FEDERAL COURTS’ HABEAS CORPUS JURISDICTION ON A SECRETARY OF STATE’S EXTRADITION DECISION IN THE CONTEXT OF A CONVENTION AGAINST TORTURE CHALLENGE

Ke Gang*

A recent Ninth Circuit decision holding that federal courts have habeas corpus jurisdiction to determine whether the United States has complied with its obligations under the United Nations Convention Against Torture (“CAT”) has resulted in a circuit split as the Fourth and D.C. Circuits have held that federal courts have no such jurisdiction. This article explores federal court habeas corpus jurisdiction over CAT challenges to the Secretary of State’s extradition decisions. It first articulates the constitutional justification for habeas corpus jurisdiction in federal courts to review detainees’ claims, and then employs case analysis to argue that habeas corpus jurisdiction extends to extradition decisions where extraditees file CAT claims. It concludes by arguing that federal court habeas corpus review is appropriate under common law principles, notwithstanding any concerns about judicial competence.

INTRODUCTION .................................................................................................................................96
I. THE CIRCUIT SPLIT ..........................................................................................................................97
II. UNITED NATIONS CONVENTION AGAINST TORTURE, ITS IMPLEMENTING REGULATION, AND INTRODUCTION TO EXTRADITION PRACTICE ..........100
   A. United Nations Convention Against Torture and Its Implementing Regulation ........100
   B. Introduction to the Extradition Process ..................................................................................102
III. JUSTIFICATIONS FOR FEDERAL COURTS’ GENERAL HABEAS CORPUS REVIEW ..................................................................................................................................................105
   A. Suspension Clause ..................................................................................................................106
   B. Due Process Clause ................................................................................................................107
   C. Relevant statutes ......................................................................................................................109
IV. THE COMMON LAW CONSTRAINT AND THE CONCERN ABOUT JUDICIAL COMPETENCE HAVE NO INFLUENCE ON FEDERAL COURTS’ JURISDICTION TO REVIEW EXTRADITEES’ HABEAS CORPUS PETITIONS .....109
   A. The Rule of Non-Inquiry Does Not Bar Any Judicial Review on Extradition

* J.D., 2018, Drexel University Thomas R Kline School of Law; L.L.B. 2014, Nankai University School of Law. I would like to thank Prof. Chapin Cimino, Prof. David Cohen, and Prof. Rachel Lopez for their guidance through its formative stages; Prof. Clare Coleman, Prof. Bret Asbury, and the University of Pennsylvania Journal of Law and Social Change editorial team for their editing; and my friends and family for their invaluable support during the entire process. All errors are solely on me.

1 There are several articles that are devoted to exploring those two questions based on the United States Constitution, statutes, common law principles, separation of powers concerns, and foreign relations concerns. Most of those articles propose that jurisdiction is justified and meaningful review which allows a federal court to meticulously review the merits of the Secretary’s internal extradition review and any other evidence provided by extraditees is the best solution based on concern stated above. However, the analyses of most articles are partial. Scholars from various ends of the jurisprudential spectrum address habeas corpus review on each separate and isolated consideration. See infra text accompanying notes 12, 17, 41, 64.
INTRODUCTION

In connection with removal proceedings, military detainee releases proceedings, and extradition proceedings, the U.S. government often decides whether to transfer individuals from the U.S. to foreign countries.\(^2\) An individual who committed a crime in a foreign country and is being extradited by the U.S. government could be subject to a terrible fate; he could be surrendered to terrible torture and face an unfair criminal trial, or he could suffer endless imprisonment without sufficient remedy.\(^3\) Although there are some defenses to extradition—including barriers based on statute of limitation, certain capital offenses, military offenses, or purely political issues according to the laws of the requesting or requested country \(^4\)—these

\(^2\) As for extradition, it can occur two ways: the U.S. government can extradite people to the U.S. from a foreign country or receive a request from a foreign country to extradite an individual within its custody to its jurisdiction. This article focuses solely on the extradition from the U.S. to a foreign government.

\(^3\) See generally Kurtis A. Kemper, Annotation, Admissibility of Evidence Procured by Torture or Alleged Torture—Global Cases, 16 A.L.R. Fed. 2d 257 (2007) (citing U.S. ex rel Williams v. Lavalle, 170 F. Supp. 582 (N.D.N.Y. 1959), order aff’d on other grounds, 276 F.2d 645 (2d Cir. 1960)).

situations rarely happen.\textsuperscript{5} The extraditee’s only way out in most cases is to challenge his pending involuntary transfer by rousing U.S. treaty obligations under the 1984 United Nations Convention Against Torture (“CAT”).\textsuperscript{6}

Such claims often prove unavailing. The State Department could, for example, sacrifice a detainee’s due process rights and right to be secured from cruel and unusual punishment in order to achieve the U.S.’ national interest in the context of international affairs.\textsuperscript{7} Federal courts today do not have sufficient power to review the Secretary of State’s decisions that could result in a terrible fate for the extraditee. The Ninth Circuit’s recent extradition decision, \textit{Trinidad y Garcia v. Thomas}, creates new space for inquiring into the proper role of federal courts in the context of extraditions facing CAT challenges.\textsuperscript{8}

The Article will discuss habeas corpus review over extradition decisions by combining all of the applicable considerations, including constitutional basis, statutory basis, common law principles, and the competence of the judicial branch in dealing with CAT challenges. Part I presents the current circuit split on the issue of whether federal courts have habeas corpus jurisdiction over the Secretary of State’s extradition decisions in the context of CAT challenges. Part II discusses CAT and its implementing laws that impose the U.S. government non-refoulement (not extraditing detainees) obligations when a detainee might be subject to torture in the requesting country; it also describes the current process for extradition. Part III discusses three foundations for general habeas corpus review: the Suspension Clause, the Due Process Clause, and relevant U.S. statutes. Part IV argues that the non-inquiry principle and the concern about judicial competence do not bar federal courts’ habeas corpus jurisdiction over the Secretary of State’s extradition decisions involving CAT claims. Part V argues that federal courts have habeas corpus jurisdiction over the Secretary of State’s extradition decisions involving CAT claims under the Suspension Clause. Further, the Foreign Affairs Reform and Restructuring Act of 1998, and REAL ID Act do not deprive this jurisdiction. Part VI argues that constitutional collateral review over the Secretary of State’s extradition decisions involving CAT claims is essential for protecting extraditees’ due process rights. Finally, Part VII proposes habeas corpus review is the solution for due process defects that exist in current extradition proceeding.

I. THE CIRCUIT SPLIT

The Supreme Court has recognized that, in the context of immigrant law, there are three principal administrative actions that federal courts have jurisdiction to review: (1) removal (also known as deportation), by which the U.S. government repatriates inadmissible aliens and criminal aliens to mother countries under immigration laws; (2) extradition, by which the U.S. government


\textsuperscript{7} Lopez-Smith v. Hood, 121 F.3d 1322, 1326 (9th Cir. 1997) (stating that the Secretary of State’s exclusive authority to exercise extradition may be based on merely foreign policy considerations); see Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

\textsuperscript{8} See generally Trinidad y Garcia v. Thomas, 683 F.3d 952 (9th Cir. 2012).
turns over a criminal suspect to a foreign country under an extradition treaty; and (3) transfer of military detainees in connection with post-9/11 detention at Guantanamo Bay. This Article addresses only habeas corpus review jurisdiction of extradition decisions.

Two recent cases, Mironescu v. Costner and Trinidad y Garcia v. Thomas, have created a circuit split with respect to the habeas jurisdiction of federal courts in extradition cases. The circuit split relates to divergent answers to two questions: first, whether federal courts have habeas corpus jurisdiction to review the petition challenging the Secretary of State’s extradition decision that might lead an extraditee to being tortured; and second, to what extent, if any, courts may review the habeas corpus petition brought under CAT. This article addresses only the first question.

The Fourth and D.C. Circuits have held that Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”) and REAL ID Act (“REAL ID”) stripped federal courts of habeas jurisdiction over CAT claims because FARRA and REAL ID manifest sufficiently clear statements of intent to deprive courts of such jurisdiction. FARRA provides that “nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section . . . except as part of the review of a final order of removal.” In Mironescu v. Costner, Mironescu allegedly committed murder in Romanian and Romanian authorities wanted Mironescu to be extradited back to the Romania on automobile theft charges. A magistrate judge conducted an extradition hearing, concluded there was probable cause to believe Mironescu had committed the alleged offenses, therefore certified his extraditability to the Secretary of State. After the Secretary signed the extradition warrant, Mironescu filed a habeas petition requesting the court to reject his extradition on the grounds that he might be subject to torture. The Fourth Circuit denied his petition holding that the REAL ID Act, in conjunction with § 2242(d) of FARRA, deprived federal courts of habeas jurisdiction to hear claims under CAT. Similarly, the D.C. Circuit in Omar II held that the 2005 REAL ID Act blocked the access of extraditees and military transferees to have their habeas claims heard.

Furthermore, the Third Circuit and the First Circuit held that the rule of non-inquiry bars

10 See Mironescu v. Costner, 480 F.3d 664, 665 (4th Cir. 2007).
11 See Trinidad y Garcia, 683 F.3d at 956.
13 Id.
16 See infra Section II.A.
19 Mironescu v. Costner, 480 F.3d 664, 667 (4th Cir. 2007).
20 Id.; see infra Section II.B.
22 Mironescu, 480 F.3d at 673-77.
the federal court’s habeas corpus review. In *Hoxha v. Levi*, Albania requested Hoxha be returned to the country on murder charges.24 Hoxha tried to halt the extradition by alleging that he would be subject to torture and possibly death if he returned to Albania.25 Under the rule of non-inquiry, the Third Circuit upheld the district court’s decision not to consider Hoxha’s claim because “such humanitarian considerations are within the purview of the executive branch and generally should not be addressed by the courts in deciding whether petitioner is extraditable.”26 In *Koskotas v. Roche*, the First Circuit declined to hear the habeas claim despite petitioner’s concerns for his personal safety if returned to Greece because international comity “would be ill-served by requiring foreign governments to submit their purposes and procedures to the scrutiny of United States courts.”27

Unlike the Fourth and D.C. Circuits, the Ninth Circuit, in *Trinidad y Garcia*, held that the federal court had habeas corpus jurisdiction because FARRA and the REAL ID Act do not repeal habeas jurisdiction given the constraint of the Suspension Clause,28 and because non-inquiry implicates only the scope of habeas review and does not affect federal habeas jurisdiction.29 In *Trinidad y Garcia*, Hedelito Trinidad y Garcia, a citizen of the Philippines, was charged with conspiracy to kidnap in the Philippines and was requested to be returned.30 In 2004, the United States government commenced extradition proceedings against Trinidad y Garcia under the request of Philippines.31 After a federal magistrate judge certified the extradition request, Trinidad y Garcia filed a habeas petition for fear of being tortured if extradited.32 Trinidad y Garcia provided evidence that, “to coerce a confession, Philippine law enforcement officials had suffocated and electrocuted the defendant, induced him to vomit, and made threats against his family.”33 However, Trinidad y Garcia’s claim did not prevent his extradition issued by the magistrate judge and approved by the Secretary.34 In November 2009, the district court granted Trinidad y Garcia’s habeas petition without touching the merits of his torture claim.35 In June 2012, the court, en banc, reconciled its divergent discussion and doctrinal ramifications by issuing a legal report consists of three-page per curiam opinion and fifty-nine-page concurrences and dissents.36 In a 10-1 majority,37 the court held that § 1252(a)(4) does not withdraw the federal

24 465 F.3d 554, 556 (3d Cir. 2006).
25 Id. at 559.
26 Id. at 563.
27 931 F.2d 169, 174 (1st Cir. 1991).
28 Trinidad y Garcia v. Thomas, 683 F.3d 952, 959 (9th Cir. 2012).
29 Id.
31 Id.
32 Id.
33 Stover, supra note 12, at 326 (citing Brief for Appellee at 7-8, Trinidad y Garcia v. Thomas, 683 F.3d 952 (9th Cir. 2012).
34 Trinidad y Garcia, 2009 WL 4250694, at *1.
35 See id., at *3-6 (adopting the magistrate judge’s report and recommendation and denying the government’s motion to dismiss based on the jurisdictional issue).
36 See Trinidad y Garcia v. Thomas, 683 F.3d 952 (9th Cir. 2012).
37 Only Chief Judge Kozinski disagreed with the holding. See id. at 1009 (Kozinski, C.J., dissenting);
courts’ habeas jurisdiction in extradition cases by reasoning that neither the REAL ID Act nor FARRA itself contained the “particularly clear statement” to show that Congress had intent to exclude federal courts from reviewing by habeas corpus review as required in St. Cyr. 38

II. UNITED NATIONS CONVENTION AGAINST TORTURE, ITS IMPLEMENTING REGULATION, AND INTRODUCTION TO EXTRADITION PRACTICE

As discussed in Part I, the U.S. government has non-refoulement obligations under CAT. 39 In addition to treaty obligations under CAT, the government also has separate obligations under extradition treaties to extradite criminals who are convicted of crimes in other countries. 40 This section will describe CAT, the U.S. laws enacted in accordance with CAT, and the current process for extradition.

A. United Nations Convention Against Torture and Its Implementing Regulation

The General Assembly’s request for a convention against torture, preliminary drafts for a convention, and “perpetual international momentum” prompted the birth of CAT in 1984. 41 The goal of CAT is to “reinforce the longstanding prohibition against torture and other cruel, inhuman or degrading treatment or punishment in customary international law” by prohibiting that which “occur[s] in a government setting and implicates the actions of public officials or other individuals acting in a representative or official capacity.” 42 CAT Article I defines “torture” as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed or is suspected of having committed . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official

---

38 Id. at 956; I.N.S. v. St. Cyr, 533 U.S. 297, 299-300 (2001) (“First, as a general matter, when a particular interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result. Second, if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ we are obligated to construe the statute to avoid such problems.”).

39 As discussed later, non-refoulement is a requirement of the United Nations Convention Against Torture, meaning a nation should not extradite a detainee when the detainee might be subject to torture in the receiving country. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), G.A. Res. 39/46, art. 3 (June 26, 1987).

40 Trinidad y Garcia, 683 F.3d at 964 n.2.


42 Id. at 214.
CAT Article 3 creates nonrefoulement obligations by preventing the requested country from extraditing or transferring a detainee when the detainee might be subject to torture in the requesting country. Article 3 states, in part:

No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. (2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 31 of the Vienna Convention on the Law of Treaties (VCLT) requires that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,” and interpretation and implementation should be consistent with its objectives. Article 31(3)(c) requires consideration of “relevant rules of international law” in treaty interpretation. The object and purpose of CAT was to create an internationally uniform mechanism to eradicate torture. The international legal community recognizes the non-refoulement obligation imposed by CAT as a jus cogens norm of customary international law.

The United States Senate ratified CAT in 1990, and the U.S. legal community “recognized as fundamental the right of an individual not to be forcibly returned to a country where he might be tortured.” The United States Senate interpreted the non-refoulement prohibition wording, “where there are substantial grounds for believing that he would be in danger of being subjected to torture,” to mean “if it is more likely than not that he would be tortured.”

---

43 CAT, supra note 39, at art. 1.
44 Nelinson, supra note 41, at 216.
45 CAT, supra note 39, at art. 3.
46 VCLT is a treaty concerning the international law on treaties between states. It was adopted on May 23, 1969, opened for signature on the same day, and entered into force on January 27, 1980. The United States recognizes parts of it as a restatement of customary law and binding upon them as such. Vienna Convention on the Law of Treaties, May 23, 1969, 6 U.S.T. 3316.
48 Id. at art. 31 (3)(c).
49 Nelinson, supra note 41, at 214.
The Senate declared that “the provisions of Articles 1 through 16 of the Convention are not self-executing.”54 Because CAT is a non-self-executing treaty,55 the United States has adopted most of the CAT obligations via the domestic implementing legislation of FARRA, in order to provide an available approach for executive detainees to break away from their potentially terrible fate. FARRA states, in part:;

It is “policy . . . not to expel [or] extradite . . . any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”56

Subsequently, the State Department enacted regulations pursuant to FARRA to implement domestic obligations under Article 3 of CAT.57 The regulation forbids the U.S. government from extraditing any detainee to a foreign country where it is more likely than not that the detained will be tortured.58

Subsequent to FARRA, Congress passed the REAL ID, aimed at formalizing and standardizing judicial review of orders of removal. It provides, in part:;

Notwithstanding any other provision of law, . . . or any other habeas corpus provision, . . . a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of any cause or claim under the [CAT].59

The United States enacted sufficient laws and regulations to realize the effect of CAT in the United States. The Convention and its implementing regulations are binding domestic law, which means that the Secretary of State must make a torture determination before surrendering an extraditee who makes a claim under the Convention.60

B. Introduction to the Extradition Process

The definition of international extradition is “the formal surrender of a person by a State to another State for prosecution or punishment.”61 Specifically, extradition is a process by which a

54 Senate resolution ratifying the treaty is reproduced at 136 Cong. Rec. S17486-01 (1990).
56 FARRA, supra note 14.
57 22 C.F.R. § 95.2(b) (2001).
58 Id. (providing that the Secretary of State has to determine whether the detainee facing extradition is “more likely than not to be tortured.”).
59 REAL ID, supra note 15.
fugitive (relator)\(^{62}\) may be surrendered to a foreign country where he or she allegedly committed a crime and will face criminal charges.\(^{63}\) An extradition treaty authorizes the extradition.\(^{64}\) The main purposes of extradition treaties are to promote signing parties’ public safety and to benefit the international community by supporting “collaborative efforts between states in the fight against crime.”\(^{65}\) For maintaining domestic benefits, \(^{66}\) with an emphasis on promoting the well-being of citizens and fighting crimes, a state may enter into an extradition treaty through sacrificing its “sovereign rights over their people.”\(^{66}\) An extradition treaty lists in detail all requirements that must be satisfied for commencing an extradition process specific to the signing countries.\(^{67}\) The United States is a party to over 150 extradition treaties.\(^{68}\)

The process starts with the submission of an extradition request by a foreign government to surrender the people who allegedly committed crime in the foreign country.\(^{69}\) The request has to go through a two-level review process within the executive branch. The U.S. State Department takes the first shot—determining whether the request is within the scope of the applicable treaty between the requesting country and the U.S.\(^{70}\) Then, the U.S. Justice Department assesses the substantive content of the request.\(^{71}\) Assuming the request survives the double screening, it is referred to the United States Attorney of the appropriate district to file a complaint in the district court “seeking certification of the fugitive’s extraditability and a warrant for his arrest.”\(^{72}\)

The judicial branch becomes involved after the fugitive is in detention. A district court judge or magistrate judge conducts an extradition hearing to determine whether: (1) there is “probable cause to believe that the fugitive has violated one or more of the criminal laws of the country requesting extradition”;\(^{73}\) (2) the alleged conduct constitutes “dual criminality” (i.e. the crime is considered as serious in both the United States and the requesting countries);\(^{74}\) (3) the fugitive is the subject of the extradition request;\(^{75}\) (4) there is an extradition treaty in operation between the United States and the requesting country;\(^{76}\) and (5) the offenses underlying the

---

\(^{62}\) Relator or fugitive is the term regularly used to refer to the person who is sought by the requesting country and therefore is detained and surrendered by the requested country through extradition process.


\(^{65}\) Id.

\(^{66}\) Id. Extradition treaties are typically bilateral treaties and their terms are produced by the negotiation between signing countries.

\(^{67}\) Id.


\(^{69}\) Mironescu v. Costner, 480 F.3d 664, 665 (4th Cir. 2007) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 478 cmt. a (AM. LAW INST. 1987)).

\(^{70}\) Id.

\(^{71}\) Id.

\(^{72}\) Id.

\(^{73}\) Id.

\(^{74}\) U.S. v. Kin-Hong, 110 F.3d 103, 114 (1st Cir. 1997).

\(^{75}\) See Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976).
request are extraditable according to the treaty. The U.S. government has the burden to prove these elements at the extradition hearing.

The U.S. government can easily prove that the fugitive committed the underlying offense in the requesting country by showing probable cause. The test employed by courts in determining probable cause is whether a reasonable person can conscientiously conclude that there is a fair possibility that the defendant committed the crime under the totality of the circumstances. At the extradition hearing, the fugitive “has no right to contradict the demanding country’s proof or to pose questions of credibility as in an ordinary trial, but only to offer evidence which explains or clarifies that proof.” Worse than suffering disadvantaged proving privilege, the fugitive is not allowed to raise affirmative defenses such as insanity or self-defense to confront the U.S. government’s charge.

If five elements are satisfied and no other refusing extradition basis is posed by the treaty stipulation between the U.S and the requesting country, the district court judge or magistrate judge certifies to the Secretary of State that the fugitive is extraditable. The judge’s certification of extraditability is not appealable, and the only judicial remedy for the fugitive is limited collateral review of the certification in the form of habeas corpus petition. The common issues considered by federal courts in hearing the habeas claims are whether the judge had jurisdiction, whether the charged offense was within the scope of the applicable treaty, and whether probable cause was established properly.

Following certification by the district court, the Secretary of State is vested with the discretionary power to decide whether to extradite the fugitive. In deciding whether to extradite, the Secretary of State reviews de novo the judge’s findings of fact and conclusions of law, in conjunction with “factors affecting both the individual defendant as well as foreign relations—

---

76 Kin-Hong, 110 F.3d at 114.
77 Prasoprat v. Benov, 421 F.3d 1009, 1014 (9th Cir. 2005).
78 Id.
81 Collins v. Loisel, 259 U.S. 309, 317 (1922); Hooker v. Klein, 573 F.2d 1360, 1368 (9th Cir. 1978); Garcia, 825 F. Supp. 2d at 829-30.
83 See Peroff v. Hylton, 563 F.2d 1099, 1102 (4th Cir. 1977).
84 See Prushinowski v. Samples, 734 F.2d 1016, 1018 (4th Cir. 1984); Fernandez v. Phillips, 268 U.S. 311, 312 (1925); Skafrouros v. United States, 667 F.3d 144, 157 (2d Cir. 2011); Ntakirutimana v. Reno, 184 F.3d 419, 423 (5th Cir. 1999).
factors that may be beyond the scope of the . . . judge’s review.”

The available options for the Secretary of State include: refusing extradition based on discretionary grounds, such as humanitarian and foreign policy considerations; “granting extradition with conditions[,] and using diplomacy to obtain fair treatment for the fugitive.” Furthermore, appropriate policy and legal offices evaluate and analyze all circumstances of the case and provide a recommendation to the Secretary of State on the issue of extradition. The participants include (1) the Department’s Bureau of Democracy, Human Rights, and Labor; (2) the relevant regional bureau and country desk; and (3) the applicable U.S. Embassy.

Executive assurance (also known as “diplomatic assurance”) is commonly used in extradition practice. Executive assurances come from informal verbal exchanges between two sovereign nations regarding the likelihood of torture, and they manifest their reliability in a signature. For example, the Secretary of State obtains assurance from the requesting country, then she makes her own assurance by signing a formal statement with her extradition determination. This practice has been met with skepticism in the international legal community for two reasons: first, the reliability of executive assurance is in question; and second, the executive assurance is made by executive officials—a group of people who tend to trump the interest of the individual for safeguarding national interest.

III. JUSTIFICATIONS FOR FEDERAL COURTS’ GENERAL HABEAS CORPUS REVIEW

This section will explain habeas corpus’s constitutional justifications—the Suspension Clause and Due Process Clause. It also will describe habeas corpus’s statutory justifications: § 2241 and § 2243. An analysis of the bases for all detainee’s habeas corpus petition forms the foundation for arguments supporting habeas corpus jurisdiction of federal courts on extradition decisions under Part V and Part VI.

---

86 Mironescu v. Costner, 480 F.3d 664, 666 (4th Cir. 2007) (citing Sidali v. INS, 107 F.3d 191, 195 n.7 (3d Cir. 1997)).

87 It is worth mentioning that the Secretary of State usually only reviews information provided to it in making decisions instead of substantially investigating torture based on human rights record. Langworthy v. Dean, 37 F. Supp. 2d 417 (D. Md. 1999).

88 Mironescu, 480 F.3d at 666.

89 22 C.F.R. § 95.3(a).


91 Stover, supra note 12, at 357.


94 Stover, supra note 12, at 349-50.

95 See infra Part V (the Suspension Clause, FARRA, and REAL ID) and Part VI (the Due Process Clause).
A. Suspension Clause

Habeas corpus stems from English common law in the mid-1600s, which provided “detainees a remedy to challenge their detention in court in order to protect the individual’s right to be free from bodily restraint.”96 After the United States won independence from England, the framers of the U.S. Constitution carried forward the tradition by confirming the power of habeas corpus as a “vital instrument for the protection of individual liberty against government power.”97 The Constitution’s Article I Suspension Clause provides that the habeas corpus “shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”98 In 1788, during the New York Ratifying Convention, a resolution declared that the Suspension Clause was aimed at limiting government’s arbitrary power, as well as providing an “affirmative right to judicial inquiry into causes of detention.”99 In 1789, habeas corpus was embraced into federal courts’ purview for expanding an individual’s remedy of challenging executive detention or transfer.100 Today, the Supreme Court continues to adhere to the principle that “habeas provided an effective means to challenge all manners of illegal confinement.”101 In short, the Suspension Clause affirmatively guarantees detainees’ individual rights of combating arbitrary execution detention by resorting to federal courts. The habeas corpus proceeding is an original civil action in a federal court; it is a new suit brought by a criminal defendant to enforce a civil right.102

*Boumediene v. Bush* is a famous example of the application of habeas corpus under the Suspension Clause. Following the attacks on September 11, 2001, the U.S. commenced a war on terror in which it detained hundreds of terrorism suspects and imprisoned them at a detention facility—the U.S. Naval Station in Guantanamo Bay, Cuba—under the Authorization for Use of Military Force (AUMF)103 without criminal charges. In response, detainees at Guantanamo Bay began to file habeas petitions to challenge their status and detention.104 In *Boumediene*, the petitioners were captured in Afghanistan, Bosnia, and Gambia and detained at Guantanamo Bay due to their alleged involvement with al Qaeda or the Taliban.105

The Court ruled that there are at least three relevant factors in determining the reach of the Suspension Clause: “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving

---

96 Slawter, *supra* note 17 at 2494.
97 Id. at 2496 (quoting *Boumediene v. Bush*, 553 U.S. 723, 743 (2008)).
98 U.S. CONST. art. 1, § 9, cl. 2.
99 Slawter, *supra* note 17, at 2496-97 (quoting *Boumediene v. Bush*, 553 U.S. at 744 (citing Resolution of the New York Ratifying Convention (July 26, 1788)).
100 Id.
101 Id. at 2497.
102 Rivera, *supra* note 64, at 136.
103 The Congressional Authorization for Use of Military Force (AUMF) allows the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” of September 11, 2001. Pub.L. 107-40, §§ 1-2, 115 Stat. 224 (Sept. 18, 2001).
105 Id.
the prisoner’s entitlement to the writ.”

Applying the first factor, even if the detainees were presumably enemy combatants, the current process for determining status was inadequate. The Court noted that the detainees had been afforded some process in Combatant Status Review Tribunals (CSRTs) proceedings to determine their status, but, “there ha[d] been no trial by military commission for violations of the laws of war.” Although the detainees were allowed to present “reasonably available” evidence, their “ability to rebut the Government’s evidence against [them was] limited by the circumstances of his confinement and his lack of counsel at this stage.” Further, “although the detainee[s] can seek review of his status determination in the Court of Appeals, that review process cannot cure all defects in the earlier proceedings.” Therefore, the CSRT was not sophisticated adversarial mechanism that would replace judicial review.

As to the second factor, the U.S. government controlled Guantanamo Bay; therefore, “in every practical sense Guantnamo is not abroad; it is within the constant jurisdiction of the United States.” As to the third factor, although it is true that habeas corpus proceedings may “require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks,” money concerns are not dispositive. One of the strongest counter-arguments to the expenditure arguments is that the history manifests that civilian courts and the Armed Forces operate to safeguard individual human rights regardless of “some incremental expenditure of resources.” The Court held in a 5-4 decision, that the petitioners possessed a constitutional authorization to have their detention reviewed by federal courts by habeas petition.

B. Due Process Clause

The Fifth Amendment to the U.S. Constitution states that the federal government may not “deprive any person of life, liberty, or property without due process of law.” The Due Process Clause entitles detainees, both citizens and noncitizens, to procedural due process—

106 Id. at 766.
107 In re Guantnamo Bay Detention Litig., 581 F.Supp.2d 33, 36 (D.D.C. 2008) (defining “enemy combatant” as “an individual who was part of or supporting Taliban or Al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.”).
108 Boumediene, 553 U.S. at 766-67 (Combatant Status Review Tribunals (CSRTs) were developed and tasked with deciding whether Guantnamo detainees were in fact “enemy combatants”—the requisite standard to lawfully detain a person).
109 Boumediene, 553 U.S. at 767.
110 Id.
111 Id.
112 Id.
113 Id. at 769.
114 Id.
115 Id.
116 Id. at 732.
117 U.S. CONST. amend. V.
fundamentally fair judicial proceedings and fundamentally fair administrative proceedings.\footnote{118} The test for determining whether an administrative procedure is constitutionally sufficient is the \textit{Mathews} test, which requires consideration of three distinct factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.\footnote{119}

The fundamental test is to determine whether the administrative procedures are fair and reliable.\footnote{120}

In \textit{Hamdi v. Rumsfeld}, Yaser Esam Hamdi was arrested by the Northern Alliance in Afghanistan and handed over to the United States military.\footnote{121} Hamdi was transferred to a naval brig in Norfolk, Virginia, from Guantanamo Bay, Cuba, after the U.S. government determined he was an “enemy combatant” based on evidence that he had surrendered and given firearms to Northern Alliance forces.\footnote{122} Hamdi was arrested pursuant to AUMF.\footnote{123} Detained without charges filed against him, Hamdi filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241 and challenged the constitutionality of his detention under the Fifth and Fourteenth Amendments to the U.S. Constitution.\footnote{124} For addressing the U.S. Government’s autonomy in domestic affairs and a citizen’s constitutional right not to be deprived of life, liberty, or property without due process of law, the U.S. Supreme Court used the \textit{Mathews} test as a mechanism to balance all of the competing interests from both sides.\footnote{125} Under the \textit{Mathews} test, the Court attempted to balance private and public interests, including “the function involved and the burdens the Government would face in providing greater process.”\footnote{126}

Under the Court’s analysis, both sides (Hamdi and the United States) had substantial interests. The Court noted that Hamdi’s private interest affected by the imprisonment is the “most elemental of liberty interests—the interest in being free from physical detention by one’s own government.”\footnote{127} The Court determined the government’s interests included: 1) “ensuring that those who have in fact fought with the enemy during war do not return to battle against the United States”;\footnote{128} 2) avoiding a distraction resulting from a habeas corpus hearing for “soldiers whose

\footnote{118}{See generally Wang Yang Sung v. McGrath, 339 U.S. 33 (1950).}
\footnote{119}{Mathews v. Eldridge, 424 U.S. 319, 335 (1976).}
\footnote{120}{Id. at 342.}
\footnote{121}{Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).}
\footnote{122}{Id.}
\footnote{123}{Id; AUMF, supra, note 103.}
\footnote{124}{Hamdi v. Rumsfeld, 542 U.S. 507, 511 (2004).}
\footnote{125}{Id. at 529.}
\footnote{126}{Id. (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).}
\footnote{127}{Id. (citing Fouche v. Louisiana, 504 U.S. 71, 80 (1992)).}
\footnote{128}{Id. at 531.}
main mission is to wage war”; and 3) protecting “sensitive secrets of national defense.” The Court, in an 8-1 decision, held that a citizen-detainee must get “a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”

C. Relevant statutes

Under the U.S. Constitution, “[t]he judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.” Therefore, statutes are an equally indispensable source for providing a basis for habeas corpus. There are four main federal statutes that embody such rights: 28 U.S.C. § 2241, which mandates habeas corpus rights generally; 28 U.S.C. § 2243, which emphasizes that petitioners are entitled to relief as a matter of law; 28 U.S.C. § 2254, which mandates habeas corpus rights for state prisoners specifically; 28 U.S.C. § 2255, which mandates habeas corpus rights for federal prisoners specifically. This Article focuses on § 2241 and § 2243, which are applicable to petitioners being requested for extradition.

Section 2241 presents two main requirements for use of habeas corpus: first, the petitioner must be “in custody”; and second, his custody must be “in violation of the Constitution or laws or treaties of the United States.” Because the U.S. Constitution applies to non-citizens in some contexts, this provision suggests that habeas corpus provides a remedy to even non-citizens challenging executive detention.

Section 2243 provides that habeas corpus should be granted as a matter of law, stating that “[a] court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted.” Further, this provision provides that the court must review all of the facts and information anew in making a decision by stating that “[t]he applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.”

IV. THE COMMON LAW CONSTRAINT AND THE CONCERN ABOUT JUDICIAL COMPETENCE

130 Id. at 532.
131 Id. at 533.
132 U.S. Const. art. III, § 2.
139 Boumediene, 553 U.S. at 767.
142 Id.
143 Id.
HAVE NO INFLUENCE ON FEDERAL COURTS’ JURISDICTION TO REVIEW EXTRADITEES’ HABEAS CORPUS PETITIONS

As discussed in Part I, the Third Circuit and the First Circuit held that the rule of non-inquiry bars the federal court’s habeas corpus review.144 This section will address the non-inquiry principal and its related consideration—judicial incompetence on the issue of extradition decisions. It will conclude that the non-inquiry principal has no influence on habeas corpus jurisdiction and the judicial branch of U.S. has competence to review extradition decisions.

A. The Rule of Non-Inquiry Does Not Bar Any Judicial Review on Extradition Decisions Facing CAT Challenge

The origins of the rule of non-inquiry145 can be traced to early Supreme Court cases.146 In Neely v. Henkel, the petitioner was an American citizen who was charged with embezzlement while working as a public employee in Cuba, therefore was requested by Cuba.147 The petitioner challenged the extradition decision by alleging an unfair trial impending in Cuba.148 The court stated:

When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided by treaty stipulation between that country and the United States.149

Thus, the Court denied the petitioner’s habeas claim.150

In Glucksman v. Henkel, the petition was related to the forgery of certain bills, therefore was requested by Russia.151 The petitioner filed a habeas petition.152 The Court noted, in dicta, “[w]e are bound by the existence of an extradition treaty to assume that the trial will be fair.”153 The Court denied the petitioner’s habeas claim.154 The holdings in Neely and Glucksman were

145 This is a common law rule which halts any judicial review on the likely fate of fugitives if extradited to the requesting country even in extremely egregious cases where human rights concerns are truly serious. Hoxha, 465 F.3d at 554.
147 Neely, 180 U.S. at 112-13.
148 Id. at 122-23.
149 Id. at 123.
150 Id. at 125
151 Glucksman, 221 U.S. at 511-12.
152 Id.
153 Id. at 512.
154 Id.
motivated by national sovereignty concerns.\textsuperscript{155} Both cases shifted their attention toward concerns regarding the unfair trials instead of concerns regarding the physical harm to the extraditees.\textsuperscript{156}

However, lower courts have interpreted two cases expansively to mandate non-inquiry into physical harm to the extraditee.\textsuperscript{157}

The non-inquiry principle should not be regarded as a bar to judicial review for three reasons. First, the rule of non-inquiry does not have sufficient power to interfere in extraditees’ substantive rights expressed in FARRA. Although the rule of non-inquiry is a judicially developed rule, the Supreme Court has never adopted the term “rule of non-inquiry,” let alone defined its scope and requirements of application.\textsuperscript{158} Instead, the term evolved in the lower courts, which relied on the Supreme Court’s refusal to review foreign legal systems.\textsuperscript{159} Therefore, there is no constitutional or statutory basis for such a rule to preclude any substantive judicial inquiry into the likely fate of fugitives.

In addition, the rule of non-inquiry is a judge-made rule lacking solid constitutional or statutory foundation. Instead, a habeas corpus petition is not only based on constitutional rights that people should not be tortured, but also based on an affirmative congressional enactment that enforces a treaty obligation.\textsuperscript{160} Finally, petitioners are entitled to judicial inquiry into the circumstance of extradition because the U.S. government has created domestic law, such as FARRA, to implement CAT obligations. Under the principle that a statute is superior to common law rule, FARRA’s creation of habeas relief for fugitives preempts the application of the rule of non-inquiry because administering justice according to the Constitution and laws is an inescapable obligation for courts and all government officials.

Second, judicial review is beneficial for preserving the delicate balance of governance. Initially, “the rule of non-inquiry can be understood as a prudential constraint under the Separation of Powers Doctrine on judges’ ability to overrule the executive branch’s extradition authority.”\textsuperscript{161} However, judicial review also could achieve the goal of balancing executive and judicial power. The executive branch’s authority to extradite is under the scrutiny of the judicial branch;\textsuperscript{162} and this is consistent with other constitutional practices, for example, seizures and searches on extraditees must be reasonable under the Fourth Amendment.\textsuperscript{163} Judicial review prevents the inappropriate concentration of power within a single branch. Furthermore, the judicial review of the executive branch’s extradition decision ensures that the executive’s

\textsuperscript{155} The “sovereign right of nations to prosecute crimes in accordance with their own laws” was a motivating force for the outcomes of these two original cases. Stover, supra note 12, at 331.

\textsuperscript{156} Id.

\textsuperscript{157} See, e.g., Sindona v. Grant, 619 F.2d 167, 174 (2d Cir. 1980) (“the degree of risk to Sindona’s life from extradition is an issue that properly falls within the exclusive purview of the executive branch”); In re Extradition of Manzi, 888 F.2d 204, 206 (1st Cir. 1989) (“Manzi’s request for a deposition and an evidentiary hearing concerning his safety in returning to Italy runs afoul of the well-established rule of ‘non-inquiry’ in these matters.”).

\textsuperscript{158} Trinidad y Garcia v. Thomas, 683 F.3d 952, 992 (9th Cir. 2012).

\textsuperscript{159} Id.

\textsuperscript{160} Id.

\textsuperscript{161} Slawter, supra note 17 at 2529 (citing Brief of Legal Historians and Habeas Corpus Experts as Amici Curiae in Support of Petitioner at 3, Trinidad y Garcia v. Thomas, 683 F.3d 952 (9th Cir. 2012).

\textsuperscript{162} See generally Trinidad y Garcia v. Thomas, 683 F.3d 952 (9th Cir. 2012).

\textsuperscript{163} Fernandez v. Cal., 134 S. Ct. 1126, 1131-32 (2014).
discretion to extradite is exercised within the parameters of the law and directives established by Congress.\textsuperscript{164} In essence, habeas corpus was born to safeguard people’s freedom from arbitrary and unlawful government action through mechanisms of checks and balances. Third, the historical underpinnings of extradition law imply that the U.S. regards courts as an important check against executive overreach in the extradition context. In United States \textit{v. Robins}, an American citizen, Jonathan Robbins, committed murder in 1794 pursuant to the Jay Treaty, therefore was requested by the United Kingdom.\textsuperscript{165} The court decided not to get involved in the extradition decision because extradition is “a matter for the executive interference” and the treaty was silent about inviting judicial review.\textsuperscript{166} Robbins was ultimately hanged by the United Kingdom authority, provoking popular indignation in U.S. society.\textsuperscript{167} The national demand for judicial involvement spurred the progress of signing the new treaty.\textsuperscript{168} In 1842, in the new treaty, the government made sure the treaty stipulation invited judicial involvement in extradition cases.\textsuperscript{169} Six years later, Congress confirmed judicial relief for extraditees in the form of a statute.\textsuperscript{170}

\textbf{B. The Judicial Branch Has Sufficient Competence to Review Extradition Decisions Facing CAT Challenges}

First, the judicial branch is competent to review extradition decisions because the judicial branch plays a vital role in the preliminary stage of the extradition decision-making process. Once the fugitive is in custody, a district court judge or magistrate judge conducts a hearing to determine five issues stated above.\textsuperscript{171} Although determining extraditability and identifying probable cause is preposition procedure to determining the possibility of torture and fairness of another country’s criminal justice system, such roles show that the judicial branch has relevant sources and abilities to apply to extradition decisions. Second, the judicial branch has sufficient competency to decide the potential for torture following extradition because judicial judges use the fundamentally same standard as the standard used by the administrative judges during immigration proceedings. In considering torture claims in the context of removal cases, immigration judges use the same “more likely than not” standard currently used by the State Department in the extradition context.\textsuperscript{172} Additionally, immigration

\textsuperscript{165} United States \textit{v.} Robins, 27 F. Cas. 825, 825-26 (D.S.C. 1799).
\textsuperscript{166} \textit{Id.} at 833.
\textsuperscript{167} Stover, \textit{supra} note 12, at 329.
\textsuperscript{168} \textit{Id.}
\textsuperscript{169} \textit{Id.} at 329-330.
\textsuperscript{170} \textit{Id.} at 330.
\textsuperscript{171} (1) There is “probable cause to believe that the fugitive has violated one or more of the criminal laws of the country requesting extradition.” Mironescu \textit{v.} Costner, 480 F.3d 664, 665 (4th Cir. 2007). (2) The alleged conduct constitute “dule criminality”—the crime is considered as serious in both the United States and requesting countries. U.S. \textit{v.} Kin-Hong, 110 F.3d 103, 114 (1st Cir. 1997). (3) The fugitive is the subject of the extradition request. \textit{See} Peroff \textit{v.} Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976). (4) There an extradition treaty in operation exists between the United States and the requesting country. \textit{Lui Kin Hong}, 110 F.3d at 114. (5) The offenses underlying the request are extraditable according to the treaty. Prasoprat \textit{v.} Benov, 421 F.3d 1009, 1014 (9th Cir. 2005).
\textsuperscript{172} 8 C.F.R. § 208.16 (c)(2).
judges consider evidence of “past torture inflicted upon the applicant,” “[e]vidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured,” and “[e]vidence of gross, flagrant or mass violations of human rights within the country of removal.”173 Evidence to be considered by judicial courts is identical to evidence to be considered by the administrative courts in the extradition context. Although the administrative court system and the judicial system are two separate operations, yet, administrative decisions are reviewable by federal judges.174 In sum, federal judges, as neutral decision-makers, are competent to deal with torture claims.

Third, the judicial branch is qualified to review other countries’ legal systems under due process considerations. In Zivotofsky, the Court held that the judicial branch was not suitable to deal with international affairs because evaluating international relationships with another country and determining the statute of Jerusalem were executive in nature.175 In the context of extradition decisions, however, the judicial branch is qualified to assess the fairness and competence of other criminal justice systems for protecting individual rights because similar assessment is part of their daily work. CAT obligates the U.S. to review other legal systems by stating that “[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.”176

V. BASED ON THE SUSPENSION CLAUSE, FARRA, AND REAL ID, FEDERAL COURTS HAVE HABEAS CORPUS JURISDICTION TO REVIEW THE SECRETARY OF STATE’S EXTRADITION DECISIONS IN THE CONTEXT OF EXTRADITEES WHO FILE CAT CHALLENGES

As discussed in Part I, the circuit split between the Ninth Circuit and the Fourth Circuit hinges on the issue of whether FARRA and REAL ID stripped federal courts of habeas corpus jurisdiction over CAT claims. This Part will argue that FARRA and REAL ID do not deprive the federal courts of habeas corpus jurisdiction under the Suspension Clause and by applying strict statutory interpretation to FARRA and REAL ID.

A. The Suspension Clause Authorizes Habeas Corpus as a Constitutional Remedy for Extraditees Who File CAT Claims

The Suspension Clause is a constitutional mandate for collateral review of extradition decisions.177 An analogy to Boumediene v. Bush proves that the Suspension Clause authorizes the federal courts’ jurisdiction to hear habeas claims challenging the Secretary of State’s extradition decision that might bring an extraditee into torture.

Boumediene’s three-factor legal framework suggests that the judicial system’s jurisdiction to review habeas corpus petitions in the context of extradition is justified under the Suspension Clause.178 According to the first factor, the status of a detainee (citizenship), unlike

173 8 C.F.R. § 208.16.
174 See Salvielo-Fernandez v. Gonzales, 455 F.3d 1063 (9th Cir. 2006).
176 UNCAT article 14 (emphasis added).
177 Rivera, supra note 129, at 813.
178 “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the
that of enemy combatants, is made obvious by checking relevant document like birth certificates. The U.S. government bears the burden to prove a detainee’s status by collecting and presenting all of the substantial supporting documents.179 The process for determining the status of a detainee is conducted by a district court judge or magistrate judge180 who has sufficient competence to deal with this paperwork. Suspension Clause protection extends to non-U.S. citizens,181 so the citizenship of a detainee by no means bars judicial review. Under the second factor, the location of the detainee for extradition is usually under the U.S. government’s control;182 therefore, this factor does not create a bar for application of the Suspension Clause. With respect to the third factor in Boumediene, expenditure of funds by the government and any other kind of expenditure of resources are not persuasive reasons for denying judicial review.183

B. FARRA and REAL ID Did Not Strip Federal Courts of Habeas Corpus Jurisdiction over CAT Claims

FARRA and REAL ID do not strip federal courts of habeas corpus jurisdiction under the “clear statement” interpretation. Section 2241 expresses that a statute must contain a particularly clear statement to be construed as intending to repeal habeas jurisdiction.184 Even if a sufficiently clear statement exists, courts still need to determine whether there is a fairly possible alternative interpretation of the statute when an otherwise acceptable construction of a statute would raise serious constitutional problem before concluding that the law actually repealed habeas relief.185 Section V.B of this Article will argue against the notion that FARRA and REAL ID deprive federal courts of habeas corpus jurisdiction by analyzing the contents of these two statutes. Traditional statute-construing tools include interpreting the plain language of a statute and inquiring into the congressional intent behind the statute by reviewing legislative history.186 Further, statutes must be constitutional to stay in force. Where there is a constitutional or unconstitutional interpretation of an ambiguous term, the statute should be interpreted in a way that is consistent with the Constitution.187

As an implementing regulation, FARRA adopted the goals of CAT without stripping habeas corpus jurisdiction. Congress passed FARRA to implement U.S. obligations under CAT by domestic law.188 The Act provides, in part:


181 Boumediene, 553 U.S. at 757 (adopting “the doctrine of territorial incorporation” which means that the place of petitioners’ confinement instead of petitioners’ citizenship determine the application of Suspension Clause).
182 See generally Mironescu, 480 F.3d at 667.
183 Id.; Boumediene 553 U.S. at 769.
187 U.S. CONST. art. VI, cl. 2.
188 FARRA, supra note 14, at § 1242 (d).
(d) Review and construction.—Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).189

First, the strained statutory interpretation of FARRA does not support the assertion that FARRA repeal habeas corpus jurisdiction in extradition proceeding. Under the interpretation rule made at a series of U.S. Supreme Court cases, statutory language and congressional intent both should be taken into consideration. A primary rule of statutory interpretation is to interpret the plain language of a statute first.190 In inquiring into congressional intent, a court may review “the legislative history and other traditional aids of statutory interpretation.”191 Initially, FARFA does not refer specifically to § 2241 nor does it contain the word “habeas,” and such absence of any reference strongly suggests that Congress did not intend to repeal habeas jurisdiction.192 Further, while the additional language “consider or” may preclude some additional forms of review, it is not clear that these words should be construed to cover habeas review. Finally, the ambiguous reference fails to show that Congress meant to preclude habeas review. The reason is that “judicial review” entails markedly different procedures, for example, there is habeas review in the extradition on a magistrate judge’s certification of extraditability.193

Second, the legislative history of FARRA194 demonstrates that Congress intended to eradicate and prevent all forms of torture against human beings worldwide. Extraditing fugitives to a foreign country filled with cruel torture and other inhumane treatment fundamentally violates

---

189 Id.
190 Negusie v. Holder, 555 U.S. 511, 542 (2009) (“As with all statutory interpretation questions, construction of the [Immigration and Nationality Act’s] persecutors bar must begin with the plain language of the statute.”).
192 The court in Saint Fort v. Ashcroft, 329 F.3d 191 (1st Cir. 2003) stated that [H]ere, there is no statement of congressional intent to preclude review of constitutional claims. There is the absence of explicit language by Congress repealing § 2241 jurisdiction. There is also implied congressional knowledge of judicial precedents interpreting similar provisions; the distinction between “judicial review” and “habeas corpus” in the immigration context; the weight of historical precedent supporting continued habeas review in immigration cases; the problem of lack of an alternative forum; and the importance of avoiding a construction of FARRA that would give rise to grave constitutional concerns.
193 Id. at 201. The court in Wang v. Ashcroft, 320 F.3d 130, 142 (2d Cir. 2003) stated that [B]ecause, under the test set forth by the Supreme Court in St. Cyr, FARRA does not speak with sufficient clarity to exclude UNCAT claims from § 2241 jurisdiction, we are able to avoid the serious constitutional concerns that would have arisen if FARRA had explicitly excluded UNCAT claims from § 2241. In sum, federal courts have jurisdiction under § 2241 to consider claims arising under UNCAT, as implemented by FARRA and the regulations promulgated thereunder.
Congress’ intent.\footnote{H.R.1757, 105th Cong. (2nd Sess.1998).} The House Committee Report states “[t]he provision agreed to by the conferees does not permit for judicial review of the regulations or of most claims under the Convention.”\footnote{H. R. Rep. No. 105-432.} Nevertheless, it did not explicitly state that habeas corpus should be eliminated in the context of extraditions. In a word, the ambiguous language of FARRA does not satisfy the “clear statement” requirement for repealing habeas review.

The REAL ID Act is the other implementing regulation with the purpose of ensuring that petitions for review were to be the “sole and exclusive means” by which courts can hear CAT claims.\footnote{REAL ID, supra note 15.} The Act states, in part:

Notwithstanding any other provision of law, . . . or any other habeas corpus provision, . . . a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of any cause or claim under the [CAT].\footnote{Id.}

There are two reasons here showing that this statute has no influence on an extraditee’s habeas claim: First, the statute’s legislative history indicates that Congress aimed to reduce the judicial relief in the context of removal orders for inadmissible, arriving aliens and aliens who commit crimes in the United States. There was no congressional intent to affect extraditees’ substantive rights under FARRA.\footnote{H.R. Rep. No. 109-72, at 176 (2005) (Conf. Rep.); Trinidad y Garcia v. Thomas, 683 F.3d 952, 958 (9th Cir. 2012) (“the REAL-ID Act’s jurisdiction-stripping provisions do not remove federal habeas jurisdiction over petitions that do not directly challenge a final order of removal”); Nadarajah v. Gonzales, 443 F.3d 1069, 1076 (9th Cir. 2006).} The House Committee Report also explicitly states that Congress did not intend to “preclude habeas review over challenges to detention that are independent of challenges to removal orders.”\footnote{H.R. Rep. No. 109-72, at 122, reprinted in 2005 U.S.C.C.A.N. 240, 300, available at perma.cc/GTT6-VP3Z.} The legislation was intended to “eliminate habeas review only over challenges to removal orders.”\footnote{Id.; accord Pub. L. No. 109-13, Div. B, Title I, § 106(b), 119 Stat. 231, 311 (2005) (codified as a note to § 1252) (“amendments made by subsection (a) . . . shall apply to cases in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after the date of the enactment of this division”).}

Second, the categorical language of “a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations [CAT]”\footnote{REAL ID, supra note 15.} seems to satisfy the “clear statement” requirement. However, given the constraints of the Suspension Clause, “there is a strong presumption against construing statutes to repeal habeas jurisdiction.”\footnote{Trinidad y Garcia v. Thomas, 683 F.3d 952, 959 (9th Cir. 2012) (Thomas, J., concurring) (citations omitted), cert. denied, 133 S.Ct. 845 (2013). Judge Tallman similarly argued that: “Given St. Cyr, I think it [is] plain that Trinidad would historically have been entitled to habeas review of his claim to the extent he argues that the Convention or the FARR Act bind the authority of the Executive to extradite him. . . .” Id. at 971 (Tallman, J., dissenting).} When such interpretation raises a constitutional question,
the general rule of statutory construction would require the interpretation to be consistent with the Suspension Clause which protects the substantive right of detainees to combat wrongful restraints upon their liberty via habeas claim.\textsuperscript{204}

VI. THE DUE PROCESS ANALYSIS LAID THE SUBSTANTIVE GROUNDWORK FOR HABEAS CORPUS JURISDICTION FOR EXTRADITEES WHO FILE CAT CLAIMS BY FRAMING IT AS A CONSTITUTIONAL RIGHT UNDER THE FIFTH AMENDMENT

Moving beyond the arguments in Part IV and Part V that negate the deprivation on habeas corpus review based on the non-injury principal, judicial incompetence, FARRA, and REAL ID, this Part will bring in a compelling justification for habeas corpus review—the Due Process Clause. Extraditees’ due process right under the Fifth Amendment opens the door to habeas corpus review by challenging the U.S. government’s violation of CAT obligation. As discussed in Section III.A, the test for determining the procedural due process issue has three prongs.\textsuperscript{205} The analysis of all three prongs proves that constitutional collateral review on extradition decisions involving potential CAT violations is necessary.

A. The private interests of extraditees who file CAT claims affected by extradition are most fundamental liberty interests

Extradition can result in grievous consequences, which makes the protection of petitioners’ liberty interests essential. A fugitive may face a terrible fate; he could be subjected to terrible torture and face an unfair criminal trial, or he could suffer endless imprisonment without sufficient remedy.\textsuperscript{206} Additionally, petitioners entering into foreign criminal justice systems face foreseeable consequences such as losing connections to family and friends, losing jobs, and losing property.\textsuperscript{207}

B. The risk of an erroneous deprivation of personal interests is high

Currently, the possibility for due process violations in extradition hearings is undoubtedly high because there is no guarantee of a fair procedure nor a neutral decision-maker, each of which is required to ensure due process of law.\textsuperscript{208} First, due process protection at extradition hearings is inadequate because the extradition hearing is an executive and summary process.\textsuperscript{209} Extraditees are not permitted to contradict the government’s evidence nor cross-

\textsuperscript{204} Art. I, § 9, cl. 2.

\textsuperscript{205} “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

\textsuperscript{206} See generally Admissibility of Evidence Procured by Torture or Alleged Torture – Global Cases, 16 A.L.R. Fed. 2d 257.

\textsuperscript{207} Rivera, supra note 64, at 149.

\textsuperscript{208} The whole extradition process is described in Section II.B.

\textsuperscript{209} See supra Part II.B.
examine the government’s witnesses. They are only allowed to introduce explanatory evidence to frustrate the government’s showing of probable cause. It is granted that the extradition hearing, unlike criminal proceeding, does not determine the merits of petitioners’ CAT claims, so that certain remedies derived from due process rights are not applicable, such as Exclusionary Rule. However, the extradition hearing, by limiting petitioners’ scope of burden, stick its mines that will destroy petitioners’ due process right subsequently. Further, the collateral review on magistrate judges’ decisions is extremely limited. Common issues considered by federal courts are whether the judge had jurisdiction; whether the charged offense was within the scope of the applicable treaty; and whether probable cause was properly established.

Second, State Department officers are not likely to be neutral, qualified decision-makers with respect to torture and extradition determinations. The policy-oriented standard is an elusive test without quantitative criteria. Even if making an extradition decision is an internal affair for the executive branch, the State Department has no executive regulations establishing clear procedural guidelines monitoring governmental action.

Third, executive assurances weaken due process protections by excluding judicial review in extradition and explicitly derogating treaty obligation as intangible and unreliable “government promise[s].” It is highly doubtful that executive assurances, as a means of implementation, can serve CAT’s grand purpose given their opaque nature and difficulty of operation.

C. Governmental Interests in the Context of Ordinary Extradition Are Not As Compelling Making Constitutional Review Proper

The analogy to *Hamdi v. Rumsfeld* explains that governmental interests in the context of executive extradition are not high enough to bar constitutional collateral review. Governmental interests in executive detention regarding extradition are not as compelling as in the context of military detention. Military detentions usually address anti-terrorism concerns whereas a regular extradition is motivated only by ordinary concerns about national safety: excluding criminals and any danger they pose from the U.S. In addition, the government has an interest in following treaty obligations to extradite the criminal to the requesting country. Yet the requirements of extradition

---

210 Eain v. Wilkes, 641 F.2d 504, 511 (7th Cir. 1981).
211 Barapind v. Enomoto, 400 F.3d 744, 749 (9th Cir. 2005).
212 See Prushinowski v. Samples, 734 F.2d 1016, 1018 (4th Cir. 1984); See Fernandez v. Phillips, 268 U.S. 311, 312 (1925); Skaftouros v. United States, 667 F.3d 144, 157 (2d Cir. 2011); Ntakirutimana v. Reno, 184 F.3d 419, 423 (5th Cir. 1999).
have to be met before the Secretary of State makes a determination. Further, conserving scarce fiscal and administrative resources is a factor that must be weighed. However, the cost to ensuring that the government acts in accordance with international obligations is unlikely unreasonably high, as the U.S. Senate would elaborately evaluate the burden produced before ratifying the treaty.

In sum, given the potential deterioration of fairness and individual human rights under the current extradition proceeding, and because governmental interests are not very compelling, a wider scope of review including habeas corpus proceedings is necessary and proper.

VII. HABEAS CORPUS REVIEW IS THE MOST APPROPRIATE COLLATERAL REVIEW ON EXTRADITION DECISIONS FOR ADDRESSING DEFECTS THAT EXIST IN CURRENT EXTRADITION PROCEEDING

In modern jurisprudence, habeas corpus review is treated as a civil remedy informed by equitable principles. Courts describe habeas corpus as governed by “a complex and evolving body of equitable principles informed and controlled by historical usage . . . and judicial decisions.” Further, one of habeas corpus’ essential characteristics is flexibility, which is imperative for eradicating fundamental injustice. More and more courts pursue justice regardless of any obstacles. For example, in 1977, the U.S. Supreme Court has pronounced itself “willing to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged.”

Therefore, habeas corpus is a reasonable solution for correcting the miscarriages of justice in extradition proceedings.

VIII. CONCLUSION

Federal courts have habeas corpus jurisdiction to review the Secretary of State’s extradition decisions. The constitutional, statutory, and common law justifications are the three basic building blocks of that jurisdiction. The Suspension Clause affirmatively grants access to the detainees to seek a writ of habeas corpus, which allows federal courts’ judicial review of the Secretary of State’s extradition decision to examine the legality of executive detention. The Due Process Clause entitles detainees to fundamentally fair administrative proceedings. The relevant statutes make a writ of habeas corpus available to all persons held in custody and in violation of

---

216 Mironescu v. Costner, 480 F.3d 664, 666 (4th Cir. 2007) (citing Sidali v. INS, 107 F.3d 191, 195 n.7 (3d Cir. 1997)).
218 Fay v. Noia, 372 U.S. 391, 423-24 (1963) (“The traditional characterization of the writ of habeas corpus as an original . . . civil remedy for the enforcement of the right to personal liberty, rather than as a stage of the state criminal proceedings or as an appeal therefrom, emphasizes the independence of the federal habeas proceeding from what has gone before.”), overruled by Keeney v. Tamayo-Reyes, 504 U.S. 1, 5-6 (1992).
the Constitution or laws or treaties of the United States. In sum, the common law constrains and concerns about judicial competence have no influence on federal courts’ jurisdiction to review an extraditee’s habeas corpus petition. Furthermore, the authorization from the Suspension Clause extends to federal courts’ jurisdiction to review an extraditee’s habeas corpus petition challenging the U.S.’s violation of CAT obligations; FARRA and REAL ID in no sense negate federal courts’ habeas corpus jurisdiction. Finally, the guarantee for an extraditee’s due process right makes federal courts’ habeas corpus review indispensable.