *Francois v. Gonzales*, 448 F.3d 645, 647 (3d Cir. 2010) (holding, in an immigration context, that the statutory language examined in *St. Cyr* as “closely mirror[ing]” the language in the FARR Act). *See generally* *Trinidad*, 683 F.3d 952 (applying the canons of statutory interpretation used by the Supreme Court in *St. Cyr*).

example, the Ninth Circuit Court of Appeals in *Trinidad* held that because Trinidad y Garcia's claim was historically protected in habeas, the canons of statutory interpretation used in *St. Cyr* controlled, meaning that Congress could not strip habeas jurisdiction without a "particularly clear statement" demonstrating congressional intent to strip.<sup>180</sup> Even if a statute has a sufficiently clear statement, the opinion noted that courts must address whether an alternative interpretation of the statute, that does not raise a potentially difficult constitutional question, is possible.<sup>181</sup> According to a majority of judges, the FARR Act lacked a sufficiently clear statement to strip jurisdiction.<sup>182</sup> Further, the REAL ID Act, which the court read to contain a sufficiently clear statement to strip habeas jurisdiction, could also be alternatively interpreted as only affecting Article Three habeas jurisdiction in the immigration context—an interpretation that the court felt would not offend the Constitution.<sup>183</sup>

By contrast, after holding that the extraditee had a due process right to have an Article Three determination, the Fourth Circuit in *Mironescu* held that the FARR Act's language was sufficient to strip that right.<sup>184</sup> The Fourth Circuit distinguished *St. Cyr* by explaining that *St. Cyr*'s statutory interpretation was premised on the fact that, in the immigration context, there are substantial differences between the terms "judicial review" and "habeas corpus."<sup>185</sup> Because there was no such distinction of those terms in the extradition context, the court interpreted the FARR Act's use of "judicial review" to also preclude

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180. *See Trinidad*, 683 F.3d at 956 (requiring a clear expression of congressional intent to strip habeas jurisdiction).

181. *See id.* (explaining that Supreme Court precedent mandates adopting constitutionally sound interpretations of statutes if fairly possible).

182. *See id.* This is all the per curiam opinion said on this subject, but they cited to *Saint Fort v. Ashcroft*, 329 F.3d 191, 200–02 (1st Cir. 2003) (explaining that the FARR Act did not explicitly refer to 28 U.S.C. § 2241, or to habeas review generally, and so Supreme Court precedent counseled against reading it as stripping habeas jurisdiction) and *Wang v. Ashcroft*, 320 F.3d 130, 140–42 (2d Cir. 2003) (interpreting *St. Cyr* as requiring a statute to mention either "habeas corpus" or "28 U.S.C. § 2241" before it can be sufficient to repeal habeas jurisdiction) for support. *See Trinidad*, 683 F.3d at 956.

183. *See id.* (finding an alternative interpretation of the REAL ID Act).

184. *See Mironescu v. Costner*, 480 F.3d 664, 676 (4th Cir. 2007) (refusing to require Congress to always explicitly mention habeas corpus or § 2241 to effectuate a repeal of habeas jurisdiction).

185. *See id.* at 676 (arguing that *St. Cyr*, as an immigration case, was distinguishable because in the immigration context, the terms habeas corpus and judicial review have "historically distinct meanings").

habeas review for Article Three claims.<sup>186</sup> The court explained that the Supreme Court had never explicitly stated that Congress must mention “habeas” or “§ 2241” to bar habeas review, and so it adopted what it interpreted to be the FARR Act’s unambiguous demonstration of Congressional intent.<sup>187</sup>

Still other courts have found the language of the REAL ID Act sufficient to strip habeas jurisdiction over Article Three claims.<sup>188</sup> In *Omar*, the D.C. Circuit stated that even if the FARR Act created a judicially enforceable right, Congress retained the right to subsequently remove that right without having to adhere to *St. Cyr*’s statutory canons.<sup>189</sup> According to the court, to hold otherwise would advance a “one-way ratchet theory” of habeas protections, where any expansion of habeas rights by Congress would essentially be treated as an amendment to the Constitution.<sup>190</sup> If the petitioner sought to enforce a right created by the FARR Act, that right would be, by definition, a statutory right.<sup>191</sup> Article Three claims could not gain the protections of the Suspension Clause merely because they were labeled habeas claims.<sup>192</sup> Because the petitioner’s claim was not of a class that was historically cognizable in habeas, no constitutional problems arose by stripping the court’s jurisdiction and the petitioner’s right to bring the claim.<sup>193</sup> Therefore, the court did not apply *St. Cyr*’s rules of statutory interpretation, and it read the plain

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186. *See id.* at 676 (reading the FARR Act’s preclusion of habeas jurisdiction to include the consideration of Article Three claims).

187. *See id.* at 666 (noting that even though the Supreme Court had implied that would require such language, until it did, they would not adopt such a stringent view).

188. *See, e.g., Omar v. McHugh*, 646 F.3d 13 (D.C. Cir. 2011).

189. *See id.* at 22 (arguing that congress does not amend the constitutional protections of the writ when it adds some new statutory protection to habeas petitioners).

190. *See id.* at 22–23 (dismissing the logic underpinning this one-way ratchet theory); *see also Swain v. Pressley*, 430 U.S. 372, 384–85 (1977) (Burger, C.J., concurring) (finding no constitutional problem when Congress partially retracts statutory enlargement of habeas rights); *I.N.S. v. St. Cyr*, 533 U.S. 289, 342 (2001) (Scalia, J., dissenting) (labeling this one-way ratchet argument as “too absurd to be complicated”). *But see Neuman, supra* note 90, at 590 (arguing that Scalia’s dissent in *St. Cyr* incorrectly assumed that the Suspension Clause’s protections are fixed by Eighteenth Century practice).

191. *See Omar*, 646 F.3d at 22 (explaining that statutory expansions of the writ of habeas corpus do not alter the scope of the Suspension Clause).

192. *See id.* at 23 (citing *LaGuerre v. Reno*, 164 F.3d 1035, 1038 (7th Cir. 1998)) (explaining that curtailing an optional statutory enlargement of habeas corpus does violate the Constitution).

193. *See id.* at 22 (reasoning that even if the FARR Act created habeas jurisdiction, the REAL ID Act subsequently stripped that jurisdiction without any constitutional problem).

language of the REAL ID Act as clearly precluding habeas review of Article Three claims outside the immigration context.<sup>194</sup>

There is a short history underlying the jurisprudence of Article Three claims.<sup>195</sup> Part II summarized the conflicting opinions of US jurists and scholars attempting to interpret murky Supreme Court precedent from *Munaf*, *St. Cyr*, and *Boumediene*. The disagreement among jurists is based partly on the fact that Article Three claims can be framed in many different ways, each requiring a very different analysis.<sup>196</sup> Further, even among courts that reach the same result, they do not necessarily rely on the same legal reasoning to reach that result.<sup>197</sup> While Article Three claims present many difficulties, Part III will demonstrate that the current state of the law allows for only one result.

### III. *THE LAW IS CLEAR: US COURTS DO NOT HAVE JURISDICTION TO REVIEW EXTRADITEES' ARTICLE THREE CLAIMS IN HABEAS*

Article Three claims are not cognizable in US courts on petitions for writs of habeas corpus. Part III.A begins by framing Article Three claims and calling them what they really are: requests for judicial review of an extraditee's expected treatment in the requesting State. Part III.A.1 explains that this is the only plausible interpretation because Article Three claims did not exist historically, and therefore, they cannot implicate the Suspension Clause. Moreover, as Part III.A.2 argues, neither the CAT nor its implementing statutes and regulations created any judicial cause of action. Finally, Part III.A.3 demonstrates that even if one interprets the CAT, the FARR Act, or

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194. *See id.* at 18 (holding that the petitioner, a military transferee, was not of a class that would have historically had access to habeas relief).

195. The CAT did not enter into force in the United States until 1994, while habeas was first codified in the United States with the Judiciary Act of 1789. *Compare* Garrett, *supra* note 63 (explaining that habeas was first codified in the Judiciary Act of 1789), with *United States Report to CAT*, *supra* note 1, ¶ 3 (stating that the CAT went into force in the United States in 1994).

196. *See, e.g.*, *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 1010 (9th Cir. 2012) (rehearing en banc) (Kozinski, C.J., dissenting in part) (per curiam) (arguing that because *Trinidad y Garcia's* claim did not implicate the Suspension Clause, his colleagues on the Ninth Circuit incorrectly applied the canons of constitutional avoidance from *St. Cyr*).

197. *Compare* *Mironescu v. Costner*, 480 F.3d 664 (applying the canons of constitutional avoidance from *St. Cyr* to find that the FARR Act strips habeas jurisdiction), with *Trinidad*, 683 F.3d at 952 (applying the same canons from *St. Cyr* to find hold the FARR Act did not contain a sufficiently clear statement to strip habeas jurisdiction).

its implementing regulations as creating a claim cognizable on habeas review, none would preclude Congress from subsequently stripping habeas jurisdiction because Article Three claims do not implicate the Suspension Clause and the rules of statutory interpretation used in *St. Cyr*'s would not apply. Therefore, the plain text of the REAL ID Act would clearly strip courts of jurisdiction to hear the claim. There are real and substantial inter-branch and international comity concerns that accompany judicial review of the Secretary's Article Three determinations, and Part III.B concludes by recognizing this. However, it also recognizes the incredibly high stakes faced by any extraditee who makes an Article Three claim. These claims should be dealt with as completely and fairly as possible. But as this Note concludes, despite the split amount US Circuit Courts, the current state of the law is clear, and US courts do not have habeas jurisdiction over Article Three claims.

A. *Article Three Claims Ask Courts to Review an Extraditee's Expected Treatment in the Requesting State*

When an extraditee brings an Article Three claim in habeas, the first issue a court must address is: what relief is being sought?<sup>198</sup> Article Three of the CAT protects against extradition where there is a substantial risk of torture in the requesting State.<sup>199</sup> When making an Article Three claim to a US court, an extraditee is clearly asking a court to determine whether that risk is substantial.<sup>200</sup> Courts may determine whether there is a substantial risk of torture only by going beyond the extradition record.<sup>201</sup>

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198. See *supra* note 136 and accompanying text.

199. See *supra* notes 40–43 and accompanying text.

200. See WOUTERS, *supra* note 35, at 428 (stating the United States interprets “substantial grounds” in Article Three to mean that torture is “more likely than not”); Statement of Mark Richard, *supra* note 34, at 18 (recommending that Article Three’s prohibitions apply where torture is “more likely than not,” the same standard applied in US asylum proceedings).

201. See ABBELL, *supra* note 10, at 203–34 (explaining that the US Government generally submits the requesting State’s formal extradition request as evidence in extradition hearings); BASSIOUNI, *supra* note 9, at 906 (quoting 6 MAJORIE WHITEMAN, DIGEST OF INTERNATIONAL LAW 998–99 (1963)) (explaining that it is well-established that extradition proceedings are not meant to determine guilt or innocence and that an extraditee generally cannot introduce evidence that is not specifically required by the applicable treaty).

When examining the rights and obligations created by the Suspension Clause, history matters.<sup>202</sup> The Court has made it clear that at a minimum the protections of the Suspension Clause exist as they did in 1789.<sup>203</sup> Because *St. Cyr*'s statutory claim could not have existed in 1789, the Court had to frame the claim more broadly, as challenging the legality of Executive detention, the historic core of the writ.<sup>204</sup>

### 1. Article Three Claims Do Not Implicate the Suspension Clause

Article Three claims cannot be framed so broadly.<sup>205</sup> Although Article Three of the CAT creates similar obligations for the United States in both the immigration and extradition contexts, it does not abrogate centuries of extradition case law by creating habeas jurisdiction for courts.<sup>206</sup> Moreover, even though *St. Cyr* noted that habeas protections are strongest in the context of Executive detention, the court implicitly recognized that that was an inappropriately broad level of abstraction, and discussed at length how *immigration* case law supported habeas review.<sup>207</sup> *Boumediene* is further distinguishable because an extraditee does not face the prospect of indefinite Executive detention.<sup>208</sup> Although extradition habeas is limited in scope by the Rule of Non-Inquiry, it still provides extraditees an "affirmative right to judicial inquiry into the causes of [their] detention."<sup>209</sup> In reality, Article Three claims do not seek judicial review of the *causes* of detention, but rather a determination

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202. See *Boumediene v. Bush*, 553 U.S. 723, 746 (2008) (explaining the importance of seeking historical guidance in habeas cases); *I.N.S. v. St. Cyr*, 533 U.S. 289, 304 (2001) (describing the understanding of habeas corpus in 1789 as the "absolute minimum" of the protections of the Suspension Clause).

203. See *St. Cyr*, 533 U.S. at 304.

204. See *id.* at 301 (indicating that "[a]t its historical core" habeas corpus allowed for judicial review of Executive detention).

205. See *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 1011 (9th Cir. 2012) (rehearing en banc) (Kozinski, C.J., dissenting in part) (per curiam) (refusing to frame the Article Three claim before the court as challenging Executive detention).

206. See *Omar v. McHugh*, 646 F.3d 13, 19 (D.C. Cir. 2011) (reading the FARR Act to provide a right to judicial review of Article Three claims only in the immigration context); BASSIOUNI, *supra* note 9, at 940 (stating habeas corpus has been held by courts not be a valid means of inquiry into expected treatment in the requesting State).

207. See *St. Cyr*, 533 U.S. at 306–07 (discussing the historical application of immigration laws in habeas cases challenging Executive detention).

208. See *Boumediene*, 553 U.S. at 788 (discussing the possibility that detention may be indefinite).

209. *Id.* at 744 (citing THE FEDERALIST NO. 84 (Alexander Hamilton)).



that torture is likely, meaning that their surrender to the requesting country—their *release* from United States custody—violates the CAT.<sup>210</sup> Finally, as the Court noted in *Munaf*, the Judiciary cannot assume that the Executive is oblivious to its humanitarian duties and presume that the Secretary of State has decided not to deny extradition where denial is required by law.<sup>211</sup>

## 2. Article Three Claims Were Not Created by Statute

The Suspension Clause protects claims that are of a class that would have been cognizable in 1789—this does not include Article Three claims.<sup>212</sup> In the extradition context, the Rule of Non-Inquiry remains in the background.<sup>213</sup> Article Three claims are *the precise type of claim* that the Rule of Non-Inquiry forecloses: those that call for examining the conditions that an extraditee may encounter upon his return to the requesting State.<sup>214</sup> Therefore, although the Court has never defined the upper limits of the Suspension Clause’s protections, it seems unlikely that it would include Article Three Claims.<sup>215</sup>

If an Article Three claim is not contemplated by the Suspension Clause, then petitioners must argue that it comes from some new right.<sup>216</sup> That is exactly the argument accepted by the Ninth Circuit in *Trinidad* when they held that the United States’ new obligations under

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210. See *Munaf v. Geren*, 553 U.S. 674, 693 (2008) (noting that release to foreign criminal custody is the “last thing petitioners want”).

211. *Id.* at 702 (quoting *Omar v. Harvey*, 479 F.3d 1, 17 (D.C. Cir. 2007) (Brown, J., dissenting in part) *vacated*, 553 U.S. 674; *accord* *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 962–63 (rehearing en banc) (Tallman, J., dissenting) (per curiam) (“I cannot question so lightly the honor of the Secretary . . .”).

212. See, e.g., BASSIOUNI, *supra* note at 9, at 940 (stating habeas corpus has been held by courts not be a valid means of inquiry into expected treatment in the requesting State); *Trinidad*, 683 F.3d at 1010 (Kozinski, C.J., dissenting in part) (writing that *Trinidad y Garcia* had not presented any case to support a holding that the Rule of Non-Inquiry allowed for even minimal review).

213. See *supra* notes 112–27 and accompanying text.

214. See ABBELL, *supra* note 10, at 267–69 (noting the near unanimous judicial acknowledgment that the Executive is better suited to inspect, monitor, and safeguard the conditions an extraditee may face in the requesting State); BASSIOUNI, *supra* note 9, at 940 (acknowledging that the Rule of Non-Inquiry generally prohibits habeas courts from inquiring into the treatment the extraditee is likely to receive in the requesting State).

215. See *supra* Part II accompanying text (discussing various lines of thought related to the CAT’s effect on an extraditee’s rights in habeas proceedings).

216. See 28 U.S.C. § 2241(c) (extending the writ of habeas corpus to prisoners only where custody violates the Constitution or laws or treaties of the United States).

the CAT created Trinidad y Garcia's cause of action.<sup>217</sup> Though accepted by the Ninth Circuit, this argument is unavailing.<sup>218</sup> First, the CAT itself did not create the claim because it was not self-executing, and therefore not legally binding in US courts.<sup>219</sup> Second, neither the CAT's implementing legislation, the FARR Act, nor the subsequently promulgated regulations can reasonably be read to create a cause of action for an Article Three claim.<sup>220</sup> Not only should the FARR Act's broad policy statement not be read to create an individually enforceable right, the legislative history clearly demonstrates that Congress intended the Secretary of State to remain the competent authority to determine whether an extraditee faces a substantial risk of torture.<sup>221</sup>

### 3. Even if a Court Erroneously Finds a Jurisdictional Basis for Article Three Claims, Congress Has Stripped That Jurisdiction

Even if a court could read the CAT, the FARR Act, or the implementing regulations to create a habeas claim, then the court must examine whether Congress has subsequently revoked that claim.<sup>222</sup> In *St. Cyr*, the Court explained that the clear statement rule

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217. See *Trinidad*, 683 F.3d at 956–57 (arguing that the FARR Act and its implementing regulations, which were binding domestic law, created a cognizable Due Process interest, reviewable in habeas).

218. See *id.* at 1010 (Kozinski, C.J., dissenting in part) (explaining that his colleagues characterized *Trinidad*'s claim "at too high a level of generality"); cf. *Omar v. McHugh*, 646 F.3d 13, 19–21 (D.C. Cir. 2011) (explaining that military transferees could not historically bring habeas petitions to argue a claim akin to a modern Article Three claim).

219. *Trinidad*, 683 F.3d at 972–72 (Tallman, J., dissenting) (explaining non-self-ratifying treaties are not binding US law unless Congress enacts implementing statutes); 136 Cong. Rec. S17486 (daily ed. Oct. 27, 1990) (Statement of Sen. Terry Sanford) (stating that Articles 1 through 16 of the CAT are not self-executing). *But see United States Report to CAT*, *supra* note 1, ¶ 57 (citations omitted) (explaining that US courts may take notice of US obligations under a non-self-executing treaty).

220. FARR Act § 2242(d) (stating that the Act did not provide courts with jurisdiction to hear Article Three claims outside the immigration context); 22 C.F.R. § 95.4 (describing the Secretary's Article Three Determinations as matters of Executive discretion, not subject to judicial review); accord *Omar*, 646 F.3d at 17 (stating that the FARR Act's language only provides for judicial review in the immigration context).

221. See Statement of Mark Richard, *supra* note 34, at 18 (reporting that the Secretary of State is the "competent authority" under existing law, and that the United States did not and would never extradite a person to a country where it was known he would be tortured); *Convention Against Torture: Hearing Before the Comm. on Foreign Relations*, 101st Cong. 69–72 (1990) (letter from Janet G. Mullins, Assistant Secretary for Legislative Affairs, U.S. Dept. of State, to Sen. Clairborne Pell) (clarifying that the Secretary will remain the competent authority in extradition).

222. See *supra* notes 178–97 and accompanying text.

requires that a statute must unambiguously state its intention to revoke habeas review when such a revocation would create “a serious Suspension Clause issue.”<sup>223</sup> The Court’s definition of the Suspension Clause creates a very clear floor: 1789.<sup>224</sup> While *Boumediene* made it clear that the protections of the Suspension Clause can be expanded, there has never been any indication that it has expanded to include Article Three claims.<sup>225</sup> Further, the CAT, which entered into force in the United States in 1994, and the FARR Act, which was signed into law in 1998, simply have not existed for a long enough time to create a right to judicial review that is so foundational in US law that its revocation could create serious constitutional issues.<sup>226</sup>

In contrast to the short history of the CAT’s binding legal status in the United States, the Supreme Court recently reaffirmed over a century of well-settled extradition case law—*i.e.*, the Rule of Non-Inquiry—demonstrating that inquiring into the extraditee’s expected treatment in the requesting State is the exact opposite of foundational—it is forbidden.<sup>227</sup> Therefore, neither the CAT, the FARR Act, nor the REAL ID Act constitutes a removal of habeas rights, as defined in *Boumediene*.<sup>228</sup> First, none require courts to depart from common law habeas procedures because the common law is framed by the Rule of Non-Inquiry.<sup>229</sup> None limit the status quo of

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223. *I.N.S. v. St. Cyr*, 533 U.S. 289, 305 (2001).

224. *See id.* at 301 (describing 1789 as the absolute minimum of the protections of the Suspension Clause).

225. *See* Neuman, *supra* note 89, at 589 (explaining how the *Boumediene* Court chose not to even attempt to elaborate the full scope of the protections of the Suspension Clause).

226. *See* Omar v. McHugh, 646 F.3d 13, 22 (D.C. Cir. 2011) (arguing that Congress does not amend the constitutional protections of the writ when it adds some new statutory protection to habeas petitioners); *supra* note 1 and accompanying text (describing the CAT’s implementation in the United States).

227. *See supra* notes 112–27 and accompanying text (discussing the Rule of Non-Inquiry and its importance to the Court’s holding in *Munaf*).

228. *Boumediene v. Bush*, 553 U.S. 723, 774–76 (2008) (citations omitted) (setting forth factors that could be seen to constitute a removal of habeas protections, including: substantial departure from common law habeas procedure, whether the purpose and effect of a particular statute was to restrict the writ, and whether the statute substituted some new collateral process for habeas review).

229. *Compare supra* note 111 and accompanying text (discussing factors that could be seen to constitute a removal of habeas protections), with BASSIOUNI, *supra* note 9, at 940 (acknowledging, that in the extradition context, the Rule of Non-Inquiry generally prohibits habeas courts from inquiring into the treatment the extraditee is likely to receive in the requesting State).

judicial involvement in habeas review.<sup>230</sup> Secondly, their “purpose or effect” is not to restrict the writ, as they cannot restrict the writ in a situation to which it has never applied.<sup>231</sup> Because Article Three claims do not implicate the Suspension Clause, their revocation by Congress would not create serious constitutional questions.<sup>232</sup> As such, the clear statement requirement used in *St. Cyr* does not apply; normal canons of statutory interpretation do.<sup>233</sup> Therefore, even if a court read the FARR Act as creating a cognizable habeas claim, the REAL ID Act clearly revoked that claim by clarifying that only immigration detainees had a right to judicial review of the conditions in the requesting State.<sup>234</sup>

*B. Supreme Court Precedent Makes It Clear that the Rule of Non-Inquiry Precludes Habeas Review of Article Three Claims*

Historically, courts have followed the Rule of Non-Inquiry, and kept the scope of habeas review in extradition very narrow.<sup>235</sup> The Rule of Non-Inquiry has its underpinnings in principles of international comity and horizontal separation of powers between the branches of the Federal Government; these concerns existed in the

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230. Compare *supra* note 111 and accompanying text (discussing factors that could be seen to constitute a removal of habeas protections), with BASSIOUNI, *supra* note 9, at 880 (describing the scope of an extradition hearing), and BASSIOUNI, *supra* note 9, at 930–36 (explaining the process and scope of habeas in extradition).

231. Compare *supra* note 111 and accompanying text (discussing factors that could be seen to constitute a removal of habeas protections), with BASSIOUNI, *supra* note at 9, 940 (stating habeas corpus has been held by courts not be a valid means of inquiry into expected treatment in the requesting State); *c.f.* *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 1012 (9th Cir. 2012) (rehearing en banc) (Kozinski, C.J., dissenting in part) (per curiam) (arguing that there was not, nor had there ever been any jurisdiction basis for *Trinidad y Garcia*’s Article Three claim).

232. See *Omar v. McHugh*, 646 F.3d 13, 22 (D.C. Cir. 2011) (arguing that Congress does not amend the constitutional protections of the writ when it adds some new statutory protection to habeas petitioners); *Trinidad*, 683 F.3d at 1010–11 (Kozinski, C.J., dissenting in part) (arguing that an Article Three claim does not implicate the Suspension Clause).

233. *I.N.S. v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (explaining that whenever a statute invokes the outer limits of congressional power, the Court will require a clear expression that Congress intended that particular result); *Trinidad*, 683 F.3d at 1010–11 (Kozinski, C.J., dissenting in part) (arguing that, because an Article Three claim is not constitutional in nature, there is no need to require a clear expression of congressional intent).

234. See *Omar*, 646 F.3d at 18 (holding that the language of the REAL ID Act effectively stripped courts of habeas jurisdiction, if any ever existed for military transferees).

235. See *supra* notes 112–27 and accompanying text (discussing the Rule of Non-Inquiry).

nation's early history, and they exist today.<sup>236</sup> Although *Munaf* concerned the transfer of military detainees, its affirmation of the principals underlying the Rule of Non-Inquiry was critical to its holding.<sup>237</sup>

Congress is of course free to amend the current law and expand the scope of habeas review to include Article Three claims.<sup>238</sup> However, as the Court made clear in *Munaf*, not only is the Judiciary ill-suited to examine the substance of the Secretary's Article Three determinations, judicial review would damage American foreign affairs and the Executive's ability to speak with one voice.<sup>239</sup> Further, *Munaf* reaffirmed another longstanding principal that US courts should not pass judgment on foreign legal proceedings or systems.<sup>240</sup> Therefore, the Court's decision in *Munaf* only makes it clearer that US Courts are not the proper forum for an extraditee's Article Three claim.

Some courts and commentators, perhaps inadvertently, have implied that the Secretary may not always comply with Article Three of the CAT in the extradition context.<sup>241</sup> If the potential for torture or mistreatment in the requesting State is ever at issue, the Secretary is required to consider the risk of torture, and cannot issue a Surrender Warrant if there are substantial grounds to believe torture is more

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236. See Quigley, *supra* note 117, at 1217 (1996) (noting the Rule of Non-Inquiry is premised upon the Secretary's ability to exercise independent discretion to deny extradition); *Munaf v. Geren*, 553 U.S. 674, 701 (2008) (citing *The Schooner Exchange v. McFaddon*, 7 Cranch 116, 143) (explaining that the political branches are better suited to address issues affecting the ability of other sovereign nations to exercise jurisdiction over fugitives from their justice system).

237. See Parry, *supra* note 119, at 2015 (discussing the extradition precedents that the Court used to support its decision in *Munaf*); *Juarez-Saldana v. United States*, 700 F. Supp. 2d 953, 957 (W.D. Tenn. 2010) (arguing that the Court, in *Munaf*, reaffirmed the principles supporting the Rule of Non-Inquiry).

238. See *supra* notes 158–97 (discussing Congress's ability to amend the scope of habeas review within the limits of the Suspension Clause).

239. See *Munaf*, 553 U.S. at 702 (citing THE FEDERALIST NO. 42 (J. Madison) (recognizing that the Judiciary is not well suited to second-guess decisions of foreign justice systems ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations."))).

240. *Munaf*, 553 U.S. at 699–700 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)) (discussing the Act of State doctrine).

241. See Vladeck, *supra* note 15 (criticizing the lack of review required in *Trinidad* as it would allow the Secretary to make Article Three claims "go away" "merely by filing a piece of paper"); *Munaf*, 553 U.S. at 702 (refusing to question, as the petitioner requested, that the Secretary complied with her humanitarian duties); *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 962–63 (9th Cir. 2012) (rehearing en banc) (Tallman, J., dissenting) (per curiam) (criticizing the other judges in the Ninth Circuit for questioning the "honor of the Secretary").

likely than not.<sup>242</sup> Additionally, as part of the Secretary's de novo review of the extradition request, the Secretary will consider any submissions from the extraditee.<sup>243</sup> Lastly, only the Secretary can impose conditions on extradition by requiring the requesting State to provide diplomatic assurances regarding humanitarian concerns.<sup>244</sup>

### CONCLUSION

Article Three claims are not cognizable in US courts.<sup>245</sup> As a matter of law, Article Three claims are not of the type that would have been cognizable on habeas, nor has Congress subsequently made them cognizable.<sup>246</sup> As a policy matter, this approach is consistent with US extradition practice, consistent with notions of inter-branch comity underlying that practice, and consistent with the United States' obligations under the CAT.<sup>247</sup> Well before implementing the CAT, basic notions of human decency required the Secretary to ensure extraditees' would not face torture in the requesting State—that obligation continues today.<sup>248</sup> While the CAT created legal obligations for the United States, it did not change the federal Judiciary's role in international extradition—only the US Congress can do that.<sup>249</sup>

This Note sought only to resolve conflicting interpretations of the CAT and its implementing statutes and regulations. Many have argued that evolving notions of human rights should affect US extradition practice.<sup>250</sup> This Author does not disagree. However, the

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242. See 22 C.F.R. § 95.3 (requiring the Secretary of State to make an Article Three determination prior to issuing a Surrender Warrant); *Trinidad*, 683 F.3d at 956–57 (holding that the FARR Act and its implementing regulations, which are binding domestic law, require the Secretary to determine that an extraditee does not face a substantial likelihood of torture).

243. See ABBELL, *supra* note 10, at 300–04 (pointing out that the Secretary's review of the extradition de novo and the Department of State generally considers any submissions from the extraditee, although it consistently refuses to grant the extraditee any sort of oral hearing).

244. See *supra* note 117 and accompanying text (discussing diplomatic assurances).

245. See *supra* Part III.

246. See *supra* Part III.A.

247. See *supra* Part III.B.

248. Statement of Mark Richard, *supra* note 34, at 18 (reporting that the United States did not and would never extradite a person to a country where it was known he would be tortured).

249. See *supra* notes 158–97 (discussing Congress's ability to amend the scope of habeas review within the limits of the Suspension Clause).

250. See Nelinson, *supra* note 17, at 237–38 (referring to the lack of judicial oversight of the Secretary's Article Three determination as an “explicit derogation of [the CAT]”); Stover, *supra* note 6 (arguing that the lower courts should take a more proactive role in hearing Article

reality is that the US Supreme Court has not said that evolving notions of human rights should affect courts' interpretations of the Suspension Clause.<sup>251</sup> The only way to change the current procedures surrounding extraditees' Article Three claims is through Congressional action. For the reasons set out above, the Judiciary simply is not equipped to ensure compliance with the CAT. However, recognizing this does not mean that the Secretary's review process need be as opaque as it was for *Trinidad y Garcia*.<sup>252</sup>

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Three claims in the first instance); *supra* notes 163–65 (discussing Judge Berzon's proposal for a Rule of Limited Non-Inquiry from *Trinidad*, which would balance human rights concerns and international comity concerns to design novel habeas review procedures for Article Three claims on a case-by-case basis).

251. *See* *Munaf v. Geren*, 553 U.S. 674, 697 (2008) (reaffirming the Rule of Non-Inquiry). It is true that the Supreme Court's Opinion in *Boumediene* expanded the protections of the Suspension Clause to non-citizen detainees in Guantanamo Bay, Cuba, but that expansion was based on functional factors. *See* *Azmy*, *supra* note 70, at 467 (describing the criteria used by the Court to determine the reach of the Suspension Clause as "functional and highly subjective").

252. Brief for Appellee at 14–25, *Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012) (rehearing en banc) (per curiam) (No. 09-56999) 2010 WL 4199736, (discussing *Trinidad y Garcia*'s submission to the Secretary of State, but noting that *Trinidad y Garcia* was denied the opportunity to appear before any decision making body at the State Department); *accord* *ABBELL*, *supra* note 10, at 300 (pointing out an extraditee may make submissions to the Secretary to consider prior to issuing a Surrender Warrant, although there is no right to a oral hearing).

