

## International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty

John T. Parry\*

The law of international extradition in the United States rests on a series of myths that have hardened into doctrine.<sup>1</sup> 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.”<sup>2</sup>

Once courts declare that extradition is naturally a subject for the executive branch, it becomes easy to deduce additional rules, each based on the founding myth but 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.<sup>3</sup> 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 18 U.S.C. § 3184 [the federal extradition statute], the Executive would retain plenary authority to extradite.”<sup>4</sup>

---

\* Professor of Law, Lewis & Clark Law School. I am grateful for the research assistance of Amy Heverly.

<sup>1</sup> See John G. Kester, *Some Myths of United States Extradition Law*, 76 Geo. L.J. 1441 (1988).

<sup>2</sup> *Ordinola v. Hackman*, 478 F.3d 588, 606 (4<sup>th</sup> Cir. 2007) (Traxler, J., concurring); see also *Hoxha v. Levi*, 465 F.3d 554, 560 (3<sup>rd</sup> Cir. 2006); *Lopez-Smith v. Hood*, 121 F.3d 1322, 1326 (9<sup>th</sup> Cir. 1997); *Sidali v. INS*, 107 F.3d 191, 194 (3<sup>rd</sup> Cir. 1997); *Martin v. Warden*, 993 F.2d 824, 828 (11<sup>th</sup> Cir. 1993). Kester, *supra* note 1, does not include this statement in his list of extradition myths, but my assertion is consistent with his analysis. See also Christopher H. Pyle, *Extradition, Politics, and Human Rights* 301, 305 (2001) (including a similar claim as one of the “unwarranted assumptions, fictions, delusions, and myths” of extradition law).

<sup>3</sup> See 18 U.S.C. § 3184; *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925) (stating habeas review in extradition case includes the judge’s jurisdiction, whether the offense was within the treaty, and whether there was “any evidence warranting the finding that there was reasonable ground to believe the accused guilty”); *In re Howard*, 996 F.2d 1320, 1325 (1<sup>st</sup> Cir. 1993) (noting Secretary of State is “the ultimate decisionmaker”); *Ward v. Rutherford*, 921 F.2d 286 (D.C. Cir. 1990) (holding district court cannot directly review magistrate’s extradition decision, although habeas is available); *In re Mackin*, 668 F.2d 122, 125-30 (2<sup>nd</sup> Cir. 1981) (holding there is no direct appeal from district judge’s extradition decision). See also *In re Smyth*, 61 F.3d 711, 720-21 (9<sup>th</sup> 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 (2<sup>nd</sup> Cir. 1960) (discussing advantages provided to the requesting country and disadvantages imposed on the extraditee), *vacated as moot*, 375 U.S. 49 (1963).

<sup>4</sup> *LoDuca v. United States*, 93 F.3d 1100, 1103 (2<sup>nd</sup> Cir. 1996); see also *Ordinola*, 478 F.3d at 606 (Traxler, J., concurring) (“The decision to extradite is one that is ‘entirely within the dis-

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.<sup>5</sup> It should be no surprise, therefore, that courts frequently refer to international extradition proceedings in U.S. courts as “sui generis.”<sup>6</sup>

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.<sup>7</sup> In its 2008 decision in *Munaf v. Geren*, 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.”<sup>8</sup> 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 pro-

---

cretion 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.

<sup>5</sup> See *DeSilva v. Dileonardi*, 125 F.3d 1110, 1113 (7<sup>th</sup> 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 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.”). Note that a judge’s decision to grant bail in an extradition case may be an Article III decision. See *In re Kirby*, 106 F.3d 855, 859-61 (9<sup>th</sup> Cir. 1996); see also Roberto Iraola, *The Federal Common Law of Bail in International Extradition Proceedings*, 17 Ind. Int’l & Comp. L. Rev. 29 (2007). Under *Kirby*, in other words, the judge switches back and forth during an extradition case between Article III court and Article I adjunct.

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

<sup>7</sup> See, e.g., *Ahmad v. Wigen*, 910 F.2d 1063, 1066-67 (2<sup>nd</sup> Cir. 1990) (“A consideration of the procedures that will or may occur on 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.”)

<sup>8</sup> *Munaf v. Geren*, 128 S. Ct. 2207, 2225 (2008). *Munaf* was not itself an extradition case. See *id.* at 2227 (“this is not an extradition case, but one involving the transfer to a sovereign’s authority of an individual captured and already detained in that sovereign’s territory”).

cedures or harsh treatment in that country.

This article uses the rule of non-inquiry to assess the state of extradition law and the theories that support it. I focus first on the doctrinal status of the rule, with the goal of demonstrating that it is more flexible than courts often purport to believe and that a more explicitly functional approach would better serve the issues that the non-inquiry doctrine encompasses and implicates. Indeed, *Munaf* itself 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 its more rigorous applications. Throughout my doctrinal discussion, I also consider the broader question of the proper scope of habeas corpus review of extradition decisions.

Although it proposes doctrinal reforms, this article has broader ambitions. For example, my discussion of non-inquiry and the scope of habeas review seeks also to historicize these doctrines and in so doing to reveal the process of mythmaking that has frozen extradition law.<sup>9</sup> Second, and relatedly, 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. Third, my suggestions for the rule of non-inquiry also work within and seek to incorporate some of the many changes in international law that have taken place since the rule was first announced.<sup>10</sup>

Finally, and perhaps most ambitiously, I discuss and explore the implications of the rule of non-inquiry's reliance on a particular – some might say “traditional” – notion of 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.<sup>11</sup>

---

<sup>9</sup> See Steven Lubet, *Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists*, 15 Cornell Int'l L. Rev. 247, 253-54 (1982) (“The extradition laws of the United States essentially ceased developing at the turn of the [twentieth] century.”). On this point, this article continues a project I began in John T. Parry, *The Lost History of International Extradition Litigation*, 43 Va. J. Int'l L. 93 (2002).

<sup>10</sup> See also John Quigley, *The Rule of Non-Inquiry and Human Rights Treaties*, 45 Catholic U. L. Rev. 1213 (1996).

<sup>11</sup> David D. Cole, *Rights over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2007-08 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) (claiming the existence of “a postmodern world in which the

Professor Cole was writing about the Supreme Court's decision in *Boumediene v. Bush*,<sup>12</sup> and he is correct that *Boumediene* can be read as an example of changing conceptions of sovereignty.<sup>13</sup> Yet Professor Cole – like most commentators on *Boumediene* – did not include *Munaf* in his analysis. The Supreme Court decided *Munaf* on the same day as *Boumediene*, and the majority opinion repeatedly stressed and relied upon Iraq's "sovereign right" or "prerogative" to punish offenses "committed on its soil."<sup>14</sup> The conception of sovereignty at work in *Munaf* is precisely that sovereignty is "absolute, territorial, and sacred." 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.

This article asks whether *Munaf*'s conception of sovereignty was already outdated 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 – and the article ends by exploring what that coexistence might mean.

## I. HISTORICIZING THE RULE OF NON-INQUIRY

### A. *The Importance of Habeas Corpus*

Some courts and commentators suggest that the rule of non-inquiry derives from the limited scope of review announced in late nineteenth century international extradition habeas cases.<sup>15</sup> In *Benson v. McMahon*, for example,

---

nation-state has been deconstructed and eighteenth-and nineteenth-century notions of unmediated national sovereignty have been properly put to rest"). For a more cautious assessment, see Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* 9 (2009) ("These claims contain elements of truth, but are strongly overstated. Sovereign borders still matter greatly for economic and political life.").

<sup>12</sup> 128 S. Ct. 2229 (2008).

<sup>13</sup> See also Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2007-08 Cato Sup. Ct. Rev. 23 (agreeing *Boumediene* articulated a more "cosmopolitan" vision of rights).

<sup>14</sup> *Munaf*, 128 S. Ct. at 2220 ("Iraq's sovereign right to 'punish offenses against its laws committed within its borders'") (quoting *Wilson v. Girard*, 354 U.S. 524, 529 (1957)); *id.* at 2221 ("Iraq has a sovereign right to prosecute Omar and Munaf for crimes committed on its soil"); *id.* at 2224 ("a sovereign's recognized prerogative to apply its criminal law to those alleged to have committed crimes within its borders"); see also *id.* at 2222 ("a nation state reigns sovereign within its own territory"); *id.* at 2223 ("the habeas petitioners concede that Iraq has the sovereign authority to prosecute them for alleged violations of its law"); *id.* (Iraq is "a sovereign with undoubted authority to prosecute" the petitioners); *id.* ("the sovereign authority of Iraq"); *id.* at 2227-28 ("Petitioners concede that Iraq has a sovereign right to prosecute them for alleged violations of its law").

<sup>15</sup> *Mironescu v. Costner*, 480 F.3d 664, 669 (4<sup>th</sup> Cir. 2007); *Ahmad v. Wigen*, 910 F.2d 1063, 1066 (2<sup>nd</sup> Cir. 1990); *Gallina v. Fraser*, 278 F.2d 77, 79 (2<sup>nd</sup> Cir. 1960); Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 Cornell L. Rev. 1198, 1211-12 (1991).

the Court began by describing the extradition proceeding itself, which 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 very 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 . . . .<sup>16</sup>

Habeas review was to be even narrower. According to the Court, “We 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.”<sup>17</sup>

The Court confirmed the narrow scope of extradition habeas in *In re Oteiza y Cortes*<sup>18</sup> and *Ornelas v. Ruiz*.<sup>19</sup> In both cases, the Court endorsed *Benson*’s limited set of issues for review.<sup>20</sup> Significantly, the *Ornelas* Court also analogized to the limited scope of habeas review for criminal convictions to confirm that habeas review “cannot perform the office of a writ of error.”<sup>21</sup>

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.’”<sup>22</sup> But the petitioners in *Benson*, *Oteiza*, and *Ornelas* made no claims about the procedures or treatment that awaited them in the requesting country, so the “exclusion” of these topics from the list of habeas issues in these cases proves little. The most one can say about these cases is that the Court stressed the nar-

---

<sup>16</sup> 127 U.S. 457, 463 (1888).

<sup>17</sup> *Id.* Under the original version of 18 U.S.C. § 3184, commissioners could hear extradition cases. See also Judith Resnik, “*Uncle Sam Modernizes His Justice*”: *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 Geo. L.J. 607, 612 n.4 (2002) (explaining the functions of commissioners). Under the current version of § 3184, “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” may hear an extradition case. State judges rarely preside over extradition hearings, presumably because the U.S. Department of Justice initiates the case and chooses to proceed in a federal forum. See *United States Attorneys’ Manual* § 9-15.700(2) (1997) (“The Assistant United States Attorney assigned to the case obtains a warrant and the fugitive is arrested and brought before the magistrate judge or the district judge.”)

<sup>18</sup> 136 U.S. 330 (1890).

<sup>19</sup> 161 U.S. 502 (1896).

<sup>20</sup> *Oteiza*, 136 U.S. at 334; *Ornelas*, 161 U.S. at 508.

<sup>21</sup> See *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 \_\_, at 153-56.

<sup>22</sup> Semmelman, *supra* note \_\_, at 1211-12 (1991) (quoting *Gallina v. Fraser*, 278 F.2d 77, 79 (2<sup>nd</sup> Cir. 1960)).

rowness of habeas in general and of extradition habeas in particular, and that the narrowness of that inquiry 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.<sup>23</sup> In extradition cases, most courts continue to cite the early cases and to insist that habeas review must be narrow.<sup>24</sup> Most discussions of the rule of non-inquiry reflect the same approach.

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*.<sup>25</sup> As I will discuss in

---

<sup>23</sup> For discussions of the historical scope of habeas review, see Richard H. Fallon, *et al.*, *Hart & Weschler's The Federal Courts and the Federal System* 1206-07, 1220-22 (6<sup>th</sup> ed. 2009); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 483-93 (1963); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 Colum. L. Rev. 197, (1992); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961 (1998).

<sup>24</sup> 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 also Parry, *Lost History*, *supra* note \_\_, at 155 n. 322. For court of appeals cases citing *Fernandez* or the other early cases as authority for the scope of extradition habeas, see *Ordinola v. Hackman*, 478 F.3d 588, 598 (4<sup>th</sup> Cir. 2007); *Hoxha v. Levi*, 465 F.3d 554, 560 (3<sup>rd</sup> Cir. 2006); *Prasoprat v. Benov*, 421 F.3d 1009, \_\_\_\_ (9<sup>th</sup> Cir. 2005); *Sidali v. INS*, 107 F.3d 191, \_\_\_\_ (3<sup>rd</sup> Cir. 1997); *Martin v. Warden*, 993 F.2d 824, 828 (11<sup>th</sup> Cir. 1993); *Ahmad v. Wigen*, 910 F.2d 1063, 1064 (2<sup>nd</sup> Cir. 1990); *David v. Attorney General*, 699 F.2d 411, \_\_\_\_ (7<sup>th</sup> Cir. 1983); *Eain v. Wilkes*, 641 F.2d 504, \_\_\_\_ (7<sup>th</sup> Cir. 1981); *In re Assarsson*, 635 F.2d 1237, \_\_\_\_ (7<sup>th</sup> Cir. 1980); *Escobedo v. United States*, 623 F.2d 1098, \_\_\_\_ (5<sup>th</sup> Cir. 1980); *Jhirad v. Ferrandina*, 536 F.2d 478, 482 (2<sup>nd</sup> Cir. 1976).

<sup>25</sup> See *Mironescu v. Costner*, 480 F.3d 664, 671-72 (4<sup>th</sup> Cir. 2007) (noting courts “have expanded the justifications for the rule of non-inquiry since its origin”). Matthew Murchison argues the rule of non-inquiry originated in an 1800 statement by then-Congressman John

Part II, the executive power justification need 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 (as well as the rule of non-inquiry) should expand to reflect contemporary legal developments.

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

*I. Neely v. Henkel*

The rule of non-inquiry began with the Supreme Court's 1901 decision in *Neely v. Henkel*.<sup>26</sup> 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

---

Marshall during a debate in the House of Representatives over the extradition of Jonathan Robbins, when 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). Murchison is correct that the Robbins affair demonstrated "the politically-charged nature of extradition," see *id.* at 301, but his claim that "Marshall's viewpoint won the day" such that the later non-inquiry doctrine rests on deference to executive foreign policy prerogatives, see *id.* at 301-02, is incorrect. See Parry, *Lost History*, *supra* note \_\_, at 108-13; John T. Parry, *Congress, the Supremacy Clause, and the Implementations of Treaties*, 32 Fordham Int'l L.J. 1209, 1295-1303 (2009). To the contrary, the Robbins affair was a cautionary tale of executive power for decades to come – including in the context of extradition, see Parry, *Lost History*, *supra* note \_\_, at 114-16, 126-36; Semmelman, *supra* note \_\_, at 1207-08 – 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 also Michael P. Van Alstine, *Taking Case of John Marshall's Political Ghost*, 53 St. Louis L.J. 93, (2008) (noting the relative legal obscurity of Marshall's speech until *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)). 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 (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.

<sup>26</sup> *Neely v. Henkel* (No. 1), 180 U.S. 109, 123 (1901). *Neely* was the first of two companion cases. The second case, *Neely v. Henkel* (No. 2), 180 U.S. 126 (1901), was decided "[f]or the reasons stated in the opinion just delivered." 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 (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. But the court also found that one of the officers was extraditable for a murder committed several months before the coup. 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.*

people, unless a different mode be provided by treaty stipulation between that country and the United States.<sup>27</sup>

The Court also referred to the fact that Neely faced extradition to Cuba pursuant to a statutory process, and it emphasized that “[i]n the judgment of Congress these provisions were deemed adequate.”<sup>28</sup>

*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.<sup>29</sup> 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. As I will suggest below, the fact of military occupation was almost certainly 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.<sup>30</sup> 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.”<sup>31</sup> 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

---

<sup>27</sup> *Neely*, 180 U.S. at 123.

<sup>28</sup> *Id.* at 123.

<sup>29</sup> See *supra* note 3 (citing cases establishing the lack of direct appeal from an extradition decision).

<sup>30</sup> 180 U.S. at 122.

<sup>31</sup> *Id.*

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.<sup>32</sup> A holding of this kind would not turn precisely on the issue of extraterritoriality, but its resolution almost certainly would respond to extraterritoriality analysis.

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.<sup>33</sup> 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."<sup>34</sup> *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. Although the right to trial by jury in a criminal case is a federal constitutional right, 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* held that the jury trial right was not "fundamental" enough to apply to criminal proceedings held in "unincorporated" territories of the United States.<sup>35</sup> Thirty years later, the Supreme Court

---

<sup>32</sup> See *Munaf v. Geren*, 128 S. Ct. 2207, 2222-23 (2008) (appearing to interpret *Neely* as stating such a holding).

<sup>33</sup> *In re Ross*, 140 U.S. 453 (1891). The petitioner in *Ross* was a British citizen who was a seaman on a U.S. vessel. 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.

<sup>34</sup> *Neely*, 180 U.S. at 122.

<sup>35</sup> See *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (holding there was no constitutional right to a grand jury in the territory of Hawaii); *Dorr v. United States*, 195 U.S. 138, 149 (1904) (holding there was no right to trial by jury in the territory of the Philippines); *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (holding there is no right to a jury in Puerto Rico even though citizens of Puerto Rico are also citizens of the United States). For overviews of the *Insular Cases*, see T. Alexander Aleinikoff, *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* 21-23, 81-83 (2002); Owen M. Fiss, 8 *History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888-1910*, at 233-56 (1993); Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* 83-89 (1996); Raustiala, *supra* note \_\_\_, at 76-86.

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 *Webster v. Reid*, 52 U.S. 437 (1850) (holding there was a right to a civil jury

held that the Constitution did not compel juries in state criminal proceedings,<sup>36</sup> and it did not incorporate the jury trial right against the states until 1968.<sup>37</sup>

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.<sup>38</sup> 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* is one of the *Insular Cases*, or at least is a critical precursor to them.<sup>39</sup> *Neely* faced extradition to Cuba for crimes allegedly committed during the U.S. military occupation of the island – an occupation that was ongoing when the Supreme Court decided the case. His argument that he was entitled

---

in the territory of Iowa); *Callan v. Wilson*, 127 U.S. 540 (1888) (holding there is a right to trial by jury applies in the District of Columbia). 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.”); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality after Boumediene*, 109 Colum. L. Rev. 973, 984-92 (2009) (discussing these issues); Bartholomew H. Sparrow, *The Insular Cases and the Emergence of American Empire* 40-55, 169-206 (2006) (discussing the jurisprudence of constitutional rights in territories and the approach of the *Insular Cases* to constitutional criminal procedure).

<sup>36</sup> See *Palko v. Connecticut*, 302 U.S. 319 (1937); *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

<sup>37</sup> See *Duncan v. Louisiana*, 391 U.S. 145 (1968); see also Akhil Reed Amar, *The Bill of Rights* 81-110 (1998) (arguing the jury right is fundamental for structural and individual rights reasons). For a compelling argument that the questions of incorporation and extraterritoriality have important commonalities, see Burnett, *A Convenient Constitution?*, *supra* note \_\_.

<sup>38</sup> See *Boumediene v. Bush*, 128 S. Ct. 2229, 2254 (2008) (“the former Spanish colonies operated under a civil-law system, without experience in the various aspects of the Anglo-American legal tradition, for instance the use of grand and petit juries”); Gerald L. Neuman, *The Extraterritorial Constitution after Boumediene v. Bush*, 82 S. Cal. 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”).

<sup>39</sup> See Christina Duffy Burnett, *A Note on the Insular Cases*, in *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* 389, 390 (Christina Duffy Burnett & Burke Marshall eds. 2001); Sparrow, *supra* note \_\_, at 133, 257; see also Raustiala, *supra* note \_\_, at 85 (appearing to argue *Neely* is one of the *Insular Cases*).

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 it was deciding a case about extraterritoriality or, instead, about U.S. territory.<sup>40</sup>

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.<sup>41</sup> The peace treaty between the United States and Spain also contemplated the eventual independence of Cuba.<sup>42</sup> 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."<sup>43</sup> 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."<sup>44</sup>

The United States had de facto sovereignty over Cuba and could legislate for it,<sup>45</sup> yet because the occupation and resulting de facto sovereignty were declared to be temporary it remained a foreign country and crimes committed there were "without the jurisdiction of the United States."<sup>46</sup> *Neely*, in short,

---

<sup>40</sup> *Neely*, 180 U.S. at 115 (stating the issue was whether "Cuba is to be deemed a foreign country or territory").

<sup>41</sup> *Id.* at 115-16 (quoting 30 Stat. 738 (Apr. 20, 1898)). For the background of the joint resolution, see Sparrow, *supra* note \_\_\_, at \_\_\_-\_\_\_.

<sup>42</sup> *Neely*, 180 U.S. at 116-17.

<sup>43</sup> *Id.* at 119.

<sup>44</sup> *Id.* at 120.

<sup>45</sup> See *Neely*, 180 U.S. at 121-22; *cf.* *Boumediene v. Bush*, 128 S. Ct. 2229, 2253 (2008) ("we accept the Government's position that Cuba . . . retains *de jure* sovereignty over Guantanamo. [But] we take notice of the obvious and uncontested fact that the United States . . . maintains *de facto* sovereignty over this territory.").

<sup>46</sup> *Id.* at 122. Cuban independence and sovereignty would remain de facto for the first part of the twentieth century. At the insistence of the United States, the Cuban constitution restricted the ability of Cuba to enter into treaties with other countries and gave explicit consent "that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the government of Cuba." See "Relations with Cuba," in 6 *Treaties and Other International Agreements of the United States of America, 1776-1949*, at 1116, 1117 (Charles I. Bevans ed. 1971). U.S. forces repeatedly invaded and occupied the country through the 1920s, and U.S. companies controlled large parts of the Cuban economy through the 1950s. The U.S. Naval Base at Guantánamo Bay is the last vestige of this influence. See, e.g., Sparrow, *supra* note \_\_\_, at 240-46; *cf.* Uday Singh

dealt with one end of the post-war territorial spectrum, while the other *Insular Cases* would address the status of territories that the United States planned to keep for longer periods of time.<sup>47</sup>

If *Neely* is an *Insular Case*, then 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. Put more clearly, it was important in 1901 to affirm Cuba's status as an 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.<sup>48</sup> *Neely* was preoccupied with Cuban sovereignty, but that does not mean the law of international extradition must exhibit a similar concern in every subsequent case.

## 2. *The Rule of 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.<sup>49</sup>

He also contended, "The 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

---

Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (1999) (arguing liberal political theory has often worked with imperial power to hold out a promise of future but ever receding freedom).

<sup>47</sup> See Burnett, *A Note on the Insular Cases*, *supra* note \_\_, at 390 (discussing the relationship between *Neely*'s analysis and the analysis of the other *Insular Cases*). The most significant *Insular Case* of that Term bears this out. See *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 must have power to 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 military occupation; "What use can be made of that case in order to prove that the Constitution is not in force in a territory of the United State acquired by treaty, except as Congress may provide, is more than I can perceive").

<sup>48</sup> See *Neely*, 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 that the Cuban justice system was overseen by U.S. officials. See Pyle, *supra* note \_\_, at 124.

<sup>49</sup> 221 U.S. 508, 511 (1911).

as a matter of personal spite, malice and vengeance.”<sup>50</sup> 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.”<sup>51</sup> 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 liberty or rights claim is much less certain.

In the meantime, the Court began to assess the role of the executive branch in extradition. In its 1902 decision in *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.<sup>52</sup>

These comments could support a broad reading of Holmes’ subsequent statement in *Glucksman* as a comment about the executive or treaty powers, such that the rule of non-inquiry is based on the conclusion that issues of fairness or

---

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 512.

<sup>52</sup> 184 U.S. 270, 289 (1902). 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, 713-14 (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 the judiciary. To my knowledge, only one person has ever been extradited from the United States to another country without a judicial hearing. See Parry, *Lost History*, *supra* note \_\_, at \_\_\_\_\_. Note as well that *Terlinden* is sometimes cited as holding that extradition treaties are self-executing, but the Court’s assertion was that an extradition treaty empowers the executive branch, not the judiciary. The Court knew that the extradition statute (18 U.S.C. § 3184) was already in place to provide a process for executing extradition treaties. See John T. Parry, *No Appeal: The U.S.-U.K. Supplementary Extradition Treaty’s Effort to Create Federal Jurisdiction*, 25 Loyola (LA) Int’ & Comp. L. Rev. 543, 570 & n.141 (2003).

rights are decided in the treaty-making process or by executive officials in individual cases.

Even if that reading of *Glucksman* by way of *Terlinden* is accurate, the question remains whether it could still be good law. The idea that the executive branch can resolve individual rights claims by treaty runs into constitutional and international law concerns that I will discuss below. Even leaving those concerns aside, the Court's subsequent decision in *Valentine v. United States ex rel. Neidecker* 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 power to surrender. It must be found that statute or treaty confers the power.<sup>53</sup>

The Court ultimately held that the extradition at issue was not explicitly authorized by the treaty. 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.<sup>54</sup> If one reads *Glucksman* in light of *Valentine*, its holding becomes more limited and perhaps best can be described as a response to the specific claims in that case.

Since *Valentine*, the Supreme Court has been remarkably silent on extradition.<sup>55</sup> Lower courts, by contrast, have heard scores of cases, including many on the issue of non-inquiry. Non-inquiry doctrine accordingly owes far more to these lower court decisions than to the Supreme Court's general statements. District and circuit judges often portray the resulting doctrine as a powerful impediment to hearing claims about procedural irregularities or physical mi-

---

<sup>53</sup> 299 U.S. 5, 8-9 (1936).

<sup>54</sup> See also *In re Howard*, 996 F.2d 1320, (1<sup>st</sup> Cir. 1993) ("no 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 (9<sup>th</sup> Cir. 1986) (same); *Semmelman*, *supra* note \_\_, at 1222 (same). 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 (9<sup>th</sup> Cir. 1997); see *supra* note 4.

<sup>55</sup> The Court has mentioned extradition in related contexts. See, e.g., *Munaf v. Geren*, 128 S. Ct. 2207 (2008) (prisoner transfer); [**Alvarez-Machain (kidnapping of Mexican citizen for prosecution in the United States)**].

streatment. 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.”<sup>56</sup> 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.”<sup>57</sup> But reliance on selective quotations leads to a skewed and incomplete picture of non-inquiry doctrine. In the rest of this section, I sort the non-inquiry cases into several categories that provide a better account of what the rule has meant in practice, including in cases in which the relator faces likely mistreatment.

First, some courts have cited the rule in cases that do not raise non-inquiry issues at all.<sup>58</sup> The courts simply mention the rule as part of a general discussion of extradition or while discussing other issues. 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.<sup>59</sup> These cases often also involve

---

<sup>56</sup> 910 F.2d 1063, 1066-67 (2<sup>nd</sup> Cir. 1990).

<sup>57</sup> 121 F.3d at 1327.

<sup>58</sup> See *Argento v. Horn*, 241 F.2d 258, 263-64 (6<sup>th</sup> Cir. 1957) (citing *Neely* and expressing discomfort about sending the relator, who “has apparently been a law-abiding person during the thirty years that he has been in this country . . . back to life imprisonment in Italy”); *United States v. Kin-Hong*, 110 F.3d 103, \_\_\_ (1<sup>st</sup> Cir. 1997) (discussing the rule in the context of a general discussion of extradition and concluding that it “is shaped by concerns about institutional competence and by notions of separation of powers.”); *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1208 (9<sup>th</sup> Cir. 2003) (discussing the rule in a case about immunity from a civil suit over an extradition); *Al-Anazi v. Bush*, 370 F. Supp.2d 188, 195 (D.D.C. 2005) (discussing the rule in a prisoner transfer case and describing it as “[c]ounseling even further against judicial interference”); see also *Ordinola v. Hackman*, 478 F.3d 588, 607 (4<sup>th</sup> Cir. 2007) (Traxler, J., concurring) (using the rule in a political offense case to stress the limited judicial role in extradition).

<sup>59</sup> See *In re Lincoln*, 228 F. 70, 73 (E.D.N.Y. 1915), *aff’d mem. sub nom. Lincoln v. Power*, 241 U.S. 651 (1916); *Jhirad v. Ferrandina*, 536 F.2d 478, 485 (2<sup>nd</sup> Cir. 1976); *In re Locatelli*, 468 F. Supp. 568, \_\_\_ (S.D.N.Y. 1979); *Eain v. Wilkes*, 641 F.2d 504 (7<sup>th</sup> Cir. 1981); *United States v. Ramnath*, 533 F. Supp.2d 662, 672 (E.D. Tx. 2008). See also *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894), discussed *supra* note 26. Note that the extradition in *Eain v. Wilkes* involved more than claims of subterfuge. The court discussed the alleged torture of a witness, see 641 F.2d at \_\_\_ n.9, and the United States extradited Eain only after receiving diplomatic assur-

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 criminal process in the requesting country, such as the use of in absentia proceedings or the lack of a jury trial.<sup>60</sup> These cases fall squarely within the scope of *Neely* – except to the extent one cabins *Neely* as being an *Insular Case* about

---

ances from Israel to ensure a fair civilian trial. See *Memorandum of Decision by 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 U.N. G.A. Res. 36/171, *Question of Human Rights Relating to the Case of Mr. Ziad Abu Eain* (12 Feb. 1982), reprinted at 21 ILM 442 (1982).

<sup>60</sup> See *Gallina v. Fraser*, 278 F.2d 77, \_\_\_ (2<sup>nd</sup> Cir. 1960) (in absentia conviction); *Holmes v. Laird*, 459 F.2d 1211, 1214, 1219 (D.C. Cir. 1972) (rejecting claims about German criminal procedure in a case that involved a surrender under a Status of Forces Agreement [SOFA] of soldiers in the United States, not an extradition); *In re Ryan*, 360 F. Supp. 270, 274 (E.D.N.Y. 1973), *aff'd w/out op.*, 478 F.2d 1397 (2<sup>nd</sup> Cir. 1973) (double jeopardy claim); *United States ex rel. Bloomfield v. Gengler*, 507 F.2d 925, 928 (2<sup>nd</sup> Cir. 1974) (rejecting claims based on “conviction in absentia” and “the argument that they were never permitted to put in a defense”); *Jhirad*, 536 F.2d at 484-85 (refusing to apply a beyond a reasonable doubt standard in the extradition proceeding with respect to a foreign statute of limitations); *Plaster v. United States*, 720 F.2d 340, \_\_\_ n.9 (4<sup>th</sup> Cir. 1983) (stating “[i]t 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”); *Esposito v. Adams*, 700 F. Supp. 1470, 1480-81 (N.D. Ill. 1988) (rejecting claim that the Italian criminal justice system “violates all American notions of due process, decency and human rights”); *Martin v. Warden*, 993 F.2d 824, 828-30 (11<sup>th</sup> Cir. 1993) (rejecting a fifth amendment “speedy extradition” claim as inconsistent with rule of non-inquiry); *Yapp v. Reno*, 26 F.3d 1562, 1568 (11<sup>th</sup> Cir. 1994) (confirming *Martin* and applying it to treaty interpretation as well); *Sidali v. INS*, 107 F.3d 191, \_\_\_ n.7 (3d Cir. 1997) (double jeopardy and the possibility of the death penalty; see *In re Sidali*, 899 F. Supp. 1342, 1349 (D. N.J. 1995)); *In re Chan Seong*, 346 F. Supp.2d 1149, (D. N.M. 2004) (applying the rule to claim of undue delay); *In re Harusha*, 2008 U.S. Dist. LEXIS 28812, \*23-\*24 (E.D. Mich. Apr. 9, 2008) (in absentia conviction and lack of counsel); *Basso v. United States Marshall*, 278 Fed. Appx. 886 (11<sup>th</sup> Cir. 2008) (refusing to consider relator’s “assertion that he would be subject to due process violations if extradited”). See also *In re Assarsson*, 635 F.2d 1237 (7<sup>th</sup> Cir. 1980) (rejecting request for “the production of formal Swedish charges”); *Emami v. U.S. District Court for the Northern District of California*, 834 F.2d 1444, 1448-49 (9<sup>th</sup> Cir. 1987) (following *Assarsson*). Cf. *Argento*, 241 F.2d 258 (expressing discomfort about in absentia proceedings but not treating their use as giving rise to a potential claim); *Rosado v. Civiletti*, 621 F.2d 1179 (2<sup>nd</sup> Cir. 1980) (using the rule as an analogy in a decision rejecting the habeas corpus claims of Americans allegedly tortured in Mexico, then convicted and confined in appalling condition, and then transferred to the U.S. to serve their sentences); *Sahagian v. United States*, 864 F.2d 509, 514 (7<sup>th</sup> Cir. 1988) (using rule of non-inquiry to reject claims about Spanish procedures in a civil rights case over an extradition from Spain to the United States). For discussion of extraditions involving in absentia proceedings, see Roberto Iraola, *Foreign Extradition and In Absentia Convictions*, 39 Seton Hall L. Rev. 843 (2009).

occupied territory – and again courts consistently reject such claims.<sup>61</sup>

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.<sup>62</sup>

The fifth, and largest, category of non-inquiry cases involve 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.<sup>63</sup>

---

<sup>61</sup> The closest case to an exception is *United States v. Fernandez-Morris*, 99 F. Supp.2d 1358 (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." *Id.* at 1371, 1373. Yet because it found the government had "failed to show probable cause and dual criminality," it did not decide whether the case justified an exception to the rule of non-inquiry. That is, in one of the few cases in which a court had serious concerns about the foreign proceedings (albeit proceedings in the past), it found a way to deny extradition.

<sup>62</sup> See *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, \_\_\_ (9<sup>th</sup> Cir. 1983) (rejecting claim that relator would face "solitary confinement during questioning"); *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"); *Chan Seong*, 346 F. Supp.2d at 1153-54 (applying the rule to refuse consideration of relator's claim for a humanitarian exception because she was pregnant and had small children at home); *Ramirez v. Chertoff*, 267 Fed. Appx. 668, 670 (9<sup>th</sup> Cir. 2008) (applying the rule to reject claim that foreign law would impose an unduly harsh sentence and that relator's age and poor health created concerns about the effects of imprisonment). *Cf.* *Prushinowski v. Samples*, 734 F.2d 1016 (4<sup>th</sup> Cir. 1984) (rejecting claim that British prisons would not provide food that complied with Chassidic dietary rules).

<sup>63</sup> See *In re Normano*, 7 F. Supp. 329, 330-31 (D. Mass. 1934) (refusing to deny extradition based on the 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"); *Peroff v. Hylton*, 542 F.2d 1247, 1249 (4<sup>th</sup> Cir. 1976), *later proceeding*, *Peroff v. Hylton*, 563 F.2d 1099 (4<sup>th</sup> Cir. 1977) (refusing to consider relator's claim that he was at risk from "underworld assassins" because, "[i]f there are potential assassins in Swedish prisons, it is for Sweden to take measures adequate to secure Peroff's safety and protection"); *Sindona v. Grant*, 619 F.2d 167, 174 (2<sup>nd</sup> 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"); *Escobedo v. United States*, 623 F.2d 1098, \_\_\_ (5<sup>th</sup> Cir. 1980) (refusing to consider claim that relator "may be tortured or killed if surrendered to Mexico" because "the degree of risk to (Escobedo's) life from extradition is an issue that properly falls within the exclusive purview of the executive branch.") (quoting *Sindona*, 619 F.2d at 174); *In re Manzi*, 888 F.2d 204 (1<sup>st</sup> Cir. 1989)

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 involved potentially meritorious allegations of physical risk appears to be relatively small,<sup>64</sup> and I have found only four clear cases in which courts applied the doc-

---

(“Manzi’s request for a deposition and an evidentiary hearing concerning his safety in returning to Italy runs afoul of the well-established rule of ‘non-inquiry’ in these matters”); *Ahmad v. Wigen*, 910 F.2d 1063 (2<sup>nd</sup> Cir. 1990) (according to the district court, relator contended that “he would be subjected to torture and cruel and unusual punishment during interrogation . . .; he would not receive even ‘a semblance of due process’ in the Israeli criminal justice system, particularly since any conviction would in all likelihood rest on either his or his alleged accomplices’ coerced confessions; and, finally, he would be housed in indecent detention and prison facilities,” *Ahmad v. Wigen*, 726 F. Supp. 389, 409 (E.D.N.Y. 1989), but court of appeals ruled the district court should not have considered the claims); *Gill v. Imundi*, 747 F. Supp. 1028, 1048-49 (S.D.N.Y. 1990) (refusing to consider claims that evidence could be falsified and that relators could be tortured or killed in custody); *Koskotas v. Roche*, 931 F.2d 169 (1<sup>st</sup> Cir. 1991) (“the degree of risk to [the relator’s] life from extradition is an issue that properly falls within the exclusive purview of the executive branch” (quoting *Ahmad*, 910 F.2d at 1066)); *Mainero v. Gregg*, 164 F.3d 1199, 1210 (9<sup>th</sup> Cir. 1999) (refusing to consider claims of potential mistreatment); *Cornejo-Barreto v. Siefert*, 379 F.3d 1075 (9<sup>th</sup> Cir.) (refusing consideration of torture claim), *vacated as moot*, 389 F.3d 1307 (9<sup>th</sup> Cir. 2004) (en banc); *In re Singh*, 170 F. Supp.2d 982, 1038-39 (E.D. Cal. 2001) (holding relator’s claim that “he will be tortured or executed if surrendered to India” is “not cognizable in the extradition proceeding”); *In re Salazar Solis*, 402 F. Supp.2d 1128, 1132 (C.D. Cal. 2005) (citing non-inquiry rule as authority for not considering torture claim); *Cohen v. Benov*, 374 F. Supp.2d 850, 860 (C.D. Cal. 2005) (citing non-inquiry rule against a claim that relator would face physical harm from corrupt police or criminals if returned to Canada); *Hoxha v. Levi*, 465 F.3d 554, 563-64 (3<sup>d</sup> Cir. 2006) (using non-inquiry doctrine against claim of potential torture and extrajudicial killing); *In re Stern*, 2007 U.S. Dist. LEXIS 79486 (S.D. Fla. Oct. 25, 2007) (refusing to consider torture claim); *In re Tawakkal*, 2008 U.S. Dist. LEXIS 65059 (E.D. Va. Aug. 22, 2008) (same); *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”). *See also* *In re Smyth*, 61 F.3d 711 (9<sup>th</sup> Cir. 1995) (stating, in an extradition under a treaty that allowed some inquiry into potential mistreatment, that “[i]f this were a traditional extradition, we likely would not concern ourselves with the operation of the justice system in Northern Ireland. The long-standing ‘rule of noninquiry’ has traditionally circumscribed the breadth of a court’s inquiry into such matters.”); *Sidali*, 107 F.3d 191 (refusing to consider claim about possible death penalty; *see In re Sidali*, 899 F. Supp. 1342, 1349 (D. N.J. 1995)); *Prasoprat v. Benov*, 421 F.3d 1009, 1171 (9<sup>th</sup> Cir. 2005) (same; *see Prasoprat v. Benov*, 294 F.Supp.2d 1165, 1171 (C.D. Cal. 2003)). *Cf. Emami*, 834 F.2d at 1453-54 (refusing to address claim that if extradited to Germany, Germany might deport relator to Iran, where he could be summarily executed).

<sup>64</sup> *See Koskotas*, 931 F.2d 169 (refusing to hear claims about “the motives of the Greek government and the probable consequences of extradition,” where the “probable consequences” were a risk of assassination by the “17 November” terrorist group, which “has made the Koskotas Affair one of its stated reasons for violence,” *see Koskotas v. Roche*, 740 F. Supp.

trine while also admitting that the extraditee faced a meaningful risk of physical harm.<sup>65</sup> In two of those cases, the court rejected extradition on other grounds.<sup>66</sup>

Also important is the way in which many 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

---

904, 909 (D. Mass. 1990)); *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 there was some basis to be concerned about this possibility). Many of the cases involving extradition to Mexico may have had merit, and the extent to which this remains true is unclear. See *Rosado*, 621 F.2d 1179 (detailing the 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 note 65, *infra* (noting two cases in which the risk of torture appears to have been apparent to the court); Comment, *Bringing Fairness to Extradition Hearings: Proposing a Revised Evidentiary Bar for Political Dissidents*, 38 Cal. W. Int'l L.J. 177 (2007).

<sup>65</sup> See *Normano*, 7 F. Supp. at 330-31 (refusing to consider treatment Jewish academic would receive in Nazi Germany); *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"); *Smyth*, 61 F.3d at \_\_\_ ("the evidence undoubtedly reflected the prospect of harsh treatment if Smyth were returned to the Maze"); *Singh*, 170 F. Supp.2d 982 (noting India's past torture of relator and allowing an offer of proof about potential torture). A possible fifth case is *Cornejo-Barreto v. Siefert*, 218 F.3d 1004 (9<sup>th</sup> Cir. 2000), 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 that 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. 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 any mention of the magistrate's findings. See *Cornejo-Barreto v. Siefert*, 379 F.3d 1075 (9<sup>th</sup> Cir. 2004). 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 1307 (9<sup>th</sup> Cir. 2004) (en banc); Second Periodic Report of the United States of America to the Committee Against Torture ¶ 42 (May 6, 2005). See also *Chan Seong*, 346 F. Supp.2d at \_\_\_\_ ("The Court is deeply concerned that Ms. Chan was pregnant at the time of the extradition hearing and has small children at home. Thus, if I had jurisdiction, I might deny extradition based on humanitarian concerns."). It is possible that the cases in note 64, *supra*, should be combined with the four (or five) 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.

<sup>66</sup> See *Normano*, 7 F. Supp. at 330-32 (failure to extradite within required time period); *Gill*, 747 F. Supp. at 1043-47 (no probable cause). See also *United States v. Fernandez-Morris*, 99 F. Supp.2d 1358 (S.D. Fla. 1999) (rejecting extradition for lack of probable cause but also stating that the procedural irregularities in the case were "shocking").

as “unsupported” or “speculative.”<sup>67</sup> Several courts have done the same thing with claims about foreign procedures.<sup>68</sup> Finally, courts sometimes stress the availability of diplomatic assurances or other methods that the executive branch can use to ensure the fairness of the proceedings or the safety of the fu-

---

<sup>67</sup> See *Peroff*, 542 F.2d at \_\_\_\_ (finding “no basis for suspecting Sweden’s criminal processes, or supposing that Sweden cannot or will not adequately provide for Peroff’s protection from criminal elements who may have grievances against him”); *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679 (9th Cir. 1983) (“In light of Iceland’s outstanding human rights’ record and appellant’s uncorroborated prediction of maltreatment, the district court had no obligation to hold an evidentiary hearing to consider the claim.”); *Prushinowski v. Samples*, 734 F.2d 1016 (4<sup>th</sup> 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”); *Emami*, 834 F.2d at 1453 (noting in response to claim that relator risked a heart attack from “the stress of incarceration and trial” that district court appointed a cardiologist and considered the opinions of 3 others and found “that the German government had given every indication that it would be at least as solicitous of Emami’s health as the United States had been while Emami was in federal custody”); *Manzi*, 888 F.2d at \_\_\_\_ (noting “Manzi’s failure to produce any factual evidence of a threat to his safety”); *Mainero*, 164 F.3d at \_\_\_\_ (stating torture claim is “speculative”); *Salazar Solis*, 402 F. Supp.2d at 1132 (“Even if the Court were to consider Salazar’s torture claim in these proceedings, Salazar has not provided sufficient evidence for this Court to find that he would be in danger of being subjected to torture upon extradition to Mexico.”); *Cohen*, 374 F. Supp.2d at 860 (“petitioner has presented absolutely no reliable evidence” that corrupt officials or criminals “would harm him if he returns to Canada”); *Ramirez v. Chertoff*, 267 Fed. Appx. 668, 670 (9<sup>th</sup> Cir. 2008) (“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.”); *In re Tawakkal*, 2008 U.S. Dist. LEXIS 65059, \*42-\*43 (E.D. Va. Aug. 22, 2008) (“the Qadirs confirmed that the heart of their argument stemmed from Pakistan’s practices generally, rather than from threats specific to them.”).

<sup>68</sup> See *In re Ryan*, 360 F.Supp. 270 (E.D.N.Y.), *aff’d mem.* 478 F.2d 1397 (2nd Cir. 1973) (determining double jeopardy claim had no merit); *Esposito v. Adams*, 700 F. Supp. 1470, 1481 (N.D. Ill. 1988) (“the ‘evidence’ provided by the petitioner is not sufficient to justify his attack on the Italian criminal justice system”); *Martin v. Warden*, 993 F.2d 824, 830 (11<sup>th</sup> Cir. 1993) (“[R]ecognizing a Fifth Amendment right to a speedy extradition would conflict directly with the rule of non-inquiry [and] would simply be an oblique method of forcing treaty partners to adhere to the speedy trial guarantee contained in the United States Constitution. No circuit court has recognized such a right. There is no due process violation of Martin is tried in Canada according to Canadian law and procedure for his actions while in Canada.”); *Yapp v. Reno*, 26 F.3d 1562, 1567-68 (11<sup>th</sup> Cir. 1994) (rejecting treaty-based speedy extradition claim on the merits as well as because of non-inquiry concerns); *Lopez-Smith v. Hood*, 121 F.3d 1322, (9<sup>th</sup> Cir. 1997) (holding demand by Mexican officials for money in return for dropping charges is “not so egregious as to invoke” an exception to the rule); *Chan Seong*, 346 F. Supp. 2d at 1157 (determining delay and lack of statute of limitations do violate relator’s due process rights). See also *United States ex rel. Bloomfield v. Gengler*, 507 F.2d 925, 928 (2<sup>nd</sup> 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 and as insufficiently grave to justify departing from the rule).

gitive.<sup>69</sup> At least some of the time, the 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.<sup>70</sup>

To the extent that characterization is true, the non-inquiry rule will function in many cases as a device for determining which cases have serious human rights implications. Further support for this interpretation comes from that fact

---

<sup>69</sup> See *Gallina v. Fraser*, 278 F.2d 77, \_\_\_ (2<sup>nd</sup> Cir. 1960) (“We are informed that the Secretary of State as a condition of surrender of persons demanded by the Italian government, has required in similar cases that there be retrial of persons who have been convicted in absentia.”); *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972) (noting that there are fair trial provisions in the SOFA as well as monitoring requirements, but also calling the procedural claims “serious”); *Sindona v. Grant*, 619 F.2d 167 (2<sup>nd</sup> Cir. 1980) (noting the use of diplomatic assurances and stating the district judge had examined the evidence in support of the claim, apparently before rejecting it); *In re Geisser*, 627 F.2d 745, 752 (5<sup>th</sup> Cir. 1980) (Swiss officials “certified that they would take all necessary steps to preserve [relator’s] safety” and conveyed information about the safety of Swiss prisons); *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2<sup>nd</sup> 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.”); *In re Harusha*, 2008 U.S. Dist. LEXIS 28812, \*24-\*25 (E.D. Mich. 2008) (“the Government has represented to this Court that because of the in absentia nature of Harusha’s convictions, the United States Department of State has informed Government counsel that, prior to issuing a surrender warrant, the United States Department of State will seek diplomatic assurances from Albania that Harusha will receive a new trial in accordance with Albanian criminal procedure [and will] consider Albania’s response to that request in determining whether to surrender Harusha to Albania”). In *Gill v. Imundi*, 747 F. Supp. 1028 (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 then prior to the Secretary’s final determination on extradition.” Declaration of Andre M. Surena, in *Gill v. Imundi*, No. 88 Civ. 1530 (RWS) (Dec. 10, 1989), at <http://www.state.gov/documents/organization/28457.pdf>. See also *Cornejo-Barreto v. Siefert*, 379 F.3d 1075 (9<sup>th</sup> Cir.) (discussing a declaration by a 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 (9<sup>th</sup> Cir. 2004) (en banc).

<sup>70</sup> 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).

that some courts do not only invoke the rule while also assessing the merits and attempt to signal the State Department about serious cases. Numerous courts have also claimed the existence of or discussed the possibility of a “humanitarian exception” to the non-inquiry doctrine.<sup>71</sup> No court has ever 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.<sup>72</sup>

---

<sup>71</sup> See *Gallina*, 278 F.2d at \_\_\_ (“We can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court’s sense of decency, as to require reexamination of the principle set out above.”); *Bloomfield*, 507 F.2d at \_\_\_ (same); *Arnbjornsdottir-Mendler*, 721 F.2d 679 (treating the exception as an established part of extradition doctrine); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583 (6<sup>th</sup> Cir. 1985) (“In the absence of any showing that Demjanjuk will be subjected to procedures ‘antipathetic to a federal court’s sense of decency,’ this court will not inquire into the procedures which will apply after he is surrendered to Israel.”); *Emami*, 834 F.2d at 1453 (continuing to leave open “the possibility that the considerations expressed in the *Galina* caveat might someday cause us to develop a humanitarian exception in a case where the facts warranted it”); *United States v. Kin-Hong*, 110 F.3d 103, \_\_\_ (1<sup>st</sup> Cir. 1997) (“None of these principles, including non-inquiry, may be regarded as absolute. We, like the Second Circuit, ‘can imagine situations where the relator, upon extradition, would be subject to procedures of punishment so antipathetic to a federal court’s sense of decency as to require reexamination of the principle[s]’ discussed above.”); *Lopez-Smith v. Hood*, 121 F.3d 1322, 1326-27 (9<sup>th</sup> Cir. 1997) (assuming there is an exception “for purposes of discussion”); *Parretti v. United States*, 122 F.3d 758, 765 n.8 (9<sup>th</sup> Cir. 1997), *overruled on other grounds*, 143 F.3d 508 (9<sup>th</sup> Cir. 1998) (en banc) (“Although neither our court nor any other has ever denied extradition based on the fugitive’s anticipated treatment in the requesting country, we have implicitly suggested the possibility of some judicial inquiry into due process issues by qualifying our determinations of extraditability with the observation that the accused failed to make a showing of possible mistreatment. Other courts have also suggested this possibility.”); *United States v. Fernandez-Morris*, 99 F. Supp.2d 1358, 1373 (S.D. Fla. 1999) (noting the possibility of an exception); *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1010 (9<sup>th</sup> Cir. 2000) (same); *Ramirez*, 267 Fed. Appx. at 669-70 (“We have suggested . . . that a showing that a petitioner would be tortured in the requesting country could trigger the humanitarian exception.”). Cf. *Peroff*, 542 F.2d at \_\_\_ (stating “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 only a statement about executive power or whether it also implied a power of judicial review); *Rosado v. Civiletti*, 621 F.2d 1179, \_\_\_ (2<sup>nd</sup> 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.’”); *Manzi*, 888 F.2d at \_\_\_ (“serious due process concerns may merit review beyond the narrow scope of inquiry in extradition proceedings”).

<sup>72</sup> Indeed, the uncertainty surrounding an exception that has never been applied could have independent deterrent value. Cf. Dan M. Kahan, *Ignorance of Law is an Excuse – But Only for the Virtuous*, 96 Mich. L. Rev. 127, 137-41 (1997) (defining “prudent obfuscation” as the use of vague terms to foster law-abiding behavior).

That said, in addition to the fact that no court has ever applied the exception, a larger number of courts – particularly in recent years – has explicitly rejected the possibility of an exception or made statements that are inconsistent with such a possibility.<sup>73</sup> Perhaps relatedly, several courts have begun to make

---

<sup>73</sup> See *Sindona*, 619 F.2d at 174 (stating “the degree of risk to . . . life falls within the exclusive purview of the executive branch”); *Escobedo v. United States*, 623 F.2d 1098, \_\_\_ (5<sup>th</sup> Cir. 1980) (quoting *Sindona*); *Ahmad*, 910 F.2d 1063 (rejecting any inquiry in extradition habeas cases); *Gill*, 747 F. Supp. at 1048-49 (following *Ahmad* and rejecting inquiry by a habeas court); *Koskotas v. Roche*, 931 F.2d 169, \_\_\_ (1<sup>st</sup> Cir. 1991) (“The inapposite obiter dicta in *Gallina* and *Manzi* offer no support for Koskotas’s contention that the district court should have considered whether extradition would be so antipathetic to its sense of decency as to require reexamination of the rule of non-inquiry. Koskotas may raise these concerns with the Secretary of State, but not with the judicial branch.”); *In re Sandhu*, 886 F. Supp. 318 (S.D.N.Y. 1993) (relying on *Ahmad* to reject inquiry in case involving the same relators as *Gill*); *Martin*, 993 F.2d at 830 n.10 (citing *Escobedo* and stating, “We explicitly held that judicial intervention in extradition proceedings based on humanitarian considerations is inappropriate.”); *Sidali v. INS*, 107 F.3d 191, \_\_\_ n.7 (3d Cir. 1997) (“To the extent that Sidali contends that we should affirm the judgment of the district court on humanitarian grounds unrelated to the finding of probable cause, we note that it is the function of the Secretary of State – not the courts – to determine whether extradition should be denied on humanitarian grounds.”); *Mainero v. Gregg*, 164 F.3d 1199, 1210 (9<sup>th</sup> Cir. 1999) (“We have occasionally repeated this caveat, but have never relied on it to create a humanitarian exception to extradition. . . . [I]n view of the facts of this case, the well-established rule of non-inquiry, and the scant authority for creating a humanitarian exception, we decline to overturn either extradition order on humanitarian grounds.”); *In re Singh*, 170 F. Supp.2d 982, 1038-39 (E.D. Cal. 2001) (stating torture claim is “not cognizable in the extradition proceeding”); *Chan Seong*, 346 F. Supp.2d at 1153-54 (“Whether humanitarian concerns should preclude extradition is an issue committed to the sole discretion of the executive branch, specifically the Secretary of States. Thus, this Court is without jurisdiction to consider Ms. Chan’s arguments with regard to humanitarian concerns.”); *Prasoprat v. Benov*, 421 F.3d 1009 (9<sup>th</sup> Cir. 2005) (“We have, on occasion, cited the possibility of a humanitarian exception to extradition; however, we have never actually ‘relied on it to create’ such an exception. We therefore agree with the district court that ‘[a]n extradition magistrate lacks discretion to inquire into the conditions that might await a fugitive upon return to the requesting country.’ The extradition magistrate’s authority has been constrained by statute and caselaw to a narrow inquiry, such that the magistrate judge does not have any discretion to exercise.”); *In re Stern*, 2007 U.S. Dist. LEXIS 79486, \*12 (S.D. Fla. Oct. 25, 2007) (citing *Martin v. Warden* and stating “the humanitarian exception remains quite theoretical because no federal court has applied it in the extradition contest. As such, we find Defendant cannot avail himself of a humanitarian exception to prevent his extradition. The statutory scheme is best applied by holding that any ‘humanitarian exception’ is a matter left to the executive branch.”). See also *In re Smyth*, 61 F.3d 711 (9<sup>th</sup> Cir. 1995) (appearing to reason inconsistently with an exception by allowing extradition despite the fact that “the evidence undoubtedly reflected the prospect of harsh treatment if Smyth were returned to the Maze”); *Mainero*, 164 F.3d at 1210 (“We have occasionally repeated this caveat, but have never relied on it to create a humanitarian exception to extradition. . . . [I]n view of the facts of this case, the well-established rule of non-inquiry, and the scant authority for creating a humanitarian exception, we decline to overturn either extradition order on humanitarian grounds.”); *Cornejo-Barreto v. Siefert*, 379 F.3d 1075, \_\_\_ (9<sup>th</sup> Cir.) (seeming to reject an exception), *vacated*

statements along the lines 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.<sup>74</sup> Some of these statements

---

*as moot*, 389 F.3d 1307 (9<sup>th</sup> Cir. 2004) (en banc); *Hoxha v. Levi*, 465 F.3d 554, 564 n.14 (3d Cir. 2006) (“The exception remains theoretical, however, because no federal court has applied it to grant habeas relief in an extradition case. Regardless of whether such an exception might be justified in some circumstances, we find that it does not apply here.”); *Basso v. United States Marshall*, 278 Fed. Appx. 886, 887 (11<sup>th</sup> Cir. 2008) (“the rule of non-inquiry prevents an extradition magistrate, without exception, from assessing the receiving country’s judicial system.”); *In re Gon*, 613 F. Supp.2d 92, 94 (D.D.C. 2009) (“Any claim that the prosecution in Mexico is improperly motivated or that he will be tortured can only be addressed by the Secretary of State, once this Court fulfills its narrow obligation to ascertain whether Mexico has shown probable cause for the defendant’s arrest.”).

<sup>74</sup> See *Shapiro v. Secretary of State*, 499 F.2d 527, 531 (D.C. Cir. 1974) (“Subject to judicial determination of the applicability of the existing treaty obligation of the United States to the facts of a given case, extradition is ordinarily a matter within the exclusive purview of the Executive.” (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)); *Peroff v. Hylton*, 563 F.2d 1099, 1102-03 (4<sup>th</sup> Cir. 1977) (“Although limited judicial review is available by way of a petition for habeas corpus relief, matters involving extradition have traditionally been entrusted to the broad discretion of the executive. . . . The need for flexibility in the exercise of Executive discretion is heightened in international extradition proceeding which necessarily implicate the foreign policy interests of the United States.”); *Escobedo v. United States*, 623 F.2d 1098 (5<sup>th</sup> Cir. 1980) (“The ultimate decision to extradite is a matter within the exclusive prerogative of the Executive in the exercise of its powers to conduct foreign affairs. . . . [S]ensitivity to the Executive’s role in foreign affairs . . . causes us to reject petitioners’ argument that this discretion should be confined within specific standards.”); *Manzi*, 888 F.2d at \_\_\_ (“Courts have chosen to defer these questions to the executive branch because of its exclusive power to conduct foreign affairs.”); *Koskotas*, 931 F.2d at \_\_\_ (stating concerns about mistreatment are for the executive branch and its “exclusive power to conduct foreign affairs, as extradition proceedings necessarily implicate the foreign policy interests of the United States”); *Martin*, 993 F.2d at 828 (“Extradition is an executive, not a judicial, function. The power to extradite derives from the President’s power to conduct foreign affairs.”); *Smyth*, 61 F.3d at \_\_\_ (“undergirding [noninquiry] is the notion that courts are ill-equipped as institutions and ill-advised as a matter of separation of powers and foreign relations policy to make inquiries into and pronouncements about the workings of foreign countries’ justice systems”); *Sidalì*, 107 F.3d at \_\_\_ (“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.’”); *Kin-Hong*, 110 F.3d at \_\_\_ (“The rule of non-inquiry, like extradition procedures generally, is shaped by concerns about institutional competence and by notions of separation of powers. It is not that question about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed.”); *Lopez-Smith*, 121 F.3d at 1326 (“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.”); *Cornejo-Barreto*, 379 F.3d at \_\_\_ (“Extradition is quintessentially a matter of foreign policy; it occurs only pursuant to an international agreement and is invoked by a foreign government.”); *In re Atuar*, 300 F. Supp.2d 418, 425 (S.D. W.Va. 2003) (quoting *Mar-*

are so general as to have little meaning, and a few courts have explicitly rejected such reasoning.<sup>75</sup> Only a few of the cases – four by my count – that reject an exception or reason inconsistently with it also involved allegations of physical risk that appear to have had merit.<sup>76</sup> 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.<sup>77</sup>

### 3. Summarizing the Current Doctrine

In short, the rule of non-inquiry contains a stable core that prohibits inquiring closely into claims about the motives of the requesting government

---

*tin v. Warden*); *Hoxha*, 465 F.3d at 560 (“Extradition is an executive rather than a judicial function.”). See also *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2<sup>nd</sup> Cir. 1990) (“The interests of international comity are ill-served by requiring a foreign nation such as Israel to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced.”); *Ordinola v. Hackman*, 478 F.3d 588, 606 (4<sup>th</sup> Cir. 2007) (Traxler, J., concurring) (“Because extradition is a creature of treaty, ‘the power to extradite derives from the President’s power to conduct foreign affairs. Extradition, therefore, is an executive function rather than a judicial one. It involves a ‘diplomatic process carried out through the powers of the executive, not the judicial, branch. 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.’”).

<sup>75</sup> See *Eain v. Wilkes*, 641 F.2d 504 (7<sup>th</sup> Cir. 1981) (stating not all issues that touch on foreign relations are out of bounds for the judiciary) (citing *Baker v. Carr*, 369 U.S. 186, 211 (1962); *Plaster v. United States*, 720 F.2d 340 (4<sup>th</sup> Cir. 1983) (“although the Secretary of State and the President have the discretion not to extradite an individual for any reason whatsoever, including, for instance, a concern as to deficiencies in the judicial process in the requesting country, they may not choose to extradite an individual where such extradition would, in the opinion of the judiciary, violate the individual’s constitutional rights”); *In re Howard*, 996 F.2d 1320, 1330 n.6 (1<sup>st</sup> Cir. 1993) (rejecting claim that rule of non-inquiry is mandated by the Constitution and stating, “Rather, the rule came into being as judges, attempting to interpret particular treaties, concluded that, absent a contrary indication in a specific instance, the ratification of an extradition treaty mandated noninquiry as a matter of international comity. No doubt the rule exemplifies judicial deference to executive authority, but it is a deference stemming at least in part from the fact that the executive is the branch which most likely has written and negotiated the document being interpreted.”); *Mironescu v. Costner*, 480 F.3d 664, 671-72 (4<sup>th</sup> Cir. 2007) (disagreeing that inquiry into possible mistreatment would interfere with executive conduct of foreign relations; a court “would be required to answer only the straightforward question of whether a fugitive would likely face torture in the requesting country. American courts routinely answer similar questions, including in asylum proceedings and in applying the political offense exception”).

<sup>76</sup> See *Koskotas*, 931 F.2d 169; *Gill*, 747 F. Supp. 1028; *Singh*, 170 F. Supp.2d 982; *Hoxha*, 465 F.3d 554.

<sup>77</sup> See 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, 276 (1988); Semmelman, *supra* note \_\_\_, at 1206, 1229.

(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.

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 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 my 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. My arguments here rest in part on the premise – one that perhaps not all readers share – 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.<sup>78</sup>

### *A. Limits, Uncertainties, and Inconsistencies*

---

<sup>78</sup> Cf. Robert A. Lefflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 Cal. 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).

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 in the *Insular Cases*. 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.<sup>79</sup> To be sure, most commentators think badly of the *Insular Cases*. Gerald Neuman has declared, for example, that they were "grievously wrong" and lack any "persuasive normative basis."<sup>80</sup> 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."<sup>81</sup> The Court traced this purported doctrine through subsequent cases and stated that extraterritoriality issues turn on three factors: citizenship, the "nature of the sites" at which the relevant conduct took place, and "practical obstacles."<sup>82</sup> With respect to the third factor, the Court seemed to indicate that the burden of proving "obstacles" would rest with the government, for it stressed the question whether issuing the writ

---

<sup>79</sup> See Neuman, *The Extraterritorial Constitution*, *supra* note \_\_, at 270-71.

<sup>80</sup> Neuman, *Strangers*, *supra* note \_\_, at 100, 101; see also Burnett, *A Convenient Constitution?*, *supra* note \_\_, 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.").

<sup>81</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2255 (2008); see also Burnett, *A Convenient Constitution?*, *supra* note \_\_, at 992-94 (agreeing to some extent with the Court's characterization); Neuman, *The Extraterritorial Constitution*, *supra* note \_\_, at 270-71 (cautioning that the Court "gave a sanitized account of the motivations for the *Insular Cases* doctrine"); Raustiala, *supra* note \_\_, at 218 ("the opinion was somewhat tendentious in its reading of history"). 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." 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," he argued, 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 67, 74 (Harlan, J., concurring).

<sup>82</sup> *Id.* at 2259. The Court was addressing "the reach of the Suspension Clause." *Id.*

of habeas corpus “would be ‘impracticable or anomalous.’”<sup>83</sup>

The issues raised by the rule of non-inquiry do not fit neatly into *Boumediene*'s extraterritoriality analysis. Still, to the extent that the non-inquiry rule emerged from the issues and tensions that produced the *Insular Cases*, one might conclude that it should reflect their functional approach, particularly because the *Boumediene* Court 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 to avoid extradition in some of the cases that raise grave concerns. But one would expect courts to 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 to non-inquiry doctrine would 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 might lead to no inquiry for claims couched in some procedural rights (such as jury trial), but some level of 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 centuries, the scope of federal habeas corpus review of criminal convictions has greatly expanded.<sup>84</sup> 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.<sup>85</sup> In light of the fact 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 in particular, these changes suggest that the narrow scope of extradition habeas rests not on reasons that have contemporary weight but rather 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.<sup>86</sup> Other courts continue to cite the older habeas cases as support for a

---

<sup>83</sup> Id. at 2262 (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)); see also Burnett, *A Convenient Constitution?*, *supra* note \_\_ (emphasizing and critiquing the Court's use of the “impracticable or anomalous” test).

<sup>84</sup> See *supra* note \_\_ and accompanying text.

<sup>85</sup> See **Boumediene; Rasul; see also St. Cyr.**

<sup>86</sup> See Parry, *Lost History*, *supra* note \_\_, at \_\_\_\_-\_\_ (arguing for greater recognition of such an expansion).

narrow inquiry,<sup>87</sup> but I think it is safe to say that the overall picture indicates that extradition habeas has managed to expand – even if that expansion is fragile and uneven. Critically for purposes of this article, these holdings 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 the executive branch in deciding to extradite the accused.”<sup>88</sup> 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.<sup>89</sup>

Other courts have reached similar holdings.<sup>90</sup>

---

<sup>87</sup> See *supra* note \_\_\_\_.

<sup>88</sup> *In re Burt*, 737 F.2d 1477, 1483 (7<sup>th</sup> Cir. 1984); see also *Plaster v. United States*, 720 F.2d 340, \_\_\_\_ (4<sup>th</sup> Cir. 1983) (“neither *Fernandez v. Phillips* nor the cases that have followed it have considered the scope of habeas corpus in connection with a claim that the actions of the United States government in extraditing the petitioner would violate his constitutional rights”).

<sup>89</sup> *Burt*, 737 F.2d at 1484.

<sup>90</sup> See *In re Geisser*, 627 F.2d 745, 750 (5<sup>th</sup> Cir. 1980) (extradition treaty cannot override constitutional rights); *Plaster*, 720 F.2d at \_\_\_\_ (extradition habeas encompasses some constitutional claims); *Prushinowski v. Samples*, 734 F.2d 1016, \_\_\_\_ (4<sup>th</sup> Cir. 1984) (“It is established that constitutional questions of deprivation of rights are addressed only to the acts of the United States Government and not to those of a foreign nation, at least for purposes of determining questions of extraditability.”); *In re Manzi*, 888 F.2d 204 (1<sup>st</sup> Cir. 1989) (“this court recognizes that serious due process concerns may merit review beyond the scope of inquiry in extradition proceedings”); *Martin v. Warden*, 993 F.2d 824, 829 (11<sup>th</sup> Cir. 1993) (stating U.S. actions in an extradition case are subject to due process review); *United States v. Kin-Hong*, 110 F.3d 103 (1<sup>st</sup> Cir. 1997) (“This is not to say American courts acting under the writ of habeas corpus, itself guaranteed in the Constitution, have no independent role. There is the ultimate safeguard that extradition proceedings before United States courts comport with the Due Process Clause of the Constitution.”). See also *Hooker v. Klein*, 573 F.2d 1360, 1369 (9<sup>th</sup> Cir. 1978) (Chambers, C.J., concurring) (“The ‘victim’ of an extradition order generally gets a pretty broad review under habeas corpus, notwithstanding preachments that it is extremely limited.”); *Sahagian v. United States*, 864 F.2d 509, 513 (stating in civil suit arising out of an extradition that arrest and extradition procedures must comply with the constitution); *Ahmad v. Wigen*, 910 F.2d 1063, 1065 (2<sup>nd</sup> Cir. 1990) (noting in the course of habeas review that “the Government’s conduct violated neither the Constitution nor established principles of international law”); *Gill v. Imundi*, 747 F. Supp. 1028, 1039 (S.D.N.Y. 1990) (interpreting *Ahmad* as expanding the scope of habeas review).

Some of these statements and holdings leave room for 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 recharacterize 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.<sup>91</sup>

### 3. *The Limits of Foreign Affairs and Institutional Competence Claims*

Foreign affairs concerns will often be relevant to deciding extradition cases.<sup>92</sup> But there is no basis for concluding that foreign affairs concerns require the conclusion that extradition decisions in general or non-inquiry concerns in particular are inherently and exclusively part of the executive power.<sup>93</sup> First, the early extradition cases, including *Neely*, do not treat foreign affairs as a central concern. 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 statute” and that it is entirely defined by the relevant treaty or statute.<sup>94</sup> Third, an extradition treaty cannot override the relator’s constitutional rights, as some of the more recent extradition habeas cases have recognized.<sup>95</sup>

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, the decisions of military officials in charge of the occupation.<sup>96</sup> In other

---

<sup>91</sup> See *Reid v. Covert*, 354 U.S. 1, \_\_\_ (1957) (stating a treaty cannot override an individual’s federal constitutional rights).

<sup>92</sup> See *Geisser*, 627 F.2d at \_\_\_-\_\_\_ (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). Another example is the protracted efforts of British officials to obtain the extradition of several members or suspected members of the Irish Republican Army, which ultimately led to negotiation of a supplemental extradition treaty. See Parry, *No Appeal*, *supra* note \_\_, at \_\_\_-\_\_\_.

<sup>93</sup> Cf. *Baker v. Carr*, 369 U.S. 186, 211 (1962) (“it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance”).

<sup>94</sup> *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8-9 (1936); see also Parry, *Lost History*, *supra* note \_\_, at \_\_\_-\_\_\_.

<sup>95</sup> See *supra* notes \_\_\_-\_\_\_ and accompanying text.

<sup>96</sup> See *Neely v. Henkel*, 180 U.S. 109, 123 (1901).

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.<sup>97</sup>

---

<sup>97</sup> See also *Yapp v. Reno*, 26 F.3d 1562, 1572-73 (11<sup>th</sup> Cir. 1994) (Carnes, J., dissenting) (concluding *Neely* contemplates the ability to provide for greater rights by treaty). Some of the cases that contend extradition is primarily an executive function appear to recognize this point as well. See *Lopez-Smith v. Hood*, 121 F.3d 1322, 1326 (9<sup>th</sup> Cir. 1997) (stating extradition is an executive function “except to the extent that the statute interposes a judicial function”). Michael Scharf has argued the rule of non-inquiry has constitutional roots similar to those of the political question and act of state doctrines, such that it is unconstitutional for Congress to override the rule of non-inquiry and direct courts to consider another country's judicial and prison systems. See Scharf, *supra* note \_\_\_. Since Scharf wrote, 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 jurisdiction shall be deemed valid.” *W.S. Kirkpatrick Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990). For claims about ordinary foreign criminal processes, the act of state doctrine could buttress the rule of non-inquiry, but it is more difficult to see how it would insulate processes or mistreatment that harm individuals and violate clearly established international standards. Compare *Lizarbe v. Rondon*, 2009 U.S. Dist. LEXIS 63754, \*33-\*34 (D. Md. Feb. 26, 2009) (“acts of torture, extrajudicial killing, and crimes against humanity . . . committed in violation of customary international law, are not deemed official acts for purposes of the acts of state doctrine”); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp.2d 289, 345 (S.D.N.Y. 2004) (same), *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”). Whether or not the distinction would be sufficient, it is worth noting that some of the dispute in these cases turns 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 requesting country uses the rule of non-inquiry (and any act of state overtones that it might have) as part of its affirmative case for relief – that is, as a claim of immunity for whatever it might do once it has the person in custody – and it is the relator who is in the defensive posture.

Note that in *Munaf* the Court arguably injected the act of state doctrine into extradition litigation when it stated, “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 would very certainly “imperil the amicable relations between governments and vex the peace of nations.””).” *Munaf v. Geren*, 128 S. Ct. 2207, 2224 (2008). Yet the Court did not precisely say that the act of state doctrine applies in extradition – given the breadth of the statement, it could just as easily apply to habeas review of asylum claims – and its statement came as part of the Court's rejection of the argument that a habeas corpus could “permit a prisoner detained within a foreign sovereign's territory to prevent a trial from going forward,” *id.* – so that its application to extradition is at least debatable. The Court also ignored the fact that “amicable relations” and “the peace of nations” now coexist with frequent consideration of the legitimacy of the crimi-

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 that 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.<sup>98</sup>

And the Supreme Court's recent decisions in *Hamdi v. Rumsfeld*, *Rasul v. Bush*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush* indicate that expansive claims of constitutional foreign affairs authority will founder when they would prevent judicial review, particularly when it comes to physical treatment of people. And, as I will discuss below, the Court's decision in *Munaf v. Geren* holds out the possibility of limited inquiry despite its acceptance of foreign affairs concerns.

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. In addition, even courts that have made inquiries – as in cases under the Supplemental Treaty – have shown a decided reluctance to avoid inquiring very much.<sup>99</sup> After all, inquiring into the treatment that the relator might receive could require consideration of the adequacy of another country's criminal pro-

---

nal practices of other nations, such that the act of state doctrine no longer applies obviously to human rights concerns in transnational and international criminal law.

<sup>98</sup> Supplementary Treaty Between the Government of the United States of America and the Government of the United Kingdom and Northern Ireland, June 25, 1985, U.S.-U.K., art. 3(a), 28 U.S.T. 227, T.I.A.S. No. 12,050. For discussions of the legislative and negotiating history of this provision, see Parry, *No Appeal*, *supra* note \_\_, at \_\_\_\_-\_\_; Scharf, *supra* note \_\_, at 262-67. The countries have since entered into a new extradition treaty that 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.

<sup>99</sup> See *In re Howard*, 996 F.2d 1320 (1<sup>st</sup> Cir. 1993) (finding little space for inquiry); *In re Smyth*, 61 F.3d 711 (9<sup>th</sup> Cir. 1995) (same for second clause of Article 3(a)). Another Ninth Circuit case distinguished *Smyth* and found greater room for inquiry for the first clause of Article 3(a), but the panel was split and the Ninth Circuit took the case en banc on this issue before vacating it as moot after the United Kingdom withdrew the extradition requests. See *In re Artt*, 158 F.3d 462 (9<sup>th</sup> Cir. 1998), *withdrawn & rhg. en banc granted*, 183 F.3d 949 (9<sup>th</sup> Cir. 1999), *vacated as moot*, 249 F.3d 831 (9<sup>th</sup> Cir. 2000) (en banc).

cedures, penal system, and civil rights enforcement.

My point is simply that judicial statements about foreign affairs concerns 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.<sup>100</sup> Several courts have made flat statements to the effect that “Extradition is an executive rather than a judicial function.”<sup>101</sup> Perhaps the most far-reaching is the Eleventh Circuit’s assertion that “[e]xtradition is an 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.”<sup>102</sup> As these cases indicate, the contemporary foreign affairs argument advanced by courts is significant for its frequent lack of nuance. At best, these courts are using 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 return to 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.<sup>103</sup> 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 such a disability in the area of extradition routinely manage to perform the task in the context of immigration.<sup>104</sup>

For example, federal courts of appeals review the decisions of the Board of Immigration Appeals – including the Board’s factual findings – 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.<sup>105</sup> Simi-

---

<sup>100</sup> For a good summary of the general debate over the extent to which courts must defer to executive branch positions on foreign affairs issues, see Curtis A. Bradley & Jack L. Goldsmith, *Foreign Relations Law: Cases and Materials* 124-28 (3<sup>rd</sup> ed. 2009).

<sup>101</sup> *Hoxha v. Levi*, 465 F.3d 554, 560 (3d Cir. 2006). Several of the cases cited in *supra* note 74 contain similar statements.

<sup>102</sup> *Martin v. Warden*, 993 F.2d 824, 828 (11<sup>th</sup> Cir. 1993).

<sup>103</sup> See *supra* note 74.

<sup>104</sup> See *Mironescu v. Costner*, 480 F.3d 664, 671-72 (4<sup>th</sup> Cir. 2007); *Kester*, *supra* note \_\_\_, at 1481.

<sup>105</sup> 8 U.S.C. § 1101(a)(42)(A); see 8 U.S.C. § 1252 (providing for judicial review of final orders of removal); *Ahmed v. Keisler*, 504 F.3d 1183, 1191 (9<sup>th</sup> Cir. 2007) (stating that the court

lar 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," or on the protections of the Convention Against Torture.<sup>106</sup> 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."<sup>107</sup> Further, "[w]hile a well-founded fear must be objectively reasonable, it 'does not require certainty of persecution or even a probability of persecution.' 'Even a ten percent chance that the applicant [for asylum] will be persecuted in the future is enough to establish a well-founded fear.'"<sup>108</sup>

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 allows suits "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>109</sup> The defendants in ATS cases can include officials of foreign governments, and even when they do not, the claims may implicate the actions of foreign officials.<sup>110</sup> The Torture Victim Protection Act provides a civil cause of action against "An individual who, *under actual or apparent authority, or color of law, of any foreign nation*" subjects an individual to torture or extrajudicial killing.<sup>111</sup>

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

---

reviews BIA decisions under a "substantial evidence" standard).

<sup>106</sup> 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. 208.18 (implementing the Convention Against Torture).

<sup>107</sup> *Ahmed*, 504 F.3d at 1191.

<sup>108</sup> *Id.* (citations omitted); *see also id.* (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 '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).

<sup>109</sup> 28 U.S.C. § 1350.

<sup>110</sup> [cites, and note the corporate cases]

<sup>111</sup> 28 U.S.C. §1350 note (Torture Victim Protection Act, Pub. L. 102-256, § 1(a), 106 Stat. 73 (1992)) (emphasis added).

Practices.<sup>112</sup> 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.<sup>113</sup> Also lacking in these cases is the judicial review that ordinarily is necessary to the constitutional legitimacy of agency action against an individual.<sup>114</sup>

Extradition from the United States is different from cases involving immigration, the Alien Tort Statute, and the Torture Victim Protection Act 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.<sup>115</sup> 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

---

<sup>112</sup> See <http://www.state.gov/g/drl/rls/hrrpt/>.

<sup>113</sup> In an almost sarcastic approval of this lack of process, the Ninth Circuit declared,

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 and not subject to judicial review.

Lopez-Smith v. Hood, 121 F.3d 1322, 1326 (9<sup>th</sup> Cir. 1997); see also Peroff v. Hylton, 563 F.2d 1099 (4<sup>th</sup> Cir. 1977) (rejecting claim that person facing extradition is entitled to a hearing before the Secretary of State). The court later noted that regulations now exist for consideration of claims under the Convention Against Torture and that review of the application of those procedures was available under the Administrative Procedures Act. See Cornejo-Barreto v. Siefert, 218 F.3d 1004 (9<sup>th</sup> Cir. 2000); infra notes \_\_\_-\_\_\_ and accompanying text. See also Khouzam v. Attorney General, 549 F.3d 235 (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).

<sup>114</sup> [cites]; see also Cornejo, 218 F.3d 1004 (holding the Administrative Procedures Act allows federal courts to review Secretary of State's decision to extradite over credible concerns about torture).

<sup>115</sup> See Cornejo-Barreto v. Siefert, 379 F.3d 1075, \_\_\_ (9<sup>th</sup> Cir.) ("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."), *vacated as moot*, 389 F.3d 1307 (9<sup>th</sup> Cir. 2004) (en banc).

which foreign affairs concerns should prevent federal courts from engaging in judicial review of issues that include human rights claims.<sup>116</sup> I have already suggested that 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 providing a forum for 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 on 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. Much room remains, however, 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.<sup>117</sup> Several commentators have advanced the reasonable argument that the rise of international human rights should limit the scope of the non-inquiry doctrine.<sup>118</sup>

For example, the International Covenant on Civil and Political Rights

---

<sup>116</sup> Judicial review of persecution and torture claims also raises the possibility of creating foreign relations problems, 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. But this distinction also does not affect 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.*

<sup>117</sup> See, e.g., Cole, *supra* note \_\_, at 52; Louis Henkin, *The Age of Rights* \_\_ (1990).

<sup>118</sup> 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 (1998); Murchison, *supra* note \_\_, at 311-13; Ann Powers, *Justice Denied? The Adjudication of Extradition Applications*, 37 *Tex. Int'l L.J.* 277, 291-96 (2002); Quigley, *supra* note \_\_; 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 (1997).

(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 confront witnesses, and to appeal, and protection against compelled testimony against oneself.<sup>119</sup> The European Convention on Human Rights imposes similar obligations on its signatories.<sup>120</sup> In addition, the ICCPR, the European Convention, and the Convention Against Torture seek to prevent the infliction of torture and cruel, inhuman or degrading treatment or punishment.<sup>121</sup> 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."<sup>122</sup> The Convention Relating to the Status of Refugees states, "No 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."<sup>123</sup> 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."<sup>124</sup>

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

---

<sup>119</sup> See International Covenant on Civil and Political Rights arts. 9, 14 & 15, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

<sup>120</sup> See Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 5-7 (1950). Other regional human rights agreements impose similar obligations.

<sup>121</sup> ICCPR art. 7; ECHR art. 3; Convention Against Torture and Other forms of Cruel, Inhuman and Degrading Treatment or Punishment, arts. 1, 2, 16, G.A. res. 39/46, U.N. Doc. A/39/51 (1984). For discussion of the differences between the ICCPR and Convention on torture and cruel, inhuman or degrading treatment, as well as the jurisprudence of the European Court of Human Rights on these issues, see John T. Parry, *Understanding Torture: Law, Violence, and Political Identity* 30-40, 44-54 (2010).

<sup>122</sup> Convention Against Torture, art. 3.

<sup>123</sup> U.N. Convention Relating to the Status of Refugees, art. 33 (1951), [official cite].

<sup>124</sup> International Convention Against the Taking of Hostages, art. 9, G.A. Res. 146 (XXXIV), U.N. Doc. A/34/46 (1979).

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 Torture strengthened the Conventions protection against cruel, inhuman or degrading treatment or punishment, and the European Court of Human Rights tends to interpret the European Convention broadly.<sup>125</sup> Whether or not the obligations imposed by the text and interpretation of these agreements 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.<sup>126</sup> Indeed, a series of European Court of Human Rights decisions appears to forbid countries from extraditing 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.<sup>127</sup> Finally, 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 determine whether they provide "a sufficient guarantee against the risk of treatment prohibited by the Convention."<sup>128</sup>

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 older assumption of inviolate sovereignty in matters of criminal law. At the very least, it has become increasingly difficult to understand how a requesting country

---

<sup>125</sup> [insert ICCPR and CAT cites]; Clare Ovey & Robin White, *Jacobs and White: The European Convention on Human Rights* (4<sup>th</sup> ed. 2006). 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 discussions of such issues, see Pheng Cheah, *Inhuman Conditions: On Cosmopolitanism and Human Rights* 145-77 (2006); Parry, *Understanding Torture*, *supra* note \_\_, at 78-96, 204-15.

<sup>126</sup> See Dugard & Van den Wyngaert, *supra* note \_\_, at 189-91; see also Quigley, *supra* note \_\_, at 1226-27 (suggesting Argentina, France, and Sweden also allow inquiry under certain circumstances).

<sup>127</sup> For a summary, see Ashley Deeks, *Promises Not to Torture: Diplomatic Assurances in U.S. Courts*, American Society of International Law Discussion Paper Series, 49-54 (Dec. 2008); see also Ovey & White, *supra* note \_\_, at \_\_\_\_.

<sup>128</sup> Saadi v. Italy, ECHR, No. 37201/06, ¶ 148 (Feb. 28, 2008); see also Deeks, *supra* note \_\_, at 49-71; Human Rights Watch, *Not the Way Forward: The UK's Dangerous Reliance on Diplomatic Assurances* 21-25 (Oct. 2008).

could have a legitimate complaint under international law about a decision by a federal court to inquire into that country's possible treatment of a person facing extradition to that country. 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.<sup>129</sup>

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 obligations and weakens any objections these countries might have to inquiry. At the same time, however, most of these obligations are not part of U.S. domestic law, because the United States ratified them with the statement that they are not self-executing.<sup>130</sup> 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 issue.

First, one could say that non-self execution 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.<sup>131</sup> While I find this position attractive, I am not convinced that non-self execution declarations can be limited in this way.<sup>132</sup> Nor am I aware of significant doctrinal support for such a position. Thus, I will not rely too strongly 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 which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the per-

---

<sup>129</sup> 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, it may no longer be good domestic law.

<sup>130</sup> [insert ICCPR and CAT cites; check on status of refugee and hostage conventions, but note their more limited applicability even if self-executing; see also standard cites on self-execution issue]

<sup>131</sup> [insert cites]

<sup>132</sup> [insert cite]

son is physically present in the United States.<sup>133</sup>

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 . . . .<sup>134</sup>

The State Department has published regulations to implement this policy in the context of extradition, and the regulations insist both that the decision whether to apply this policy is discretionary and that courts have no power to review those decisions.<sup>135</sup>

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. The Third and Ninth Circuits have held that courts have habeas jurisdiction to hear Convention Against Torture claims under the Administrative Procedures Act once the Secretary of State has decided to certify the extradition in the face of such claims.<sup>136</sup> By contrast, the District of Columbia and Fourth Circuits have held that FARRA precludes jurisdiction to hear such claims.<sup>137</sup> The Supreme Court noted this issue in *Munaf* but did not address it.<sup>138</sup>

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 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,

---

<sup>133</sup> Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, § 2422(a), 112 Stat. 2681-8222, 8 U.S.C. § 1231 note.

<sup>134</sup> *Id.*, § 2242(d).

<sup>135</sup> See 22 C.F.R. §§ 95.3 (Secretary “may decide”) & 95.4 (“Decisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review.”).

<sup>136</sup> See *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9<sup>th</sup> Cir. 2000); *Hoxha v. Levi*, 465 F.3d 554, 565 (3<sup>rd</sup> Cir. 2006). A later panel of the Ninth Circuit reached a different conclusion in the appeal after remand of *Cornejo*, see *Cornejo-Barreto v. Siefert*, 379 F.3d 1075 (9<sup>th</sup> Cir. 2004), but the court took the case en banc and vacated the opinion, see *Cornejo-Barreto v. Siefert*, 389 F.3d 1307 (9<sup>th</sup> Cir. 2004) (en banc). The first *Cornejo* decision appears to remain good law. See *Prasoprat v. Benov*, 421 F.3d 1009, \_\_\_ n.1 (9<sup>th</sup> Cir. 2005).

<sup>137</sup> See *Mironescu v. Costner*, 480 F.3d 664, 673-77 (4<sup>th</sup> Cir. 2007); *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) (reaching this conclusion in a case involving transfer of prisoners from the Guantanamo Bay detention camp, not in an extradition case) [**cert. pending?**].

<sup>138</sup> *Munaf v. Geren*, 128 S. Ct. 2207, 2226 & n.6 (2008).

and they should do so in order to bring that doctrine in alignment with domestic and international law.

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

After more than eighty years, the Supreme broke its silence on the rule of non-inquiry in *Munaf v. Geren*.<sup>139</sup> *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<sup>140</sup> – and because of the rule of non-inquiry, although the Court relied on *Neely* without referring to the doctrine itself.

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.<sup>141</sup> 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. The 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."<sup>142</sup> As support, the Court cited *Wilson v. Girard* – a case concerning the transfer of a U.S. soldier who was in Japan to Japanese custody under a status of forces agreement – and *Neely*. *Wilson*'s facts are fairly similar to those of *Munaf*. It is also a case about the interaction of extraterritoriality concerns and status of forces agreements for military forces stationed overseas.<sup>143</sup> 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

---

<sup>139</sup> 128 S. Ct. 2207 (2008).

<sup>140</sup> *Id.* at 2220.

<sup>141</sup> *See id.* at 2221-22 (citing *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812); *Kinsella v. Krueger*, 351 U.S. 470, 479 (1956); *Reid v. Covert*, 354 U.S. 1, 15 n.29 (1957) (plurality opinion); *Wilson v. Girard*, 354 U.S. 524, 529 (1957)); *supra* note \_\_.

<sup>142</sup> *Munaf*, 128 S. Ct. at 2222.

<sup>143</sup> *See Raustiala, supra* note \_\_, at [ch. 5].

that lead courts to defer to executive action.<sup>144</sup>

At this point in the *Munaf* opinion, *Neely* was important because of its extraterritoriality holding as well – 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.’”<sup>145</sup> 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.<sup>146</sup>

*Neely* and *Wilson* also 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, let alone that the petitioners might be entitled to other rights or protections. It is therefore difficult to believe that the Court meant to say the Constitution has no application in habeas cases involving foreign prosecutions.<sup>147</sup> Such a holding would undermine fundamental due process protections against arbitrary seizure, detention, absence of process, and infliction of harm,<sup>148</sup> 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 must be read in their specific context of military operations, transfer of prisoners by military officials within the territory of the nation in which they will be tried, extraterritoriality, and the need to buttress Iraq’s fragile sovereignty.<sup>149</sup>

---

<sup>144</sup> Indeed, 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*, 128 S. Ct. at 2224.

<sup>145</sup> *Id.* at 2223 (quoting *Neely v. Henkel*, 180 U.S. 109, 122 (1901)).

<sup>146</sup> See also *Republic of Iraq v. Beaty*, 129 S. Ct. \_\_\_\_ (2009) (holding Iraq is entitled to immunity under the Foreign Sovereign Immunities Act for sponsoring acts of terrorism under its former government).

<sup>147</sup> 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*, 128 S. Ct. at 2223. Yet read literally, this statement is absurd. It would 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.

<sup>148</sup> See *id.* at 2228 (Souter, J., concurring) (stating that 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”).

<sup>149</sup> See *id.* (noting the specific circumstances “essential to the Court’s holding” that petitioners were not entitled to habeas relief); see also Harlan Grant Cohen, *International Decision: Munaf v. Geren*, 102 Am. J. Int’l L. 854, 857 (2008) (suggesting “[t]he Court’s denial of relief is . . . constrained by the facts”).

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."<sup>150</sup> 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 appears to have considered the merits of the claim to at least a limited extent, for it stressed that "Petitioners here allege only the *possibility* of mistreatment in a prison facility."<sup>151</sup> 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."<sup>152</sup> 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 undermine the Government's ability to speak with one voice in this area."<sup>153</sup> Thus, if the executive determines that a person will face torture, the courts must accept that determination, but they must also accept a determination that torture is not likely. Still, a court considering such a case must at least know whether or not the exception exists, which means that it must be able to find out what the executive branch has decided on the issue. Further, although it might not be able to second guess that determination, the court ought to be able to apply some standard of review to ensure that the determination is not arbitrary.<sup>154</sup>

---

<sup>150</sup> *Munaf*, 128 S. Ct. at 2225 (majority opinion).

<sup>151</sup> *Id.* at 2226 (emphasis added). Continuing its discussion of the merits, the Court also observed, "the United States explains that, although it remains concerned about torture among some sectors of the Iraqi Government, the State Department has determined that the Justice Ministry – the department that would have authority over *Munaf* and *Omar* – as well as its prison and detention facilities have 'generally met internationally accepted standards for basic prisoner needs.'" *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Munaf*, 128 S. Ct. at 2226. 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 \_\_, at 859.

<sup>154</sup> Compare *Kiyemba v. Obama*, 561 F.3d 509, \_\_\_ 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."), [**cert. pending?**].

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.”<sup>155</sup> 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.<sup>156</sup>

*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 demand some attention). Indeed, the opinion’s surface clarity obtains only if one ignores the tensions that it creates within the law of several doctrines.

For all that, *Munaf* still makes a gesture towards an exception that many lower courts were unable to accept. 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 may have been forced to face some facts – namely, that the U.S. transferred people to face torture during the George W. Bush administration and possibly under the Clinton administration, as part of the program of extraordinary rendition.<sup>157</sup> Although the Court did not apply the exception, it could not describe such a situation as improbable or hypothetical.

Lower courts must now consider how to apply this exception, and the Supreme Court one day will have to confront again the inconsistencies, gaps, and absurdities of its doctrine.

#### *B. A Rule of Limited Inquiry: When and How to Inquire*

I sought to show in the preceding section that extradition law and the rule of non-inquiry are out of step – perhaps even radically out of step – with each area of U.S. law that I discussed. This section proposes an approach that would bring non-inquiry doctrine and extradition law into closer sync with the other areas of law with which they overlap. Part III then returns to the theory that underlies and purports to justify the radical discontinuity between current extradition law and the rest of federal law.

A rule of limited inquiry emerges from a return to the building blocks of international extradition law in the United States. Importantly, these building

---

<sup>155</sup> *Id.* at 2228 (Souter, J., concurring).

<sup>156</sup> *Id.*

<sup>157</sup> See John T. Parry, *The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees*, 6 *Melb. J. Int’l L.* 516 (2005); [Satterthwaite]; see also [articles alleging there has been at least one such transfer under Obama?].

blocks – the components of the extradition process – are not the same thing as the “first principles” of extradition law, for these 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 doctrine.

First, extradition is part of the criminal process.<sup>158</sup> 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.<sup>159</sup> 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.<sup>160</sup> 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. Further, judicial review of the executive’s actions as part of that process, including the decision to extradite, should be available as a matter of basic due process, as well as international law.<sup>161</sup> Courts also should be able to inquire before extradition into the

---

<sup>158</sup> See Kester, *supra* note \_\_\_, at 1443-47.

<sup>159</sup> See 18 U.S.C. § 3184.

<sup>160</sup> For that reason, I would argue that – contrary to current doctrine – the result of the extradition decision is an appealable final decision. See *supra* note 3. But resolving that issue is not necessary to determining the proper scope of the inquiry doctrine.

<sup>161</sup> See *Sayne v. Shipley*, 418 F.2d 679, 686 (5<sup>th</sup> Cir. 1969) (“The Due Process clause guarantees appellant the right to a hearing prior to extradition.”); see also *Gerstein v. Pugh*, 420 U.S. 103, 114, 116-18 (1975). 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 (see 18 U.S.C. §3184; *supra* note 5 and accompanying text), and the terms of the extradition treaty.

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.<sup>162</sup>

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.”<sup>163</sup> 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 – there is no reason why a court’s scope of inquiry in extradition habeas should be significantly more restricted than in other contexts.

Third, the petitioner’s claims 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 punishment. 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.<sup>164</sup> In such a case, gov-

---

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, then the habeas court will have to perform that task with the benefit of the Secretary of State’s decision on the same issues.

<sup>162</sup> 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 even put pressure on the law governing these exceptional situations.

<sup>163</sup> 28 U.S.C. §2241(c)(3). When federal courts deny that they have 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, 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. As I will suggest, foreign policy concerns properly attach not to jurisdiction, but rather to the merits.

<sup>164</sup> I have drawn these standards of proof from, respectively, article 3 of the Convention Against Torture and from the United States’s modification of that standard during the ratification process. [insert cite] I would prefer the standard in the Convention, but adopting the U.S.-specific standard would ensure continuity within U.S. law among extradition, withhold-

ernment 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 physical mistreatment or arbitrary process or punishment in another country.<sup>165</sup>

Fourth, 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. The most obvious way to accomplish this 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, so imposing a requirement that they be used in cases that raise serious concerns about abuse or arbitrary treatment will not impose a new burden on its personnel, even if it heightens an existing burden.

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.<sup>166</sup> Accordingly, when assurances are an appropriate remedy, the court should retain jurisdiction over the case to make sure that the assurances are adequate and that the State Department not only follows through but also reports on the success or failure of those assurances.<sup>167</sup> 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,

---

ing of removal, and the Torture Convention.

<sup>165</sup> See also Neuman, *The Extraterritorial Constitution*, *supra* note \_\_\_, at 283-84 (discussing the question of a substantive due process right “not to be transferred to a foreign sovereign in whose hands [one] fear[s] torture”). 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. But my proposal for reforming the rule of non-inquiry can rest on due process grounds alone without taking this more controversial step.

<sup>166</sup> See Satterthwaite, *supra* note \_\_\_.

<sup>167</sup> See also Deeks, *supra* note \_\_\_, at 74-79 (proposing judicial review of assurances whenever they are used); *cf.* *Khouzam v. Attorney General*, 549 F.3d 235 (3<sup>rd</sup> Cir. 2008) (requiring notice and a hearing prior to the use of diplomatic assurances).

which allow some judicial review of diplomatic assurances.<sup>168</sup> 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.<sup>169</sup> Similarly, most people facing extradition would likely prefer a broader inquiry, because they do not face the physical mistreatment or subjection to arbitrary processes or punishment that 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. 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.”<sup>170</sup> 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, with the result that relatively few claims and cases will implicate the rule. Further, the legal standard that courts would apply would be more stringent than the one they apply in asylum cases that arguably raise fewer foreign policy concerns. And last, the proposed doctrine does not ask courts to sit in full review of the Secretary of State’s decisions in extradition cases, and courts likely would be reluctant to do so in any event.

### III. NON-INQUIRY AND SOVEREIGNTY THEORY

This part returns to the issue at the heart of contemporary justifications for the rule of non-inquiry, which the Supreme Court repeatedly highlighted in *Munaf*, in the context of transferring prisoners under conditions of military occupation. Inquiring into a nation’s criminal processes, it is said, 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.”<sup>171</sup> As the preceding sentence should make clear, contemporary discussions of sovereignty – and in particular discussions relating to the rule of non-inquiry and the treatment of prisoners and detainees – encompass

---

<sup>168</sup> See Deeks, *supra* note \_\_\_, at 49-71.

<sup>169</sup> See, e.g., Pyle, *supra* note \_\_\_, at 321 (“The time has come to abolish the rule of noninquiry, and to limit extradition to those prosecutorial offices, courts, and prisons that have been duly accredited.”).

<sup>170</sup> *Rhodes v. Chapman*, 452 U.S. 337, \_\_\_ (1981).

<sup>171</sup> Max Weber, *Politics as a Vocation*, in *From Max Weber: Essays in Sociology* 77, 78 (H.H. Gerth & C. Wright Mills eds. 1946).

two related yet distinct topics: the sovereignty of the territorial nation state as an entity, and the allocation of sovereign power within a government. 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<sup>172</sup> – 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.<sup>173</sup> Some of that erosion has resulted from the rise of international human rights law.<sup>174</sup> But a distinction also exists between the theory and practice of sovereignty. As a matter of sovereignty theory, international human rights play a large role in the erosion of sovereign power. But in practice, most states 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 ignore international human rights norms, even as enforcement of those norms is often sporadic and ineffectual.<sup>175</sup>

---

<sup>172</sup> The most obvious contemporary citations for describing executive authority in this way are Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* 5 (2<sup>nd</sup> ed. 1934) (1985) (“Sovereign is he who decides on the exception.”), and Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* 11 (1998) (“Carl 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.”).

<sup>173</sup> See Cole, *supra* note \_\_, at 61; Raustiala, *supra* note \_\_, at 8-9, 241-43; see also Antony 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).

<sup>174</sup> See Cole, *supra* note \_\_, at 52. The idea of “civilization” has long been a component in deciding whether a state is “really” sovereign. See Anghie, *supra* note \_\_, at 52-65 (outlining the way in which Europe and the United States used the idea of civilization to limit the recognition of sovereignty). The contemporary insistence on international human rights has taken on some of that role today. This fact provides significant impetus for the debate over whether it is possible to speak of international human rights at all, whether such rights can ever be “universal,” whether the current package of such rights is universal or is instead “western” or biased in some way, and whether other visions of rights should displace or be incorporated into international human rights law – all of which is beyond the scope of this article.

<sup>175</sup> See, e.g., Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* 131 (2004) (“[M]ost states . . . do comply most of the time with international law, except when it really matters to them, even in the absence of the threat of effective international sanctions,” and “when sovereign states today violate international law, they nonetheless make every effort to construe their action as of consistent with the law”).

In this sense, the erosion of exclusive national sovereignty over specific territory supports the effort to reform or eliminate the rule of non-inquiry. But, depending on the practices of a particular state, eroding the rule also threatens to create a potentially effective method of human rights enforcement. Indeed, this possibility 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 argue that such arguments did not appear in earlier cases because it would not have occurred to courts that they would need to articulate the obvious. Articulating a sovereignty rationale would have become 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 have stressed the paramount or even exclusive authority of the executive branch in international extradition and have insisted that the Secretary of State must have the last word on the issue.<sup>176</sup>

This “last word” is essentially a form of prerogative. Extradition litigation involves less process than ordinary or normal 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.<sup>177</sup> 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.<sup>178</sup> Small wonder, then, that federal courts describe these events as “sui generis.”<sup>179</sup> Further, therefore, when courts describe extradition as important to sovereignty – as the Supreme Court did in *Munaf* – they are entirely correct with respect to both of the aspects of sovereignty that I am discussing.

Importantly, 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 ex-

---

<sup>176</sup> See *supra* note \_\_\_\_.

<sup>177</sup> See *supra* note 3 and accompanying text.

<sup>178</sup> Cf. Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 *Stan. L. Rev.* 1307 (2004) (discussing clemency in terms of the sovereign power to decide on the exception).

<sup>179</sup> See *supra* note 6.

exercised by legislature, and somewhat less so with respect to judicial power.<sup>180</sup> Thus, on the one hand, the rise of 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 inconsistent with traditional conceptions of the rule of law.<sup>181</sup> This aspect of internationalization supports the rule of non-inquiry as another tool for aiding efficient cooperation among states. 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 sovereignty, and they certainly do not erode the executive discretion that remains at its core.

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 that at least initially appears as the opposite of the cosmopolitan rights-bearing individual. Put differently, by reinforcing and insulating sovereignty, 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.<sup>182</sup> Non-inquiry represents an exceptional zone of no-law between the United States and the receiving country, with the person facing extradition left exposed 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 are 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 border, outside

---

<sup>180</sup> See Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* 168-84 (2006).

<sup>181</sup> See Tamanaha, *supra* note \_\_, at 114-26 (suggesting definitions of the rule of law cluster around three themes: “government limited by law,” “formal legality,” and “rule of law, not man”); see also Hannah Arendt, *The Origins of Totalitarianism* 463 (new ed. 1979) (distinguishing between “positive laws . . . designed to function as stabilizing factors for the ever changing movements of men” and totalitarian law, in which “all laws have become laws of movement”).

<sup>182</sup> See Agamben, *supra* note \_\_, at 6-11; see also Arendt, *supra* note \_\_, at 297 (discussing “the abstract nakedness of being human and nothing but human”). Notably, Agamben highlights exile as an example of bare life. See *id.* 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 of Rights J.* 765, 828-29 (2007).

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.

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 rebuke to the claim that sovereignty has changed fundamentally in the contemporary world. Extraditees represent precisely the problem that international human rights exist to combat: the problem of the stateless person who cannot claim rights from a particular national government.<sup>183</sup> Indeed, to the extent that 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 legal protections apply is not limited to extradition. Indeed, it is all too common. 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 the hope of a political and legal identity other than mere statelessness. 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 military “illegal combatants” and suspected “terrorists” are detained with few, if any, legal rights.<sup>184</sup>

In all of these areas, the degree of judicial “inquiry” is often limited. Still, international and domestic laws also provide that these areas of sovereign action are not 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 U.S. and Cuba) and to limit executive power. *Boumediene*, lower court decisions in its wake, and the Obama administration’s efforts to close the camp hold out the possibility for change at Guantanamo.<sup>185</sup> *Rasul v. Bush* holds out the possibili-

---

<sup>183</sup> See Arendt, *supra* note \_\_\_, at 290-99.

<sup>184</sup> 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 Guantanamo are filled, indeed often packed, with rules, regulations, standard operating procedures, and the like. Rules abound and multiply in the absence of law – but they are laws of the exception, flowing from sovereign decisions.

<sup>185</sup> [cite lower court cases and new statute]

ty that the writ of habeas corpus will allow some inquiry wherever U.S. officials hold people in detention,<sup>186</sup> although I suspect the Court will never quite extend the writ that far. These cases, and the actions taken as a result of them, thus suggest that ideas of separation of powers and the rule of law, enforced by the judiciary, can check contemporary executive power.<sup>187</sup> To some observers, they confirm an idea of sovereignty eroding, blending into a more cosmopolitan or international legal order.

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 it. Sovereign discretion remains, and courts are not always hostile to it. Indeed, the *Munaf* Court defines sovereign discretion as the norm for certain classes of people, while the rule of law in the form of judicial review becomes 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* is in essence another – but perhaps not the last—Insular Case.

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 it. Perhaps “sovereignty” and “territory” are simply resources, something that a state can deploy or dispense, part of the tools of statecraft. 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 and interests within those 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 limit executive discretion. After all, at the end of the

---

<sup>186</sup> [cite lower court cases]

<sup>187</sup> See Cole, *supra* note \_\_\_, at 60.

day, 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.

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<sup>188</sup> – once again marking it as an Insular Case. Almost certainly, however, this is not what Dean 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 nation state.”<sup>189</sup> Yet taken together, isn’t this exactly what *Boumediene* and *Munaf* accomplish?

---

<sup>188</sup> See Neuman, *The Extraterritorial Constitution*, *supra* note \_\_\_, at 284 (suggesting *Munaf*’s “analysis might be regarded as an application of the functional approach to a citizen’s extraterritorial rights”).

<sup>189</sup> Aleinikoff, *supra* note \_\_\_, at 5.