

# HABEAS CORPUS, DUE PROCESS, AND EXTRADITION

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## INTRODUCTION

[O]nce established, this jurisdiction obviously would grow with each expansion of the substantive grounds for habeas corpus.<sup>1</sup>

It is difficult to dispute the central claim of Professor Brandon Garrett’s article, *Habeas Corpus and Due Process*,<sup>2</sup> that the Supreme Court’s 2008 decision in *Boumediene v. Bush*<sup>3</sup> “can and should provide a theory of the nature and structure of habeas corpus.”<sup>4</sup> After all, as Professor Garrett cogently explains, *Boumediene* was not only the first case in which the Court held that an Act of Congress violated the Constitution’s Suspension Clause;<sup>5</sup> it was the first time the Court ever gave substantive content to the Suspension Clause *at all*.<sup>6</sup>

To that end, Justice Kennedy’s opinion for the Court did not just hold that the Suspension Clause “affirmatively guarantees access to the courts to seek the writ of habeas corpus (or an adequate substitute) in order to test the legality of executive detention”;<sup>7</sup> it

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<sup>1</sup> *Brown v. Allen*, 344 U.S. 443, 533–34 (1953) (Jackson, J., concurring in the result).

<sup>2</sup> 98 CORNELL L. REV. 47 (2012).

<sup>3</sup> 553 U.S. 723 (2008).

<sup>4</sup> Garrett, *supra* note 2, at 54.

<sup>5</sup> U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”); see Garrett, *supra* note 2, at 79–92.

<sup>6</sup> See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 301 n.13 (2001) (“The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely.”).

<sup>7</sup> Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The Boumediene*

further concluded that the Clause “entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law.”<sup>8</sup> As importantly, the Court reached these conclusions while sidestepping the existence (let alone scope) of the detainees’ due process rights,<sup>9</sup> thereby confirming, in Professor Garrett’s words, that “the Suspension Clause can ensure that habeas corpus begins where due process ends”<sup>10</sup> and “serves a powerful, independent, and unappreciated role *standing alone*.”<sup>11</sup> As he concludes:

The Suspension Clause demands that habeas corpus remain in full force where there was no adequate prior judicial process, particularly in the context of indefinite detentions. This places the judiciary in the uncomfortable position of reviewing broad congressional authorizations for detentions and changing executive procedures in factually and legally contested detainee petitions. Thrust into that difficult role, lower courts have often relied upon inapposite sources, hewing to some vision of a bare constitutional minimum rather than providing a meaningful habeas process.<sup>12</sup>

Put another way, lower courts since *Boumediene* have missed perhaps its most important lesson: the “meaningful opportunity” the Suspension Clause requires courts to provide to a detainee to challenge his detention cannot be judged solely based upon due-process standards.<sup>13</sup> After all, although most post-conviction habeas petitions seek to challenge the legality of detention *by* contesting the fairness of the underlying criminal proceedings, habeas in the executive-detention context is about the legality of detention “simpliciter,”<sup>14</sup> a context in which fairness is a necessary, but not necessarily sufficient, condition.<sup>15</sup>

On this point, I have no quibble with Professor Garrett’s analysis whatsoever. Nor could I; some of my own prior scholarship has

*Decision*, 2008 SUP. CT. REV. 1, 1.

<sup>8</sup> *Boumediene*, 553 U.S. at 779 (quoting *St. Cyr*, 533 U.S. at 302).

<sup>9</sup> *See id.* at 785 (“[W]e make no judgment whether the CSRTs, as currently constituted, satisfy due process standards . . .”); *see also* Stephen I. Vladeck, *Insular Thinking About Habeas*, 97 IOWA L. REV. BULL. 16, 18–19 (2012).

<sup>10</sup> Garrett, *supra* note 2, at 47.

<sup>11</sup> *Id.* at 126 (emphasis added).

<sup>12</sup> *Id.* at 124.

<sup>13</sup> *See, e.g., Boumediene*, 553 U.S. at 785 (“Even if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry . . . . Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant.”).

<sup>14</sup> *See Fay v. Noia*, 372 U.S. 391, 430 (1963) (“The jurisdictional prerequisite is not the judgment of a state court but detention *simpliciter*.”).

<sup>15</sup> *See, e.g.,* Stephen I. Vladeck, *Access to Counsel, Res Judicata, and the Future of Habeas at Guantanamo*, 161 U. PA. L. REV. PENNUMBRA 78, 79–81 (2012).

offered less coherent variations on the same theme,<sup>16</sup> and there is exceedingly little daylight between Professor Garrett's reading of *Boumediene* (or of the D.C. Circuit's subsequent jurisprudence) and my own.<sup>17</sup> If anything, Professor Garrett's sweep may be too narrow, insofar as his focus is solely on how the Suspension Clause and the Due Process Clause independently affect the substance of habeas review. As recent developments suggest, there is also much more to say about the extent to which the Suspension Clause requires *pre-review* process (such as access to counsel) in order to guarantee detainees the meaningful opportunity for such review that *Boumediene* holds it to require.<sup>18</sup>

Rather than focus my response on an issue Professor Garrett did not address, however, my goal in the short essay that follows is to suggest how his thesis should reorient one of the bodies of jurisprudence his article *does* discuss, albeit briefly: extradition. In particular, I use a recent decision by a fractured en banc panel of the Ninth Circuit—*Trinidad y Garcia v. Thomas*<sup>19</sup>—to demonstrate how courts are making the precise error Professor Garrett laments: assuming even in executive-detention cases that the Suspension Clause requires nothing more than minimal judicial *process*, and holding that, once due process is satisfied, the detention is per se lawful. If *Boumediene* is to be taken at face value, then courts in such cases should take far more seriously independent substantive challenges to the legality of detention regardless of the rigor of the underlying process—including, in *Trinidad y Garcia*, the claim that the detainee reasonably fears torture if extradited.

## I

### TRINIDAD Y GARCIA: THE BACKGROUND

In 2004, at the behest of the Republic of the Philippines, the United States government commenced extradition proceedings against Hedelito Trinidad y Garcia, a citizen of the Philippines, for his connection with an alleged kidnapping conspiracy in the Philippines.<sup>20</sup> After a federal magistrate judge approved the

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<sup>16</sup> See, e.g., Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 945 (2011) (reviewing PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (2010)).

<sup>17</sup> See, e.g., Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1454–55 (2011).

<sup>18</sup> See *In re Guantanamo Bay Detainee Continued Access to Counsel*, No. 04-1254, 2012 WL 4039707, at \*18 (D.D.C. Sept. 6, 2012) (holding that, insofar as the Suspension Clause requires access to courts for the Guantánamo detainees, it necessarily confers a right of access to *counsel* for the purpose of accessing the courts).

<sup>19</sup> 683 F.3d 952 (9th Cir. 2012) (en banc) (per curiam), *cert. denied*, No. 12-6615, 2013 WL 57582 (U.S. Jan. 7, 2013).

<sup>20</sup> Except where otherwise noted, the facts are taken from the district court's

extradition request, Trinidad filed a habeas petition, arguing both that the evidence had been insufficient to support a finding of extraditability, and that, in any event, he credibly feared torture if extradited, and so the Due Process Clause of the Fifth Amendment, along with the United Nations Convention Against Torture (CAT)<sup>21</sup>—as implemented by Congress in § 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA)<sup>22</sup>—provided independent legal bases for relief from extradition. The government did not contest Trinidad’s claim on the merits, but instead argued that the district court lacked jurisdiction to reach the merits because of the REAL ID Act of 2005, which added new 8 U.S.C. § 1252(a)(4):

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment . . . .<sup>23</sup>

Thus, because Trinidad was not seeking to invoke CAT in a petition for review in an immigration case, the government argued that REAL ID divested the courts of jurisdiction to reach his habeas petition.

Without reaching the merits of Trinidad’s torture claim, the district court granted his habeas petition in November 2009.<sup>24</sup> Specifically, Judge Morrow ruled that a prior Ninth Circuit decision conclusively settled the jurisdictional issue,<sup>25</sup> and that, because the government had failed to provide any evidence demonstrating that Trinidad’s extradition complied with FARRA, the Secretary of State’s action in issuing a warrant for Trinidad’s surrender was arbitrary and capricious under the Administrative Procedure Act; thus, Trinidad’s

decision granting Trinidad’s habeas petition, *see Garcia v. Benov*, No. 08-07719, 2009 WL 4250694, at \*1–3 (C.D. Cal. Nov. 17, 2009), and Trinidad’s petition for certiorari, *see Petition for Writ of Certiorari* at 4–10, *Trinidad y Garcia v. Thomas*, No. 12-6615, 2013 WL 57582 (U.S. Jan. 7, 2013).

<sup>21</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter *Convention Against Torture*].

<sup>22</sup> Pub. L. No. 105-277, div. G, § 2242, 112 Stat. 2681-761, 2681-822 (codified at 8 U.S.C. § 1231 note).

<sup>23</sup> REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 106(a)(1)(B), 119 Stat. 231, 310 (codified at 8 U.S.C. § 1252(a)(4)).

<sup>24</sup> *See Garcia*, 2009 WL 4250694 at \*1; *see also Garcia v. Benov*, 715 F. Supp. 2d 974, 977 (C.D. Cal. 2009) (adopting the magistrate judge’s report and recommendation and denying the government’s motion to dismiss on the jurisdictional issue).

<sup>25</sup> *See Garcia*, 2009 WL 4250694, at \*3–4 (“In rejecting Respondent’s jurisdictional challenge, this court has relied on and continues to rely on its reading of the holding in *Cornejo-Barreto I* and its understanding that this holding remains the law of this circuit and is binding on this court.”).

detention was unlawful.<sup>26</sup> Nine months later, a three-judge panel of the Ninth Circuit affirmed the district court in its entirety in an unpublished disposition.<sup>27</sup> Arguing that § 1252(a)(4) overruled the Ninth Circuit precedent on which the district court and three-judge panel had relied, the government successfully petitioned for rehearing en banc.<sup>28</sup>

In June 2012, the en banc panel handed down its decision, issuing a terse three-page per curiam opinion vacating and remanding the district court decision, followed by fifty-nine pages of concurrences and dissents.<sup>29</sup> For what appears to be a 10-1 majority,<sup>30</sup> the per curiam opinion held that § 1252(a)(4) does not divest the federal courts of habeas jurisdiction in extradition cases, reasoning that neither the REAL ID Act nor FARRA itself contained the “particularly clear statement” that the Supreme Court had required in *St. Cyr* to find that Congress had withdrawn all habeas jurisdiction.<sup>31</sup>

As for the scope of the review that habeas courts should undertake in extradition cases, the per curiam held, apparently for a three-judge plurality,<sup>32</sup> that “[t]he process due here is that prescribed by the statute and implementing regulation: The Secretary must consider an extraditee’s torture claim and find it not ‘more likely than not’ that the extraditee will face torture before extradition can occur.”<sup>33</sup> But once the Secretary *had* made such a finding, the per curiam opinion concluded that judicial review was at its end—that habeas in extradition cases extends only to ensuring that the detainee receives the process to which he is due, i.e., that the Secretary complied with her procedural obligations.<sup>34</sup> Thus, the court ordered a remand to the district court to require such a finding, but stressed

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<sup>26</sup> See *id.* at \*5.

<sup>27</sup> *Trinidad y Garcia v. Benov*, 395 F. App’x 329, 332 (9th Cir. 2010) (unpublished).

<sup>28</sup> *Garcia v. Benov*, 636 F.3d 1174, 1175 (9th Cir. 2011) (mem.).

<sup>29</sup> See *Trinidad y Garcia v. Benov*, 683 F.3d 952 (9th Cir. 2012) (en banc) (per curiam), *cert. denied*, No. 12-6615, 2013 WL 57582 (U.S. Jan. 7, 2013).

<sup>30</sup> Only Chief Judge Kozinski disagreed with the jurisdictional holding. See *id.* at 1009–15 (Kozinski, C.J., dissenting); see also *id.* at 989 n.4 (Berzon, J., concurring in part and dissenting in part).

<sup>31</sup> See *id.* at 956 (majority opinion).

<sup>32</sup> Of the ten judges who voted in favor of jurisdiction, see *supra* note 29 and accompanying text, four argued for even *less* review than the per curiam opinion, see *id.* at 963–84 (Tallman, J., dissenting), and three argued for more, see *id.* at 997–1002 (Berzon, J., concurring in part and dissenting in part); *id.* at 1002–09 (Pregerson, J., concurring in part and dissenting in part), leaving Judges Thomas, Graber, and Wardlaw as the three judges who appeared to support the per curiam opinion’s conclusion as to the scope of review. See also *id.* at 960–62 (Thomas, J., concurring).

<sup>33</sup> *Id.* at 957 (plurality opinion) (citing 22 C.F.R. § 95.2).

<sup>34</sup> See *id.* (“An extraditee thus possesses a narrow liberty interest: that the Secretary comply with her statutory and regulatory obligations.”).

that, once such a declaration is filed, “the court’s inquiry shall have reached its end and Trinidad y Garcia’s liberty interest shall be fully vindicated.”<sup>35</sup>

As the five different opinions concurring in and dissenting from parts of the en banc Ninth Circuit’s result in *Trinidad y Garcia* indicate, exactly what existing statutes and the Constitution require with respect to habeas review in extradition cases is hardly clear. Thus, in the remainder of this response, I turn to which of the competing opinions in *Trinidad y Garcia*, based upon Professor Garrett’s (and my own) reading of *Boumediene*, had the better of the argument.

## II

### *TRINIDAD Y GARCIA*: JURISDICTION

Although the en banc Ninth Circuit’s jurisdictional analysis in *Trinidad y Garcia* rested on statutory interpretation,<sup>36</sup> there is a compelling case to be made that reading the relevant statutes to foreclose review would not only have *raised* a serious constitutional question (thereby justifying the Ninth Circuit’s invocation of the constitutional avoidance canon), but, per *Boumediene*, would have led to the conclusion that Congress violated the Suspension Clause.

This argument unpacks as follows: in cases in which it applies (as it unquestionably does to the detention of non-citizens lawfully present in the United States at the time of their arrest, such as Trinidad),<sup>37</sup> *Boumediene* holds that the Suspension Clause requires the existence of an adequate legal remedy, habeas or otherwise, through which a detainee may raise non-frivolous challenges to the legality of his detention.<sup>38</sup> Thus, before reaching the scope of review that the Suspension Clause requires, the threshold point is that it requires access to a judicial remedy from the start.<sup>39</sup>

In the context of extradition cases, the only alternative to habeas is the extradition proceeding itself, but those proceedings determine

<sup>35</sup> *Id.*

<sup>36</sup> See *supra* notes 30–31 and accompanying text.

<sup>37</sup> To put the matter another way, detention pending extradition is another form of executive detention, since it is detention *not* pursuant to a criminal conviction, but rather in contemplation of transfer to a foreign jurisdiction (regardless of whether the transfer is for the purpose of criminal trial or not). As in *Boumediene*, detention pending extradition is “[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court,” in which “the need for collateral review is *most pressing*.” *Boumediene v. Bush*, 553 U.S. 723, 783 (2008) (emphasis added); see also *id.* (“In this context the need for habeas corpus is more urgent.”).

<sup>38</sup> See *supra* text accompanying note 7.

<sup>39</sup> See Stephen I. Vladeck, *The Riddle of the One-Way Ratchet: Habeas Corpus and the District of Columbia*, 12 GREEN BAG 2D 71, 78–82 (2008) (providing further elaboration upon the remedy-requirement aspect of *Boumediene*).

only (1) whether the charged offense is extraditable under the relevant treaty; and (2) whether there is probable cause to sustain the charge against the detainee.<sup>40</sup> Thus, although the extradition proceeding itself could possibly provide adequate judicial review in cases in which the challenge to extradition is on one of those two grounds, courts in such proceedings lack the authority to entertain other legal challenges to extradition.<sup>41</sup>

The question then becomes whether other such challenges exist, and that is where CAT comes in.<sup>42</sup> Article 3 of CAT provides that “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.”<sup>43</sup> There are no exceptions to Article 3’s “nonrefoulement” principle, and there is substantial authority for the proposition that nonrefoulement is itself a *jus cogens* norm of customary international law.<sup>44</sup> Regardless, although the United States has taken the position that CAT is a non-self-executing treaty,<sup>45</sup> FARRA implemented most of our obligations under CAT (including Article 3’s “nonrefoulement” mandate). To that end, § 2242(a) of FARRA provides 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 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.<sup>46</sup>

Although there is therefore no question that non-citizens in removal proceedings may invoke FARRA/CAT defensively as a basis for relief from deportation, the harder question is whether FARRA may be enforced offensively in civil litigation, especially habeas, by those who cannot raise a FARRA/CAT claim in a removal proceeding (including individuals facing extradition and military transfer who

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<sup>40</sup> See 18 U.S.C. § 3184.

<sup>41</sup> See, e.g., *Vo v. Benov*, 447 F.3d 1235, 1240 (9th Cir. 2006) (discussing the limited legal avenues on which to challenge an extradition order).

<sup>42</sup> Much of the following analysis is based on 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, <http://www.lawfareblog.com/2012/06/why-the-munaf-sequels-matter/>.

<sup>43</sup> Convention Against Torture, *supra* note 21, S. Treaty Doc. No. 100-20, at 20, 1465 U.N.T.S. at 114.

<sup>44</sup> See, e.g., *In re Estate of Ferdinand Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994).

<sup>45</sup> See, e.g., *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 212 (3d Cir. 2003) (“The Senate adopted a resolution of advice and consent to ratification of CAT, subject to the declaration that it be deemed non-self-executing . . .”).

<sup>46</sup> Pub. L. No. 105-277, div. G, § 2242(a), 112 Stat. 2681-761, 2681-822 (codified at 8 U.S.C. § 1231 note).

are never subject to such proceedings). This issue is complicated by § 2242(d) of FARRA, which provides that “nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, . . . except as part of the review of a final order of removal pursuant to [the immigration laws].”<sup>47</sup>

Importantly, though, FARRA’s failure to *provide* jurisdiction should not matter in habeas cases, since a different federal statute already confers power upon the federal courts in such cases so long as the petitioner claims detention “in violation of the Constitution or laws or treaties of the United States . . . .”<sup>48</sup> The question is whether FARRA *takes away* habeas jurisdiction over FARRA/CAT claims. And at least initially, every circuit court to reach the issue answered that question in the negative, holding that nothing in FARRA provided the kind of “clear statement” that the Supreme Court’s *St. Cyr* decision required in order to find that Congress meant to take away habeas jurisdiction.<sup>49</sup> Thus, at least until § 1252(a)(4) was enacted as part of the REAL ID Act of 2005, it was settled that detainees facing transfer or extradition (or non-citizens facing removal who could not pursue relief in immigration proceedings) could raise FARRA/CAT as a basis for habeas relief—and numerous litigants did so.<sup>50</sup>

The addition of § 1252(a)(4) in 2005 complicated this analysis, since its plain text appeared to foreclose habeas review of CAT claims.<sup>51</sup> To be sure, as the *Trinidad y Garcia* per curiam opinion noted, because the point of the REAL ID Act was to channel review of *immigration* claims into the direct review process, it is thoroughly unlikely that Congress thereby intended to take away all jurisdiction in *non-immigration* cases in which such review was unavailable (e.g., detainee transfer and extradition cases).<sup>52</sup> Nevertheless, the

<sup>47</sup> *Id.* § 2242(d).

<sup>48</sup> 28 U.S.C. § 2241(c)(3).

<sup>49</sup> See Stephen I. Vladeck, Case Comment, *Non-Self-Executing Treaties and the Suspension Clause After St. Cyr*, 113 YALE L.J. 2007, 2008 n.11 (2004) (citing cases).

<sup>50</sup> See *Saint Fort v. Ashcroft*, 329 F.3d 191, 201–02 (1st Cir. 2003); *Wang v. Ashcroft*, 320 F.3d 130, 147 (2d Cir. 2003); *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1015–16 (9th Cir. 2000); see also *Singh v. Ashcroft*, 351 F.3d 435, 441–42 (9th Cir. 2003) (holding that a non-citizen’s CAT claim failed on the merits, but noting that FARRA and CAT do “not effect a repeal of habeas jurisdiction.”). See generally Zachary Margulis-Ohnuma, *Saying What the Law Is: Judicial Review of Criminal Aliens’ Claims Under the Convention Against Torture*, 33 N.Y.U. J. INT’L L. & POL. 861, 873–878 (2001) (reviewing how various courts have handled the availability of habeas review under CAT and FARRA).

<sup>51</sup> See *supra* text accompanying note 23.

<sup>52</sup> *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 956 (9th Cir. 2012) (en banc) (per curiam) (“The REAL ID Act can be construed as being confined to addressing final orders of removal, without affecting federal habeas jurisdiction.” (citing *Nadarajah v. Gonzales*, 443 F.3d 1069, 1076 (9th Cir. 2006))), *cert. denied*, No. 12-6615, 2013 WL 57582 (U.S. Jan. 7, 2013).

categorical language of § 1252(a)(4) *does* appear to satisfy *St. Cyr*'s "clear statement" requirement, thereby raising a constitutional question about whether the Suspension Clause protects the ability of individuals facing transfer or extradition to raise certain challenges to their transfer or extradition via habeas.

In *Omar v. McHugh*—the only court of appeals decision to consider this question thus far—the D.C. Circuit answered it in the negative.<sup>53</sup> After concluding first that FARRA had not invested non-immigration detainees with a "right" to judicial review, Judge Kavanaugh suggested that even if it had, it would not matter:

[E]ven if the REAL ID Act took away a statutory right that the FARR Act had previously granted, that scenario poses no constitutional problem. Congress does not amend the Constitution, or alter the scope of the *constitutional* writ of habeas corpus, whenever it amends a *statutory* right that might be available in a habeas case. Congress thus remains generally free to undo a statute that applies in habeas cases, just as it can undo other statutory rights that it has created.<sup>54</sup>

I have previously critiqued this analysis at some length.<sup>55</sup> For present purposes, it suffices to note the basic logical flaw underlying Judge Kavanaugh's reasoning: the REAL ID Act of 2005 did not repeal FARRA. To the contrary, even if the REAL ID Act *does* apply outside the context of immigration cases, its only effect is to repeal the statutory habeas jurisdiction of the federal courts over CAT claims. So long as § 2242(a) of FARRA still confers a right on detainees not to be returned "to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture,"<sup>56</sup> that right provides a non-frivolous basis for challenging the legality of executive detention qua extradition. That is to say, unless FARRA never conferred such a right in the first place (or the REAL ID Act of 2005 tacitly repealed it), then § 1252(a)(4) would violate the Suspension Clause to the extent it deprived individuals who are not subject to removal proceedings of the opportunity to invoke FARRA as a basis for challenging their extradition. *Trinidad y Garcia* may therefore have created a circuit split,<sup>57</sup> but Professor Garrett's reading of *Boumediene*,<sup>58</sup> like my own,

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<sup>53</sup> See 646 F.3d 13, 21 (D.C. Cir. 2011).

<sup>54</sup> *Id.* at 22.

<sup>55</sup> See Stephen I. Vladeck, *Normalizing Guantánamo*, 48 AM. CRIM. L. REV. 1547, 1562–68 (2011); see also Vladeck, *supra* note 17, at 1481–86 (criticizing the holding of *Omar v. McHugh* as one that "actively undermine[s] *Boumediene* by holding that Congress has the power to deprive federal courts of habeas jurisdiction over certain types of statutory claims even as it leaves those rights intact.").

<sup>56</sup> Pub. L. No. 105-277, div. G, § 2242(a), 112 Stat. 2681-761, 2681-822 (codified at 8 U.S.C. § 1231 note).

<sup>57</sup> See *Trinidad y Garcia*, 683 F.3d at 1013–14 (Kozinski, C.J., dissenting); see also *id.* at

appears to compel the conclusion that the Ninth Circuit got it right.

### III

#### *TRINIDAD Y GARCIA*: SCOPE OF REVIEW

Although ten of the eleven judges in *Trinidad y Garcia* agreed as to the federal courts' jurisdiction,<sup>59</sup> the judges splintered badly over the appropriate scope of the review that their jurisdictional holding mandated.<sup>60</sup> In particular, the three competing approaches all envisaged a very different relationship between the Due Process Clause and the Suspension Clause on the merits of extradition cases.

#### A. The Three Competing Approaches

The narrowest approach was the one proposed by Judge Tallman, joined in his dissenting opinion by Judges Clifton, Milan Smith, and Ikuta. In particular, Judge Tallman relied on the "rule of non-inquiry"<sup>61</sup> to suggest that, once the Secretary of State determines that an individual is properly subject to extradition, judicial review is at its end. In his words,

Neither the FARR Act nor the regulations impose on the Secretary a mandatory duty that could provide Trinidad with a liberty interest in the Secretary's compliance with any procedure. Thus, just as Trinidad cannot ask that we second-guess the Secretary's ultimate discretionary decision, he cannot ask us to peek into those internal processes employed by the Secretary in making her determination. Non-inquiry means just that, non-inquiry, and

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969 n.8 (Tallman, J., dissenting). In *Mironescu v. Costner*, 480 F.3d 664 (4th Cir. 2007), the Fourth Circuit also held that § 1252(a)(4) deprived it of jurisdiction to entertain a FARRA-based habeas challenge to extradition, albeit without discussing the potential constitutional implications of such a conclusion. *See id.* at 677 n.15.

<sup>58</sup> *See* Garrett, *supra* note 2, at 92–110.

<sup>59</sup> *See supra* note 30 and accompanying text.

<sup>60</sup> *See supra* notes 32–33 and accompanying text.

<sup>61</sup> The "rule of non-inquiry" is the idea that "courts in this country refrain from examining the penal systems of requesting nations, leaving to the Secretary of State determinations of whether the defendant is likely to be treated humanely." *Lopez-Smith v. Hood*, 121 F.3d 1322, 1327 (9th Cir. 1997). As the First Circuit has explained, however:

The rule did not spring from a belief that courts, as an institution, lack either the authority or the capacity to evaluate foreign legal systems. Rather, the rule came into being as judges, attempting to interpret particular treaties, concluded that, absent a contrary indication in a specific instance, the ratification of an extradition treaty mandated noninquiry as a matter of international comity.

*In re* Extradition of Howard, 996 F.2d 1320, 1330 n.6 (1st Cir. 1993) (emphasis added); *see also* John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. REV. 1973, 1978–96 (2010) (documenting the evolution of the non-inquiry doctrine). Even if the rule of non-inquiry applied to claims that the United States government *itself* was acting unlawfully in an extradition case, it must give way, insofar as it is judge-made, to statutes that create express substantive rights enforceable via the remedy of habeas corpus—such as FARRA.

remanding serves no purpose other than to further delay the inevitable.<sup>62</sup>

In other words, for Judge Tallman and his colleagues, the question on the merits reduced to whether FARRA invested Trinidad with a liberty interest protected by the Due Process Clause. So long as it did not, the rule of non-inquiry otherwise applied to preclude judicial scrutiny of extradition decisions.

The more moderate approach adopted by the per curiam opinion can be traced to Judge Thomas's concurrence. Writing for himself and Judge Wardlaw as to the scope of review, Judge Thomas concluded that, although most of the Secretary's extradition determination is unreviewable, "the scope of habeas review allows courts to examine whether the Secretary has complied with her non-discretionary obligations."<sup>63</sup> Although Judge Thomas did not frame these obligations as a liberty interest, his point, in effect, was that FARRA does create a *limited* liberty interest triggering due-process considerations, but that such an interest extends only to ensuring that the Secretary conducts the review required by FARRA and its implementing regulations and certifies that review to the court.<sup>64</sup> Thus, although Judges Tallman and Thomas had different views of the liberty interest conferred by FARRA, they agreed that vindication of that interest was the sole purpose for which habeas jurisdiction could be invoked.

In contrast, Judges Berzon and Pregerson, writing separately (and joined by Judge Fletcher), argued that FARRA does more than just create a liberty interest; it also provides an independent substantive basis pursuant to which individuals can challenge the legality of their detention qua extradition. As Judge Berzon explained:

[T]he duty imposed upon the Secretary extends beyond simply *considering* whether Trinidad is more likely than not to face torture. She is required not to extradite him if there are substantial grounds to believe that he is more likely than not to face torture. Judicial review, therefore, must extend not only to determining whether the Secretary *considered* Trinidad's claim that he would be tortured but to ascertaining that she complied with her obligation not to extradite where, on the available information, torture is more likely than not.<sup>65</sup>

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<sup>62</sup> *Trinidad y Garcia*, 683 F.3d at 984 (Tallman, J., dissenting) (citation and footnote omitted), *cert. denied*, No. 12-6615, 2013 WL 57582 (U.S. Jan. 7, 2013).

<sup>63</sup> *Id.* at 961 (Thomas, J., concurring).

<sup>64</sup> *See id.* at 961-62; *see also id.* at 957 (plurality opinion).

<sup>65</sup> *Id.* at 996 (Berzon, J., concurring in part and dissenting in part). As Judge Berzon explained, if FARRA only created a procedural right, "I would agree that our review of the Secretary's compliance was limited to requiring a declaration that she had, indeed,

Although Judge Berzon did not specifically frame her disagreement with her colleagues in terms of the distinction between the process that is required by the Due Process Clause and the “meaningful opportunity” that is required by the Suspension Clause, Judge Pregerson made that point overtly in his opinion: “Because Trinidad y Garcia has made a non-frivolous claim that ‘there are substantial grounds for believing [he] would be in danger of being subjected to torture’ if he is extradited to the Philippines, . . . he has stated a cognizable habeas corpus claim in which he is entitled to meaningful review.”<sup>66</sup>

Thus, the distinction between the three competing approaches in *Trinidad y Garcia* reduces to the very distinction that Professor Garrett argues courts have failed to appreciate: for Judge Tallman, Judge Thomas, and their concurring colleagues, the review required in extradition cases is that which is necessary to vindicate the liberty interest protected by the Due Process Clause—and nothing more. Although their opinions diverged as to the exact *nature* of that interest, they agreed that vindication thereof was the sole office of the writ of habeas corpus in the extradition context.

In contrast, Judges Berzon and Pregerson both invoked *Boumediene* for the proposition that, *due process aside*, individuals such as Trinidad must have a “meaningful opportunity” to raise non-frivolous challenges to their detention qua extradition, including the argument that their extradition would violate § 2242(a) of FARRA. Based solely upon *Boumediene*, it is difficult to disagree with their understanding of the separate work required in habeas cases. If § 2242(a) of FARRA truly did create a new substantive right not to be transferred to torture, and if that right remains federal law today, then *Boumediene* certainly appears to require meaningful judicial review of a claimed violation thereof.

#### B. What *Munaf* Settles—And What It Does Not

In distinguishing *Boumediene*, both Judge Tallman and Judge Thomas relied heavily on the Supreme Court’s decision—handed down the same day as *Boumediene*—in *Munaf v. Geren*.<sup>67</sup> In their view, *Munaf* drove home the central point in question, i.e., that judicial review in extradition cases is limited to holding the Secretary to her

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considered whether Trinidad would be tortured upon extradition.” *Id.* In other words, Judge Berzon’s disagreement with Judge Thomas (and the per curiam opinion) turned on her view that FARRA created an independent substantive basis on which a detainee could challenge his detention even in cases in which due process is satisfied.

<sup>66</sup> *Id.* at 1002 (Pregerson, J., concurring in part and dissenting in part) (first alteration in original) (citation omitted).

<sup>67</sup> 553 U.S. 674 (2008).

procedural obligations.<sup>68</sup>

Even if *Munaf* (which was about detainee transfer) applies to extradition cases,<sup>69</sup> it is difficult to read it as resolving this dispute in Judge Tallman's and Judge Thomas's favor. Writing for a unanimous Court, Chief Justice Roberts suggested that, although the Court clearly had jurisdiction over a claim brought by two United States citizens detained in Iraq,<sup>70</sup> the merits were settled by the State Department's assurance that the two detainees would not be tortured in Iraqi custody. As he explained:

Petitioners here allege only the possibility of mistreatment in a prison facility; this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway . . . . In these cases the United States explains that, although it remains concerned about torture among some sectors of the Iraqi Government, the State Department has determined that the Justice Ministry—the department that would have authority over [the detainees]—as well as its prison and detention facilities have “generally met internationally accepted standards for basic prisoner needs.” . . . .

The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area.<sup>71</sup>

Although the Chief Justice's opinion thereby seemed to suggest that there was nothing for courts to do in such cases once the Executive Branch made the relevant assurance, there were two critical caveats: First, as he noted, “this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway.”<sup>72</sup> (As Justice Souter noted in his concurrence, “I would extend the caveat to a case in which the probability of torture is well documented, even if the Executive fails to acknowledge it.”<sup>73</sup>) Of course, these distinctions would be irrelevant under the rule adopted by the en banc Ninth Circuit; so long as the Secretary formally averred that it was not “more likely than not” that torture would occur, any further judicial review would be pretermitted regardless of the fate likely to befall the detainee.

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<sup>68</sup> See *supra* text accompanying notes 62–63.

<sup>69</sup> But see *Munaf*, 553 U.S. at 704 (“[T]his is not an extradition case, but one involving the transfer to a sovereign's authority of an individual captured and already detained in that sovereign's territory.”).

<sup>70</sup> See *id.* at 685–88.

<sup>71</sup> *Id.* at 702 (citations and internal quotation marks omitted).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 706 (Souter, J., concurring).

Second, and more importantly for present purposes, the Court specifically sidestepped the possibility that FARRA might require relief in such cases notwithstanding the Executive Branch's assurances. As Chief Justice Roberts put it, "Neither petitioner asserted a FARR Act claim in his petition for habeas, and the Act was not raised in any of the certiorari filings before this Court. . . . Under such circumstances *we will not consider the question.*"<sup>74</sup> Indeed, as the Chief Justice suggested in a footnote to the same passage, there was a serious question raised as to whether FARRA could even be *invoked* by individuals who were already within the territorial jurisdiction of the country seeking their transfer after traveling there voluntarily.<sup>75</sup>

*Munaf* thus required *deference* to the Executive Branch, but did not address whether such deference could ever be overcome, whether in a case where the detainee's claim arose under FARRA or otherwise. To the extent it applies to ordinary extradition cases, *Munaf* at most settles whether *due process* requires more than the Secretary of State's assurances that a detainee will not be transferred to torture. But *Munaf* specifically did not address the possibility that the Suspension Clause might require more—entirely because it *reserved* whether the detainees had a viable FARRA claim. The Tallman and Thomas opinions in *Trinidad y Garcia*, then, misread *Munaf* as suggesting that the Due Process Clause and the Suspension Clause do not require anything different in the extradition context. *Munaf* itself did not so hold, and as Judges Berzon and Pregerson's opinions suggest, *Boumediene* provides powerful arguments to the contrary.

#### CONCLUSION

If the "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law,"<sup>76</sup> the harder question becomes just *how* a detainee such as Trinidad can so demonstrate in cases arising under FARRA. In her opinion in *Trinidad y Garcia*, Judge Berzon proposed the following approach:

I would structure a habeas proceeding such as this one to

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<sup>74</sup> *Id.* at 703 (majority opinion) (emphasis added) (citations omitted).

<sup>75</sup> *See id.* at 703 n.6 ("It is not settled that the Act addresses the transfer of an individual located in Iraq to the Government of Iraq; arguably such an individual is not being 'returned' to 'a country'—he is already there."). Footnote 6 also raised the possibility that FARRA does not apply outside the context of immigration proceedings, *see id.*, but, as noted above, every circuit court to reach the issue prior to the REAL ID Act had concluded to the contrary. *See supra* text accompanying note 49.

<sup>76</sup> *Boumediene v. Bush*, 553 U.S. 723, 779 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)); *see also supra* note 8 and accompanying text.

minimize the burden on the State Department, to protect its legitimate interest in conducting foreign affairs, to reveal diplomatic information even to courts only when essential and when not protected by otherwise applicable doctrines, and to defer to its competence in that arena. We should therefore apply a highly deferential, limited inquiry principle to CAT claims in the extradition context, even more deferential than in the immigration context. In other words, at most, we would reverse the decision of the Secretary of State “only if the evidence is so compelling that no reasonable fact finder could have failed to find the requisite likelihood of torture.” The detainee would bear the burden of demonstrating through strong, credible, and specific evidence that torture is more likely than not, and that no reasonable factfinder could find otherwise. If, and only if, such a *prima facie* case is made, must the Secretary submit evidence, should she so choose and *in camera* where appropriate, demonstrating the basis for her determination that torture is not more likely than not.<sup>77</sup>

Although Judge Pregerson advocated for a somewhat lower bar in his opinion,<sup>78</sup> the critical point for present purposes is the extent to which this is process required by the Suspension Clause, and not the Due Process Clause. Put another way, if Judges Berzon and Pregerson are correct that the Suspension Clause requires greater judicial review where detainees challenge their extradition under FARRA, the relevant metric for such review will not be *Mathews v. Eldridge* and its balancing test for how much process is due,<sup>79</sup> but rather how much process provides the detainee with the “meaningful opportunity” *Boumediene* requires. So understood, we reach the counterintuitive but compelling bottom line of Professor Garrett’s article: the “powerful, independent, and unappreciated role” that the Suspension Clause plays will often be a requirement of *more* process.<sup>80</sup> And because of the limited role that due process analysis has historically played in extradition cases, the difference between “due” process and the process required by the Suspension Clause could end up proving to be quite significant, indeed.

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<sup>77</sup> *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 1001 (9th Cir. 2012) (en banc) (Berzon, J., concurring in part and dissenting in part) (internal citations omitted), *cert. denied*, No. 12-6615, 2013 WL 57582 (U.S. Jan. 7, 2013).

<sup>78</sup> *See id.* at 1008–09 (Pregerson, J., concurring in part and dissenting in part).

<sup>79</sup> *See* 424 U.S. 319, 335 (1976).

<sup>80</sup> Garrett, *supra* note 2, at 126.