ARTICLES

INTERNATIONAL EXTRADITION, THE RULE OF NON-INQUIRY, AND THE PROBLEM OF SOVEREIGNTY

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INTRODUCTION

The law of international extradition in the United States rests on a series of myths that have hardened into doctrine.[1] Perhaps the most significant of these myths-turned-doctrines is the frequent claim that by its nature, extradition is "an executive function rather than a judicial one."[2]

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[1] *See generally* John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441 (1988).

[2] Ordinola v. Hackman, 478 F.3d 588, 606 (4th Cir. 2007) (Traxler, J., concurring); *see also* Hoxha v. Levi, 465 F.3d 554, 560 (3d Cir. 2006); Lopez-Smith v. Hood, 121 F.3d

Once courts declare that extradition from the United States is naturally a subject for the executive branch, additional rules follow easily. Each rule rests on the founding myth but is also undoubtedly doctrinally concrete. Thus, the person facing extradition – often referred to as "the relator" or "the fugitive" – encounters a truncated process in which he or she has few enforceable rights, primarily because the role of judges is limited to a small set of discrete questions and the final decision on whether to extradite is left to the Secretary of State.[3] Some courts have even asserted that there need not be any role at all for the judiciary in the extradition process – that "[i]n the absence of [the federal extradition statute], the Executive Branch would retain plenary authority to extradite."[4]

As if to reinforce the primacy of the executive branch in international extradition, several courts have also held that the federal district and magistrate judges who preside over extradition hearings are not Article III actors. Instead, they are "extradition magistrates" who become non-Article III actors – perhaps even adjuncts of the executive branch – for the duration of the case.[5] It should

1322, 1326 (9th Cir. 1997) ("Extradition is a matter of foreign policy entirely within the discretion of the executive branch, except to the extent that the statute interposes a judicial function."); Sidali v. INS, 107 F.3d 191, 194 (3d Cir. 1997); Martin v. Warden, 993 F.2d 824, 828 (11th Cir. 1993) ("The power to extradite derives from the President's power to conduct foreign affairs."). Though Kester, *supra* note 1, does not include this statement in his list of extradition myths, my assertion is consistent with his analysis. *Accord* CHRISTOPHER H. PYLE, EXTRADITION, POLITICS, AND HUMAN RIGHTS 301, 305 (2001) (including the similar claim that extradition magistrates do not exercise the judicial power of the United States as one of the "unwarranted assumptions, fictions, delusions, and myths" of extradition law).

[3] *See* 18 U.S.C. § 3184 (2006) (conferring to judges the authority to find "the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention," and providing the Secretary of State the ultimate discretion on whether to extradite); Fernandez v. Phillips, 268 U.S. 311, 312 (1925) (stating the limits of extradition habeas); *In re* Howard, 996 F.2d 1320, 1325 (1st Cir. 1993) (noting that the Secretary of State is "the ultimate decisionmaker"); Ward v. Rutherford, 921 F.2d 286, 288 (D.C. Cir. 1990) (holding that the district court can only review a magistrate's extradition decision under habeas); *In re* Mackin, 668 F.2d 122, 125-30 (2d Cir. 1981) (holding there is no direct appeal from district judge's extradition decision); *see also Smyth*, 61 F.3d at 720-21 (9th Cir. 1995) (noting federal rules of civil procedure, criminal procedure, and evidence do not apply to extradition proceedings); First Nat'l Bank of N.Y. v. Aristeguieta, 287 F.2d 219, 226-27 (2d Cir. 1960) (discussing advantages provided to the requesting country and disadvantages imposed on the extraditee), *vacated as moot*, 375 U.S. 49 (1963).

[4] LoDuca v. United States, 93 F.3d 1100, 1103 n.2 (2d Cir. 1996); *see also Ordinola*, 478 F.3d at 606 (Traxler, J., concurring) ("The decision to extradite is one that is 'entirely within the discretion of the executive branch, except to the extent that the statute interposes a judicial function.'" (quoting *Lopez-Smith*, 121 F.3d at 1326)). Whether these courts believe their statements apply to habeas corpus review of extradition decisions is not clear.

[5] *See* DeSilva v. Dileonardi, 125 F.3d 1110, 1113 (7th Cir. 1997); *Lopez-Smith*, 121 F.3d at 1327; *LoDuca*, 93 F.3d at 1105-09; *see also Martin*, 993 F.2d at 828 ("Extradition is an

be no surprise, therefore, that courts frequently refer to international extradition proceedings in U.S. courts as "sui generis."[6]

Finally, the Supreme Court and lower courts repeatedly have invoked the "rule of non-inquiry," under which courts hearing extradition cases may not inquire into the procedures or treatment – including possible physical abuse – that await the extraditee in the requesting state.[7] In its 2008 decision in *Munaf v. Geren*,[8] for example, the Supreme Court applied this rule to the transfer of two U.S. citizens from U.S. military custody to Iraqi custody for trial in Iraqi courts. In response to their claim that they were likely to be tortured in Iraqi custody, the Court stated that "it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments."[9] Put plainly, federal courts should not engage in judicial review of the policy decision by U.S. officials to send a person from the United States to another country, even if that person would face arbitrary procedures or harsh treatment in that country.

In a previous article, I demonstrated that international extradition from the United States has never been an exclusively executive function. With only one exception, courts have always been involved in the extradition process and have always had the authority to refuse an extradition request on legal grounds. In addition, foreign policy concerns had at best a minor role in the courts' reasoning in early extradition cases.[10]

executive, not a judicial, function. The power to extradite derives from the President's power to conduct foreign affairs. . . . An extradition proceeding is not an ordinary Article III case or controversy. . . . Rather, the judiciary serves an independent review function delegated to it by the Executive and defined by statute."). This position leads to interesting results. For example, because a judge's decision to grant bail in an extradition case is probably an Article III decision, the extradition judge switches back and forth between Article III court and Article I adjunct during the course of a single case. *See In re* Kirby, 106 F.3d 855, 859-61 (9th Cir. 1996); Roberto Iraola, *The Federal Common Law of Bail in International Extradition Proceedings*, 17 IND. INT'L & COMP. L. REV. 29, 29 (2007).

[6] Mironescu v. Costner, 480 F.3d 664, 670 (4th Cir. 2007); *Kirby*, 106 F.3d at 867 (9th Cir. 1996) (Noonan, J., dissenting); United States v. Doherty, 786 F.2d 491, 498 & n.9 (2d Cir. 1986); Hooker v. Klein, 573 F.2d 1360, 1369 (9th Cir. 1978) (Chambers, C.J., concurring); Jhirad v. Ferrandina, 536 F.2d 478, 482 (2d Cir. 1976).

[7] *See infra* Part I.B.3 (addressing the rule of non-inquiry in lower courts).

[8] 553 U.S. 674 (2008).

[9] *Id.* at 701. *Munaf* was not itself an extradition case because it involved "the transfer to a sovereign's authority of an individual captured and already detained in that sovereign's territory." *Id*. at 704.

[10] *See* John T. Parry, *The Lost History of International Extradition Litigation*, 43 VA. J. INT'L L. 93, 105-24, 150-53 (2002). Advancing a contrary view, Matthew Murchison highlights a House of Representatives debate from 1800 over the extradition of Jonathan Robbins, in which then-Congressman John Marshall argued extradition was a matter for the executive branch. *See* Matthew Murchison, Note, *Extradition's Paradox: Duty, Discretion, and Rights in the World of Non-Inquiry*, 43 STAN. J. INT'L L. 295, 300-01 (2007)

This article examines the rule of non-inquiry, critiques its rationales, and proposes a narrower doctrine. Part I reviews the history of the doctrine and surveys the case law. Careful attention to the reported decisions reveals that the rule is more flexible than courts often purport to believe. Part II examines the policy rationales for the rule of non-inquiry and argues that a narrower and more explicitly functional approach would better serve the issues that the doctrine encompasses and implicates. The Supreme Court's decision in *Munaf* provides some of the impetus for my proposals, for even as it reaffirmed the rule of non-inquiry, the Court also signaled a retreat from some of the rule's more rigorous applications.

My discussion of non-inquiry also necessarily addresses the proper scope of habeas corpus review in extradition cases. More generally, I seek to historicize non-inquiry and extradition habeas doctrine and in so doing to reveal the process of mythmaking that has paralyzed extradition law.[11] I argue for the integration of extradition law into federal law generally – that is, for unfreezing extradition law and putting it back into the overall structure of federal law and the current of legal change. My suggestions for the rule of non-inquiry also

("According to Marshall, 'the judicial power cannot extend to political compacts,' including the case before Congress, 'the delivery of a murderer under the twenty-seventh article of our present Treaty with Britain.'"). Murchison is correct that the Robbins affair demonstrated "the politically-charged nature of extradition," *id.* at 301, but his claim that "Marshall's viewpoint won the day" such that extradition and non-inquiry doctrine rest on deference to executive foreign policy prerogatives, *id*. at 301-02, is incorrect. To the contrary, the Robbins affair was a cautionary tale of executive power for decades to come, and it is unlikely that it served as any kind of meaningful precedent in favor of limited habeas or the rule of non-inquiry in the late Nineteenth Century. *See* John T. Parry, *Congress, the Supremacy Clause, and the Implementations of Treaties*, 32 FORDHAM INT'L L.J. 1209, 1295-1303 (2009) ("[W]hile Marshall's speech has become a standard citation to support executive foreign affairs authority, the full scope of his argument was controversial at the time. The republican position of more limited executive power and broad congressional power with respect to treaties . . . also had substantial support . . . ."); Parry, *Lost History*, *supra*, at 108-16, 126-36; Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1207-08 (1991) ("The [Robbins] case provoked a great deal of controversy and led to a national demand that there be some exercise of independent judicial authority before an extradition could proceed."); Michael P. Van Alstine, *Taking Care of John Marshall's Political Ghost*, 53 ST. LOUIS U. L.J. 93, 99 (2008) (explaining changes in the interpretation of Marshall's speech in the years following Robbins). The only significant case before the 1930s in which Marshall's speech figured prominently was *Fong Yue Ting v. United States*, 149 U.S. 698, 710-12 (1893), which involved immigration and the so-called plenary power doctrine. Extradition is not entirely distinct from immigration law, but the history of extradition doctrine does not support Murchison's claim.

[11] *See* Steven Lubet, *Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists*, 15 CORNELL INT'L L.J. 247, 253-54 (1982) ("The extradition laws of the United States essentially ceased developing at the turn of the [twentieth] century.").

work within and seek to incorporate some of the many changes in international law that have taken place since the rule was first announced.[12] Finally, I contest the notion that foreign affairs concerns require courts to ignore constitutional or human rights claims in extradition cases.

Most ambitiously, Part III discusses and explores the implications of the rule of non-inquiry's reliance on notions of territorial sovereignty. In a recent article, David Cole wrote:

> Sovereignty is no longer absolute, territorial, and sacred, but conditional and limited by legal obligations to the individual that simultaneously pierce the border – insisting that a state respect the rights of those within its own jurisdiction – and extend beyond the border, limiting the state's range of choice wherever it exercises effective control over an individual or place.[13]

Professor Cole was writing about the Supreme Court's decision in *Boumediene v. Bush*,[14] and he is correct that *Boumediene* can be read as an example of changing conceptions of sovereignty.[15]

Yet Professor Cole – like most commentators on *Boumediene* – did not include *Munaf* in his analysis, even though the Supreme Court decided both cases on the same day. The *Munaf* majority not only deferred to the President's foreign affairs authority but also repeatedly stressed and relied upon Iraq's "sovereign right" or "prerogative" to punish offenses "committed on its soil."[16] It did so, moreover, in the context of invoking the rule of non-inquiry. In contrast to *Boumediene*, therefore, the conception of sovereignty at work in *Munaf* is precisely that sovereignty is "absolute, territorial, and sacred."[17] That is to say, on the same day in June 2008, the Supreme Court declared both that sovereignty has changed, and that it remains the same.

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[12] *See* John Quigley, *The Rule of Non-Inquiry and Human Rights Treaties*, 45 CATH. U. L. REV. 1213, 1248 (1996).

[13] David D. Cole, *Rights over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2008 CATO SUP. CT. REV. 47, 61. For an earlier claim that traditional conceptions of sovereignty are fragmenting in the contemporary world, see Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1401 (2003) (arguing that "unmediated national sovereignty" has been put to rest and that religion and culture represent "the New Sovereignty"). For more cautious assessments, see KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? 9 (2009); Brad R. Roth, *State Sovereignty, International Legality and Moral Disagreement*, *in* THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW 123, 127-30 (Tomer Broude & Yuval Shaney eds., 2008).

[14] 553 U.S. 723 (2008).

[15] *See* Eric A. Posner, Boumediene *and the Uncertain March of Judicial Cosmopolitanism*, 2008 CATO SUP. CT. REV. 23, 24 (agreeing *Boumediene* articulated a more "cosmopolitan" vision of rights).

[16] Munaf v. Geren, 553 U.S. 674, 676 (2008) ("Iraq's sovereign right to 'punish offenses against its laws committed within its borders.'"); *see also id.* at 694, 695, 697, 700, 705.

[17] *See* Cole, *supra* note 13.

This article asks whether *Munaf*'s conception of sovereignty was already outdated when written or whether it gives the lie to claims that sovereignty has eroded. I also consider a third option: that both conceptions can exist and be consistent with each other in U.S. law. The article ends by exploring what that coexistence might mean, both for the rule of non-inquiry and more generally.

I. HISTORICIZING THE RULE OF NON-INQUIRY

A. *The Importance of Habeas Corpus*

Although people facing extradition may seek habeas corpus relief, early cases held that the scope of review would be narrow. In *Benson v. McMahon*, for example, the Court began by analogizing the extradition hearing to part of the criminal process:

> [It] is not to be regarded as in the nature of a final trial . . . but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused . . . .[18]

Habeas review of this decision was to be limited. According to the Court, "[w]e are now engaged simply in an inquiry as to whether, under the [extradition statute] and the treaty . . . there was legal evidence before the commissioner to justify him in exercising his power to commit the person accused to custody."[19]

The Court confirmed the narrow scope of extradition habeas in *In re Oteiza*[20] and *Ornelas v. Ruiz*.[21] In both cases, the Court endorsed *Benson*'s limited set of issues for review.[22] Significantly, the *Ornelas* Court also

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[18] 127 U.S. 457, 463 (1888).

[19] *Id.* Commissioners heard extradition cases under the original version of 18 U.S.C. § 3184 (2006), 9 Stat. 302 § 1 (1848). *See* Parry, *Lost History*, *supra* note 10, at 134 & n.219. The current version of § 3184 refers to "any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State." 18 U.S.C. § 3184 (2006). State judges rarely preside over extradition hearings, presumably because the U.S. Department of Justice chooses to proceed in a federal forum. *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-15.700(2) (1997) (assuming proceedings will be "before the magistrate judge or the district judge").

[20] 136 U.S. 330, 333-34 (1890).

[21] 161 U.S. 502, 508-09 (1896).

[22] *Ornelas*, 161 U.S. at 508-09 ("[I]n extradition proceeding, if the committing magistrate . . . has before him competent legal evidence . . . sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on habeas corpus."); *Oteiza*, 136 U.S. at 333-34 (agreeing with *Benson* that "[a] writ of *habeas corpus* in a case of extradition cannot perform the office of a writ of error," and stating that the court can only consider whether the commissioner had jurisdiction, and

analogized to the limited scope of habeas review in criminal cases to confirm that habeas review "cannot perform the office of a writ of error."[23]

Based on these cases, some courts and commentators argue that "[t]he rule of non-inquiry arose by implication, originating in the fact that 'the procedures which will occur in the demanding country subsequent to extradition were not listed [by the Supreme Court] as a matter of a federal court's consideration.'"[24] But the petitioners in *Benson*, *Oteiza*, and *Ornelas* made no claims about the procedures or treatment that awaited them in the requesting country. The "exclusion" of these topics from the list of habeas issues in these cases thus proves little. The most one can say is that the Court stressed the narrowness of habeas in general and of extradition habeas in particular, and that this narrow approach would be consistent with the subsequent non-inquiry doctrine.

Still, the argument that these cases support the rule of non-inquiry indicates the close historical relationship between the rule and the narrow scope of habeas, including extradition habeas. One might think, therefore, that a change to either doctrine would result in changes to the other. Yet the law of habeas corpus in the United States has changed dramatically since the decisions in *Benson*, *Oteiza*, and *Ornelas* – except in international extradition.[25] In extradition cases, many courts continue to cite the early cases and to insist that habeas review must be narrow.[26] Most discussions of the rule of non-inquiry reflect the same approach.

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whether there was legal evidence to warrant the commitment); .

[23] *Ornelas*, 161 U.S. at 508 (citing *In re* Stupp, 23 F. Cas. 296, 298-99, 303 (C.C.S.D.N.Y. 1875) (No. 13,563)); *see also* Parry, *Lost History*, *supra* note 10, at 153-56 (discussing the scope of habeas corpus review and stating that it is narrower than appellate review).

[24] Semmelman, *supra* note 10, at 1211-12 (1991) (quoting Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960)); *see also* Mironescu v. Costner, 480 F.3d 664, 668-69 (4th Cir. 2007) ("[U]nder what is called the 'rule of non-inquiry' in extradition law, 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."); Ahmad v. Wigen, 910 F.2d 1063, 1066 (2d Cir. 1990) ("A consideration of the procedures that will or may occur in the requesting country is not within the purview of a habeas corpus judge.").

[25] For an overview of the historical scope of habeas review, see RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1206-07, 1220-22 (6th ed. 2009).

[26] Most citations are to Justice Holmes' opinion in *Fernandez v. Phillips*, 268 U.S. 311 (1925), which restated the rule developed in *Benson*, *Oteiza*, and *Ornelas*:

> [The] writ as has been said very often cannot take the place of a writ of error. It is not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has had his hearing and habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.

Id. at 312; *see* Sacirbey v. Guccione, 589 F.3d 52, 62-63 (2d Cir. 2009); Ordinola v. Hackman, 478 F.3d 588, 597-98 (4th Cir. 2007); Hoxha v. Levi, 465 F.3d 554, 560 (3d Cir.

Because courts no longer can support restricted extradition habeas by analogy to general principles of habeas corpus, they have adopted other justifications – such as the claim of executive primacy in extradition matters, which the Court did not mention in *Benson*, *Oteiza*, or *Ornelas*.[27] As I will discuss in Part II, the executive power justification should not have overriding weight in this context, and the restrictive scope of extradition habeas review has become increasingly artificial, with the result that extradition habeas and the rule of non-inquiry should expand to reflect contemporary habeas doctrine.

B. *The Rule of Non-Inquiry: Origin, Development, Theory*

1. *Neely v. Henkel*

The rule of non-inquiry began with the Supreme Court's 1901 decision in *Neely v. Henkel*.[28] Speaking through Justice Harlan, the Court declared,

> 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.[29]

2006); Prasoprat v. Benov, 421 F.3d 1009, 1013 (9th Cir. 2005); Sidali v. INS, 107 F.3d 191, 194-95 (3d Cir. 1997); Martin v. Warden, 993 F.2d 824, 828 (11th Cir. 1993); *Ahmad*, 910 F.2d at 1064; David v. Attorney General, 699 F.2d 411, 413-14 (7th Cir. 1983); Eain v. Wilkes, 641 F.2d 504, 508-09 (7th Cir. 1981); *In re* Assarsson, 635 F.2d 1237, 1240 (7th Cir. 1980); Escobedo v. United States, 623 F.2d 1098, 1101 (5th Cir. 1980); Jhirad v. Ferrandina, 536 F.2d 478, 482 (2d Cir. 1976).

[27] *Cf. Mironescu*, 480 F.3d at 671-72 ("[Courts] have expanded the justifications for the rule of non-inquiry since its origin.").

[28] Neely v. Henkel (No. 1), 180 U.S. 109, 123 (1901). On the same day, the Court decided a companion case "[f]or the reasons stated in the opinion just delivered." Neely v. Henkel (No. 2), 180 U.S. 126, 126 (1901). At least one lower court case prior to *Neely* can be read to support a rule of non-inquiry. *In re Ezeta*, 62 F. 972, 976 (N.D. Cal. 1894), involved the Republic of Salvador's request for the extradition of a former military dictator and several of his officers. The court denied most of the extradition requests because it determined the crimes were political offenses and thus not extraditable. *Id.* at 991. But the court also found that one of the officers was extraditable for a murder committed several months before the coup. *Id.* at 993-94. The officer claimed Salvador sought his extradition "for the purpose of wreaking vengeance upon him for the part he took against them in the late war." *Id*. at 986. The court responded:

> it is not a matter of which I can properly take cognizance, in view of the other features of this particular case. . . . If, as is claimed, he is being extradited for a political purpose, that is a matter which can very properly be called to the attention of the executive when he comes to review my action.

Id.

[29] *Neely (No. 1)*, 180 U.S. at 123.

The Court also referred to the fact that Neely faced extradition to Cuba pursuant to a statutory process. It emphasized that "[i]n the judgment of Congress these provisions were deemed adequate."[30]

Neely deserves sustained attention for several reasons. The first is simply that *Neely* was a habeas case – indeed, it had to be, for there was no other way for the Supreme Court to review the extradition proceeding.[31] As I discussed above, the narrow scope of habeas review did not compel the rule of non-inquiry, but it did provide implicit support for the holding in *Neely* – and the link between habeas and the rule of non-inquiry remains significant.

Second, *Neely* referred to treaties and "the judgment of Congress" but said nothing about executive primacy in extradition cases or a possible need for deference to the executive on foreign policy issues – even though Cuba was under U.S. military occupation when the Court decided the case.[32] As I will suggest below, the fact of military occupation was important to the Court's holding, but that fact more easily undermines than strengthens non-inquiry doctrine. More generally, at its origin the non-inquiry doctrine drew from federal powers that involved Congress, not powers reserved to the executive branch.

Third, *Neely* is a case about the extraterritorial application or enforcement of the Constitution. Neely claimed that the statute authorizing his extradition was unconstitutional because it would allow his surrender to another country for trial without "all of the rights, privileges and immunities that are guaranteed by the Constitution," including habeas corpus and trial by jury.[33] The Court responded that "those provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country."[34] To buttress that statement, the Court went on to announce what has become known as its non-inquiry holding. Thus, the Court initially announced the rule of non-inquiry as a corollary to a broader assertion that the Constitution does not regulate proceedings in another country that relate to crimes committed in that country.

A more complex and controversial holding may also be implicit in this analysis: the government does not violate a citizen's due process rights when it sends him to face a criminal proceeding that differs materially from criminal proceedings conducted in U.S. federal courts.[35] A holding of this kind would not turn precisely on the issue of extraterritoriality, but its resolution almost certainly would respond to extraterritoriality analysis.

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[30] *Id.* at 123.

[31] *See supra* note 3 (citing cases regarding lack of direct appeal from extradition decision).

[32] *See Neely (No. 1)*, 180 U.S. at 122-23.

[33] *Id.* at 122.

[34] *Id*.

[35] *See* Munaf v. Geren, 553 U.S. 674, 695-97 (2008) (appearing to interpret *Neely* as stating such a holding).

Fourth, *Neely* is also about extraterritorial application of the jury trial right. As such, it follows *In re Ross*, which held there was no jury trial right for U.S. citizens or people under U.S. jurisdiction who were tried overseas before U.S. consular courts.[36] Indeed, *Neely* appears to contain an oblique reference to *Ross*: a citizen "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."[37] *Ross* was a case about a "treaty stipulation," and the issue in that case was whether the provision of a "different mode" also required greater constitutional protections.

The fact that jury trial triggered the rule of non-inquiry is significant, because it indicates what was – and what was not – at stake. The right to trial by jury in a criminal case is a federal constitutional right and was an issue in the first U.S. extradition case.[38] Yet the Court did not consider the right to a jury to be particularly important at the time *Neely* was decided. Several of the *Insular Cases*[39] held that the jury trial right was not "fundamental" enough to apply to criminal proceedings held in "unincorporated" territories of the United States.[40] Thirty years later, the Supreme Court held that the Constitution did

[36] *In re* Ross, 140 U.S. 453, 464 (1891). The petitioner in *Ross* was a British citizen who was a seaman on a U.S. vessel. *See id.* at 458. The Court stated:

> The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other.

Id. at 464.

[37] *Neely (No. 1)*, 180 U.S. at 122.

[38] *See* Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 296-97, 321 (1990).

[39] The *Insular Cases* are a series of cases decided after the presidential election in 1900 that addressed the political and constitutional status of the territories gained by the United States in the Spanish-American War. Among other things, the cases concluded that full constitutional rights did not extend to "unincorporated" territories under U.S. control. BARTHOLOMEW H. SPARROW, THE *INSULAR CASES* AND THE EMERGENCE OF AMERICAN EMPIRE 4 (2006). Commentators debate exactly which cases qualify as "Insular Cases," but a full list might include as many as "twenty-three Supreme Court decisions handed down between 1902 and 1922." Christina Duffy Burnett, *A Note on the* Insular Cases, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 389, 389 (Christina Duffy Burnett & Burke Marshall eds., 2001).

[40] *See* Balzac v. Porto Rico, 258 U.S. 298, 305 (1922) (finding no right to a jury in Puerto Rico even though citizens of Puerto Rico are also citizens of the United States); Dorr v. United States, 195 U.S. 138, 149 (1904) (finding no right to trial by jury in the territory of the Philippines); Hawaii v. Mankichi, 190 U.S. 197, 237-38 (1903) (finding no right to a grand jury in the territory of Hawaii). The Supreme Court already had held that the right to a jury trial in criminal and civil cases applied in "the territories of the United States." Thompson v. Utah, 170 U.S. 343, 346 (1898); *see also* Callan v. Wilson, 127 U.S. 540 (1888) (finding a right to trial by jury in the District of Columbia); Webster v. Reid, 52 U.S.

not compel juries in state criminal proceedings,[41] and it did not incorporate the jury trial right against the states until 1968.[42]

The issue for the *Neely* Court, in other words, was whether to insist on a procedural right that it did not believe was integral to a just outcome and which was not part of Cuban criminal procedure.[43] It did not confront an arbitrary or "emergency" departure from established procedures or the application of a more critical procedural right, let alone a right related to basic human needs, physical mistreatment or other forms of coercion. At its start, therefore, the rule of non-inquiry could be described as a rule of not inquiring into claims that the foreign trial would be different from, but perhaps no less accurate or just than, a U.S. trial.

Fifth, *Neely* has close connections to the *Insular Cases*.[44] Neely faced extradition to Cuba for crimes allegedly committed during the U.S. military

437 (1850) (finding a right to a civil jury in the territory of Iowa). The *Insular Cases* dealt with these precedents by distinguishing between "the Territories of the United States," such as Iowa and Utah had been, and "territory belonging to the United States which has not been incorporated into the Union," such as Hawaii, the Philippines, and Puerto Rico. *Balzac*, 258 U.S. at 304-05; *see also Mankichi*, 190 U.S. at 220 (White, J., concurring) ("The mere annexation not having effected the incorporation of the islands into the United States, it is not an open question that the provisions of the Constitution as to grand and petit juries were not applicable to them."); SPARROW, *supra* note 39, at 40-55, 169-206; Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality after* Boumediene, 109 COLUM. L. REV. 973, 984-92 (2009).

[41] Palko v. Connecticut, 302 U.S. 319, 324 (1937) ("This court has ruled that consistently with [the Sixth and Seventh Amendments] trial by jury may be modified by a state or abolished altogether."); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[42] Duncan v. Louisiana, 391 U.S. 145, 149 (1968) ("Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which – were they to be tried in a federal court – would come within the Sixth Amendment's guarantee."). For a compelling argument that the questions of incorporation and extraterritoriality overlap in important ways, see Burnett, *A Convenient Constitution?*, *supra* note 40, at 1031-42 (discussing the potential of "exporting incorporation").

[43] *See* Boumediene v. Bush, 553 U.S. 723, 757 (2008) ("[T]he former Spanish colonies operated under a civil-law system, without experience . . . in the use of grand and petit juries."); Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CALIF. L. REV. 259, 269 (2009) (observing the *Insular Cases* are in part about "hesitancy to impose common law procedures on a population accustomed to the civil law"); *cf.* Schiro v. Summerlin, 542 U.S. 348, 354 (2004) (holding allocation of authority between judge and jury in a criminal case is not an issue of fundamental fairness).

[44] *See* RAUSTIALA, *supra* note 13, at 85 (noticing that *Neely* and the *Insular Cases* both decided that "military occupation by the United States is not tantamount to sovereignty"); SPARROW, *supra* note 39, at 133, 257 (stating that some scholars include *Neely* among the *Insular Cases*); Burnett, *A Note on the* Insular Cases, *supra* note 39, at 390 ("The *Neely* cases . . . belong on a complete list of the *Insular Cases* because their account of why Cuba was a 'foreign country' while at the same time subject to U.S. sovereignty forms an integral

occupation of the island – an occupation that was ongoing when the Supreme Court decided the case. His argument that he was entitled to U.S. criminal procedure rights was therefore at least plausible. Before it could decide what rights, if any, Neely could claim, the Court first had to determine whether "Cuba is to be deemed a foreign country or territory."[45]

To answer the question of Cuba's status, the Court pointed out that before the Spanish-American War, Congress had proclaimed the right of the Cuban people to be "free and independent" and the "duty of the United States" to bring about that freedom.[46] The peace treaty between the United States and Spain also contemplated the eventual independence of Cuba.[47] The Court went on to characterize the occupation as consistent with the goal of independence, and it concluded that "Cuba is foreign territory. It cannot be regarded, in any constitutional, legal or international sense, a part of the territory of the United States."[48] Although it remained under U.S. military government, it was "territory held in trust for the inhabitants of Cuba to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action."[49]

The United States had de facto sovereignty over Cuba and could legislate for it,[50] yet because the occupation and resulting de facto sovereignty were declared to be temporary, Cuba remained foreign territory, and crimes committed there were "without the jurisdiction of the United States."[51] *Neely*, in short, dealt with one end of the post-war territorial spectrum, while the *Insular Cases* would address the status of territories that the United States planned to keep for longer periods of time.[52]

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part of the Court's broader analysis in the *Insular Cases* . . . .").

[45] Neely v. Henkel (No. 1), 180 U.S. 109, 115 (1901).

[46] *Id*. at 115-16 (quoting Teller Resolution, Pub. L. No. 24, 30 Stat. 738 (1898)). For the background of the joint resolution, see SPARROW, *supra* note 39, at 33.

[47] *Neely (No. 1)*, 180 U.S. at 116-17.

[48] *Id*. at 119.

[49] *Id*. at 120.

[50] *See Neely (No. 1)*, 180 U.S. at 121-22; *cf.* Boumediene v. Bush, 553 U.S. 723, 755 (2008) ("[W]e accept the Government's position that Cuba . . . retains *de jure* sovereignty over Guantanamo Bay. [But] we take notice of the obvious and uncontested fact that the United States . . . maintains *de facto* sovereignty over this territory.").

[51] *Neely (No. 1)*, 180 U.S. at 122. Cuban independence and sovereignty would remain de facto for much of the Twentieth Century. The U.S. Naval Base at Guantánamo Bay is the last vestige of this influence. *See, e.g.*, PETER H. SMITH, TALONS OF THE EAGLE 71, 130-35, 149-50, 158-72 (2d ed. 2000); SPARROW, *supra* note 39, at 240-46.

[52] *See, e.g.*, Downes v. Bidwell, 182 U.S. 244, 344 (1901) (White, J., concurring) (citing *Neely* to assert that "the sovereignty of the United States may be extended over foreign territory to remain paramount until, in the discretion of the political department of the United States, it be relinquished," with the result that the United States may acquire territory without incorporating it or giving full effect to the Constitution in it); *id*. at 388 (Harlan, J., dissenting) (denying *Neely*'s relevance because it involved territory under temporary

To the extent *Neely* can be grouped with the *Insular Cases*, it is as much or more about the management and government of occupied territory as it is about international extradition. One easily could conclude that a doctrine announced in such circumstances should also be confined to them or applied differently in other circumstances. Put more clearly, it was important in 1901 to affirm Cuba's status as an emerging independent sovereign nation and not to make rulings that could undermine that status. The idea of not inquiring into the Cuban justice system and not requiring it to play by U.S. rules is entirely consistent with that goal, even if in fact that justice system was overseen by U.S. military officials and subject to congressional legislation.[53] *Neely* was preoccupied with Cuban sovereignty, but that does not mean the law of international extradition must exhibit a similar concern in every case.

2. The Supreme Court and Non-Inquiry after Neely

The Supreme Court has decided only one other extradition case involving the rule of non-inquiry. In *Glucksman v. Henkel*, the alleged fugitive argued: "This is an extraordinary proceeding and before a person within the jurisdiction of the United States is to be deprived of his liberty and sent four thousand miles away as a prisoner to stand trial upon a criminal charge the greatest caution should be exercised."[54] He also contended "[t]he papers in this case show that the real purpose of this proceeding is not the forgery charge, but that it had been instituted by creditors as a matter of personal spite, malice and vengeance."[55]

To these fairly vague claims – neither of which raised a specific concern about the nature of the criminal proceeding in Russia or the treatment the fugitive would receive – Justice Holmes responded for a unanimous Court: "We are bound by the existence of an extradition treaty to assume that the trial will be fair."[56] Holmes did not explain exactly why the provisions of a treaty would trump Glucksman's claims, but the statement makes sense to the extent that his claims were first, simply a complaint about the fact of extradition and a trial in another country, and second, an insinuation about the motives behind the extradition request. Whether *Glucksman* should have any relevance to a specific individual rights claim is much less certain.

military occupation); *see also* Burnett, *A Note on the* Insular Cases, *supra* note 39, at 390 (discussing the relationship between *Neely* and the *Insular Cases*).

[53] *See Neely (No. 1)*, 180 U.S. at 117-19. The Court may also have thought that Neely's claims to U.S. constitutional criminal procedure rights were weakened by the fact of U.S. control over the Cuban justice system. *See* PYLE, *supra* note 2, at 124 ("Implicit in the court's decision, then, may have been the assumption that Neely would be surrendered to a fair and impartial court system supervised by Americans.").

[54] Glucksman v. Henkel, 221 U.S. 508, 511 (1911) (argument of appellant).

[55] *Id.*

[56] *Id.* at 512 (majority opinion).

In the meantime, the Court began to assess the role of the executive branch in extradition. In its 1902 decision, *Terlinden v. Ames*, the Court insisted:

> The power to surrender is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers. Its exercise pertains to public policy and governmental administration, is devolved on the Executive authority, and the warrant of surrender is issued by the Secretary of State as the representative of the President in foreign affairs.[57]

These comments support a broad reading of Holmes' subsequent statement in *Glucksman* as a comment about the executive or treaty powers. Under such a reading, the rule of non-inquiry is based on the conclusion that issues of fairness or rights are decided in the treaty-making process or by executive officials in individual cases.

Even if that reading is accurate, the question then is whether it remains good law. The idea that the executive branch can resolve individual liberty claims by treaty runs into constitutional and international law concerns that I will discuss below.[58] Even leaving those concerns aside, the Court's subsequent decision in *Valentine v. United States ex rel. Neidecker*[59] suggests that such a reading cannot control contemporary doctrine. In *Valentine*, Chief Justice Hughes noted that the power to extradite is "a national power":

> But, albeit a national power, it is not confided to the Executive in the absence of treaty or legislative provision. . . . There is no executive discretion to surrender [a fugitive] to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the

[57] Terlinden v. Ames, 184 U.S. 270, 289 (1902) (citations omitted). The Court went on to say,

> The decisions of the Executive Department in matters of extradition, within its own sphere and in accordance with the Constitution, are not open to judicial revision, and it results that, where proceedings for extradition, regularly and constitutionally taken under the acts of Congress, are pending, they cannot be put an end to by writs of *habeas corpus*.

Id. at 290. In *Fong Yue Ting v. United States*, 149 U.S. 698, 714 (1893) – an immigration case – the Court stated that extradition "may be made by the executive authority of the President alone, when no provision has been made by treaty or by statute for an examination of the case by a judge or magistrate." Consistent practice, however, belies statements of this kind and ensures a role for courts. To my knowledge, only one person has been extradited from the United States to another country without a judicial hearing. *See* Parry, *Lost History*, *supra* note 10, at 118.

[58] *See infra* text accompanying notes 182-203 (applying principles of constitutional law and international law to propose a rule of limited inquiry).

[59] 299 U.S. 5 (1936).

> power to surrender. It must be found that statute or treaty confers the power.[60]

The Court ultimately held that the extradition at issue was not explicitly authorized by the treaty.[61] While *Terlinden* suggests extradition is part of an inherent executive foreign affairs power, *Valentine* insists on a contrary view, that the power to extradite does not exist "in the absence of treaty or statute" and that it is entirely defined by the relevant treaty or statute.[62] If one reads *Glucksman* in light of *Valentine* instead of *Terlinden*, its holding becomes narrower – perhaps narrow enough to be described as a response to the specific claims in that case.

3. The Rule of Non-Inquiry in the Lower Courts

Since *Valentine*, the Supreme Court has said little about extradition. Lower courts, by contrast, have heard scores of cases, including many on the issue of non-inquiry. District and circuit judges often portray the resulting doctrine as a powerful impediment to hearing claims about procedural irregularities or physical mistreatment. In *Ahmad v. Wigen*, for example, the Second Circuit declared: "A consideration of the procedures that will or may occur in the requesting country is not within the purview of a habeas corpus judge. . . . It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds."[63] And in *Lopez-Smith v. Hood*, the Ninth Circuit stated: "[U]nder what is called the 'rule of non-inquiry' in extradition law, 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."[64] But reliance on selective quotations leads to a skewed and incomplete picture of non-inquiry doctrine. The rest of this section organizes the non-inquiry cases into categories that provide a better account of what the rule has meant in practice, including in cases in which the relator faces likely mistreatment.

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[60] *Id.* at 8-9.

[61] *Id.* at 11

[62] *See* Parry, *Lost History*, *supra* note 10, at 119-20, 123-24; *see also In re* Howard, 996 F.2d 1320, 1329 (1st Cir. 1993) ("[N]o branch of government has authority to surrender an accused to a foreign country except in pursuance of statute or treaty."); Quinn v. Robinson, 783 F.2d 776, 782 (9th Cir. 1986) ("[N]o branch of the United States government has any authority to surrender an accused to a foreign government except as provided for by statute or treaty."); Semmelman, *supra* note 10, at 1222 ("United States law prohibits extradition not based upon a statute or treaty obligation."). That said, numerous lower courts have ignored *Valentine* and treated extradition as an inherently executive function "except to the extent that the statute interposes a judicial function." Lopez-Smith v. Hood, 121 F.3d 1322, 1326 (9th Cir. 1997); *see also supra* note 4 (citing more cases stating that the executive has this broader power).

[63] Ahmad v. Wigen, 910 F.2d 1063, 1066-67 (2d Cir. 1990).

[64] *Lopez-Smith*, 121 F.3d at 1327.

First, some courts cite the rule in cases that do not raise non-inquiry issues at all. The courts simply mention the rule as part of a general discussion of extradition or while discussing other issues.[65] The discussions of non-inquiry in these cases, in other words, easily could be dismissed as dicta, yet courts sometimes cite them as authority for a broad rule.

Second, several non-inquiry cases involve claims about the motives of the requesting country. Usually the claim is that the requesting country is seeking to punish the relator for political activities and that the specific crimes for which extradition is sought are subterfuges.[66] These cases often also involve claims that the alleged crimes are political offenses. Courts apply the rule of non-inquiry to reject the improper-motivation aspect of this argument, consistent with *Glucksman*'s rejection of a similar claim.

Third, a large number of non-inquiry cases involve complaints about the ordinary criminal process in the requesting country, such as the use of in absentia proceedings or the lack of a jury trial.[67] These cases fall squarely

[65] *See* Blaxland v. Commonwealth Dir. of Pub. Prosecutions, 323 F.3d 1198, 1208 (9th Cir. 2003) (discussing the rule in a case about immunity in a civil suit over an extradition); United States v. Kin-Hong, 110 F.3d 103, 110-11 (1st Cir. 1997); Argento v. Horn, 241 F.2d 258, 263-64 (6th Cir. 1957); Al-Anazi v. Bush, 370 F. Supp. 2d 188, 194-95 (D.D.C. 2005); *see also* Ordinola v. Hackman, 478 F.3d 588, 607 (4th Cir. 2007) (Traxler, J., concurring) (using the rule in a political offense case to stress limits on judicial role in extradition).

[66] *See* Eain v. Wilkes, 641 F.2d 504, 519 (7th Cir. 1981) ("Petitioner claims that Israel seeks his extradition on charges of common crimes in order to try him for his political beliefs. . . . [That determination is] within the sole province of the Secretary of State."); Jhirad v. Ferrandina, 536 F.2d 478, 485 (2d Cir. 1976) ("Appellant's final claim is that his extradition is politically motivated . . . . Whatever weight may properly be given to any such claims, it is surely beyond dispute that the embezzlement of money . . . is not in any sense a political offense."); United States v. Ramnath, 533 F. Supp. 2d 662, 672 (E.D. Tex. 2008); *In re* Locatelli, 468 F. Supp. 568, 574-75 (S.D.N.Y. 1979); *In re* Lincoln, 228 F. 70, 73-74 (E.D.N.Y. 1915), *aff'd mem. sub nom.* Lincoln v. Power, 241 U.S. 651 (1916); *see also In re* Ezeta, 62 F. 972, 986 (N.D. Cal. 1894). For a discussion of *Ezeta*, see *supra* note 28. The extradition in *Eain v. Wilkes* involved more than claims of subterfuge, even though the court's non-inquiry analysis was limited to that issue. The court discussed the alleged torture of a witness, *see* 641 F.2d at 512 n.9, and the United States extradited Eain only after receiving diplomatic assurances from Israel of a fair civilian trial. *See* William P. Clark, *Memorandum of Decision by Mr. William P. Clark, Deputy Secretary of State of the United States, in the Case of the Request by the State of Israel for the Extradition of Mr. Ziad Abu Eain*, appended to G.A. Res. 36/171, U.N. Doc. A/RES/36/171 (Feb. 12, 1982), *reprinted in* 21 I.L.M. 442, 448 (1982).

[67] *See* Basso v. U.S. Marshal, 278 Fed. Appx. 886, 887 (11th Cir. 2008) (refusing to consider relator's "assertion that he would be subject to due process violations if extradited"); Yapp v. Reno, 26 F.3d 1562, 1568 (11th Cir. 1994); Martin v. Warden, 993 F.2d 824, 828-30 (11th Cir. 1993); Plaster v. United States, 720 F.2d 340, 349 n.9 (4th Cir. 1983) ("It is settled that the petitioner cannot block his extradition simply because the other country's judicial procedures do not comport with the requirements of our constitution."); *Jhirad*, 536 F.2d at 484-85; United States *ex rel.* Bloomfield v. Gengler, 507 F.2d 925, 928

within the scope of *Neely* – except to the extent one cabins *Neely* as a case about transfer in occupied territory – and again courts consistently reject such claims.

Fourth are the cases in which the relator complains about conditions of confinement. The claim usually turns on the length of the potential sentence in the requesting country, not on assertions that the treatment meted out in the foreign prison will be harsh or coercive. Courts reject these claims as well.[68]

The fifth, and largest, category of non-inquiry cases involves claims that the extraditee's physical safety is at risk on return to the requesting country. These cases put the greatest pressure on the doctrine, for it is obviously one thing to return a person to a country with different procedures from the United States, and quite another thing to send him back to certain mistreatment or death. Yet courts reject claims in these cases as consistently as they do in all of the other categories.[69]

(2d Cir. 1974); Holmes v. Laird, 459 F.2d 1211, 1214, 1219 (D.C. Cir. 1972); Gallina v. Fraser, 278 F.2d 77, 78 (2d Cir. 1960); *In re* Harusha, No. 07-x-51072, 2008 U.S. Dist. LEXIS 28812, at *23-24 (E.D. Mich. Apr. 9, 2008), *stay denied*, *In re* Harusha, 2008 U.S. Dist. LEXIS 35690 (E.D. Mich. May 1, 2008); *In re* Extradition of Chan Seong-I, 346 F. Supp. 2d 1149, 1157 (D.N.M. 2004); *In re* Sidali, 899 F. Supp. 1342, 1349 (D.N.J. 1995), *aff'd*, Sidali v. INS, 107 F.3d 191, 195 n.7 (3d Cir. 1997); Esposito v. Adams, 700 F. Supp. 1470, 1480-81 (N.D. Ill. 1988); *In re* Ryan, 360 F. Supp. 270, 274 (E.D.N.Y. 1973) (double jeopardy), *aff'd mem.*, 478 F.2d 1397 (2d Cir. 1973); *see also* Emami v. U.S. Dist. Court for the N. Dist. of Cal., 834 F.2d 1444, 1448-49 (9th Cir. 1987); *In re* Assarsson, 635 F.2d 1237, 1243-44 (7th Cir. 1980); *cf.* Sahagian v. United States, 864 F.2d 509, 514 (7th Cir. 1988); Rosado v. Civiletti, 621 F.2d 1179, 1195 (2d Cir. 1980); *Argento*, 241 F.2d at 263. For a discussion of extraditions involving in absentia proceedings, see generally Roberto Iraola, *Foreign Extradition and In Absentia Convictions*, 39 SETON HALL L. REV. 843 (2009).

[68] *See* Ramirez v. Chertoff, 267 Fed. Appx. 668, 670 (9th Cir. 2008) (rejecting claims that foreign law would impose an unduly harsh sentence and that relator's age and poor health raised special concerns); *Emami*, 834 F.2d at 1453 (rejecting claim "that Germany might detain him for investigation for up to four years before either trying or releasing him, and [that] the stress of incarceration and trial would expose him to a high risk of suffering a serious heart attack"); Arnbjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983) (rejecting claim about "solitary confinement during questioning"); *Chan Seong-I*, 346 F. Supp. 2d at 1153-54; *cf.* Prushinowski v. Samples, 734 F.2d 1016, 1018-19 (4th Cir. 1984) (rejecting claim that British prison food would not comply with Chassidic dietary rules).

[69] *See* Hoxha v. Levi, 465 F.3d 554, 563-64 (3d Cir. 2006) (using non-inquiry doctrine against claim of potential torture and extrajudicial killing); Cornejo-Barreto v. Siefert, 379 F.3d 1075, 1086 (9th Cir. 2004), *vacated as moot*, 389 F.3d 1307 (9th Cir. 2004) (en banc); Mainero v. Gregg, 164 F.3d 1199, 1210 (9th Cir. 1999) (refusing to consider claims of potential torture to elicit information about alleged co-conspirators); Koskotas v. Roche, 931 F.2d 169, 174 (1st Cir. 1991); Ahmad v. Wigen, 910 F.2d 1063, 1066 (2d Cir. 1990), *reversing* Ahmad v. Wigen, 726 F. Supp. 389, 409 (E.D.N.Y. 1989); *In re* Manzi, 888 F.2d 204, 206 (1st Cir. 1989); Escobedo v. United States, 623 F.2d 1098, 1107 (5th Cir. 1980)

Initially, this consistent approach to allegations of potential physical mistreatment suggests an uncompromising doctrine that has significant consequences for the human rights of people facing extradition. Such a conclusion is less robust than it first appears, however. The number of cases that involve potentially meritorious allegations of physical risk appears to be relatively small,[70] and I have found only four clear cases in which courts applied the doctrine while also admitting that the extraditee faced a meaningful

(refusing to consider claim that relator "may be tortured or killed if surrendered to Mexico"); Sindona v. Grant, 619 F.2d 167, 174 (2d Cir. 1980) (refusing to consider argument that relator's "return to Italy would subject him to risk of murder or injury at the hands of political enemies on the left"); Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976), *later proceeding*, 563 F.2d 1099 (4th Cir. 1977); *In re* Gon, 613 F. Supp. 2d 92, 94 (D.D.C. 2009) (refusing to consider claim that relator "has been victimized by racial discrimination and that he will be tortured if extradited"); *In re* Tawakkal, Criminal No. 3:08mj118, 2008 U.S. Dist. LEXIS 65059, at *42-44 (E.D. Va. Aug. 22, 2008); *In re* Stern, No. 07-21704-MC-Torres, 2007 U.S. Dist. LEXIS 79486, at *11-12 (S.D. Fla. Oct. 25, 2007); *In re* Solis, 402 F. Supp. 2d 1128, 1132 (C.D. Cal. 2005); Cohen v. Benov, 374 F. Supp. 2d 850, 860 (C.D. Cal. 2005); *In re* Singh, 170 F. Supp. 2d 982, 1038-39 (E.D. Cal. 2001); Gill v. Imundi, 747 F. Supp. 1028, 1048-49 (S.D.N.Y. 1990); *In re* Normano, 7 F. Supp. 329, 330-31 (D. Mass. 1934) (refusing to deny extradition based on fact that relator, who was Jewish, faced extradition to Nazi Germany, because "[w]hatever may be the situation in Germany, the Extradition Treaty between that government and the United States is still in full force, and it is the duty of the court to uphold and respect it just as it is bound to uphold the laws and Constitution of the United States"); *see also* Prasoprat v. Benov, 421 F.3d 1009, 1014-15 (9th Cir. 2005), *aff'g* Prasoprat v. Benov, 294 F. Supp. 2d 1165, 1171 (C.D. Cal. 2003); *Sidali*, 107 F.3d at 195 n.7, *reversing In re* Sidali, 899 F. Supp. at 1349; *In re* Smyth, 61 F.3d 711, 714 (9th Cir. 1995); *cf. Emami*, 834 F.2d at 1453-54.

[70] *See Hoxha*, 465 F.3d at 563 & n.13 (noting relator's concern that "he will be tortured and may be killed by the Albanian authorities if he is extradited" and suggesting some basis for concern); *Koskotas*, 931 F.2d at 173 (refusing to hear claims about "the motives of the Greek government and the probable consequences of extradition"), *aff'g* Koskotas v. Roche, 740 F. Supp. 904, 909 (D. Mass. 1990) (refusing to hear relator's claims that there was a risk of assassination by the "17 November" terrorist group, which "has made the Koskotas Affair one of its stated reasons for violence"). Many of the cases involving extradition to Mexico may have had merit, but the extent to which this remains true is unclear. *See* Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1008 (9th Cir. 2000) (taking notice of the magistrate judge's finding that relator likely would be tortured if extradited to Mexico); *Rosado*, 621 F.2d 1179 at 1186-87 (detailing past use of torture by Mexican police and prison officials). More recent cases involving the extradition of Sikhs to India are in a similar category. *See infra* note 71 (citing two cases in which the risk of torture appears to have been apparent to the court); *see also* Handseep Singh, Comment, *Bringing Fairness to Extradition Hearings: Proposing a Revised Evidentiary Bar for Political Dissidents*, 38 CAL. W. INT'L L.J. 177, 190-203, 210 (2007) (bringing examples of torture of Sikhs in India, and proposing a heightened evidentiary bar for extradition in order to satisfy due process requirements).

risk of physical harm.[71] In two of those cases, the court rejected extradition on other grounds.[72]

Also important is the way in which courts apply the rule to claims of physical mistreatment. In a significant number of the cases, courts do not simply cite the rule and refuse to consider the claim. They also frequently comment on the claim's apparent lack of merit – for example, characterizing it as "unsupported" or "speculative."[73] Several courts have engaged in a similar analysis of claims about foreign procedures.[74] There is also some basis for

[71] *See Smyth*, 61 F.3d at 721 ("[T]he evidence undoubtedly reflected the prospect of harsh treatment if Smyth were returned to the Maze . . . ."); *Singh*, 170 F. Supp. 2d at 1038-39 (noting India's past torture of relator and allowing offer of proof about potential torture); *Gill*, 747 F. Supp. at 1048 ("This substantial, chilling proffer from sources with at least surface credibility had convinced this court of the justification for further judicial inquiry . . . ."); *Normano*, 7 F. Supp. at 330-31 (refusing to consider treatment Jewish academic would receive in Nazi Germany). A possible fifth case is *Cornejo-Barreto*, 218 F.3d at 1008, in which the magistrate judge found that the relator likely would be tortured if extradited to Mexico. The court of appeals accepted that finding and held it was unnecessary to consider whether an exception to the rule of non-inquiry would apply because Cornejo-Barreto was entitled to review under the Administrative Procedures Act of any final decision by the Secretary of State to extradite him. *Id.* at 1016. On appeal after remand, the court rejected its earlier statements about APA review, stressed the importance of diplomatic flexibility, and applied the rule of non-inquiry without mentioning the magistrate's findings. *See* Cornejo-Barreto, 379 F.3d at 1082-86. The Ninth Circuit took the case en banc and vacated the opinion after Mexico withdrew the extradition request. *See* Cornejo-Barreto v. Siefert, 389 F.3d at 1307 (en banc); *see also* Committee Against Torture, *Second Periodic Report of the United States of America to the Committee Against Torture* ¶ 42, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005) (summarizing the Cornejo-Barreto litigation). The cases in footnote 70, *supra*, could be read with the ones in this note to provide a broader view of the cases in which courts have refused to inquire in the face of potential mistreatment. Also, a court might state that the allegations were not compelling precisely because it was rejecting the claim, or it might require the extraditee to meet an unreasonably high burden of proof before it would be willing to craft an exception to the perceived mandate of the non-inquiry rule.

[72] *See Gill*, 747 F. Supp. at 1043-47 (no probable cause); *Normano*, 7 F. Supp. at 330-32 (failure to extradite within required time period); *see also supra* note 71 (discussing *Cornejo-Barreto*).

[73] *See Ramirez*, 267 Fed. Appx. at 670 ("Ramirez does not claim that she will be tortured; she claims that she will be subjected to unduly 'harsh punishment' because the crime with which she is charged in Mexico carries a mandatory minimum sentence of six years, while she would 'presumably' be subject to a shorter sentence under United States law."); *Mainero*, 164 F.3d at 1210; *Manzi*, 888 F.2d at 206; *Emami*, 834 F.2d at 1453; Prushinowski v. Samples, 734 F.2d 1016, 1019 (4th Cir. 1984) (finding relator's claim about lack of religious diets in British prisons as "simply too insubstantial, too farfetched, to withstand, in and of itself, the light of day"); *Arnbjornsdottir-Mendler*, 721 F.2d at 683; *Peroff*, 542 F.2d at 1249; *Solis*, 402 F. Supp. 2d at 1132; *Tawakkal*, 2008 U.S. Dist. LEXIS 65059 at *42-43; *Cohen*, 374 F. Supp. 2d at 860.

[74] *See* Lopez-Smith v. Hood, 121 F.3d 1322, 1327 (9th Cir. 1997) (holding demand by

concluding that when courts face claims of irregular procedures, they are more likely to reject extradition than when they face more typical procedural complaints.[75] For example, federal courts used the political offense exception to refuse extradition of four men accused of committing violent crimes in support of Irish Republican Army efforts in Northern Ireland, but it is difficult to believe that the combination of possible physical mistreatment and irregular procedures was not also important to the courts' decisions.[76]

Finally, courts sometimes stress the availability of diplomatic assurances or other methods that the executive branch can use to ensure the fairness or regularity of the proceedings or the safety of the fugitive.[77] At least some of

Mexican officials for money in return for dropping charges is "not so egregious as to invoke" an exception to the rule); Yapp v. Reno, 26 F.3d 1562, 1567-68 (11th Cir. 1994) (rejecting treaty-based speedy extradition claim on the merits as well as because of non-inquiry concerns); Martin v. Warden, 993 F.2d 824, 830 (11th Cir. 1993) ("[R]ecognizing a Fifth Amendment right to a speedy extradition would simply be an oblique method of forcing treaty partners to adhere to the speedy trial guarantee contained in the United States Constitution. . . . There is no due process violation if Martin is tried in Canada according to Canadian law and procedure for his actions while in Canada."); *In re* Chan Seong-I, 346 F. Supp. 2d 1149, 1157 (D.N.M. 2004) (determining that delay and lack of statute of limitations do not violate relator's due process rights); Esposito v. Adams, 700 F. Supp. 1470, 1481 (N.D. Ill. 1988) ("[T]he 'evidence' provided by the petitioner is not sufficient to justify his attack on the Italian criminal justice system."); *In re* Ryan, 360 F. Supp. 270, 274-75 (E.D.N.Y. 1973) (determining double jeopardy claim had no merit), *aff'd mem.*, 478 F.2d 1397 (2d Cir. 1973); *see also* United States *ex rel.* Bloomfield v. Gengler, 507 F.2d 925, 928 (2d Cir. 1974) (rejecting claims based on "conviction in absentia" and "the argument that they were never permitted to put in a defense" on the merits as insufficiently grave to justify departing from the rule).

[75] In *United States v. Fernandez-Morris*, 99 F. Supp. 2d 1358, 1371-72 (S.D. Fla. 1999), the court stated the rule of non-inquiry "is not inviolate" and found that the Bolivian process that led to the extradition request was "shocking." Yet because the government had "failed to show probable cause and dual criminality," the court did not decide whether the case justified an exception to the rule of non-inquiry. *Id.* at 1373.

[76] *See In re* McMullen, 989 F.2d 603, 610 (2d Cir. 1993) (en banc) (describing failed 1978 extradition proceedings); United States v. Doherty, 786 F.2d 491, 495 (2d Cir. 1986) (rejecting government's effort to obtain declaratory relief from denial of extradition); Quinn v. Robinson, 783 F.2d 776, 786 (9th Cir. 1986) (describing district court's grant of habeas on political offense grounds); *In re* Mackin, 668 F.2d 122, 130 (2d Cir. 1981) (rejecting government's effort to take direct appeal from denial of extradition).

[77] *See* Noriega v. Pastrana, 564 F.3d 1290, 1298 (11th Cir. 2009) (suggesting diplomatic assurances addressed any concerns derived from Geneva Conventions); Ahmad v. Wigen, 910 F.2d 1063, 1067 (2d Cir. 1990) ("So far as we know, the Secretary never has directed extradition in the face of proof that the extraditee would be subjected to procedures or punishment antipathetic to a federal court's sense of decency. Indeed, it is difficult to conceive of a situation in which a Secretary of State would do so." (citations omitted)); Bauer v. United States (*In re* Geisser), 627 F.2d 745, 752 (5th Cir. 1980); Sindona v. Grant, 619 F.2d 167, 173 & n.9 (2d Cir. 1980) (noting use of diplomatic assurances and stating district judge had examined the evidence in support of the claim, apparently before rejecting

the time, courts appear to intend that these discussions will send a message to the executive branch that executive review should be more searching in a particular case or class of cases.

In short, many courts simultaneously invoke the rule of non-inquiry while also considering the merits or otherwise taking steps to ensure that the extraditee is not at risk. The frequency of this practice indicates both that courts may not be entirely comfortable with the rule in its most rigorous formulations, and that the rule itself is not as strong as those formulations maintain. One might even conclude that in cases involving physical mistreatment, the rule of non-inquiry is less a bar to judicial review than it first appears.[78]

To the extent that this characterization is true, the non-inquiry rule masks an actual practice of assessing which cases have serious human rights implications. Further support for this view of the doctrine and practice comes from that fact that several courts have taken the additional step of suggesting a "humanitarian exception" to the non-inquiry doctrine.[79] No court has ever

it); Holmes v. Laird, 459 F.2d 1211, 1223-24 (D.C. Cir. 1972) (noting there were fair trial provisions in the Status of Forces Agreement as well as monitoring requirements, but also calling the procedural claims "serious"); Gallina v. Fraser, 278 F.2d 77, 78 (2d Cir. 1960); *In re* Harusha, No. 07-x-51072, 2008 U.S. Dist. LEXIS 28812, *24-25 (E.D. Mich. Apr. 9, 2008). In *Gill v. Imundi*, 747 F. Supp. 1028, 1049-50 (S.D.N.Y. 1990), in which the court expressed concern about India's likely treatment of the relators but refused a humanitarian exception, the State Department informed the court that it was "aware of the seriousness of the allegations and [would] consider them prior to the Secretary's final determination on extradition." Declaration of Andre M. Surena at 5-6, Gill v. Imundi, No. 88 Civ. 1530 (RWS) (S.D.N.Y. Dec. 10, 1989), *available at* http:/www.state.gov/documents/organization /28457.pdf; *see also* Cornejo-Barreto v. Siefert, 379 F.3d 1075, 1081 (9th Cir. 2004) (discussing declaration by State Department official which notes the use of assurances in extradition cases, possibly including the case at bar), *vacated as moot*, 389 F.3d 1307 (9th Cir. 2004) (en banc).

[78] *See* Quigley, *supra* note 12, at 1242-47 (suggesting judicial discomfort with the rule in cases of severe rights violations); *cf.* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 601, 606 (1976) (arguing most political question cases involve substantive review and are not part of a category of cases or issues immune from judicial review).

[79] *See* Ramirez v. Chertoff, 267 Fed. Appx. 668, 669-70 (9th Cir. 2008) (recognizing the possibility of an exception); Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1010 (9th Cir. 2000); Parretti v. United States, 122 F.3d 758, 765 n.8 (9th Cir. 1997), *rev'd on other grounds*, 143 F.3d 508, 509 (9th Cir. 1998) (en banc); *Lopez-Smith* 121 F.3d at 1326-27 (9th Cir. 1997) (assuming there is an exception "for purposes of discussion"); United States v. Kin-Hong, 110 F.3d 103, 112 (1st Cir. 1997); Emami v. U.S. Dist. Court for the N. Dist. of Cal., 834 F.2d 1444, 1453 (9th Cir. 1987); Demjanjuk v. Petrovsky, 776 F.2d 571, 583 (6th Cir. 1985); Arnbjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983); *Bloomfield*, 507 F.2d at 928; *Gallina*, 278 F.2d at 79; *Fernandez-Morris*, 99 F. Supp. 2d at 1373; *cf. In re* Manzi, 888 F.2d 204, 206 (1st Cir. 1989) ("[S]erious due process concerns may merit review beyond the narrow scope of inquiry in extradition proceedings."); Rosado

applied the exception as the basis for refusing extradition. Still, the assertion that such an exception is available not only preserves judicial flexibility but also sends yet another signal to the State Department that it must address serious claims.[80]

That said, in addition to the fact that no court has ever applied the exception, a larger number of courts – particularly in recent years – have explicitly rejected the possibility of an exception or has made statements that are inconsistent with such a possibility.[81] Perhaps relatedly, several courts have asserted that extradition is a matter primarily for the executive branch and that it involves complicated foreign policy decisions that courts either cannot or are ill-equipped to second-guess.[82] Some of these statements are so general as to

v. Civiletti, 621 F.2d 1179, 1195 (2d Cir. 1980) (stating in a non-extradition habeas case, "this court has previously indicated that the presumption of fairness routinely accorded the criminal process of a foreign sovereign may require closer scrutiny if a relator persuasively demonstrates that extradition would expose him to procedures or punishment 'antipathetic to a federal court's sense of decency'"); Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976) (stating that "denial of extradition by the Executive may be appropriate when strong humanitarian grounds are present, but such grounds exist only when it appears that, if extradited, the individual will be persecuted, not prosecuted, or subjected to grave injustice," but not making clear whether this was a statement that also envisioned judicial review).

[80] Indeed, the uncertainty surrounding an exception that has never been applied could have independent deterrent value. *See* Dan M. Kahan, *Ignorance of Law* is *an Excuse – But Only for the Virtuous*, 96 MICH. L. REV. 127, 139-41 (1997) (defining "prudent obfuscation" as the use of vague terms to foster law-abiding behavior).

[81] *See* Basso v. U. S. Marshall, 278 Fed. Appx. 886, 887 (11th Cir. 2008); Hoxha v. Levi, 465 F.3d 554, 564 n.14 (3d Cir. 2006); Prasoprat v. Benov, 421 F.3d 1009, 1016 (9th Cir. 2005); Cornejo-Barreto v. Siefert, 379 F.3d 1075, 1083-86 (9th Cir. 2004) (seeming to reject an exception), *vacated as moot*, 389 F.3d 1307 (9th Cir. 2004) (en banc); Mainero v. Gregg, 164 F.3d 1199, 1210 (9th Cir. 1999); Sidali v. INS, 107 F.3d 191, 195 n.7 (3d Cir. 1997); Martin v. Warden, 993 F.2d 824, 830 n.10 (11th Cir. 1993); Koskotas v. Roche, 931 F.2d 169, 174 (1st Cir. 1991); *Ahmad*, 910 F.2d at 1064; Escobedo v. United States, 623 F.2d 1098, 1107 (5th Cir. 1980) (quoting *Sindona*); *Sindona*, 619 F.2d at 174; *In re* Gon, 613 F. Supp. 2d 92, 94 (D.D.C. 2009); *In re* Stern, No. 07-21704-mc-torres, 2007 U.S. Dist. LEXIS 79486, at *12 (S.D. Fla. Oct. 25, 2007); *In re* Chan-Seong-I, 346 F. Supp. 2d 1149, 1153-54 (D.N.M. 2004); *In re* Singh, 170 F. Supp. 2d 982, 1038-39 (E.D. Cal. 2001); *In re* Sandhu, 886 F. Supp. 318, 322 (S.D.N.Y. 1993); *Gill*, 747 F. Supp. at 1049-50 (following *Ahmad*); *see also In re* Smyth, 61 F.3d 711, 721-22 (9th Cir. 1995).

[82] *E.g.*, *Sidali*, 107 F.3d at 194 ("Because the power to extradite derives from the President's power to conduct foreign affairs, extradition is an executive, not a judicial, function. Thus, 'the judiciary has no greater role than that mandated by the Constitution, or granted to the judiciary by Congress.'" (citations omitted)); *see also* Noriega v. Pastrana, 564 F.3d 1290, 1294 (11th Cir. 2009); Ordinola v. Hackman, 478 F.3d 588, 606 (4th Cir. 2007) (Traxler, J., concurring); *Hoxha*, 465 F.3d at 560; *Cornejo-Barreto*, 379 F.3d at 1088-89; *Lopez-Smith*, 121 F.3d at 1326; *Kin-Hong*, 110 F.3d at 110-11; *Smyth*, 61 F.3d at 714; *Martin*, 993 F.2d at 828; *Koskotas*, 931 F.2d at 174; *Ahmad*, 910 F.2d at 1067; *Manzi*, 888 F.2d at 206; *Escobedo*, 623 F.2d at 1105-06; Peroff v. Hylton, 563 F.2d 1099, 1102 (4th Cir.

have little meaning, and a few courts have explicitly rejected such reasoning.[83] As few as four of the cases that reject an exception or reason inconsistently with it also involved allegations of physical risk that appear to have had merit.[84] Nonetheless, these statements suggest a belated effort to shore up the rule of non-inquiry by anchoring it in a theory of executive power over foreign relations. Some commentators have made a similar effort.[85]

C. *Summarizing the Current Doctrine*

The rule of non-inquiry contains a stable core that prohibits inquiring closely into claims about the motives of the requesting government (except to the extent the claim falls within the political offense exception), about that country's ordinary criminal procedures, or about its ordinary penal policies (such as the length of prison sentences). Outside that core – where the relator faces unusual procedures or possible personal injury – the rule is less stable, and courts not only inquire into the merits but also sometimes find ways to refuse extradition or signal the executive branch that caution is warranted.

The non-inquiry rule emerged in Supreme Court cases that made little effort to provide a theoretical or policy basis for it. Yet the instability of the rule creates a need for some kind of grounding or justification. Recent courts have therefore not surprisingly turned to the amorphous idea of "foreign affairs" to justify the rule. The foreign relations argument has the twin virtue of associating the rule with constitutional principles while relieving courts of responsibility for any mistreatment that a person might suffer after extradition.

Thus, to the extent the rule has a theory, it draws partly from a substantive policy about allocation of authority that overlaps with an institutional stance of deference. Worth stressing, however, is that a third component emerges from between the lines of the cases: more than anything else, the rule of non-inquiry is grounded in sheer precedential force. It exists now precisely because it has existed in some form for more than a century. Courts faced with potentially

1977); Shapiro v. Secretary of State, 499 F.2d 527, 531 (D.C. Cir. 1974); *In re* Atuar, 300 F. Supp. 2d 418, 425 (S.D.W. Va. 2003).

[83] *See* Mironescu v. Costner, 480 F.3d 664, 671-72 (4th Cir. 2007); *In re* Howard, 996 F.2d 1320, 1330 n.6 (1st Cir. 1993); Plaster v. United States, 720 F.2d 340, 349 (4th Cir. 1983); Eain v. Wilkes, 641 F.2d 504, 513-17 (7th Cir. 1981).

[84] *See Hoxha*, 465 F.3d at 563 & n.13; *Koskotas*, 931 F.2d at 173-74 (rejecting an exception despite relator's concerns about the "probable consequences" of extradition, which included risk of assassination by a terrorist group), *aff'g* Koskotas v. Roche, 740 F. Supp. 904, 909 (D. Mass. 1990); *Singh*, 170 F. Supp. 2d at 1038-39; *Gill*, 747 F. Supp. at 1049.

[85] *See* Semmelman, *supra* note 10, at 1206, 1229; Michael P. Scharf, Note, *Foreign Courts on Trial: Why U.S. Courts Should Avoid Applying the Inquiry Provision of the Supplementary U.S.-U.K. Extradition Treaty*, 25 STAN. J. INT'L L. 257, 275-76 (1988) ("[L]ike the act of state and political question doctrines, the rule of noninquiry is premised on judicial recognition of the institutional limitations of the courts and the peculiar requirements of successful foreign relations.").

disturbing claims can compile reassuring string cites of cases in which their predecessors refused – or claimed to refuse – to inquire into possible violations of human rights. That is to say, like much of international extradition law, the rule of non-inquiry is self-reinforcing and frozen in time.

II. TOWARDS A RULE OF LIMITED INQUIRY

One response to this doctrinal summary is to conclude that everything is perfectly fine with the rule of non-inquiry. By applying the doctrine in some cases and paying lip service to it in others, courts can review serious claims at the same time that they protect the ability of the executive branch to control foreign relations. This Part will argue that everything is not all right with the doctrine and will suggest replacing it with a rule of limited inquiry – or perhaps simply a doctrine of what rights apply in extradition. My arguments here rest in part on the premise that transparency in the reasoning and conclusions of a court is better than subterfuge. Put differently, even if the current substance of non-inquiry doctrine were normatively desirable, the continued refusal by courts to disclose its actual workings would be a mistake.[86]

A. *Limits, Uncertainties, and Inconsistencies*

Courts usually describe the rule of non-inquiry as a formal proposition: courts should not look at what the receiving country will do because this issue is not part of the habeas inquiry and U.S. law does not apply to foreign practices, and perhaps also because foreign sovereigns are immune from scrutiny. This proposition receives additional contemporary support from assertions that courts are unable to assess foreign practices and must defer to executive primacy in foreign affairs. Each piece of this doctrinal structure is vulnerable or simply incorrect.

1. The Legacy of the Insular Cases

The assumption that non-inquiry doctrine should operate as a formal rule conflicts with the doctrine's origin alongside the *Insular Cases*.[87] The *Insular Cases* exhibited a functional approach to the question of how the Constitution applies to territories (and the people in them) that are under U.S. control but not organized into states.[88] To be sure, many commentators think badly of the *Insular Cases*. Gerald Neuman has declared, for example, that they were

[86] *Cf.* Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1585-86 (1966) (suggesting attention to "the real reasons" for deciding choice of law issues will aid "[u]nderstanding of the decisions, by students, by lawyers, and by other judges" and "occasionally" generate different results).

[87] *See supra* text accompanying notes 44-53 (detailing the connections between *Neely* and the *Insular Cases*).

[88] *See* Neuman, *supra* note 43, at 270-71.

"grievously wrong" and lack any "persuasive normative basis."[89] Yet in *Boumediene v. Bush*, the Supreme Court treated the *Insular Cases* as the foundation for a doctrine in which the Constitution applies to U.S. territories *unless* an exception is warranted because of "practical difficulties."[90] The Court linked this doctrine to subsequent extraterritoriality cases and concluded that extraterritoriality issues turn on a functional analysis of three factors: citizenship, the "nature of the sites" at which the relevant conduct took place, and "practical obstacles."[91] With respect to the third factor, the Court seemed to indicate that the burden of proving "obstacles" would rest with the government; it stressed the question whether issuing the writ of habeas corpus "would be 'impracticable or anomalous.'"[92]

The issues raised by the rule of non-inquiry do not fit neatly into *Boumediene*'s extraterritoriality analysis. Indeed, my argument in favor of reforming non-inquiry doctrine contends that the knowledge and conduct of U.S. officials, not extraterritoriality, should be the primary focus. Nonetheless, courts could modify *Boumediene*'s general functional approach to fit the extradition context. Further, to the extent that the non-inquiry rule emerged from the issues and tensions that produced the *Insular Cases*, one might independently conclude that the scope of inquiry should reflect their functional approach, particularly because *Boumediene* stressed that approach as their central doctrinal legacy.

Many courts have gone part of the way toward a functional approach by considering the strength of the relator's claim in some cases and finding ways

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[89] GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 100, 101 (1996); *see also* Burnett, *A Convenient Constitution?*, *supra* note 40, at 982 ("*The Insular Cases* . . . have long been reviled as the cases that held that most of the Constitution does not 'follow the flag' outside the United States.").

[90] Boumediene v. Bush, 553 U.S. 723, 759 (2008); *see also* RAUSTIALA, *supra* note 13, at 218 ("[T]he opinion was somewhat tendentious in its reading of history . . . ."); Burnett, *A Convenient Constitution?*, *supra* note 40, at 992-94 (agreeing to some extent with the Court's characterization); Neuman, *supra* note 43, at 270-71 (cautioning that the Court "gave a sanitized account of the motivations for the *Insular Cases* doctrine"). By contrast, Justice Black's plurality opinion half a century earlier in *Reid v. Covert* sought to limit the *Insular Cases* to their specific context and declared that "neither the cases nor their reasoning should be given any further expansion." Reid v. Covert, 354 U.S. 1, 14 (1957). Justice Harlan's concurrence came closer to the reasoning of *Boumediene*: not only do the *Insular Cases* "still have vitality," *id.* at 67 (Harlan, J., concurring), but they stand for the proposition, "not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place." *Id.* at 74.

[91] *Boumediene*, 128 U.S. at 766. The Court was addressing "the reach of the Suspension Clause." *Id.*

[92] *Id.* at 770 (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)). *See generally* Burnett, *A Convenient Constitution?*, *supra* note 40 (emphasizing and critiquing the Court's use of the "impracticable or anomalous" test).

to avoid extraditions that raise grave concerns.[93] But courts might go further if they understood the non-inquiry doctrine to be based in functional rather than formal analysis. One might even follow *Boumediene* to conclude that a functional approach should ask whether inquiring into treatment would be "impracticable or anomalous" under all the circumstances of the case. That is to say, a functional approach to the rule of non-inquiry would involve a preliminary analysis of the claim that might lead to no further inquiry for most rights claims (such as jury trial) but a more searching inquiry for more fundamental claims.

2. Habeas Corpus and the Scope of Inquiry

Since the Supreme Court announced the scope of extradition habeas review in the late nineteenth and early twentieth century, the scope of federal habeas corpus review of criminal convictions has greatly expanded.[94] In the context of executive detention outside or alongside criminal law, the Supreme Court recently confirmed the importance of habeas corpus and expanded its reach.[95] Remember that the rationale for the narrow scope of extradition habeas was in large part the similarly narrow scope of habeas review in general and in criminal law cases in particular. These changes in the general law of habeas corpus suggest that the continued narrow scope of extradition habeas rests less on reasons that have contemporary weight and more on the simple fact of precedent alone.

In recognition of this situation, many courts over the past twenty-five years have begun to expand the scope of habeas corpus review in extradition cases. While some courts continue to cite the older habeas cases as support for a narrow inquiry,[96] I think it is safe to say that extradition habeas has managed to expand – even if that expansion is fragile and uneven. Critically for purposes of this Article, the decisions that expand extradition habeas also state or imply that the rule of non-inquiry does not prevent a habeas court from ensuring that the United States complies with the Constitution in the course of an extradition.

For example, in *In re Burt*, the Seventh Circuit noted that the general scope of habeas review has expanded since the early extradition habeas cases and that earlier cases did not involve "constitutional challenges to the conduct of

[93] *See supra* text accompanying notes 78-80 (describing the extent of the humanitarian exception to the rule of non-inquiry).

[94] *See supra* note 25 and accompanying text.

[95] *See Boumediene*, 553 U.S. at 771 (holding that the Suspension Clause has full effect in Guantanamo Bay, and that a statute suspending federal jurisdiction for the writ is unconstitutional in the absence of adequate substitutes); Rasul v. Bush, 542 U.S. 466, 483-84 (2004) (holding that United States Courts have jurisdiction to hear habeas challenges by Guantanamo Bay Detainees); *see also* INS v. St. Cyr, 533 U.S. 289, 298 (2001).

[96] *See* discussion *supra* note 26.

the executive branch in deciding to extradite the accused."[97] The court then stated,

> We hold that federal courts undertaking habeas corpus review of extraditions have the authority to consider not only procedural defects in the extradition procedures that are of constitutional dimension, but also the substantive conduct of the United States in undertaking its decision to extradite if such conduct violates constitutional rights.[98]

Other courts have reached similar conclusions.[99] The basic argument is, first, that the federal habeas statute grants federal courts the jurisdiction to inquire whether a person is held in custody "in violation of the Constitution or laws or treaties of the United States."[100] Second, government conduct must conform to the Constitution, particularly when it is domestic conduct with respect to a person held in custody.[101] Third, in the extradition context, in which the initial hearing may not even be an Article III proceeding, habeas will often provide the only opportunity for independent judicial review of constitutional claims.[102]

Some of the statements and holdings in these cases suggest a due process analysis that would overlap with and partly displace the rule of non-inquiry. That is to say, by focusing on what U.S. officials are doing rather than on what foreign officials might do, one could re-characterize some of the claims that currently run afoul of the non-inquiry doctrine. Instead of (or in addition to) asking courts to prevent the extradition because of the likely conduct of foreign officials, the relator could argue that due process prohibits the involvement of executive branch officials in the extradition of a person to face known or reasonably likely mistreatment. To the extent that such claims sound in due process, moreover, they override *Glucksman*-derived claims that the extradition treaty itself prevents such an inquiry.[103]

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[97] *In re* Burt, 737 F.2d 1477, 1483 (7th Cir. 1984); *see also* Plaster v. United States, 720 F.2d 340, 348 (4th Cir. 1983).

[98] *Burt*, 737 F.2d at 1484.

[99] *See* United States v. Kin-Hong, 110 F.3d 103, 106 (1st Cir. 1997); Martin v. Warden, 993 F.2d 824, 829 (11th Cir. 1993); *In re* Manzi, 888 F.2d 204, 206 (1st Cir. 1989); Prushinowski v. Samples, 734 F.2d 1016, 1018 (4th Cir. 1984); *Plaster*, 720 F.2d at 348; Bauer v. United States (*In re* Geisser), 627 F.2d 745, 750 (5th Cir. 1980); *see also* Ahmad v. Wigen, 910 F.2d 1063, 1065 (2d Cir. 1990); Sahagian v. United States, 864 F.2d 509, 513 (7th Cir. 1988); Hooker v. Klein, 573 F.2d 1360, 1369 (9th Cir. 1978) (Chambers, C.J., concurring); Gill v. Imundi, 747 F. Supp. 1028, 1039 (S.D.N.Y. 1990).

[100] 28 U.S.C. § 2241(c)(3) (2006).

[101] *See Burt*, 737 F.2d at 1484-85 ("When the conduct of the United States government is challenged, such conduct must be assessed in light of the Constitution.").

[102] *See* Parry, *Lost History*, *supra* note 10, at 157-58 (arguing for greater recognition of expanded extradition habeas). Thus, even if there were no habeas review of criminal convictions, expanded habeas review would still be appropriate for extradition cases.

[103] *See* Reid v. Covert, 354 U.S. 1, 16 (1957) (holding that a treaty cannot override

This discussion demonstrates that federal courts have jurisdiction over at least some inquiry claims. Indeed, habeas corpus law would appear to support a presumption that judicial review of constitutional claims is available, even if such review overlaps with traditional non-inquiry doctrine. As the next section shows, foreign policy concerns are insufficient to bar this review, although they provide reasons to be cautious about its extent.

3. The Limits of Foreign Affairs and Institutional Competence Claims

Foreign affairs concerns are often relevant in extradition cases. For example, political offense cases involving suspected IRA members led to the negotiation of a supplementary extradition treaty between the United States and the United Kingdom.[104] But foreign affairs concerns provide no basis for concluding that extradition decisions in general or non-inquiry concerns in particular are inherently and exclusively part of the executive power.[105]

First, the early extradition cases, including *Neely*, do not treat foreign affairs as a central concern. In fact, through much of the nineteenth century the executive's role in extradition was unclear, and there was good authority for the claim that it was only ministerial.[106] Second, the Supreme Court addressed the executive power claim in *Valentine*, when it made clear that the power to extradite does not exist "in the absence of treaty or legislative provision" and that it is entirely defined by the relevant treaty or statute.[107] Third, an extradition treaty has no greater power than any other treaty to override the relator's constitutional rights, as some of the more recent extradition habeas cases have recognized.[108]

Fourth, on the specific issue of non-inquiry, the Court made clear in *Neely* that the President and Senate as treaty-makers can bypass the rule, and the Court explicitly relied on the judgment of Congress rather than, for example,

federal constitutional rights).

[104] *See* John T. Parry, *No Appeal: The U.S.-U.K. Supplementary Extradition Treaty's Effort to Create Federal Jurisdiction*, 25 LOY. L.A. INT'L & COMP. L. REV. 543, 551-52 (2003) (describing the origin and goals of the supplementary treaty); *see also* Sacirbey v. Guccione, 589 F.3d 52, 69 (2d Cir. 2009) (holding invalid the warrant that formed part of the extradition request for former Bosnian ambassador to the United Nations); *Bauer*, 627 F.2d at 747-48 (detailing efforts of U.S. officials to convince Swiss officials not to demand a particular extradition and the diplomatic distractions and tensions that those efforts produced).

[105] *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) ("[I]t cannot of course be thought that 'every case or controversy which touches foreign relations lies beyond judicial cognizance.'" (quoting Baker v. Carr, 369 U.S. 186, 211 (1962))).

[106] *See* Parry, *Lost History*, *supra* note 10, at 150-51; *see also* JOHN BASSETT MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION, 551-55 (1891).

[107] Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 8-9 (1936); *see also* Parry, *Lost History*, *supra* note 10, at 119-20, 123-24.

[108] *See Reid*, 354 U.S. at 16 (holding that a treaty cannot override federal constitutional rights); *supra* note 99 (citing numerous cases supporting this proposition).

the decisions of military officials in charge of the occupation.[109] In other words, regardless of the foreign affairs concerns that an inquiry into the requesting country's judicial system might create, *Neely* indicates that the Constitution does not require a rule of non-inquiry.[110]

[109] *See* Neely v. Henkel (No. 1), 180 U.S. 109, 123 (1901).

[110] *See* Yapp v. Reno, 26 F.3d 1562, 1572-73 (11th Cir. 1994) (Carnes, J., dissenting) (concluding that *Neely* contemplates ability to provide for greater rights by treaty). Some cases that contend that extradition is primarily an executive function appear to recognize this point as well. *See* Lopez-Smith v. Hood, 121 F.3d 1322, 1326 (9th Cir. 1997) (stating that extradition is an executive function "except to the extent that the statute interposes a judicial function").

Michael Scharf has argued that Congress cannot override the rule of non-inquiry because it has constitutional roots similar to those of the political question and act of state doctrines. *See* Scharf, *supra* note 85, at 275-76 ("[T]he extradition rule of noninquiry . . . is functionally identical to the act of state doctrine. . . . [T]he rationale underlying both the motive and fair trial prongs of the rule of noninquiry is indistinguishable from that identified in *Sabbatino* and its act of state progeny."). My discussion takes the position that the rule of non-inquiry has shallow constitutional roots, if it has any. In addition, since Scharf wrote in 1988, the Supreme Court has held that the act of state doctrine should be narrowly construed to prevent it from creating "an exception for cases and controversies that may embarrass foreign governments" – although it still requires that, "in the process of deciding [cases], the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." W.S. Kirkpatrick Co., Inc. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990). Allowing federal court review of the actions of U.S. officials is arguably consistent with this rule. Further, although the act of state doctrine could buttress the rule of non-inquiry for claims about ordinary foreign criminal processes, the extent to which it insulates processes or mistreatment that harm individuals and violate clearly established international standards is less certain. *Compare* Lizarbe v. Rondon, 642 F. Supp. 2d 473, 488 (D. Md. 2009) ("[A]cts of torture, extrajudicial killing, and crimes against humanity . . . committed in violation of the norms of customary international law, are not deemed official acts for purposes of the acts of state doctrine."), *and* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 345 (S.D.N.Y. 2004), *with* Doe I v. Liu Qi, 349 F. Supp. 2d 1258, 1304 (N.D. Cal. 2004) (observing that most suits that have allowed human rights claims to go forward over act of state objections are against "former dictators, rulers or officials no longer in power"). The dispute in these cases turns in part on the fact that plaintiffs are arguing that the act of state doctrine does not bar an affirmative suit for relief – that officials cannot use it defensively to shield themselves from liability. By contrast, in an extradition case, the United States, on behalf of the requesting country, uses the rule of non-inquiry (and any act of state overtones that it might have) to support its affirmative case for relief – to claim that whatever the requesting country might do once it has the person in custody is irrelevant – and it is the relator who is in the defensive posture.

Note, however, the following statement and citation in *Munaf*:

> To allow United States courts to intervene in an ongoing foreign criminal proceeding and pass judgment on its legitimacy seems at least as great an intrusion as the plainly barred collateral review of foreign convictions. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 417-18 (1964) ("To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the court of another

Much has happened in the law and practice of foreign relations since *Neely*, but this aspect of the case appears to remain sound. The Reagan Administration, for example, acquiesced in this conclusion when it agreed to Senate-initiated revisions to the 1986 U.S.-U.K. Supplementary Extradition Treaty. Those revisions allowed courts to inquire whether:

> the request for extradition has in fact been made with a view to try or punish [the relator] on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions.[111]

Moreover, the Supreme Court's recent decisions in the Detention Cases indicate that expansive claims of constitutional foreign affairs authority will founder when they would prevent judicial review, particularly when it comes to extraordinary procedures or physical mistreatment of people.[112] Further, as I will discuss below, the Court's decision in *Munaf v. Geren*[113] holds out the possibility of limited inquiry despite its acceptance of foreign affairs concerns.

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would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'").

Munaf v. Geren, 553 U.S. 674, 699 (2008). This broad statement came as part of the Court's rejection of the argument that habeas corpus could "permit a prisoner detained within a foreign sovereign's territory to prevent a trial from going forward," *id*. at 698, so that its application to extradition is at least debatable. If it does apply, it would seem to obliterate the political offense exception as much as it would support the rule of non-inquiry. The Court also ignored the fact that "amicable relations" and "the peace of nations" now coexist with frequent consideration of the legitimacy of the criminal practices of other nations, such that the act of state doctrine no longer applies as obviously to human rights concerns in transnational and international criminal law. Finally, the statement does not literally bar an assessment of the knowledge and actions of U.S. officials.

[111] Supplementary Treaty Between the Government of the United States of America and the Government of the United Kingdom and Northern Ireland, U.S.-U.K., art. 3(a), June 25, 1985, 28 U.S.T. 227. For discussions of the legislative and negotiating history of this provision, see Parry, *No Appeal*, supra note 104, at 552-55 (discussing the addition of a new Article 3(a) to the treaty); Scharf, *supra* note 85, at 262-67 (exploring the legislative history on the right of inquiry embodied in Article 3(a)). The 2003 U.S.-U.K. extradition treaty does not include this language. *See* Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom and Northern Ireland, U.S.-U.K., Mar. 31, 2003, S. TREATY DOC. NO. 108-23 (providing only that "[e]xtradition shall not be refused based on the nationality of the person sought" in Article 3).

[112] *See* Boumediene v. Bush, 553 U.S. 723, 765-66 (2008); Hamdan v. Rumsfeld, 548 U.S. 557, 567, 590 (2006); Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (holding that although Congress had authorized Hamdi's detention, "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention"); Rasul v. Bush, 542 U.S. 466, 485 (2004).

[113] 553 U.S. 674 (2008).

I do not want to overstate the current willingness of courts to relax their deference to foreign affairs concerns. Many courts have cited such concerns as a basis for applying the rule of non-inquiry, and one could conclude that these statements are the best source for describing the content of current doctrine. Even the courts that made inquiries under the command of the Supplementary Treaty exhibited a decided reluctance to inquire very much.[114]

Similarly, I do not mean to deny the importance of foreign affairs concerns. The Supreme Court has stressed the importance of caution in cases with "potential implications for the foreign relations of the United States."[115] It is also significant that extradition is an important tool for combating the increasing globalization of crime, such that law enforcement concerns in such cases overlap with or merge into foreign affairs concerns. At the same time, however, "there is a long history of judicial review of Executive and Legislative decisions related to the conduct of foreign relations and national security."[116] Nor is it at all clear that global crime-fighting should displace traditional or developing notions of due process and human rights.

My point is simply that judicial statements about foreign affairs concerns in extradition cases do not rest on any kind of measured assessment of extradition doctrine or of the proper scope of foreign affairs deference in the extradition context.[117] Several courts have made flat statements to the effect that "[e]xtradition is an executive rather than a judicial function."[118] Perhaps the most far-reaching is the Eleventh Circuit's assertion that "[t]he power to extradite derives from the President's power to conduct foreign affairs. An extradition proceeding is not an ordinary Article III case or controversy. . . . Rather, the judiciary serves an independent review function *delegated to it by the Executive* and defined by statute."[119] As these quotations suggest, the

[114] *See In re* Smyth, 61 F.3d 711, 720 (9th Cir. 1995); *In re* Howard, 996 F.2d 1320 (1st Cir. 1993). Another Ninth Circuit case found greater room for inquiry under the first clause of Article 3(a), but the Ninth Circuit withdrew the opinion, took the case en banc, and vacated after the United Kingdom withdrew the extradition requests. *See In re* Artt, 158 F.3d 462, 466 (9th Cir. 1998), *withdrawn*, *reh'g en banc granted*, 183 F.3d 944 (9th Cir. 1999), *vacated as moot*, 249 F.3d 831 (9th Cir. 2000) (en banc) (finding that under Article 3(a), judges may examine not just the factors behind the request for extradition but also the treatment the accused is likely to receive under the foreign criminal justice system if extradited).

[115] Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004).

[116] Arar v. Ashcroft, 585 F.3d 559, 581 (2d Cir. 2009) (in banc) (quoting Arar v. Ashcroft, 532 F.3d 157, 213 (2d Cir. 2008) (Sack, J., concurring in part and dissenting in part)).

[117] For a good summary of the general debate over judicial deference to the executive branch on foreign affairs issues, see CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 124-28 (3d ed. 2009) (discussing current debates and court cases on deference).

[118] Hoxha v. Levi, 465 F.3d 554, 560 (3d Cir. 2006); *see also* cases cited *supra* note 82.

[119] Martin v. Warden, 993 F.2d 824, 828 (11th Cir. 1993) (emphasis added) (citations

contemporary foreign affairs argument advanced by extradition courts is significant for its frequent lack of nuance. At best, these courts use exaggerated language to recognize the important role that the executive branch plays in extradition. Less charitably, statements such as these immunize courts from having to make decisions in this area at all. At worst, courts are making an argument for executive prerogative – an issue I will address in Part III.

The foreign affairs argument sometimes shades into or attempts to draw strength from an institutional competence claim that courts simply are not in a good position to make inquiries into the process or treatment that awaits the extraditee.[120] But the institutional competence claim is puzzling. It is simply not true that federal courts lack the ability to inquire into the treatment that a person will receive from government officials in another country. Indeed, the same federal courts that claim incompetence in extradition cases routinely manage to perform the task in immigration cases.[121]

For example, federal courts of appeals review the factual findings of Article I immigration courts on the question whether an alien faces "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" such that he or she is eligible for asylum.[122] Similar review exists for claims for withholding of removal based either on a threat to the alien's "life or freedom . . . because of the alien's race, religion, nationality, membership in a particular social group, or political opinion,"[123] or on the protections of the Convention Against Torture.[124] According to the Ninth Circuit, "[t]he source of the persecution must be the government or forces that the government is unwilling or unable to control."[125] Further, "[w]hile a well-founded fear must be objectively reasonable, it 'does not require certainty of persecution or even a probability of persecution.'"[126] The court quantified the requisite likelihood of future persecution: "'Even a ten percent chance . . . is enough to establish a well-founded fear.'"[127]

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omitted).

[120] *See* cases cited *supra* note 82.

[121] *See* Mironescu v. Costner, 480 F.3d 664, 671-72 (4th Cir. 2007); Kester, *supra* note 1, at 1481.

[122] 8 U.S.C. § 1101(a)(42)(A) (2006); *see* 8 U.S.C. § 1252 (2006); Ahmed v. Keisler, 504 F.3d 1183, 1191 (9th Cir. 2007).

[123] 8 U.S.C. § 1231(b)(3)(A) (2006).

[124] 8 C.F.R. § 208.18 (2009) (implementing the Convention Against Torture).

[125] *Ahmed*, 504 F.3d at 1191.

[126] *Id*. (quoting Hoxha v. Ashcroft, 319 F.3d 1179, 1184 (9th Cir. 2003))

[127] *Id*. at 1192 (quoting Sael v. Ashcroft, 386 F.3d 922, 925 (9th Cir. 2004)) (stating the court "look[s] at the totality of the circumstances in deciding whether a finding of persecution is compelled"). For withholding of removal, the alien must

> establish a "clear probability," that his "life or freedom would be threatened" upon return because of his "race, religion, nationality, membership in a particular social group, or political opinion." This "clear probability" standard, interpreted as meaning

In at least two other contexts, federal courts consider the past or ongoing actions of foreign government officials despite the foreign policy concerns that such inquiries raise. The Alien Tort Statute (ATS) allows suits "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States,"[128] and ATS cases frequently implicate the actions of foreign officials.[129] The Torture Victim Protection Act (TVPA) provides a civil cause of action against "[a]n individual who, *under actual or apparent authority, or color of law, of any foreign nation*" subjects an individual to torture or extrajudicial killing.[130]

To engage in the review required in all of these cases, federal courts can draw on the specific allegations and evidence of the person making the claim, probative if not always conclusive information compiled by human rights groups, and the State Department's own Country Reports on Human Rights Practices.[131] Courts also can make use of the reports and decisions of various international and regional bodies, such as the United Nations' Human Rights Committee, Human Rights Council, and Committee Against Torture, and the European Court of Human Rights. Note as well that in immigration cases, courts engage in this factual review notwithstanding the fact that an immigration judge and the Board of Immigration Appeals have already considered the facts of the case. Under the rule of non-inquiry, by contrast, the Secretary of State considers human rights issues on an essentially ad hoc basis, with no structured opportunity for the relator to present arguments.[132] These

> "more likely than not," is more stringent than asylum's "well-founded fear" standard because withholding of deportation is a mandatory form of relief. "Unlike asylum, withholding of removal is not discretionary. The Attorney General is not permitted to deport an alien to a country where his life or freedom would be threatened on account of" one of the protected grounds.

Id. at 1199 (citations omitted).

[128] 28 U.S.C. § 1350 (2006).

[129] *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 254-56 (2d Cir. 2009) (addressing claims that the Republic of Sudan committed genocide); Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1197 (9th Cir. 2007), *vacated*, 499 F.3d 923 (9th Cir. 2007), *remanded*, 550 F.3d 822 (9th Cir. 2008) (en banc) (finding that some claims by Papua New Guinea residents of violations of international law by non-U.S. actors can be heard in United States courts).

[130] Torture Victim Protection Act, Pub. L. No. 102–256, § 2(a), 106 Stat. 73 (1992) (Historical and Revision Notes) (codified as amended in 28 U.S.C. § 1350 (2006)) (emphasis added).

[131] *See Human Rights Reports*, U.S. DEPARTMENT OF STATE (Mar. 11, 2010), http://www.state.gov/g/drl/rls/hrrpt/.

[132] Consider this almost sarcastic description by a Ninth Circuit panel:

> We suppose there is nothing to stop Lopez-Smith's lawyer from putting together a presentation showing why the Secretary ought to exercise discretion not to extradite Lopez-Smith, and mailing it to the Secretary of State. As for whether the Secretary of State considers the material, and how the Secretary balances the material against other considerations, that is a matter exclusively within the discretion of the executive branch

cases also lack the judicial review that ordinarily is necessary to the constitutional legitimacy of agency action against an individual.[133]

Extradition from the United States is different from cases involving immigration, the ATS, and the TVPA because it involves direct dealings between the U.S. State Department and officials of the requesting country, where the topic of their exchanges is enforcement of the requesting country's criminal law – an area often thought to sit at the heart of sovereign power.[134] But this point does not undermine the *competence* of federal courts to make inquiries that are essentially the same as the ones they make in other areas. Instead, it simply raises again the question of the extent to which foreign affairs concerns should prevent federal courts from engaging in judicial review of issues that include human rights claims.[135] I have already suggested that the

and not subject to judicial review.

Lopez-Smith v. Hood, 121 F.3d 1322, 1326 (9th Cir. 1997); *see also* Peroff v. Hylton, 563 F.2d 1099, 1101-03 (4th Cir. 1977) (rejecting claim that person facing extradition is entitled to a hearing before the Secretary of State). The Ninth Circuit later noted that regulations now exist for consideration of claims under the Convention Against Torture in extradition cases and held that review of the application of those procedures was available under the Administrative Procedures Act. *See* Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1007 (9th Cir. 2000) ("Examining federal legislation implementing the Torture Convention, we conclude that the Administrative Procedure Act (''APA'') allows an individual facing extradition who is making a torture claim to petition, under habeas corpus, for review of the Secretary of State's decision to surrender him."); *infra* notes 153-158 and accompanying text; *see also* Khouzam v. Attorney General, 549 F.3d 235, 259 (3d Cir. 2008) (holding due process provides an alien with notice and an opportunity to be heard before the government may accept diplomatic assurances that the alien will not be tortured on removal to another country).

[133] *See supra* note 132 and accompanying text (citing *Cornejo-Barreto*, 218 F.3d at 1007).

[134] *See Cornejo-Barreto*, 379 F.3d 1075, 1088-89 (9th Cir. 2004) ("Extradition is quintessentially a matter of foreign policy; it occurs only pursuant to an international agreement and is invoked by a foreign government. Immigration, on the other hand, is a matter solely between the United States and an alien.").

[135] Judicial review of persecution and torture claims in immigration cases also raises foreign relations concerns because of what court decisions might say about the practice of the rule of law in certain countries with which the United States maintains diplomatic relations. Still, one could contend federal courts have a statutory warrant to engage in specific inquiries in immigration, ATS, and TVPA cases, so that fewer separation of powers concerns exist – as opposed to extradition, where the process is governed by statute but the decision whether or not to inquire is more of a common law rule. If this objection has any weight, it goes to the authority, not the competence, of federal courts to inquire in extradition cases. Further, on issues of individual rights and liberties, it is unclear how much the statutory predicate should count. *Cf.* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 389-91 (1971) (holding a cause of action exists directly under the Constitution for violations by federal actors of individual constitutional rights). Finally, to the extent that the relevant inquiry is the actions of U.S. officials, the

answer should not be a categorical bar. The early cases on non-inquiry provide no support for a bar, and the Supreme Court's recent decisions insisting on judicial review for suspected terrorists and illegal combatants underscore the doctrinal importance of allowing habeas to provide a vehicle for reviewing claims of mistreatment.

In sum, foreign affairs and institutional competence concerns do not disable federal courts from inquiring into the treatment that a person will receive after extradition to another country. Still, some basis for caution exists. As I conceded at the beginning of this subsection, some extradition cases do raise significant foreign affairs concerns. In addition, most federal judges are reluctant to inquire too closely into issues that implicate foreign affairs unless they believe there is a compelling reason to do so. Any proposal that seeks wholesale revision of the rule of non-inquiry is therefore likely to be ineffectual. That said, much room remains for adapting and limiting the doctrine.

4. International Law and the Practices of Other Countries

The rule of non-inquiry dates from a period in which international law was primarily concerned with relations among sovereigns. Since the end of the Second World War, the scope of international law has expanded enormously, such that it no longer stops at national borders but instead aspires to regulate a sovereign's relationship with its population.[136] Several commentators have accordingly advanced the plausible argument that the rise of international human rights should limit or displace the non-inquiry doctrine.[137]

For example, the International Covenant on Civil and Political Rights (ICCPR) limits signatory countries' powers of arrest and detention, and it requires a series of procedural protections for criminal trials, including prompt hearings and a presumption of innocence, as well as rights to counsel, to

habeas statute, 28 U.S.C. § 2241(c)(3), provides a sufficient statutory basis for review.

[136] *See, e.g.*, LOUIS HENKIN, THE AGE OF RIGHTS 16 (1990); Cole, *supra* note 13, at 52.

[137] *See* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 466 (1974); John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 212 (1998) ("[I]nternational criminal law is better served by an extradition law that expressly accommodates the interests of human rights than by one that fails to acknowledge the extent to which human rights law has reshaped this branch of international cooperation."); Murchison, *supra* note 10, at 311-13; Ann Powers, *Justice Denied? The Adjudication of Extradition Applications*, 37 TEX. INT'L L.J. 277, 326 (2002); Quigley, *supra* note 12, at 1239 ("The rule of non-inquiry is a rule of judicial origin, and the federal courts could abandon it on policy grounds, even if the courts are not persuaded that the human rights treaties require them to do so."); Richard J. Wilson, *Toward the Enforcement of Universal Human Rights Through Abrogation of the Rule of Non-Inquiry in Extradition*, 3 ILSA J. INT'L & COMP. L. 751, 761-64 (1997); *see also* Institute de Droit International, *New Problems of Extradition*, Res. § IV (Sept. 1, 1983) ("In cases where there is a well-founded fear of the violation of the fundamental human rights of an accused in the territory of the requesting State, extradition may be refused . . . .").

confront witnesses, and to appeal, and protection against compelled testimony against oneself.[138] The European Convention on Human Rights (ECHR) imposes similar obligations on its signatories.[139] In addition, the ICCPR, the ECHR, and the Convention Against Torture seek to prevent the infliction of torture and cruel, inhuman or degrading treatment or punishment.[140]

The Convention Against Torture also 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."[141] The Convention relating to the Status of Refugees states, "[n]o Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[142] Similarly, the International Convention against the Taking of Hostages prohibits extradition of hostage-takers if the request "has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion."[143]

The provisions of these various agreements reach deep into the criminal, detention, and penal practices of sovereign states. These agreements also provide that international or regional bodies will assess those practices and make decisions about their legality in individual cases: for example, the Human Rights Committee under the ICCPR, the Committee Against Torture under the Convention Against Torture, and the European Court of Human Rights under the European Convention. In several instances, these entities have expanded the scope of the protections beyond the text of the agreements. Thus, the Human Rights Committee interpreted the ICCPR to include a ban against expulsion, return, or extradition to face torture, the Committee Against

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[138] *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), arts. 9, 14, 15, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

[139] *See* Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 5-7, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. Other regional human rights agreements impose similar obligations.

[140] ICCPR, *supra* note 138, at art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); ECHR, *supra* note 139, at art. 3 (prohibiting torture); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, arts. 1, 2, 16, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter *Convention Against Torture*] (requiring parties to prevent acts of torture and of cruel, inhuman or degrading treatment by officials); JOHN T. PARRY, UNDERSTANDING TORTURE: LAW, VIOLENCE, AND POLITICAL IDENTITY 30-40, 44-54 (2010) (discussing all three documents).

[141] *Convention Against Torture*, *supra* note 140, at art. 3.

[142] United Nations Convention relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 150.

[143] International Convention against the Taking of Hostages, G.A. Res. 146 (XXXIV), art. 9, U.N. Doc. A/34/46 (Dec. 17, 1979).

Torture strengthened the Convention's protection against cruel, inhuman or degrading treatment or punishment, and the European Court of Human Rights tends to interpret the European Convention broadly.[144] Regardless of the ambiguities of these documents, and whether or not the obligations they impose are particularly onerous, the point is that they intrude on and regulate areas historically considered to be under the control of sovereign states.

The practices of other countries are also relevant to the international law status of the rule of non-inquiry. Courts in many countries recognize some version of the rule, but several countries, including Canada, Germany, Ireland, the Netherlands, and the United Kingdom, allow inquiry in certain circumstances, such as when the extraditee's human rights are at risk.[145] Indeed, a series of European Court of Human Rights decisions forbids parties to the European Convention from extraditing or deporting a person to a country if there are substantial grounds for believing he or she would be subjected to torture or to cruel, inhuman or degrading treatment.[146] Many European countries rely on diplomatic assurances to satisfy their obligations, but those assurances are generally subject to judicial review, and the European Court of Human Rights has insisted that courts must review assurances to

[144] International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *General Comment No. 31, Human Rights Committee*, ¶ 12, HRI/GEN/1/Rev.9 (Vol. I), May 27, 2008 [hereinafter International Human Rights Instruments] ("[T]he article 2 obligation requiring that States parties . . . ensure the Covenant rights . . . entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm . . . ."); *see also* International Human Rights Instruments, *General Comment No. 2, U.N. Committee Against Torture*, ¶ 3; International Human Rights Instruments, *General Comment No. 20,Human Rights Committee*, art. 7, ¶ 9. *See generally* ROBIN C.A. WHITE & CLARE OVEY, JACOBS, WHITE, & OVEY: THE EUROPEAN CONVENTION ON HUMAN RIGHTS (5th ed. 2010) (detailing the European Court of Human Rights's interpretations of the ECHR). My analysis here is descriptive, not critical or normative. I take no position here on the efficacy of liberal rights or the overall structure or likely results of an international human rights regime. For such discussions, see PHENG CHEAH, INHUMAN CONDITIONS: ON COSMOPOLITANISM AND HUMAN RIGHTS 145-77 (2006); PARRY, *Understanding Torture*, *supra* note 140, at 78-96, 204-15.

[145] *See* Dugard & Van den Wyngaert, *supra* note 137, at 189-91; Quigley, *supra* note 12, at 1226-27.

[146] *See, e.g.*, Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 34-36 (1989); *see also* Kaboulev v. Ukraine, No. 41015/04 Eur. Ct. H.R., at ¶¶ 107, 112 (Nov. 19, 2009) http://www.echr.coe.int ("[T]he Court accepts the applicant's contention that the mere fact of being detained as a criminal suspect [in Kazakhstan] . . . provides sufficient grounds to fear a serious risk of being subjected to [torture or inhuman or degrading punishment] contrary to Article 3 of the Convention."); GEOFF GILBERT, RESPONDING TO INTERNATIONAL CRIME 149-59, 163-67 (2006) (in one case, "[r]eports from the Committee Against Torture and the European Committee for the Prevention of Torture were cited in the successful attempt to block extradition to Russia of [a] Chechen leader"); WHITE & OVEY, *supra* note 144, at 172, 179-82.

determine whether they provide "a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention."[147]

It may be too much to say that a rule of customary international law in favor of inquiry is emerging. Yet the weight of international law and practice has made significant inroads on, and perhaps even broken down, the assumption of inviolate sovereignty in matters of criminal law. At the very least, it has become increasingly difficult to understand how a requesting country could have a legitimate complaint under international law about a decision by a federal court to inquire into that country's possible mistreatment of a person facing extradition to that country.[148] Similarly, it is difficult to see how a country could conclude that the existence of an extradition treaty that does not provide for inquiry would somehow insulate its criminal and penal practices from judicial scrutiny on the question whether those practices violate international law or fundamental rights recognized by the extraditing country.[149]

In many of the countries that are parties to these agreements, the resulting obligations are part of domestic law, which strengthens the force of these

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[147] Saadi v. Italy, No. 37201/06 Eur. Ct. H.R., at ¶ 148 (Feb. 28, 2008), http://www.echr.coe.int; *see also Kaboulev*, No. 41015/04 Eur. Ct. H.R. at ¶ 108; *Soering*, 11 Eur. Ct. H.R. (ser. A) at 36-39; GILBERT, *supra* note 146, at 159-63. On this issue, the extradition agreement between the European Union and the United States provides,

> Where the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfillment of its obligation to extradite, and resolution of the matter is not provided for in this Agreement or the applicable bilateral treaty, consultations shall take place between the requested and requesting States.

Agreement on Extradition Between the European Union and the United States of America art. 17, ¶ 2, July 19, 2003, 181 OFF. J.E.U 27 (entering into force Feb. 1, 2010).

[148] The European Court of Human Rights has addressed this issue by insisting that inquiring does not lead to an assessment of the regulating country:

> In this type of case, the Court is therefore called upon to assess the situation in the receiving country . . . . Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State, by reason of its having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment.

Al-Saadoon & Mufdhi v. United Kingdom, No. 61498/08 Eur. Ct. H.R., at ¶ 124 (Mar. 2, 2010), http://www.echr.coe.int.

[149] That is to say, the Supreme Court's statement in *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911), "We are bound by the existence of an extradition treaty to assume that the trial will be fair," arguably reflects a valid rule of domestic law for most cases, but it does not reflect any kind of contemporary international consensus. Further, to the extent that *Glucksman* intended to align U.S. law with the customary international law of extradition, this statement may no longer be good domestic law.

obligations and weakens any objections these countries might have to inquiry. Most of these obligations are not part of U.S. domestic law, however, because the United States ratified them with the statement that they are not self-executing.[150] As a result, the ability of federal courts to use them as express authority to inquire is doubtful. Short of giving up on the idea of expanded inquiry, there are at least three possible responses to this problem.

First, one could say that non-self-executing declarations apply to efforts to use a treaty as part of an affirmative claim for relief, but they do not bar defensive uses of a treaty against government actions that violate it.[151] While I find this position attractive, I am not convinced that non-self execution declarations can be limited in this way. Nor am I convinced that significant doctrinal support exists for such a position.[152] Thus, I will not rely on it as a basis for reforming the rule of non-inquiry.

Second, one could find a statutory provision that arguably executes one of the relevant treaties and is also applicable to extradition. Courts have already flirted with this response, and the results have been inconclusive. The Foreign Affairs Reform and Restructuring Act (FARRA) partially implements the Convention Against Torture:

> It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in

[150] *See* 138 CONG. REC. 8068 (1992); 136 CONG. REC. 36,199 (1990). The United States is not a party to the Refugee Convention, but it is a party to the 1967 Protocol relating to the Status of Refugees, which incorporates Article 33 of the Convention by reference. *See* G.A. Res. 2198 (XXI), A/RES/21/2198 (Dec. 16, 1966); I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 427 (1999) ("The Protocol incorporates by reference Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees . . . ."). Federal courts repeatedly have held that the Protocol is not self-executing. *See, e.g.*, Zheng v. Holder, 562 F.3d 647, 655-66 (4th Cir. 2009) (stating the protocol is not self-executing and is implemented by the immigration statutes). The status of the Hostage Convention is less clear, but Congress implemented its primary provisions in 18 U.S.C. § 1203 (2006). For discussion of self execution issues, including non-self-execution declarations, see Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008). For historical aspects of these issues, see Parry, *Congress*, *supra* note 10.

[151] *See* David Sloss, *The Constitutional Right to a Treaty Preemption Defense*, 40 U. TOL. L. REV. 971, 972-73 (2009); David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 135 (1999); *see also* Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1143-44 (1992) (suggesting this possibility).

[152] *See* Medellin v. Texas, 552 U.S. 491, 530-32 (2008) (holding a non-self-executing treaty cannot be enforced in habeas proceedings); Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 547-48 (2008) ("The [*Medellin*] Court seems to be clearly rejecting the argument that . . . a non-self-executing treaty merely fails to provide a private right of action and thus can be enforced by courts . . . when a treaty is invoked defensively in a criminal case . . . .").

> 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.[153]

Yet the statute also 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, 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 . . . .[154]

The State Department has published regulations to implement this policy in the context of extradition. The regulations insist both that the decision whether to apply this policy is discretionary and that courts have no power to review those decisions.[155]

In a series of cases, federal courts have confronted the question whether they can hear claims that an extradition would violate Article 3 of the Torture Convention, as implemented by FARRA, or whether the statute simply instructs the Secretary of State how to exercise non-reviewable discretion. The Third and Ninth Circuits have held that courts have habeas jurisdiction to hear Administrative Procedures Act claims about application of FARRA once the Secretary of State has decided to certify the extradition in the face of torture allegations.[156] By contrast, the District of Columbia and Fourth Circuits have held that FARRA precludes jurisdiction to hear such claims.[157] The Supreme Court noted this issue in *Munaf* but did not address it.[158]

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[153] Foreign Affairs Reform and Restructuring Act, 8 U.S.C. § 1231 (2006).

[154] 8 U.S.C. § 1231.

[155] *See* 22 C.F.R. § 95.3-4 (2005).

[156] *See* Hoxha v. Levi, 465 F.3d 554, 565 (3d Cir. 2006) (finding that while the "APA provides for review of 'final agency action,'" such as extradition decisions, the Secretary had not yet made a decision allowing such review in this case); Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1007 (9th Cir. 2000). A later panel of the Ninth Circuit reached a different conclusion in the appeal after remand of *Cornejo*. Cornejo-Barreto v. Siefert, 379 F.3d 1075 (9th Cir. 2004). But the court subsequently took the case en banc and vacated the opinion. Cornejo-Barreto v. Siefert, 389 F.3d 1307 (9th Cir. 2004) (en banc). The 2000 *Cornejo* decision appears to remain good law. *See* Prasoprat v. Benov, 421 F.3d 1009, 1012 n.1 (9th Cir. 2005) (noting that the en banc court declined to vacate the first Cornejo decision); Trinidad v. Benov, No. CV 08-07719-MMM(CW), 2009 U.S. Dist. LEXIS 115843, at *12-14 (C.D. Cal. Nov. 19, 2009) ("[T]his court's determination that it has jurisdiction to review Petitioner's Torture Convention claim is controlled by the Ninth Circuit's decision in *Cornejo-Barreto I*.").

[157] *See* Kiyemba v. Obama, 561 F.3d 509, 514-15 (D.C. Cir. 2009) (reaching this conclusion in a prisoner transfer case); Mironescu v. Costner, 480 F.3d 664, 673-77 (4th Cir. 2007) (reaching this conclusion in an extradition case but stating that "courts may consider or review CAT or FARR Act claims as part of their review of a final removal

FARRA clearly states a limit on the discretion of the executive branch, and the effort to enforce it through the APA provides a potentially fruitful option for getting around the rule of non-inquiry, at least with respect to torture claims. Indeed, I agree with the approaches of the Third and Ninth Circuits. But the split among the circuits remains a hurdle for FARRA claims. FARRA also does not cover all of the serious claims that should be subject to review.

The third response builds on the fact that the rule of non-inquiry is a court-created doctrine. Courts can modify it in light of changing circumstances and domestic and international legal developments. For the most part, this article advances this view. Federal courts have the authority to change non-inquiry doctrine, and they should do so in order to bring that doctrine in alignment with domestic law and with international law and practice. Taking this step does not require courts to hold that international legal rights restrict extradition. They need only recognize that changes in international law undermine aspects of the historical and foreign affairs rationales for non-inquiry. Without these obstacles, courts can focus more clearly on constitutional challenges to particular extraditions.

5. *Munaf v. Geren* and the Humanitarian Exception

After more than eighty years, the Supreme Court returned to the rule of non-inquiry in *Munaf v. Geren*. *Munaf* is not an extradition case. It involved habeas petitions brought by two U.S. citizens who had traveled to Iraq and allegedly committed crimes there. They were in the custody of U.S. forces in Iraq and faced transfer to Iraqi custody where, they claimed, they would be tortured. The Supreme Court held that federal courts have habeas jurisdiction over such a case but also decided that no relief was appropriate because of Iraq's "sovereign right" to punish criminal offenses committed on its territory[159] – and because of the rule of non-inquiry, although the Court relied on *Neely* without referring to the doctrine by name.

The Court repeatedly stressed Iraq's status as a sovereign nation with the power to prosecute crimes committed within its borders, and it marshaled an array of precedents designed to buttress those statements.[160] But the most recent of those cases is more than fifty years old, and they overlap only slightly with the post-World War II revolution in international human rights.[161] The

order" in an immigration case).

[158] Munaf v. Geren, 553 U.S. 674, 703 & n.6 (2008).

[159] *Id*. at 692.

[160] *See id*. at 694-95 (citing Wilson v. Girard, 354 U.S. 524, 529 (1957); Reid v. Covert, 354 U.S. 1, 15 n.29 (1957)) (plurality opinion); Kinsella v. Krueger, 351 U.S. 470, 479 (1956); The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812)); *see also supra* note 16.

[161] Significantly, one of the cases, *Reid v. Covert*, is the foundation for the contemporary view that constitutional rights can apply extraterritorially. 354 U.S. at 7 ("[V]arious constitutional limitations apply to the Government when it acts outside the continental

Court's insistence on inviolate national sovereignty thus seems forced and anachronistic, at least when stated as a flat assertion rather than a reasoned conclusion.

The Court then held that due process does not "include[] a '[f]reedom from unlawful transfer' that is 'protected *wherever* the government seizes a citizen,'" and it rejected the idea that "the Constitution precludes the Executive from transferring a prisoner to a foreign country for prosecution in an allegedly unconstitutional trial."[162] As support, the Court cited *Neely* and *Wilson v. Girard*. *Wilson*'s facts are fairly similar to those of *Munaf*; it involved the transfer of a U.S. soldier who was in Japan to Japanese custody under a status of forces agreement.[163] *Wilson* is also a case about the interaction of extraterritoriality concerns and status of forces agreements for military forces stationed overseas.[164] As such it is not only distinct from cases involving extradition from the United States; it is also closer to the heart of the foreign affairs concerns that lead courts to defer to executive action.[165]

At this point in the *Munaf* opinion, *Neely* was also important because of its extraterritoriality holding – that the constitutional rights Neely claimed "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country."[166] Left unstated was the fact that *Neely*'s chief importance to *Munaf* may have been the fact that both cases implicated the sovereignty of a country that was under U.S. military occupation.[167]

Neely and *Wilson* involved claims that the petitioner was entitled to specific U.S. criminal procedure rights, not claims that U.S. officials had due process obligations to a person held in their custody (although *Neely* can be read this way), let alone that the petitioners might be entitled to other rights or protections. It is therefore difficult to believe that the *Munaf* Court meant to say the Constitution has no application in habeas cases involving foreign prosecutions.[168] Such a holding would undermine fundamental due process

United States."). As such, it is in tension with *Munaf*'s invocation of traditional territory-based sovereignty.

[162] *Munaf*, 553 U.S. at 695.

[163] *See Wilson*, 354 U.S. at 525-26.

[164] *See* RAUSTIALA, *supra* note 13, at 138-40.

[165] The Court stressed that "[n]either *Neely* nor *Wilson* concerned individuals captured and detained within an ally's territory during ongoing hostilities involving our troops." *Munaf*, 553 U.S. at 699.

[166] *Id.* at 696 (quoting Neely v. Henkel (No. 1), 180 U.S. 109, 122 (1901)).

[167] *Cf.* Republic of Iraq v. Beaty, 129 S. Ct. 2183, 2195 (2009) (holding Iraq is entitled to immunity under the Foreign Sovereign Immunities Act for sponsoring acts of terrorism under its former government).

[168] The Court asserted that "habeas is not a means of compelling the United States to harbor fugitives from the criminal justice system of a sovereign with undoubted authority to prosecute them." *Munaf*, 553 U.S. at 697. Read literally, this statement is absurd. It would

protections against arbitrary seizure, detention, absence of process, and infliction of harm,[169] and it would effectively create an executive prerogative to deal with the bodies of people according to the needs of foreign policy. For these reasons, the Court's statements in this part of the opinion almost certainly must be read in their specific context of extraterritoriality, military operations, transfer of prisoners by military officials within the territory of the nation in which they will be tried, and the need to buttress Iraq's fragile sovereignty.[170]

The Court finally turned to the petitioners' claim that they faced torture if transferred to Iraqi custody, and it applied the rule of non-inquiry to hold that "in the present context that concern is to be addressed by the political branches, not the judiciary."[171] In light of the Court's repeated insistence on Iraqi sovereignty and its invocation of *Neely* throughout the opinion, this conclusion is hardly surprising. What is surprising is the Court's refusal to embrace an absolute ban on inquiry. First, as many lower courts have done, the Court considered the merits of the claim to at least a limited extent, for it stressed that "[p]etitioners here allege only the *possibility* of mistreatment in a prison facility."[172] Second, *unlike* many of the recent appellate non-inquiry opinions, the Court did not reject the "humanitarian exception" to the rule. To the contrary, it stressed that "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."[173] Put plainly, the Court held out the possibility of inquiry in a small class of cases.

Admittedly, the Court likely anticipated a very small exception. Immediately after recognizing the possibility, it stressed that the judiciary is not suited to second guess executive determinations about treatment, because to do so would improperly "pass judgment on foreign justice systems and

prevent any habeas corpus review in extradition cases, because any relief in such a case would have precisely the effect of "compelling the United States to harbor fugitives," particularly if those fugitives were citizens not subject to removal.

[169] *See id.* at 706 (Souter, J., concurring) (stating if the Executive sought to transfer a person in "a case in which the probability of torture is well documented . . . it would be in order to ask whether substantive due process bars the Government from consigning its own people to torture").

[170] *See id*.; *see also* Harlan Grant Cohen, *International Decision:* Munaf v. Geren, 102 AM. J. INT'L L. 854, 857 (2008).

[171] *Munaf*, 553 U.S. at 700.

[172] *Id*. at 702 (emphasis added). Continuing its discussion of the merits, the Court also observed:

> 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 Munaf and Omar – as well as its prison and detention facilities have "generally met internationally accepted standards for basic prisoner needs."

Id. (citations omitted).

[173] *Id*.

undermine the Government's ability to speak with one voice in this area."[174] Thus, in cases similar to *Munaf*, courts must accept an executive determination that a person will, or will not, face torture. Still, a court considering such a case must at least know whether or not the exception is an option, which means that it must be able to find out what the executive branch has decided on the issue.[175] Further, although it might not be able to second guess that determination in a prisoner transfer case, the court ought to be able to apply some standard of review to ensure that the determination is not arbitrary.[176]

In a concurring opinion that Justices Breyer and Ginsburg joined, Justice Souter stated that the exception to the non-inquiry rule should include cases "in which the probability of torture is well documented."[177] He also suggested that a person in such a situation might have a substantive due process right against being sent to face torture, and he indicated that some judicial remedy should be available in such cases, even if it was not the traditional habeas remedy of release from custody.[178]

Munaf is a curious case. The majority opinion contains numerous broad statements about sovereignty, habeas review, and foreign affairs deference. But it lacks any meaningful analysis of these issues and makes no effort to recognize the context that produced the cases it cites or how current circumstances might compel different results (or at least require some updating of analysis). Indeed, the opinion's surface clarity obtains only if one ignores the tensions that it creates within the law of several doctrines.[179]

For all that, *Munaf* still makes a gesture towards a humanitarian exception that many lower courts were unable to accept for extradition. In general, the Court acted as if nothing has changed since *Neely* and a handful of cases in the 1950s. But here, at least, the Court also appears to have recognized, if only obliquely, that the United States used irregular procedures, mistreated people, and transferred people to face torture and other mistreatment during the George W. Bush administration and possibly under the Clinton administration, as part

[174] *Id.* Further, the majority's and Justice Souter's "apparent rejection of the evidence of torture in Iraq that was presented to the Court . . . implies that [the exception] is very limited." Cohen, *supra* note 170, at 859.

[175] *Cf.* Khouzam v. Attorney General, 549 F.3d 235, 254 (3d Cir. 2008) (finding that *Munaf*'s non-inquiry doctrine application did not control).

[176] *Compare* Kiyemba v. Obama, 561 F.3d 509, 518 n.3 (D.C. Cir. 2009) (Kavanaugh, J., concurring) ("After *Munaf*, courts in extradition cases presumably may require – but must defer to – an express executive declaration that the transfer is not likely to result in torture."), *with infra* notes 196-199 (discussing the court's deference to executive decisions to extradite).

[177] *Munaf*, 553 U.S. at 706 (Souter, J., concurring).

[178] *Id.*

[179] For the European Court of Human Rights' rather different treatment of similar issues, see Al-Saadoon v. United Kingdom, No. 61498/08 Eur. Ct. H.R. (2009), http://www.echr.coe.int.

of the program of extraordinary rendition.[180] Although the Court did not apply the exception, it could not dismiss as improbable or hypothetical the facts that would support application of the exception.

In prisoner transfer cases, lower courts have cited *Munaf* as authority for not reviewing claims of potential mistreatment.[181] But extradition, which generally operates as part of the ordinary criminal justice system, lacks the heightened military and foreign policy concerns that arguably were present in *Munaf* and subsequent cases involving transfer of people in military custody. Lower courts must now consider how to apply *Munaf*, and its recognition of a humanitarian exception, in extradition cases. In such cases, the *Munaf* exception should be more readily available. Even more, the exception might reasonably expand to cover analogous issues, such as arbitrary process and physical mistreatment falling short of torture, precisely because the heightened military and foreign policy concerns of the transfer cases will not be present. Similarly, in such cases courts will not have to pay as much deference to the executive branch, particularly with respect to determinations that mistreatment is or is not likely.

B. *A Rule of Limited Inquiry: What Rights Apply in Extradition?*

I sought to show in the preceding section that extradition law and the rule of non-inquiry are markedly out of step with each area of U.S. law that I discussed. I also suggested that, for all its rhetoric of sovereignty and prerogative, *Munaf* opens an important door. This section proposes an approach that would bring non-inquiry doctrine and extradition law into closer sync with the areas of law with which they overlap. Part III then returns to the theory that underlies and purports to justify the discontinuity between current extradition law and the rest of federal law.

A rule of limited inquiry – or rather, a doctrine of what constitutional rights are relevant to the decision to extradite – emerges from a return to the building blocks of international extradition law in the United States. Importantly, these

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[180] *See* John T. Parry, *The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees*, 6 MELB. J. INT'L L. 516, 528-32 (2005); Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1395 (2007); *see also* Greg Miller, *Obama Preserves Rendition as Counter-Terrorism Tool*, L.A. TIMES, Feb. 1, 2009, at A1.

[181] Mohammed v. Obama, No. 10-5218, 2010 U.S. App. LEXIS 16023, at *2 (D.C. Cir. July 8, 2010), *stay denied* 2010 U.S. LEXIS 5544 (July 16, 2010); Kiyemba v. Obama, 561 F.3d 509, 513-16 (D.C. Cir. 2009), *cert. denied* 130 S. Ct. 1880 (2010); *see also* Bacha v. Copeman, No. 08-5350, 2010 U.S. App. LEXIS 15806, at *2 (D.C. Cir. July 29, 2010) (citing *Mohammed* and the denial of certiorari in *Kiyemba*); Naji v. Obama, No. 10A70, 2010 U.S. LEXIS 5545, at *1 (July 16, 2010) (denying stay of transfer); Lyle Denniston, *Another Algerian's Case*, SCOTUSBLOG (July 16, 2010, 11:27 AM), http://www.scotusblog.com/2010/07/another-algerian-case; Lyle Denniston, *Curb on Judges' Power Stands – For Now*, SCOTUSBLOG (July 16, 2010, 7:44 PM), http://www.scotusblog.com/2010/07/curb-on-judges-power-stands.

building blocks – the components of the extradition process – are not the same thing as the "first principles" of extradition law. Those "principles" – such things as overstated concerns about foreign relations – are the source of the myths that have frozen extradition doctrine and wrenched it out of step with U.S. and international law. Renewed attention to the components of extradition, combined with the recognition that those components exist as part of a contemporary and dynamic legal system, should generate a new set of extradition principles and derivative doctrines.[182]

First, extradition is part of the criminal process.[183] It does not take place unless the requesting country has charged the relator with a crime. And, from the relator's point of view, the extradition process begins with his arrest and imprisonment (and, rarely, bail). At the hearing, the primary question is the same as at a preliminary hearing in a criminal case: whether there is probable cause to believe the accused committed the alleged crime.[184] If the judge certifies that the relator is extraditable, the Secretary of State or her designee reviews the case and decides whether to extradite, and the executive branch is responsible for surrendering the relator to the requesting country. The goal of this process from the government's point of view is to confirm its right to hold that person and transfer him to the custody of the requesting country so that he can face criminal charges and, ultimately, receive a sentence that likely will include incarceration.

Not only is this a criminal process, in its basic components it is also quintessentially a judicial process under U.S. law despite the executive functions of review and surrender. As a matter of both domestic and international law, the criminal process triggers heightened due process concerns relating to arrest and detention. Those concerns heighten further when one adds the likely result of extradition – being forcibly removed from the United States and therefore being placed beyond the jurisdiction of its courts.[185] Further, judicial review of the executive's decision to extradite should be available as a matter of basic due process, as well as international law.[186] Courts also should be able to inquire before extradition into the

[182] My proposal assumes that courts would take the lead in an effort to reform and narrow the rule of non-inquiry, particularly with respect to the constitutional aspects of the doctrine, but Congress could certainly craft a statute that would achieve roughly the same results.

[183] *See* Kester, *supra* note 1, at 1443-47 ("In any meaningful sense . . . extradition proceedings are criminal, and 'criminal' was the word the Supreme Court long ago used to describe them.").

[184] *See* 18 U.S.C. § 3184 (2006).

[185] For these reasons, I would also argue that – contrary to current doctrine – the result of the extradition proceeding before judge or magistrate is an appealable final decision for purposes of 28 U.S.C. § 1291. *See supra* note 3. But resolving that issue is not necessary to determining the proper scope of the inquiry doctrine.

[186] *See* Sayne v. Shipley, 418 F.2d 679, 686 (5th Cir. 1969); *see also* Gerstein v. Pugh,

treatment that a person will receive in the second part of the criminal process, in the requesting country – treatment that will take place because of the actions of U.S. officials who participate in the extradition process.[187]

Second, if the extradition hearing and review by the Secretary of State result in a decision to extradite, the person facing extradition may seek habeas corpus relief. Regardless of the nature of the extradition hearing, there is no question that a habeas case is a proceeding before an Article III federal court. Further, the court's jurisdiction in such a case flows directly from the federal habeas statute: the court has jurisdiction to ask whether the petitioner is being held "in violation of the Constitution or laws or treaties of the United States."[188] Nothing in the statute suggests that foreign policy concerns should limit the court's jurisdiction to inquire into the legality of the petitioner's detention and impending extradition. There is no special habeas statute for extradition, and – as several courts of appeals have recognized – the argument that federal courts cannot hear constitutional claims in extradition habeas cases conflicts with the statutory grant. As a result, the longstanding but eroding limits on the scope of extradition habeas should be discarded as inappropriate and illegitimate.

Third, the petitioner's claims at the extradition hearing or, more likely, on habeas should include the possibility of asserting that officials of the federal government would violate his due process rights if they were to send him to face (1) physical harm or (2) arbitrary or fundamentally unfair process or

420 U.S. 103, 114, 116-18 (1975); Khouzam v. Attorney Gen., 549 F.3d 235, 255-59 (3d Cir. 2008). The jurisdiction of the judge at the extradition hearing might be limited by the nature of his or her role under Article I or Article III, the extradition statute, and the terms of the extradition treaty. *See* 18 U.S.C. § 3184; *supra* note 5 and accompanying text. As a result, it may not be appropriate for the judge to inquire into procedures or treatment, and the fact that the Secretary of State also may not have considered those issues yet is an additional reason to delay consideration of them. If that is true, the habeas court can perform that task with the benefit of the Secretary of State's decision on the same issues.

[187] Cases involving soldiers, prisoners of war, illegal combatants, or detainees in a war on terror are distinguishable because of their military and national security contexts. Still, recognizing a rule of limited inquiry in the context of extradition would at least prevent these military and national security cases from dictating the content of the "normal" rule. Indeed, a rule of limited inquiry could influence the law governing these exceptional situations.

[188] 28 U.S.C. § 2241(c)(3) (2006). When federal courts deny their jurisdiction to inquire into the treatment or procedures that a person faces in another country, they are not referring to the statute but rather to the judicial gloss that has been placed on it. They plainly have statutory jurisdiction to assess whether the actions of U.S. officials violate the Constitution, and their effort to deny that fact seems less a meaningful doctrinal statement and more an effort to explain their failure to confront the issues in non-inquiry cases. *Cf.* Stephen I. Vladeck, *The Increasingly "Unflagging Obligation": Federal Jurisdiction after* Saudi Basic *and Anna Nicole*, 42 TULSA L. REV. 553, 574-76 (2007) (discussing Supreme Court rulings that stress the obligation of district courts to exercise jurisdiction over cases within the statutory grant). As I will suggest, foreign policy concerns properly attach to the merits, not to jurisdiction.

punishment.[189] The person facing extradition would have to make allegations of likely physical harm – whether torture or cruel, inhuman, or degrading treatment – or the use of arbitrary procedures or punishments, and would then have to establish those allegations under a "substantial grounds" or "more likely than not" standard.[190] In such a case, government officials could be charged with knowledge of the consequences of their decision to extradite – knowledge they might already have had, or knowledge that they gained from the habeas proceedings. The critical step is then to declare – again, as several courts of appeals have already recognized – that due process forbids the federal government from participating in the infliction of harm by knowingly sending a person lawfully in the United States to face likely physical mistreatment or arbitrary process or punishment in another country.[191]

Federal courts already have developed due process doctrines that could inform the inquiry in extradition cases. First, the state or its agents may owe a constitutional obligation to the victim of private violence if the state had a "special relationship" with the victim. Second, the state may owe such an obligation if its agents "in some way assisted in creating or increasing the danger to the victim."[192]

The special relationship doctrine usually flows from the fact of custody: "when the State takes a person into its custody and holds him there against his

[189] These claims also roughly overlap with the *jus cogens* norms that override treaty obligations, *see* Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331 ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."), and with the basic protections of the ICCPR and Convention Against Torture.

[190] I draw these standards of proof from the standard that applies to withholding of removal, which is the more stringent of the two relevant standards in immigration law. *See supra* note 127 and accompanying text. They are also consistent with Article 3 of the Convention Against Torture as ratified by the United States. *See* 128 CONG. REC., 36,198 (1990) (adopted by two-thirds of the Senate); *Convention Against Torture*, *supra* note 140.

[191] *See* Neuman, *The Extraterritorial Constitution*, *supra* note 43, at 283-84. With respect to the foreign affairs concerns I discussed earlier, there is obviously some formalism or semantics in distinguishing between inquiring into the practices of a foreign state, and inquiring into what U.S. officials know about those practices, because the latter inquiry ultimately requires an inquiry into those practices. Still, the latter inquiry seeks to balance human rights and foreign affairs concerns, and for that reason it has made its way into law. *See* Al-Saadoon v. United Kingdom, No. 61498/08 Eur. Ct. H. R., at ¶ 100 (2009), http://www.echr.coe.int; *see also* GILBERT, *supra* note 146, at 141. I would also hold out the possibility of appealing directly to international law principles, whether the customary international law that is often said to be "part of our law," The Paquete Habana, 175 U.S. 677, 700 (1900), or to international conventions that the United States has ratified (whether or not self-executing). But my proposal for reforming the rule of non-inquiry can rest on due process grounds alone without taking this more controversial step.

[192] Matican v. City of New York, 524 F.3d 151, 155 (2d Cir. 2008) (citations omitted); *see also* Wang v. Reno, 81 F.3d 808, 818-19 (9th Cir. 1996); JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 280-81 (2d ed. 2007).

will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."[193] The state-created danger doctrine does not require custody; rather "the state does infringe a victim's due process rights when its officers assist in creating or increasing the danger that the victim faced at the hands of a third party."[194]

In an extradition case, these two doctrines overlap. A person facing extradition is usually held in custody, and federal officials will certainly take the relator into federal custody for the purpose of transferring him to the custody of the requesting government. Thus, the government "assume[s] some responsibility for his safety and general well-being." Further, when federal officials transfer a person to a country that will employ arbitrary procedures or harsh treatment, those officials "assist in creating or increasing the danger" that the relator faces.[195]

The remedy in such a case can take either of two forms. First, the court can order the release of the petitioner and thereby prohibit the executive from extraditing that person. Second, the court can allow extradition under circumstances that ensure U.S. officials do not knowingly participate in a process that harms the relator.[196] The most obvious way to accomplish this

[193] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199-200 (1989).

[194] *Matican*, 524 F.3d at 157; *see also* Kamara v. Attorney Gen., 420 F.3d 202, 217 (3d Cir. 2005). Three circuits have held that the state-created danger doctrine does not protect aliens in removal proceedings. *See* Vicente-Elias v. Mukasey, 532 F.3d 1086, 1095 (10th Cir. 2008); Enwonwu v. Gonzales, 438 F.3d 22, 30-31 (1st Cir. 2006) ("The state-created danger theory argument fails because an alien has no constitutional substantive due process right not to be removed from the United States, nor a right not to be removed from the United States to a particular place."); *Kamara*, 420 F.3d at 217-18. *But see* Morgan v. Gonzales, 495 F.3d 1084, 1093 (9th Cir. 2007) ("The state-created danger doctrine may also be invoked to enjoin deportation." (citing *Wang*, 81 F.3d at 818-19)). These decisions rest on the doctrine that the political branches have plenary power over immigration. This doctrine has no general application to extradition, which involves citizens as well as aliens. Further, while extradition of aliens overlaps with removal, that fact alone does not support denying due process rights in extradition. Indeed, such a denial would have to rest on the policies that support the rule of non-inquiry – policies which I have argued are inadequate.

[195] Both doctrines also require proof that the official behavior "shock[s] the . . . conscience." *See Matican* 524 F.3d at 155. According to the Second Circuit, "[t]his requirement screens out all but the most significant constitution violations, 'lest the Constitution be demoted to . . . a font of tort law.'" *Id*. (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 848 n.8 (1998)). The proposal I am putting forward restricts judicial inquiry to the most serious cases, those that are most likely to be conscience shocking. Further, and to the extent that my proposal goes beyond conscience-shocking conduct, it remains consistent with these due process doctrines. Unlike them, my proposal does not carry the risk of turning due process into a font of tort law, because it would not create an affirmative cause of action, and the remedy would take the form of an injunction against government action, not damages.

[196] A third remedy would be to defer extradition until the conditions that support the relator's claim have abated. But a court might require statutory authority to impose such a

second remedy is to require the Secretary of State to obtain diplomatic assurances that the court's due process concerns will be addressed. The State Department already uses diplomatic assurances in extradition cases. Thus, imposing a requirement that assurances be used in cases that raise serious concerns about abuse or arbitrary treatment would not impose a new burden on its personnel, even if it would make an existing burden more demanding.

Merely requiring the use of diplomatic assurances is an insufficient remedy, however, as the controversy over their use as cover for the extraordinary rendition process makes clear.[197] Accordingly, when assurances are an appropriate remedy, the court should retain jurisdiction over the case for the purposes of reviewing the adequacy of the assurances and making sure that the State Department not only follows through but also reports on the success or failure of those assurances.[198] The legal basis for such review could come from the habeas statute or perhaps from the APA.[199] If officials respond that such a requirement is too onerous, then the remedy would revert to denial of extradition.

U.S. officials undoubtedly would be unhappy with such a doctrine because it would complicate their work. But these complications would put the U.S. in rough parity with Canada, the United Kingdom, and other European states, which provide some judicial review of diplomatic assurances.[200] Importantly, just as officials might think this proposal goes too far, some commentators might conclude that it does not go far enough to protect the rights of people facing extradition.[201] Similarly, most people facing extradition would likely prefer a broader inquiry, because they do not face the conscience-shocking physical mistreatment or subjection to arbitrary processes or punishment that

remedy, particularly if it involved monitoring the relator in the interim.

[197] *See* Satterthwaite, *supra* note 180, at 1333 (concluding that "rendition to justice, a practice purportedly developed to uphold the rule of law against lawless terrorists, has become a lawless practice which perverts the rule of law in relation to terrorism").

[198] *See* Ashley Deeks, *Promises Not to Torture: Diplomatic Assurances in U.S. Courts*, AM. SOC'Y OF INT'L L., 74-79 (Dec. 2008) (ASIL Discussion Paper Series) (proposing judicial review of assurances whenever they are used). *Khouzam v. Attorney Gen.*, 549 F.3d 235, 257-58 (3d Cir. 2008), held that due process requires notice and a hearing prior to the use of diplomatic assurances, but the court was not clear on the standard of review it would apply to determine the adequacy of assurances. A more deferential standard of proof, such as whether the assurances are supported by substantial evidence, could apply to review in these circumstances.

[199] *See* Cornejo-Barreto v. Siefert, 218 F.3d 1004, 1014 (9th Cir. 2000). For an example of this approach at work, see *Trinidad v. Benov*, No. CV 08-07719-MMM(CW), 2009 U.S. Dist. LEXIS 115843, at *19 (C.D. Cal. Nov. 17, 2009) (granting habeas in an extradition case involving a torture claim because the Secretary of State refused to provide the record or reasons for denying the claim, which left the court "no alternative" but to conclude the decision was arbitrary).

[200] *See supra* note 147 (discussing the European Court of Human Rights's approach).

[201] *See, e.g.*, PYLE, *supra* note 2, at 321.

the proposal addresses. The rule of limited inquiry would not apply if the criminal process in the requesting country is materially different from U.S. law but is still fundamentally fair.[202] Nor would it apply to sanctions that are not cruel and unusual, or to prison conditions that are unpleasant but not "grossly disproportionate to the severity of the crime warranting imprisonment."[203] Most extraditions from the United States do not raise such issues.

Finally, courts could implement a rule of limited inquiry while still remaining cognizant of the executive's primary role in foreign relations. Limited inquiry already reflects a balance of foreign policy concerns: courts will inquire only into credible claims of physical mistreatment or arbitrary processes or punishment, not into all claims of difference from U.S. law. Relatively few claims and cases will require serious attention under this doctrine. Further, the legal standard that courts would apply would be more stringent than the one they apply in asylum cases that also raise foreign policy concerns. And last, the proposed doctrine stops well short of insisting on full review of the Secretary of State's decisions in extradition cases.

III. NON-INQUIRY AND SOVEREIGNTY THEORY

This part returns to the concept and rhetoric of sovereignty that sits at the heart of contemporary justifications for the rule of non-inquiry. I examine the implications of sovereignty theory as the Supreme Court seems to understand it today, and I seek to clarify the ideas of sovereignty that support the rule of non-inquiry. I also hope that this part will spur readers who are not persuaded by my doctrinal proposal to consider more closely the consequences of continued adherence to the rule. Importantly, however, I do not intend this section to be a critique of sovereignty or sovereignty theory in general.[204] My target is the deployment of an arguably ahistorical and sometimes facile notion of sovereignty for the apparent purpose of preserving state and executive power at the expense of other values or interests.

According to many federal courts and executive branch lawyers, inquiring into a nation's criminal processes goes to the core of national sovereignty, particularly the sovereign's ability to coerce its population through its "monopoly of the legitimate use of physical force within a given territory."[205] This way of conceptualizing sovereignty – particularly when it appears in the

[202] *Cf.* Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (holding that the Court "give[s] retroactive effect to only a small set of 'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding'").

[203] Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

[204] For discussions of different conceptions and uses of sovereignty, including its relationship to international law and human rights, see Roth, *supra* note 13, at 127-37; Robert D. Sloane, *Human Rights for Hedgehogs?: Global Value Pluralism, International Law, and Some Reservations of the Fox*, 90 B.U. L. REV. 975, 1006-07 (2010).

[205] MAX WEBER, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H. H. Gerth & C. Wright Mills eds., 1946).

context of the rule of non-inquiry and the treatment of prisoners and detainees – encompasses two related yet distinct topics: the sovereignty of the territorial nation state as an entity, and the allocation of sovereign power within a government.[206] Part of my effort in this concluding part is to highlight the rise of executive authority – that is, of sovereign power both in the sense of consolidated power and in the sense of the power to make decisions about critical issues[207] – and thereby to complicate the common assertion that national sovereignty has weakened or fragmented.

There is no doubt that since the end of the Second World War, national sovereignty in the territorial sense has eroded from its nineteenth-century heights.[208] Some of that erosion (as well as consequent shifts in ways of talking about sovereignty) comes from the rise of international human rights law.[209] But a distinction also exists between the theory and practice of sovereignty. In theory, international human rights play a large role in the erosion of a particular kind of sovereign power. But in practice, most countries continue to have an enormous control over their criminal and penal processes. The critical component to the significance of international human rights is the various strategies that exist for their enforcement. These strategies ensure that no state can simply ignore international human rights norms. At the same time, however, enforcement of those norms is often sporadic and ineffectual.[210]

The decline of exclusive national sovereignty over specific territory supports the effort to reform or eliminate the rule of non-inquiry. But eroding the rule of non-inquiry to allow greater judicial scrutiny of executive decisions to extradite is also a foot in the door for effective human rights enforcement. For countries that have sought to avoid direct enforcement of international human

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[206] *See* Roth, *supra* note 13, at 123 n.1. Territorial sovereignty and national sovereignty are not always synonymous, although I treat them as such for purposes of this discussion.

[207] The most obvious contemporary citations for such a description are CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab trans., Univ. Chicago Press 2005) (1922) ("Sovereign is he who decides on the exception."), and GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 11 (1995) (Daniel Heller-Roazen trans. 1998) ("Schmitt's definition of sovereignty . . . became a commonplace even before there was any understanding that what was at issue in it was nothing less than the limit concept of the doctrine of law and the State, in which sovereignty borders . . . on the sphere of life and becomes indistinguishable from it.").

[208] *See* RAUSTIALA, *supra* note 13, at 8-9, 241-43; Cole, *supra* note 13, at 61; Roth, *supra* note 13, at 127-30; *see also* ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW 254 (2004) (noting most countries never experienced the kind of territorial sovereignty experienced by the United States and the nations of Western Europe).

[209] *See* Cole, *supra* note 13, at 52. *But cf.* Roth, *supra* note 13, at 128 (arguing that although human rights norms are legally binding, they "do not, in and of themselves, vitiate the legal constraints on the application of power across territorial boundaries").

[210] *See* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 128-31 (2004).

rights, therefore, this erosion poses a threat. Indeed, this threat may help explain the rise of sovereignty-based rationales for the rule in U.S. judicial opinions, as a form of pushback against these developments. One might even suggest that these arguments did not appear in earlier cases because it had not occurred to courts that they needed to articulate the obvious. Articulating a sovereignty rationale became necessary only as territory-based sovereignty began to decline or was perceived to be under threat.

Be that as it may, the sovereignty rationale for the rule of non-inquiry only sometimes takes the form of respecting the sovereign authority of the requesting country. At least as often, courts express concern, not about other countries, but about the United States, specifically the authority of the executive branch to control foreign relations. As I noted already, many courts assert the paramount or even exclusive authority of the executive branch in international extradition and insist that the Secretary of State must have the last word on the issue.[211]

This "last word" is essentially a form of prerogative. Extradition litigation involves less process than ordinary federal court cases, even though the consequence of a government victory is both physical and territorial: expulsion of a person lawfully within the United States.[212] At the end of this truncated process sits the Secretary of State, with the power to grant or withhold mercy in the form of the final decision whether or not to extradite.[213] Small wonder, then, that federal courts describe these events as "sui generis."[214] When courts describe extradition and non-inquiry as important to sovereignty, therefore, they are entirely correct with respect to both of the aspects of sovereignty that I am discussing.

These two aspects of sovereignty – territorial and executive – have an important relationship in the contemporary era of "globalization." As Saskia Sassen has observed, the decline of territory-based sovereignty assists the redistribution of national power towards executive officials, if not necessarily towards a unitary executive. This is particularly true of the power once exercised by legislatures, and somewhat less so with respect to judicial power.[215] Thus, on the one hand, changes in international law and the processes of globalization erode territory-based sovereignty, which, among other things, makes the rule of non-inquiry increasingly anachronistic. On the other hand, these same processes increase the power of one branch of government to set policy and make decisions, and to do so in ways that are

[211] *See supra* note 82.

[212] *See supra* note 3 and accompanying text.

[213] *Cf.* Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307, 1311 (2004).

[214] *See supra* note 6.

[215] *See* SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES 168-84 (2006).

inconsistent with traditional conceptions of the rule of law.[216] This aspect of internationalization supports the rule of non-inquiry as another tool for aiding efficient cooperation among national executives. But in so doing, it allows the rule of non-inquiry, and the extradition processes built around it, to reinforce territory-based models of national sovereignty as well. At the risk of over-generalizing, one might conclude that internationalization and the rise of cosmopolitan law and global legal pluralism do not necessarily erode traditional, territorial conceptions of sovereignty. They certainly do not erode the executive discretion that sits at the core of contemporary versions of those traditional conceptions.

To the extent the rule of non-inquiry allows harm to individuals in order to protect relations among sovereign executives, it also aids the construction of a particular type of international citizen, one who at least initially appears to be the opposite of the cosmopolitan rights-bearing individual. Put differently, by reinforcing and insulating the conceptions of sovereignty that I have been discussing, the rule of non-inquiry produces what Giorgio Agamben labels the "homo sacer," the person reduced to bare life and suspended between the norm and the exception.[217] Non-inquiry represents an exceptional zone of no-law (or, rather, no judicially enforceable law) between the United States and the receiving country, with the person facing extradition left exposed, if only temporarily, at this border.

This exposure is not simply theoretical. Under the rule of non-inquiry, a person has few legal rights in the United States even though U.S. officials may be sending her to face physical mistreatment or arbitrary processes or punishment. Nor does the person yet have any rights under the law of the receiving country – and, of course, the extraditee's complaint is that there may never be a remedy in the receiving country. That is to say, the condition of being on a legal or conceptual border, outside the normal law and subject to the law of the exception, is a tangible suspension, a place of actual exposure that results in concrete physical harm to specific individuals when they are transported across a political or territorial border.

This condition and these harms flow directly from the material effects of territory-based sovereignty and executive authority working in tandem. So long as it exists, the rule of non-inquiry stands as a partial rebuke to the claim that sovereignty has changed fundamentally in the contemporary world. Extraditees represent, albeit in more fleeting form, precisely the problem that international human rights exist to combat: the problem of the stateless person

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[216] *See* TAMANAHA, *supra* note 210, at 114-26; *see also* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 463 (new ed. 1979).

[217] *See* AGAMBEN, *supra* note 207, at 6-11; *see also* ARENDT, *supra* note 216, at 297. Notably, Agamben highlights exile as an example of bare life. *See* AGAMBEN, *supra* note 207, at 109-11. I made a similar point about extradition and bare life in John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765, 828-29 (2007).

who cannot claim rights from a particular national government.[218] Indeed, to the extent the rule of non-inquiry expands beyond the context of extradition, as in *Munaf*, its doctrine and the resulting affirmation of sovereignty and subjection of people to a condition of no-law that produces physical harm, will remain *a* norm, even if not necessarily *the* norm, in the midst of the age of rights.

Importantly, the condition of being suspended in a physical and legal space in which no enforceable legal protections apply is not limited to extradition. Immigration and refugee practices, for example, constantly result in people being placed in camps, often literally along borders, where they must live without the legal rights of the territory in which their camp exists but are also unable to return to the territory in which they once had rights or at least had the hope of a political and legal identity other than mere statelessness.[219] And, of course, a similar dynamic has played out at Guantanamo Bay Naval Base and continues at other U.S. facilities where large numbers of "enemy combatants" and suspected "terrorists" are detained with few legal rights.[220]

In all of these areas, officials usually try to limit judicial inquiry. Still, international and domestic laws also provide that these areas of sovereign action should not be insulated from review. The Supreme Court's decision in *Boumediene v. Bush* arguably reflects an appreciation of this view, which the Court applied to override territory-based ideas of sovereignty (both of the United States and Cuba) and to limit executive power. *Boumediene*, lower court decisions in its wake, and the Obama administration's efforts to close the camp have enhanced the rights of persons detained at Guantánamo.[221] *Boumediene* and *Rasul v. Bush* raise the possibility that the writ of habeas corpus will allow some inquiry wherever U.S. officials hold people in detention, although I suspect the Court will never quite extend the writ that far.[222] These cases, and the actions taken as a result of them, suggest that ideas

[218] *See* ARENDT, *supra* note 216, at 290-99.

[219] *See* PARRY, UNDERSTANDING TORTURE, *supra* note 140, at 159-63.

[220] The condition of being outside the law, in a lawless space, does not mean that such spaces are literally free of law. To the contrary, places such as Guantánamo are filled with rules, regulations, and standard operating procedures. Rules abound and multiply in the absence of law, but they are laws of the exception, flowing from sovereign decisions. *See id*. at 185-86.

[221] *See* Center for Constitutional Rights, *Guantanamo Habeas Scorecard*, CCR, http://ccrjustice.org/files/2010-05 Habeas SCORECARD Website Version.pdf (last updated May 06, 2010); *cf.* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1041, 123 Stat. 2190 (2009) (providing conditions for transfer of people from the Guantánamo Bay detention camp).

[222] *Compare* Al Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009) (holding federal courts have habeas corpus jurisdiction to review detentions at a U.S. military base in Afghanistan), *with* Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010) (reversing the district court and applying a functional test that bars automatically extending habeas rights to people held at U.S. military bases, particularly those in a theater of war).

of separation of powers and the rule of law, enforced by the judiciary, can check contemporary executive power. To some observers, they confirm an idea of traditional sovereignty eroding and blending into a more cosmopolitan or international legal order.[223]

But the ability of courts to check executive power is uncertain at best – as the steady increase in executive power in the face of judicial review easily attests. Further, the reinforcement of non-inquiry in *Munaf* suggests caution about judicial willingness to check executive authority. Sovereign discretion remains, and courts are not always hostile to it. Indeed, the *Munaf* Court defined sovereign discretion as the norm for certain classes of people, while the rule of law in the form of judicial review risks becoming the exception.

Munaf's insistence on sovereign power and territory at first appears to be an hysterical response to concerns about globalization and international law – and perhaps, too, to the restrictions on executive power declared in *Boumediene*. Yet it is also true that in *Boumediene*, the Court was controlling and limiting U.S. sovereignty within an area of traditional judicial activity, and within territory that was under exclusive and long-time U.S. control. In *Munaf*, the Court again asserted its ability to decide habeas cases. But on the merits, in an area outside traditional judicial activity, it upheld the sovereignty of another country, a country that had not been sovereign or had been barely sovereign for several years before. The insistence on sovereignty in *Munaf*, therefore, includes an assertion of the boundary between the United States and Iraq, so that *Munaf* not only repeats *Neely* but perhaps also – together with *Boumediene* – lays claim to being the latest of the *Insular Cases*.

Further, in *Boumediene*, the Court used the idea of de facto control to get around territorial sovereignty, while in *Munaf* it looked to de jure authority to reinforce sovereignty. Perhaps "sovereignty" and "territory" are simply resources, something that a state – or a court – can deploy or dispense, part of the tools of statecraft and governance.[224] And, if this is true, then the possibility arises that the supposed fragmentation of territorial sovereignty in *Boumediene* is itself strategic. Rather than being a concession to globalization or cosmopolitanism, the Court's reasoning deploys national resources within national frameworks to achieve a goal that serves its conception of national interests. Similarly, the Court deployed judicial resources through those same frameworks to reassert a domestic separation of powers balance and to limit executive discretion. After all, what the petitioners in *Boumediene* obtained was the right to pursue their claims for national rights under national law, with the decision on whether to grant or deny those rights under the control of national courts instead of at the discretion of the national executive.

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[223] *See* Cole, *supra* note 13, at 60.

[224] *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-22 (1964) (refusing to derive act of state doctrine from formal principles of sovereign authority, which is only a factor in application of the doctrine).

Under this view of sovereignty, *Munaf* may not be as formalist or hysterical as it first appears. Rather, it represents another move, another deployment of sovereignty, a counterweight to *Boumediene* and a signal to the Executive branch. Perhaps, that is, its formalism and insistence on territorial sovereignty are functional.[225] At this point, it becomes difficult to tell which case – *Boumediene* or *Munaf* – represents the norm, and which the exception. That difficulty, in turn, creates more room for strategic deployments of territorial and executive sovereignty. Almost certainly, this is not what Professor Aleinikoff meant when he declared that "a constitutional law for the twenty-first century needs understandings of sovereignty and membership that are supple and flexible, open to new arrangements that complement the evolving nature of the modern state."[226] Yet taken as a whole, isn't this exactly what *Boumediene*, *Munaf*, and the rule of non-inquiry accomplish?

[225] *See* Neuman, *The Extraterritorial Constitution*, *supra* note 43, at 284 (suggesting *Munaf*'s analysis is "an application of the functional approach to a citizen's extraterritorial rights").

[226] T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 5 (2002).