Article

Tying Off All Loose Ends: Protecting American Citizens from Torture Beyond America's Borders

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In the United States, the law prohibits the government from torturing its citizens. U.S. law also prohibits the government from sending its citizens to another country where they would likely be tortured. These two scenarios seemingly covered all possible ways that the U.S. government could bring about the torture of its own citizens—until Munaf v. Geren, 553 U.S. 674 (2008). In Munaf, the Supreme Court posed an intriguing question: Does the law also forbid the U.S. government from transferring custody of an American citizen to a country that will likely torture him, when the U.S. government was maintaining custody of that citizen within, and at the permission of, the country that engages in torture? This Article seeks to definitively close this possible loophole through two points of attack. First, it looks to emerging theories on the extraterritorial application of the Constitution and concludes that Fifth Amendment Substantive Due Process extends beyond America's borders to protect her citizens from any government action that would lead to their torture. Second, this Article explores the federal law that ostensibly leaves open the possibility for torture and, after analyzing its drafters' intent as well as the international conflicts that a pro-torture interpretation would cause, concludes that any loophole found is false.

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INTRODUCTION

On the same day that the momentous Boumediene v. Bush opinion was issued by the United States Supreme Court, Munaf v. Geren, another important decision concerning the extraterritorial applicability of constitutional protections and the Habeas Corpus Statute, was issued with much less fanfare. Perhaps because the decision was unanimous, or perhaps simply because it was overshadowed by the Boumediene decision, Munaf as well as the controversial issues that it tackled and, more importantly, those that it left unanswered, have seemingly flown under the radar.

In Munaf, a multi-national force in Iraq led by American military personnel, arrested and detained two American citizens for allegedly breaking Iraqi law. Next-friend habeas corpus petitions were filed on behalf of each of these detainees in the Federal District Court for the District of Columbia, requesting that the court enjoin the American Armed Forces from releasing the detainees into Iraqi custody. To ascertain whether that injunction should be granted, the Court had to determine first, whether the federal district court had jurisdiction over habeas petitions in this situation (i.e., for American citizens, held by American troops within another State’s sovereign territory), and then whether a court could exercise that jurisdiction to enjoin the petitioners’ transfer out of American custody.

While the Court ruled in favor of the petitioners by holding that “United States courts have jurisdiction over habeas corpus petitions filed on behalf of American citizens challenging their detention” by American forces outside of the territory of the United States, the ruling ultimately went against them as the Court held that “district courts [cannot] exercise [habeas] jurisdiction to enjoin [American forces] from transferring” American citizens outside of American territories and possessions into the custody of local authorities or to be tried by those authorities.

This summation, however, omits one very important detail which in

4. Both the Munaf and Boumediene decisions were issued on June 12, 2008.
5. Chief Justice Roberts wrote a majority opinion for the unanimous court, with Justice Souter writing a concurrence which Justices Ginsburg and Breyer joined.
6. These two naturalized citizens of the United States were accused of acts such as aiding and abetting former Al-Qaeda in Iraq leader Abu Musab Al-Zarqawi and kidnapping Romanian journalists. Munaf, 553 U.S. at 681-85.
8. Munaf, 553 U.S. at 680 (“First, do United States courts have jurisdiction over habeas corpus petitions filed on behalf of American citizens challenging their detention in Iraq by the MNF-I? Second, if such jurisdiction exists, may district courts exercise that jurisdiction to enjoin the MNF-I from transferring such individuals to Iraqi custody or allowing them to be tried before Iraqi courts?”).
9. Id. at 680, 688.
10. Id. at 680, 705.
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One of the detainees originally sought his injunction out of fear that his Iraqi custodians would torture him. The Supreme Court dismissed his claim because passing judgment on the humaneness of the treatment of American citizens is the prerogative of the political branches. Then, because it was unnecessary to the holding, the Court refused to consider whether the United States' political branches could knowingly transfer a U.S. citizen from its custody into the hands of a sovereign that would likely torture him, when that citizen is already located within the territory of that torturing sovereign. Could such rare circumstances allow the U.S. to knowingly surrender one of its own citizens into the hands of a likely torturer?

We already know that the U.S. government cannot torture its own citizens, and that it cannot force its citizens across borders where they will likely be tortured. However, Munaf apparently created a new avenue for American complicity in the torture of its citizens—which may be particularly troublesome in light of the modern American lifestyle. Currently, Americans make about 60 million trips outside the United States each year, approximately 3.2 million Americans reside outside of U.S. borders, and more than one half million federal employees and their dependents, including military personnel, live overseas. The sheer number of Americans living abroad would suggest that the number of Americans arrested and detained each year while overseas is not insignificant. There is not significant data about how many of those Americans are actually detained by American authorities while abroad. Nevertheless, it appears that the arrest of an expatriate U.S. citizen, and that citizen's possible detention by American authorities, may be much less

11. Id. at 700.
12. Id. at 700-703.
13. Id. See also id. at 706 (Souter, J., concurring) ("The Court accordingly reserves judgment on an 'extreme case in which the Executive has determined that a detainee [in United States custody] is likely to be tortured but decides to transfer him anyway.").
15. Id.
exceptional than in years past.

Moreover, while Americans are abroad, many of the laws and guarantees that protect them while at home do not apply. Indeed, even many constitutional protections that are considered fundamental supposedly do not restrict the U.S. government’s actions with regard to its citizens while they are beyond American borders.\(^{18}\) In addition, Americans who break foreign laws are generally subject to all the methods of trial and punishment of the country in which they committed those crimes, even when American laws would proscribe those methods.\(^{19}\)

As a result, leaving \textit{Munaf}’s question unanswered allows too much room for abuse. This Article therefore works to answer that question by arguing that American federal and constitutional law prohibit the intra-State transfer of U.S.-held detainees when it is more likely than not that the State receiving those detainees will torture them.\(^{20}\) Thus, once an American citizen has entered into the custody of the United States government, whether within the U.S. or abroad, there is no longer any excuse for that person to be tortured.

In Part I, this Article shows how the Constitution extends beyond American borders to protect individuals from torture through the Fifth Amendment Substantive Due Process Clause. Part I begins with a brief overview of the jurisprudence surrounding the extraterritorial application of the Constitution, especially as it has been established by the Insular Cases. Then, it proceeds to examine the newest developments in the extraterritorial application of the Constitution, specifically analyzing the \textit{Boumediene} case and its functional approach. Part I concludes by applying that functional approach to the question posed by this Article, ultimately finding that it allows the Constitution to reach beyond American borders to prohibit the U.S. government from transferring American detainees into the custody of likely torturers.

Part II examines the extent to which U.S. federal law also bars the transfer of expatriate American detainees. This Part first analyzes the Foreign Affairs Reform and Restructuring Act (FARR Act), showing that even though the Act’s language does not clearly prohibit such transfers, its intent does. Then, this Part shows that even if the Act’s legislative history is


\(^{19}\) Neely v. Henkel, 180 U.S. 109, 123 (1901).

\(^{20}\) This Article will consistently refer to the “more likely than not” standard in situations of transferring people to torture, since that was included as one of the U.S. Senate’s reservations to the Convention Against Torture upon ratification. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en [hereinafter \textit{Convention Against Torture}].
unclear as to its intent, the Charming Betsy doctrine nevertheless requires an interpretation that is not incongruous with international law—prohibiting the U.S. from transferring anyone to likely torture.

Finally, Part III addresses an important objection to this Article's argument that was raised by Chief Justice Roberts in the Munaf opinion. The question is: if the United States refuses to transfer an alleged criminal into the custody of a torturing State, does that not essentially grant the criminal a "get-out-of-jail-free" card?21 Generally, notions of justice and fundamental fairness would oppose any transfer that would create such an outcome. Consequently, Part III demonstrates how the United States is also permitted to assert jurisdiction over detainees and prosecute them in the United States when it cannot transfer them for fear of imminent torture.

The United States cannot torture its citizens at home. Neither can it send its citizens abroad to be tortured. In the end, this Article hopes to conclusively "tie-off all of the loose ends" that would allow the American government to be responsible for the torture of one of its citizens by also showing that the U.S. government is forbidden from transferring an American into the custody of a State where he would, more likely than not, be subjected to torture, even when the American is already within that State's territory.

I. THE U.S. CONSTITUTION AND DUE PROCESS EXTEND TO DETAINEES ABROAD

The degree to which the Constitution protects individuals when they are not on United States territory is a question that has produced a tremendous amount of jurisprudence and scholarship.22 However, this Article will only give a brief summary of the doctrine before approaching the newest cases on the subject and the manner in which they extend many of the Constitution's protections, most importantly Substantive Due Process, to U.S. citizens worldwide while they are under American authority.

A. The Insular Cases and the Extraterritorial Application of the Constitution

Prior to the end of the nineteenth century, the question of how far the protections of the U.S. Constitution extended beyond the United States had not been frequently addressed. All that was clear, as evidenced by cases

21. Munaf v. Geren, 553 U.S. 674, 697 (2008) ("In the present cases, the habeas petitioners concede that Iraq has the sovereign authority to prosecute them for alleged violations of its law, yet nonetheless request an injunction prohibiting the United States from transferring them to Iraqi custody. But . . . 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.").

such as *Dred Scott v. Sandford*, as well as federal statute, was that the protections of the Constitution extended to all American territorial possessions. However, even this principle would fall apart as the U.S. entered the Age of Imperialism.

Caught up in the imperialistic frenzy of the late 1800s, the U.S. government worked to expand its global influence and possessions. The most significant of those expansions occurred as a result of the Spanish-American War, after which the U.S. acquired Puerto Rico, Guam, and the Philippines. However, contrary to prior practice, where new territories were acquired with the ultimate objective of admitting them to the Union as new states, the consensus among contemporary Americans was that the new territories should never acquire statehood. This understanding is reflected in the Supreme Court's jurisprudence after it took on a series of cases concerning the application of the Constitution in those territories—they are collectively known as the *Insular Cases*.

*Downes v. Bidwell*, one of the most important of the *Insular Cases*, is a good illustration of the group. In *Downes*, a New York customs collector

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23. See *Dred Scott v. Sandford*, 60 U.S. 393, 450–51 (1856) ("The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial Government, as well as that covered by States. . . . [C]itizens of a Territory, so far as these [rights over person and property] are concerned, [are] on the same footing with citizens of the States . . . .").

24. *Rev. Stat. i § 1891* (1878) ("The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States.").

25. Professor Burnett presents a compelling argument that the law concerning the application of the Constitution to the territories pre-Insular Cases was much less clear than I make it out to be, and points to the fact that if the *Dred Scott* decision did indeed extend the Constitution to all territories *ex proprio vigore*, then any antecedent congressional enactments would be either plainly redundant, or evidence that Congress believed that the Constitution only applied to the states in cases where it extended that application. Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality after Boumediene*, 109 COLUM. L. REV. 973, 985-986 (2009). However, since that is beyond the scope of this Article, I simply assume the position of many of the critics of the *Insular Cases*, that the *Insular Cases* broke with precedent in forming a new view.


27. Burnett, supra note 25, at 987 n.40 (citing contemporary sources to show that both "imperialists and anti-imperialists . . . were on the whole opposed to statehood: The former argued in favor of keeping the new territories as colonies; the latter argued in favor of relinquishing them altogether").


29. Burnett, supra note 25, at 988.
had imposed duties on a shipment of oranges coming from Puerto Rico.\textsuperscript{30} The problem with this, of course, is that if Puerto Rico were an integral part of the United States, the imposition of duties would be contrary to the Uniformity Clause of the Constitution, which requires that "all duties, imposts and excises . . . be uniform throughout the United States."\textsuperscript{31} Therefore, the question before the Court was whether Puerto Rico was indeed part of the United States.\textsuperscript{32} Surprisingly, the Supreme Court held that it was not.\textsuperscript{33} Because none of the new territories had been incorporated through their acquisitional treaty or through an act of Congress, none of them had become part of the United States.\textsuperscript{34} Accordingly, the Supreme Court held that the Uniformity Clause of the Constitution did not apply to unincorporated territories.\textsuperscript{35} The Supreme Court then followed the \textit{Downes} reasoning to limit the extension of many basic constitutional guarantees to individuals "outside" of the United States, even though they were located within unincorporated American territories.\textsuperscript{36}

Yet, while denying residents of these territories the benefit of the Constitution, the \textit{Insular Cases} provided an additional theme—that even though the Constitution does not completely apply outside of the United States, many fundamental constitutional rights apply of their own force where the U.S. government exercises power.\textsuperscript{37} The Supreme Court in \textit{Downes} made it quite clear that even though the Constitution did not apply to the territory in question, that did not in any way subject the residents of that territory "to an unrestrained power on the part of Congress to deal

\begin{thebibliography}{99}
\bibitem{Downes} \textit{Downes v. Bidwell}, 182 U.S. 244, 247 (1901).
\bibitem{U.S. CONST.} U.S. \textit{CONST.} art. 1, § 8, cl. 1.
\bibitem{Downes2} \textit{Downes}, 182 U.S. at 249.
\bibitem{id} \textit{id.} at 287.
\bibitem{id2} \textit{id.} at 279-81.
\bibitem{id3} \textit{id.} at 287.
\bibitem{Balzac} See, e.g., \textit{Balzac v. Porto Rico}, 258 U.S. 298, 309 (1922) ("In Porto Rico, . . . the Porto Rican can not insist upon the right of trial by jury, except as his own representatives in his legislature shall confer it on him. The citizen of the United [S]tates living in Porto Rico cannot there enjoy a right of trial by jury under the federal Constitution, any more than the Porto Rican. It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it."); \textit{Ocampo v. United States}, 234 U.S. 91, 98 (1914) ("[I]n . . . respect [to the Fifth Amendment grand jury requirement,] the Constitution does not, of its own force, apply to the [Philippine] Islands."); \textit{Dowdell v. United States}, 221 U.S. 325, 332 (1911) ("[I]n the absence of congressional legislation to that end, there [is] no right to demand trial by jury in criminal cases in the Philippine Islands."); \textit{Dorr v. United States}, 195 U.S. 138, 149 (1904) ("The power to govern territory . . . does not require [Congress] to enact for ceded territory, not made part of the United States . . . the right of trial by jury.").
\bibitem{Verdugo-Urquidez} \textit{U.S. v. Verdugo-Urquidez}, 494 U.S. 259, 268-69 (1990). \textit{Downes}, 182 U.S. at 283 ("Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property."); \textit{Dorr}, 195 U.S. at 148 (finding that if trials by jury were a fundamental right, that would have probably affected the Court's holding).
\bibitem{Van Dyke} Jon M. \textit{Van Dyke}, \textit{The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands}, 14 U. HAW. L. REV. 445, 459 (1992) ("The full effect of the \textit{Insular Cases} was thus to declare that (1) Congress has general and plenary power over the territories (which it can delegate to executive agencies), but that (2) these powers are limited by certain fundamental rights of the territorial inhabitants.").
\end{thebibliography}
with them upon the theory that they have no rights which it is bound to respect." As a result, even though the Insular Cases purport to disavow the extraterritorial expansion of complete constitutional protections, their extension of fundamental rights to individuals under American authority while in territory that would never become a part of the United States "cracked open" the door to further applications of the Constitution beyond U.S. borders.

B. The War on Terror and the Expanding Constitution

The doctrines elucidated in the Insular Cases would be revisited and questioned many years later when the U.S. engaged in its War on Terror. While waging campaigns in both Iraq and Afghanistan, the U.S. captured many combatants and detained them at sites in Afghanistan, Iraq, Cuba, and the United States itself. However, because the War on Terror is unlike any other war in which the U.S. has participated, significant questions concerning the treatment of detainees, the determination of their combatant status, and whether they have the right to challenge their detention became very important and were answered by landmark decisions such as Hamdi v. Rumsfeld and Boumediene v. Bush. Finding the door cracked open by the Insular Cases, these decisions would throw it ajar and allow for the possible extension of many constitutional protections, such as Substantive Due Process, to American citizens far beyond the borders of any incorporated United States territory.

1. Hamdi Mandates Due Process for American Detainees

Mr. Yaser Esam Hamdi, a Louisiana-born American citizen, was captured on an Afghan battlefield shortly after September 11, 2001. After being detained and interrogated in Afghanistan, Hamdi was transferred to the United States Naval Base in Guantanamo Bay where he stayed for about

38. Downes, 182 U.S. at 283.
39. While each of the Insular Cases occurred early in the twentieth century, see supra note 28, the doctrine that they established would be reconsidered on a few occasions. In one of them, Torres v. Puerto Rico, 442 U.S. 465 (1979), the Court held that constitutional protections against illegal searches and seizures applied to Puerto Rico. Id. at 474. In a brief concurrence, Justice Brennan would argue that any implicit limits to constitutional rights based in the Insular Cases were anachronistic. Id. at 475-76 (Brennan, J., concurring). In another case, Harris v. Rosario, 446 U.S. 651 (1980), the Supreme Court held that Congress did not violate the Fifth Amendment's equal protection guarantee by providing Puerto Rico with a lower level of Federal Aid to Families with Dependent Children than it did the States, since Congress may discriminate against citizens of its territories along the rational basis standard. Id. at 651-652.
41. Id.
42. Id.
44. Id. at 520.
45. Id. at 507.
47. Hamdi, 542 U.S. at 510, 513.
four months. Upon discovering that Hamdi is an American citizen, U.S. authorities transferred him to naval brigs on American soil in Virginia and South Carolina. At the outset, the U.S. Government claimed the right to designate Hamdi as an enemy combatant and therefore detain him indefinitely without any formal charges or proceedings. It based its claim on the President’s inherent constitutional power to protect national security as well as on congressional authorization.

A Supreme Court plurality disagreed with this assessment. After balancing the government’s interest in avoiding judicial process with Hamdi’s in maintaining it, Justice O’Connor’s controlling plurality concluded that a citizen who disputes his enemy-combatant status is entitled to due process. In fact, according to the plurality, “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” While the Hamdi Court did not provide a detailed list of

48. Id. at 510.
49. Id.
50. Id. at 510.
51. Id. at 510-11.
52. Id. at 516-17.
53. The congressional mandate here is the Authorization for the Use of Military Force (AUMF) which granted the President the authority to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks.” Id. (citing the Authorization for the Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).
54. The Hamdi Court divided into four groups. Justice Clarence Thomas was his own group, representing the most conservative opinion toward executive deference in war-making decisions. Hamdi, 542 U.S. at 579 (Thomas, J. dissenting) (“The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. . . . As such, petitioners’ habeas challenge should fail, and there is no reason to remand the case.”). Justices Scalia and Stevens were Justice Thomas’ polar opposite, calling for the greatest restrictions on the Executive’s power to detain. Id. at 579 (Scalia, J. dissenting) (“Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.”). Justices Souter and Ginsburg concurred in the Court’s decision, although they did not feel that the Authorization for the Use of Military Force authorized the detentions. Id. at 541 (Souter, J. concurring in part, dissenting in part, concurring in the judgment) (“The Government has failed to demonstrate that the Force Resolution authorizes the detention complained of here even on the facts that Government claims.”). Chief Justice Rehnquist, along with Justices Kennedy, Breyer, and O’Connor, who authored the opinion, formed the plurality. Id. at 508 (plurality opinion).
55. According to Justice O’Connor, the government’s interests here include (1) “ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States” and (2) preventing the military from being excessively burdened by judicial process while it is waging a war. Id. at 531-32.
56. Justice O’Connor listed Hamdi’s interests to include: (1) avoiding an erroneous deprivation of liberty, and more broadly, (2) avoiding the possibility of executive abuse by allowing the President to detain individuals without any process whatsoever. Id. at 529-31.
57. Id. at 509.
58. Id. at 533.
what must be done to satisfy the notice and hearing requirements of due process, it went so far as to recognize that “a United States citizen captured in a foreign combat zone”\textsuperscript{59}—at least while that citizen is being held on U.S. territory—is entitled to Due Process.\textsuperscript{60} While this is not a tremendous shift away from the \textit{Insular Cases}, \textit{Hamdi} becomes a stepping stone for a shift toward the possibility of extending constitutional rights to Americans anywhere in the world.

2. \textit{Boumediene} Expands the Extraterritorial Application of Constitutional Rights

Picking up where \textit{Hamdi} left off, \textit{Boumediene} v. \textit{Bush}\textsuperscript{61} confirmed that constitutional rights can extend beyond American territorial borders.\textsuperscript{62} \textit{Boumediene} began as a Guantanamo detainee case like many others. Mr. Lakhdar Boumediene, an Algerian-born citizen of Bosnia and Herzegovina, was captured in Bosnia on suspicion of plotting to blow up an American embassy and then transferred to Guantanamo.\textsuperscript{63} By the time his habeas petition reached the Supreme Court, he had already been detained by the U.S. government for at least six years.\textsuperscript{64}

What distinguishes the \textit{Boumediene} decision from other cases are not the circumstances of Mr. Boumediene’s capture or detainment, but the rationale that the Supreme Court used in granting him the constitutional right to challenge his detention, in spite of its extraterritorial nature. As stated by Justice Anthony Kennedy’s majority opinion, there is no bright-line rule for determining the extraterritorial reach of the Constitution; instead, “questions of extraterritoriality turn on objective factors and practical concerns.”\textsuperscript{65} Therefore, according to Justice Kennedy, constitutionally guaranteed rights may indeed reach across international borders and determining whether they do “depends upon the ‘particular circumstances, the practical necessities, and the possible alternatives which Congress had before it’ and, in particular, whether judicial enforcement of

\textsuperscript{59} Id. at 523.

\textsuperscript{60} \textit{Contra} Johnson v. Eisentrager, 339 U.S. 763, 777-78 (1950) (denying the privilege of litigation to the individuals in this case in part because “the scenes of their offense [and] their capture . . . were . . . beyond the territorial jurisdiction of any court of the United States”).

\textsuperscript{61} 553 U.S. 723 (2008).

\textsuperscript{62} Justice Scalia noted this possibility in his dissent, protesting that \textit{Boumediene}’s functional test was “so inherently subjective that it clears a wide path for the Court to traverse in the years to come.” \textit{Boumediene} v. Bush, 553 U.S. 723, 843 (Scalia, J., dissenting).

\textsuperscript{63} Steven Erlanger, \textit{Ex-Detainee Describes His 7 Years at U.S. Site}, N.Y. TIMES, May 27, 2009, at A10.

\textsuperscript{64} Lakhdar Boumediene was originally captured near the end of 2001. \textit{See id.} His case was not heard by the Supreme Court until December 2007. \textit{Boumediene}, 553 U.S. 723.

\textsuperscript{65} \textit{Boumediene}, 553 U.S. at 764. \textit{See also} United States v. Verdugo-Urquidez, 494 U.S. 259, 270 (1990) (describing the selective or functionalist approach found in the Harlan and Frankfurter opinions in \textit{Reid} v. \textit{Covert}, 354 U.S. 1 (1957), rather than Justice Black’s plurality opinion, as the controlling method for determining the overseas application of the Bill of Rights to citizens).
the provision would be ‘impracticable and anomalous.’” 66

In Boumediene, the Supreme Court listed and weighed three factors for determining whether Mr. Boumediene and other Guantanamo detainees were entitled to habeas corpus, in spite of, or perhaps more appropriately, because of, their circumstances. According to the Court, the relevant factors were “(1) the citizenship and status of [each] detainee and the adequacy of process through which that status determination was made;” 67 (2) the nature of the sites where the alleged constitutional breaches took place; 68 and (3) “the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.” 69

While assessing the first factor in the context of the Boumediene case, the Court noted that although none of the petitioners were American citizens, each of them contested their enemy combatant status determination. 70 In addition, the determinations made for each of the detainees were done with minimal procedural protections—falling “well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review.” 71 Because of the inadequacy of the process they received, the Court found that this factor weighed in favor of extending habeas.

After approaching the second factor, the nature of the sites where the alleged constitutional breach took place, the Court held that it also weighed in favor of the detainees. 72 Even though both the detention and apprehension of each of the detainees occurred beyond the borders of the United States, 73 the fact that their detention was at the United States Naval Station at Guantanamo Bay made a difference. 74 According to the Court, the United States’ control over the naval station at Guantanamo is both absolute and indefinite, 75 making it, “[i]n every practical sense . . . [not] abroad,” being “within the constant jurisdiction of the United States.” 76

While weighing the third factor, the Court recognized “that there are costs to holding the Suspension Clause applicable in a case of military detention abroad,” 77 but it did not consider this obstacle to be dispositive. 78 The Guantanamo Bay naval station is not located in a theater of war and there was no indication that any United States adjudications at the base

66. Boumediene, 553 U.S. 723 at 759 (quoting Justice Harlan’s concurrence in Reid v. Covert, 354 U.S. 1, 74-75 (1956)).
67. Id. at 766.
68. Id.
69. Id.
70. Id. at 766-67.
71. Id. at 767.
72. Id. at 768-69.
73. Id. at 768 (“This is a factor that weighs against finding that [the Guantanamo detainees] have rights under the Suspension Clause.”).
74. Id.
75. Id.
76. Id. at 769. Please note that the Boumediene Court did not extend this analysis to sites that are beyond both the control and the sovereignty of the United States. This creates an especially interesting dilemma that is addressed later in Parts II.C.2 and III.A & B.
77. Id.
78. Id.
would cause any friction with Cuba.79 Furthermore, simple “[c]ompliance with any judicial process requires some incremental expenditure of resources,” and that alone was not a valid excuse to withhold constitutional rights.80

Since each of the factors above weighed in favor of the detainees, the Court’s ultimate holding allowed them access to the writ of habeas corpus. However, before moving on to a more broad application of this analysis in situations of overseas American detainees, it is important to note one more factor implicit to the Boumediene functional test. According to Professor Neuman:

Another factor, inherent in the functional approach but not discussed at length in the Boumediene opinion, is a nontextual, normative valuation of the importance of the particular right under consideration. Kennedy emphasizes the “centrality” of the writ of habeas corpus and the “vital” protection for liberty that it affords. He recalls the “fundamental” character of the (selected) rights extended to overseas territories under the Insular Cases, and characterizes habeas corpus as “fundamental” in his closing paragraphs. These distinctions underline his statement that the functional approach allowed the Court “to use its power sparingly and where it would be most needed.”81

This fourth factor was of significance in Boumediene, and should also be given weight when determining the foreign reach of constitutional rights.

C. Substantive Due Process Extends Overseas to Protect U.S. Citizens from Torture

Substantive Due Process prohibits the American government from participating in the torture of its citizens.82 In addition, the government cannot act affirmatively, with deliberative indifference toward the rights of

79. Id. at 769-70.
80. Id.
82. Rochin v. California, 342 U.S. 165, 172-73 (1952). See also Chavez v. Martinez, 538 U.S. 760, 789 (2003) (Kennedy, J., concurring in part, dissenting in part) (“A constitutional right is traduced the moment torture or its close equivalents are brought to bear.”); McKune v. Lile, 536 U.S. 24, 41 (2002) (finding that under the Fifth Amendment, “the Constitution clearly protects” against “physical torture”); Colorado v. Connelly, 479 U.S. 157, 163 (1986) ("[C]ertain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned." (quoting Miller v. Fenton, 474 U.S. 104, 109 (1985))); United States ex rel. Caminito v. Murphy, 222 F.2d 698, 702 (2d Cir. 1955) (“It is imperative that our courts severely condemn confession by torture. . .”). For further information regarding the definition of torture, see infra Part I.C.4.
an individual, to create a foreseeable danger that would ultimately lead to a deprivation of constitutionally protected rights—they cannot push their citizens into situations where it is more likely than not that they will be tortured. Through Boumediene's functional analysis, the constitutional prohibitions on torture and the governmental creation of danger within the United States should be extended to U.S. citizens detained by the U.S. government while outside of the United States—protecting them from being surrendered to local governments where it is more likely than not that they will be a victim of torture. This Article will now apply Boumediene's four factors to demonstrate how Substantive Due Process reaches beyond America's borders to protect her citizens.

While it is normally important to know the facts specific to each case in applying Boumediene's functional analysis, this Article uses broad generalizations to show that the constitutional protection against torture should extend to all American citizens overseas, regardless of their situation. To reiterate, the generalizations included in this analysis are: the detainee in question is American; this detainee was apprehended in a foreign State while overseas and is being held within the State of his apprehension by American authorities; and, it is more likely than not that the detainee will be subjected to torture if American authorities hand him over to local authorities.

1. Factor One: Citizenship and Status

The first relevant factor to weigh in this situation is, once again, the citizenship and status of the detainee at issue. In Boumediene, the Supreme Court did not necessarily give any indication as to how much weight

83. Essentially, this means that the government may not permissibly toss a citizen into the lions' den, and then claim no responsibility if the citizen is injured because of the intervention of the lions' own actions. The government is constitutionally bound to protect its citizens from the dangerous situations that it creates. See, e.g., DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989); Velez-Diaz v. Vega-Irizarry, 421 F.3d 71, 79-80 (1st Cir. 2005); Rivera v. Rhode Island, 402 F.3d 27, 34 (1st Cir. 2005) (“If in situations in which there is a 'special relationship,' an affirmative, constitutional duty to protect may arise when the state 'so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs.' . . . This court has recognized that this relationship, and thus a constitutional duty, may exist when the individual is incarcerated or is involuntarily committed to the custody of the state.”) (quoting DeShaney, 489 U.S. at 200). Huffman v. Los Angeles, 147 F.3d 1054, 1061 (9th Cir. 1998) (“[T]he danger-creation plaintiff must demonstrate, at the very least, that the state acted affirmatively, and with deliberate indifference, in creating a foreseeable danger to the plaintiff, leading to the deprivation of the plaintiff's constitutional rights.”) (citations omitted).

84. Once again, this Article's scope is limited to American citizens as they are held overseas. See Enwonwu v. Gonzales, 438 F.3d 22, 29 (1st Cir. 2006) (“[T]here can be no substantive due process objection to the order removing Enwonwu. The state-created danger theory argument fails because an alien has no constitutional substantive due process right not to be removed from the United States, nor a right not to be removed from the United States to a particular place.”) (emphasis added).

85. See Boumediene, 553 U.S. 723.
American citizenship is to be given in the analysis. However, it did note that while the detainees-at-issue were not Americans, they did contest their status as "enemy aliens." That fact put them on a different plane than foreign detainees who had not contested their status, weighing in their favor.

Nevertheless, the facts of one of Boumediene's precedent cases allow for clearer conclusions to be drawn. In Reid v. Covert, two American wives were convicted for the murder of their soldier husbands while they were living overseas on American bases. In both cases, the wives were tried by a military court-martial instead of a civilian court. Consequently, each wife petitioned the Supreme Court, claiming that her Fifth and Sixth Amendment right to a trial by a jury had been violated. Because the Court's decision came down as a plurality, its holding is limited by the treatment given in the concurring opinions of Justices Frankfurter and Harlan—treatment that was later adopted by the Court in Boumediene. For the plurality, the question at issue was not just whether the Fifth and Sixth Amendments applied overseas, but whether they should apply in the particular circumstances, that is to say, to Americans. In light of the case's holding, it is easy to adopt the position that citizenship weighed in each of the military wives' favor. Consequently, the American citizenship of this Article's hypothetical detainee factors in his favor.

2. Factor Two: The Site of the Constitutional Breach

The second factor to evaluate is the nature of the site where an alleged breach of constitutionally protected rights took place. In the case of our hypothetical detainee, this is the sole factor that does not weigh in his favor.

86. Id. at 765-68.
87. Id. at 766.
88. Id. at 766-67 (citing Johnson v. Eisentrager, 339 U.S. 763, 777 (1950)).
89. 354 U.S. 1 (1957). This was, in fact, the first time that "the Supreme Court had ever found a violation of the Bill of Rights in extraterritorial action taken by the government against a citizen." Gerald L. Neuman, The Extraterritorial Constitution after Boumediene v. Bush, 82 S. CAL. L. REV. 259, 264 (2009).
90. Mrs. Covert was living with her husband on an Air Force Base in England when she killed him. Reid, 354 U.S. at 3. Mrs. Smith "killed her husband, an army officer, at a post in Japan where she was living with him." Id. at 4.
91. Id. at 3, no. 4.
92. Id. at 5.
93. See id. at 41-64 (Frankfurter, J., concurring).
94. See id. at 65-78 (Harlan, J., concurring).
95. Boumediene v. Bush, 553 U.S. 723, 761 (2008) ("[T]he two concurring Justices [in Reid] distinguished [In re Ross, 140 U.S. 453 (1891)] from the cases before them, not on the basis of the citizenship of the petitioners, but on practical considerations that made jury trial a more feasible option for them than it was for the petitioner in Ross."). See also Richard Murphy & Afsheen John Rasdan, Due Process and Targeted Killing of Terrorists, 31 CARDOZO L. REV. 405, 434 (2009) ("In essence, Justice Kennedy took Justice Harlan's Reid concurrence and made it the law.").
96. Reid, 354 U.S. at 76 (Harlan, J., concurring).
97. For the plurality opinion, citizenship was in fact the deciding factor. Id. at 39-40 (Black, J., plurality).
To reiterate, the only details provided concerning his apprehension, detention, and transfer are that they all occur within the same foreign State. According to Boumediene, the foreign breach of an alleged right seems to cut against an ultimate extension of the Constitution unless that foreign area is controlled by unhindered American authority.

However, failing in this single factor does not eliminate the opportunity for an extension of constitutional rights. Recalling Reid v. Covert, constitutional protections were extended to one of the accused military wives that American authorities had detained (and tried) while still on English soil. The relationship between the United States and England during the mid-1900s is nothing like the current American domination of Guantanamo Bay. The agreement between the United States and the United Kingdom during Reid did not even give the U.S. absolute and indefinite control over its own citizens, much less the territory where its citizens were located. In fact, their agreement only granted "jurisdiction in respect of criminal offences which may be committed in the United Kingdom by members of [the United States Forces] . . . during the continuance of the conflict against [their] common enemies." In addition, if the U.S. decided it was not going to exercise its prosecutorial jurisdiction, British authorities were permitted to exercise the "jurisdiction of the courts of the United Kingdom." Unlike Boumediene, the situs of the breach of Mrs. Covert's rights was not under absolute and indefinite American control. Consequently, her favorable ruling by the Supreme Court shows that failing on this single factor will not defeat our hypothetical detainee's case.

3. Factor Three: Examining the Practical Obstacles

Third, it is necessary to consider the practical obstacles inherent in resolving our detainee's right to Due Process. The most important obstacle here is that the judiciary's interference in the Executive's decision to transfer a detainee might undermine the government's ability to speak with one voice in matters of foreign affairs. For example, a pragmatic Executive that makes an intentional decision to overlook another State's torture record in order to cultivate its relationship with that State in the pursuit of other goals may not appreciate a meddling Judiciary. This view is well-expressed in Justice Clarence Thomas' dissenting opinion in Hamdi. According to Justice Thomas, the Founders specifically vested the Executive with the responsibility and power to act alone in these matters because they

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98. Boumediene, 553 U.S. at 768 ("[T]he sites of [the Boumediene detainees'] apprehension and detention are technically outside the sovereign territory of the United States. . . . [T]his is a factor that weighs against finding they have rights under the Suspension Clause.").
99. See id. at 2260–61.
100. 351 U.S. at 488.
102. Id. at ¶2.
recognized that "the structural advantages of a unitary Executive are essential" in that domain.\textsuperscript{104} For example, lower courts have recognized that second-guessing the political branches could "render agreements with foreign nations contingent" and "chill the frank discussions with foreign governments that are essential to diplomatic relations."\textsuperscript{105} The Supreme Court touched lightly on this issue, specifically in the case of Executive torture determinations, in \textit{Munaf}.\textsuperscript{106}

Nevertheless, even if the Framers intended that certain matters rest within the jurisdiction of one unitary branch of government, it was also "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."\textsuperscript{107} Indeed, since the Founding, "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."\textsuperscript{108} For example, even though "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs,"\textsuperscript{109} a tradition dating back to the Civil War shows that courts may interfere in the affairs of the unitary Executive in order to protect a citizen's individual rights.\textsuperscript{110} Contemporary courts have also come to the same conclusion, finding that the risk of injury to an individual can outweigh any harm to the government caused by judicial interference.\textsuperscript{111}

Consequently, any practical obstacles inherent to prohibiting the

\textsuperscript{104} \textit{Id.} at 580 (Thomas, J., dissenting).
\textsuperscript{106} See \textit{Munaf} v. Geren, 553 U.S. 674, 702 (2008) ("The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area."). The D.C. Circuit Court of Appeals interpreted this to mandate complete deference to the Executive branch. Kiyemba v. Obama, 561 F.3d 509, 514 (D.C. Cir. 2009) ("Under \textit{Munaf}, however, the district court may not question the Government's determination that a potential recipient country is not likely to torture a detainee." (citation omitted)).
\textsuperscript{110} See, \textit{e.g.}, \textit{Ex parte} Milligan, 71 U.S. (4 Wall.) 2, 62 (1866) (holding that the trial of normal citizens in military courts is unconstitutional when civilian courts are still operating). \textit{Ex parte} Merryman, 17 F. Cas. 144 (C.C. Md. 1861) (No. 9,487) (holding that the President could not unilaterally suspend the writ to habeas corpus to the disadvantage of citizens).
The transfer of an American detainee into the custody of likely torturers are not insurmountable because the judiciary was in fact designed to that end. Therefore, Boumediene's third factor also weighs in favor of the extraterritorial application of the Constitution to protect citizens from torture.

4. Factor Four: The Value of a Citizen's Right to Be Free from Torture

The fourth and final consideration, or the "normative valuation of the importance of the particular right under consideration,"112 weighs heavily in favor of extending Due Process rights to protect detainees from being surrendered to torturers. In fact, there are few rights that have as deep a foundation within the common law as the right of each citizen to be free from government imposed torture.

As early as 1215 A.D., when England adopted its system of trial by jury, the very justification or purpose of torture began to recede.113 Indeed, by the late 15th-century, Chancellor Sir John Fortescue found that "a practice so inhuman [as torture] deserves not indeed to be called a law, but the high road to hell."114 By the 17th century, English common law judges had arrived at a consensus concerning the use of torture, as evidenced by the case of John Felton.115 In that case, Felton had been indicted for the assassination of the Duke of Buckingham and the Privy Council was threatening to put him to the question on the rack in order to discover his accomplices.116 However, because the Council could not determine "whether by the law of the land they could justify the putting him to the rack," the King posed this question to the judges at common law.117 The judges unanimously decided to forbid the Council from using torture, finding that Felton "ought not by the law to be tortured by the rack, for no such punishment is known or allowed by our law."118

This same consensus against the use of torture was fully imported by the American Framers and later enshrined in the Bill of Rights. The Fifth Amendment, for example, which bars self-incrimination, was understood in part as "a ban on torture and a security for the criminally accused."119

112. Neuman, supra note 81, at 273.
114. JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE, A TREATISE IN COMMENDATION OF THE LAWS OF ENGLAND 73 (Francis Gregor, trans., Cincinnati, Robert Clarke & Co. 1874) (1470).
115. Rex v. Felton, 3 Howell's State Trials 369 (1628).
116. Id. at 371.
117. Id.
118. Id. See also 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 321 (1769) ("[T]he judges, being consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England."); EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES 35 (1797) ("[T]here is no law to warrant tortures in this land . . . And there is no one opinion in our books, or judicial record (that we have seen and remember) for the maintenance of tortures or tortments.").
119. LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 430 (1968); see Akhil Reed Amar & Renée B. Lettow, Fifth Amendment First
Eighth Amendment, which specifically prohibits the use of cruel and unusual punishment, was also specifically aimed at "proscribing 'tortures' and other ‘barbarous’ methods of punishment." Indeed, it is now well agreed that the "use of torture or its equivalent . . . violates an individual's fundamental right to liberty of the person." Consequently, the right to be free from torture is certainly fundamental, and should be given significant weight in any functional analysis for the extraterritorial extension of constitutional rights.

In conclusion, Justice Kennedy’s functional analysis in Boumediene weighs heavily in favor of extending Substantive Due Process beyond U.S. borders to protect American citizens, who are in the custody of the United States government, from transfer to likely torture. Three of Justice Kennedy’s factors (the citizenship of the claimant, the cost of extending the right in question, and the fundamentality of the right) weigh significantly, if not completely, in favor of extending the right. In addition, the only factor to weigh against the extra-territorial extension of Due Process is the situs of the alleged breach of the constitutional right, assuming here that this breach would be outside of the United States and in a territory unlike the Naval Station at Guantanamo Bay. Nevertheless, as shown in the foregoing analysis, this sole factor should not prevent the ultimate extension of the Constitution to protect Americans while abroad from being sent by their own government into the hands of torturers.

Although Substantive Due Process alone is a strong reason to forbid the U.S. government from transferring citizens in its custody into the hands of likely torturers, it is not the only one. The United States’ ratification of the Convention Against Torture has also made such a transfer contrary to federal law.

II. U.S. LAW FORBIDS THE SURRENDER OF DETAINEES TO TORTURERS

In this Part, this Article will address the ways in which federal law should apply to forbid the U.S. government from transferring expatriate American citizens into the custody of foreign governments that are likely to torture them. It will do so by first analyzing the relevant American law, and, by interpreting the language and intentions behind it, break past any ambiguity to show that it forbids the transfer of Americans to any custodian that would likely torture them. Then, using the Charming Betsy doctrine, this Part will show that even if interpreting the language and intent of the law does not allow for a definite conclusion against intra-State transfers, interpreting the statute in the light of international law certainly

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122. See Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).
would.

A. The FARR Act and the Convention Against Torture

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was signed by the United States on April 18, 1988, and then ratified in 1994. Among the many goals of the Convention was the eradication of torture by forbidding the practice of "expel[ling], return[ing] ('refouler') or extradite[ing] a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Currently, the Convention maintains its status as American federal law through the Constitution's Supremacy Clause, as well as its enacting statutes, which include the Foreign Affairs Reform and Restructuring Act of 1998 (the FARR Act). In fact, it is through the FARR Act that the Senate executed the Convention's prohibition of transfers in the face of likely torture. In addition, it is through the FARR Act that individuals who contest their impending transfers because of the likelihood of torture, would petition for relief. Therefore, this Article will specifically address the reach of the FARR Act to expatriate American citizens who are threatened with transfers to an authority that would more likely than not subject them to torture.

1. Difficulties with a FARR Act Claim

Before moving on to address the interpretation of the FARR Act and how it applies to the transfers relevant to this Article, it is necessary to determine whether the FARR Act may even be used to contest an intra-territorial transfer. The problem is that some courts have interpreted the FARR Act to only allow persons to contest transfers in a petition for review

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123. Convention Against Torture, supra note 20.
124. As noted earlier in this Article, in the Senate's reservations to the Convention, it interprets this term to mean "more likely than not." See supra note 20.
125. Convention Against Torture, supra note 20, at art. 3.
126. U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.").
128. The language of the statute in question says that "it shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." FARR Act § 2242(a), 112 Stat. 2681-882.
of a final order of removal.\textsuperscript{129} This view comes from section 2242(d) of the Act, which states that "nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section . . . except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act."\textsuperscript{130} In spite of the Act’s language, many courts have permitted habeas corpus petitions to challenge transfers\textsuperscript{131} under the Supreme Court’s decision in \textit{INS v. St. Cyr}.\textsuperscript{132} According to \textit{St. Cyr}, jurisdiction-stripping provisions in federal statutes do not strip courts of jurisdiction to decide habeas claims unless they do so explicitly.\textsuperscript{133}

This issue is further complicated by the fact that, as of 2005, Congress passed additional laws which expand the definition of "jurisdiction" to include habeas claims.\textsuperscript{134} Some courts have found that this closes off the \textit{St. Cyr} reasoning.\textsuperscript{135}

Nevertheless, it is still unclear whether prospective transferees are completely barred from obtaining relief under the FARR Act. First, the Supreme Court has not definitively made a pronouncement, even when it could have done so in \textit{Munaf}. In addition, some scholars still believe that the FARR Act is enforceable in spite of the latest jurisdiction-stripping acts of Congress.\textsuperscript{136} At any rate, this is an issue that has yet to be completely settled and this Article functions based on the assumption that a non-immigrant detainee may still use the FARR Act to challenge his transfer.

2. Interpreting the “Plain Language”

Those who resist the idea that the FARR Act protects American citizens
who are already located within the State of their planned transfer look specifically to the language of the Act, and the Convention that it executes, to justify their claims. For example, according to Chief Justice Roberts, "the [FARR] Act speaks to situations where a detainee is being 'return[ed]' to 'a country.' . . . It is not settled that the Act addresses the transfer of an individual located in [a country] to the [government of that country]; arguably such an individual is not being 'returned' to 'a country'—he is already there."  

In spite of Chief Justice Roberts's plain language interpretation to the contrary, plain language can also provide a much more encompassing interpretation of the law at issue, presenting a wider range of ambiguity than the Chief Justice perceived. Once that ambiguity appears, rules of construction require an examination of the Act's legislative intent in order to draw conclusions about its anticipated application. Unfortunately, there is a paucity of relevant legislative history to glean from for the relevant sections of the FARR Act.

As a result, it becomes necessary to look to the treaty that the Act was meant to execute—the Convention Against Torture—as well as its travaux préparatoire (or official records), to determine the meaning of the Act. Opening up the interpretive analysis to these additional documents ultimately leads to the conclusion that the Act was meant to eliminate all forms of torture and therefore prohibit detainee transfers any time that torture is an issue—even when that transfer of authority happens within a State. Moreover, even if the law's language unambiguously omits the possibility of an intra-State transfer of power, because such an interpretation would cause absurd results in light of the Convention's provisions, that omission cannot be interpreted as intended by Congress.

a. "To a country." The FARR Act language that Chief Justice Roberts cites states that "it shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." At first blush, it is easy to agree with the Chief Justice's interpretation of the language. However, the words "to a country" admit an alternative interpretation. Because Chief Justice Roberts focuses his attention on the location of the detainee, he reads

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138. Id.
139. 2A SUTHERLAND STATUTORY CONSTRUCTION § 45:5 (7th ed. 2007).
140. Universal Const. Co., Inc. v. Occupational Safety and Health Review Com'n, 182 F.3d 726, 729 (10th Cir. 1999) (noting that intent can be expressed by omitting certain language).
141. FARR Act, 8 U.S.C. § 1231 (2006) (emphasis added). According to rules of interpretation, "the construction of a treaty by a political department of government, though not conclusive, is nevertheless given weight." 1A SUTHERLAND STATUTORY CONSTRUCTION § 32:9 (7th ed. 2007). This creates a need to interpret the Convention Against Torture's meaning through the congressional enactment (the FARR Act) which establishes measures for the Convention's enforcement because the FARR Act is essentially what becomes judicially enforceable in the United States, not the Convention Against Torture.
the word “country” to signify a place, which is only one of many acceptable definitions.142 “Country” may also refer to an entity or sovereign, signifying a nation or referring to the authority of the State itself.143 This second definition is also an appropriate fit for the phrase “to a country”—meaning that the United States cannot transfer a detainee to the authority of another State when it has knowledge that the sovereign authority of that State engages in the torture of its detainees.

Then again, this alternative interpretation encounters some difficulty when readers continue past the phrase “to a country” to encounter the prepositional phrase “in which.” While the first preposition “to” can be used with both locations and entities, “in” connotes inclusion, referring only to a location.144 Nevertheless, although that preposition does not necessarily correspond with the authority definition of State, it may still fit if sovereignty also implies territorial sovereignty, since territorial sovereignty is at the heart of the Westphalia System.145 Therefore, while the preposition indicates that “country” may only connote a location within the FARR Act, the word’s multiple meanings may allow for additional interpretations.

b. “To another State.” The same issue is encountered when examining the corresponding language in the Convention Against Torture. According to the Convention, “[n]o 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.”146 Again, when the Convention speaks of a transfer “to another State,” the word “State” in this context could mean both a location147 as well as an authority.148 The argument behind the authority definition gains additional ground due to the fact that the sentence employs that definition earlier on, declaring the imperative “No State Party shall.” Yet, just as in the FARR Act, the second time the Convention employs the word “State,” the word is immediately followed by the conjunction “where,” which once again implies location.

Consequently, it appears that Chief Justice Roberts’ focus on the law’s language brings no immediate or definitive answer as to the Act’s meaning.

3. Interpreting the “Plain Intentions”: The Spirit of the Law

Generally, the United States Supreme Court has held that “the meaning of a statute must, in the first instance, be sought in the language in which

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142. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 286 (11th ed. 2004) (“[a] political state or nation or its territory.”).
143. Id.
144. Id. at 627.
146. Convention Against Torture, supra note 20, art. 3 (emphasis added).
148. Id. (defining State as a “political organization”).
the act is framed." Courts are supposed to attempt to enforce the literal meaning of a statute's language, under the assumption that it embodies the intent of its drafters.

Nevertheless, the system recognizes that drafters are not perfect. It understands that ambiguities may exist within a writing. Because courts are grounded in reality, canons of statutory construction allow them to take effective measures to ensure that the intent of the law is preserved, in spite of flaws in the language. For example, courts may interpret a statute so as to better adopt its intent when a drafting error or ambiguity would cause unintended or absurd consequences in its application. In looking to preserve that intent, courts "consider the history of the subject matter involved, the end to be attained ... and the purpose to be accomplished."

Even though a strict interpretation of the FARR Act's language (including those troublesome prepositions and conjunctions) may help to provide meaning to the Act, an interpretation along those lines rejects both the law's purpose as well as the expectations of the Convention's signatories: the worldwide eradication of torture. In addition, any application of the FARR Act that allows for a "loophole" permitting torture would create absurd results in the context of the rest of the Act and its inspirational documents.

In order to understand the true intent and purpose of the Act, it is necessary to look past alternative definitions and function words and examine the history behind the Act as well as the Act's application.

a. The FARR Act's inspirational documents: The Convention and its travaux. The drafters of and signatories to the Convention Against Torture ultimately intended to create an agreement that would eliminate torture.

The international declarations and agreements that the drafters used as a

150. 2A SUTHERLAND STATUTORY CONSTRUCTION, supra note 138, § 46:1 ("When the intention of the legislature is so apparent from the face of the statute that there can be no question as to its meaning, there is no room for construction.").
151. "Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses." Id. § 45:2.
152. See Resolution Trust Corp. v. Westgate Partners, Ltd., 937 F.3d 526, 531 (10th Cir. 1991). United States v. Maung, 267 F.3d 1113, 1121 (11th Cir. 2001) (finding that the one circumstance in which a court may properly look beyond the plain language of a statute of which the language is clear is where giving effect to the language used by Congress would lead to a clearly absurd result); United States v. Albertini, 472 U.S. 675, 680 (1985) ("Only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language.").
153. 2A SUTHERLAND STATUTORY CONSTRUCTION, supra note 138, § 45:5 (citing Garcia v. U.S., 469 U.S. 70, 75 (1984)).
155. See id. J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 1 (1988) ("The principal aim of the Convention is to strengthen the existing prohibition of [torture and other cruel, inhuman, or degrading treatment or punishment] by a number of supportive measures.") (emphasis in original).
foundation for the Convention provide a strong base for this argument. The Convention specifically recognizes the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights as significant influences in its drafting.\textsuperscript{156} While neither of those documents pertained exclusively to torture, each specifically mandates that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"\textsuperscript{157} and bases its reasoning on the "inherent dignity" of the human person.\textsuperscript{158} Their language is absolute and explicit—no human being may ever be subjected to torture.

The next important document to consider is the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.\textsuperscript{159} This Declaration was approved by the General Assembly of the United Nations on December 9, 1975 and ostensibly began the years-long process of drafting the Convention.\textsuperscript{160} While providing a foundation for the Convention,\textsuperscript{161} the Torture Declaration focuses entirely on torture. Its detailed treatment of the subject can be summed up on the same absolute and explicit terms as the Human Rights Declaration and the ICCPR: "Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity"\textsuperscript{162} and "[n]o State may permit or tolerate" any such acts.\textsuperscript{163}

Notwithstanding the clarity of the language, and the binding nature of the previous documents,\textsuperscript{164} it appears that the U.N. General Assembly was still uncertain as to whether any convention could definitively stamp out

\begin{itemize}
\item \textsuperscript{156} Convention Against Torture, supra note 20, at pmbl.
\item \textsuperscript{158} UDHR supra note 157, at pmbl; ICCPR supra note 157, at pmbl.
\item \textsuperscript{159} Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX) (Dec. 9, 1975) [hereinafter Torture Declaration].
\item \textsuperscript{160} Hans Danelius, Former Justice of the Supreme Court of Sweden, Audiovisual Library of Int'l Law, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX) (Dec. 9, 1975) [hereinafter Torture Declaration].
\item \textsuperscript{161} Convention Against Torture, supra note 20, at preamb.
\item \textsuperscript{162} Torture Declaration, supra note 159, at art. 2.
\item \textsuperscript{163} Id. arts. 3, 4.
\item \textsuperscript{164} The International Covenant on Civil and Political Rights is a treaty and therefore explicitly binds its parties. The Universal Declaration of Human Rights, although not a treaty, still has a binding effect on States, having become an authoritative document expressing international customary law. Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d. Cir. 1980) ("It has been observed that the Universal Declaration of Human Rights no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the international community ... Indeed, several commentators have concluded that the Universal Declaration has become, in toto part of binding, customary international law.") (quoting E. SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY: THE ROOTS AND GROWTH OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948-1963, 70 (1964)).
\end{itemize}
torture. Indeed, on the same day that the Torture Declaration was made, the General Assembly recognized that “further and sustained efforts are necessary to protect under all circumstances the basic human right to be free from torture and other cruel, inhuman or degrading treatment or punishment.”

Moreover, in an effort to make “further international efforts...to ensure adequate protection for all against torture,” the General Assembly put the Commission on Human Rights to work, asking it to identify necessary steps to secure an international ban on torture, and then requesting that it draft the Torture Convention to that end. Ultimately, the early purpose of the Convention is clear: the worldwide elimination of torture.

b. The all-encompassing nature of the Convention. If the Convention’s predecessor documents do not adequately establish the intent behind the FARR Act, then the absolute and all-encompassing language of the Convention itself should certainly expose the absurdity of an interpretation that would leave any loopholes to allow for torture.

First, while the Convention reprises the language of the earlier torture-banning agreements by making similar statements concerning its basis in human dignity and stating a general rule against torture, it also goes further by unequivocally eliminating any possible justification for torture within each signatory’s jurisdiction. According to the Convention, States may not rationalize torture practices because of “a state of war or a threat of war.” Nor may States torture someone because of “internal political instability or... public emergency.” Neither are individuals justified in

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166. Id.
167. Id. ¶2(a).
168. G.A. Res. 32/62, ¶1 (Dec. 8, 1977). It is also very interesting to note the urgency with which the General Assembly treated the issue of torture, and thus the drafting of the Convention Against Torture. As the drafting process began to lag, the General Assembly made repeated calls for its rapid completion. Secretariat, Report on the Sixth Congress on the Prevention of Crime and the Treatment of Offenders, at 15, U.N. Doc. A/CONF.87/14/Rev.1 (Aug. 25-Sept. 5, 1980) available at http://www.asc4l.com/6th%20UN%20Congress%20on%20the%20Prevention%20of%20Crime%20and%20the%20Treatment%20of%20Offenders.pdf (stating that the draft convention, “including the study of adequate procedures for ensuring the proper implementation of the future convention on torture... should be finalized at the earliest possible time”). See also G.A. Res. 37/193, ¶2, U.N. Doc. A/RES/37/193 (Dec. 18, 1982) (“Requests the Commission on Human Rights to complete as a matter of highest priority... the drafting of a convention on torture and other cruel, inhuman or degrading treatment or punishment.”) (italics omitted); G.A. Res. 38/119, ¶2, U.N. Doc. A/RES/38/119 (Dec. 16, 1983) (“Requests the Commission on Human Rights to complete... as a matter of the highest priority, the drafting of a convention against torture and other cruel, inhuman or degrading treatment or punishment, with a view to submitting a draft, including provisions for the effective implementation of the future convention, to the General Assembly at its [next] session.”).
170. Id. arts. 2-5.
171. Id. art. 2(2).
172. Id.
the practice of torture based on "an order from a superior officer or a public authority." 173 Quite simply, "no exceptional circumstances whatsoever . . . may be invoked as a justification of torture." 174

Furthermore, the Convention does not merely regulate the domestic behavior of each of its signatories—it goes further to require States to engage in international behavior that affirms an absolute intolerance of torture. For example, States cannot be accessories to torture by sending an individual "to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." 175 In addition, when acts or attempts at torture do occur, 176 each State is required to exercise jurisdiction over the perpetrators of the crime. 177 The Torture Convention is unlike many other international agreements in that, instead of restricting criminal jurisdiction to the location where the crime occurred, 178 the nationality of the alleged torturer, 179 or the nationality of

173. Id. art. 2(3).
174. Id. art. 2(2).
175. Id. art. 3(1).
176. Id. art. 4(1) (noting that this rule extends to both completed acts as well as attempts at torture, and any accomplice in those acts).
177. Id. art. 5. Note that the language in this article is not precatory, but imperative. The Convention does not say that each State Party may take measures to establish jurisdiction. It says that "each State Party shall take such measures as may be necessary to establish jurisdiction." Id. art. 5(1) (emphasis added).
178. This is also known as the territorial principle. Shaw, supra note 145, at 579-84 (stating that this principle reflects the well-founded concept "that a country should be able to prosecute for offenses committed upon its soil"). The Convention, even though allowing for universal jurisdiction, lists this principle first as one of the methods of obtaining jurisdiction over torture crimes. Convention Against Torture, supra note 20, at art. 5(1)(a) (stating that a State must take measures to exercise jurisdiction "[w]hen the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State"). There appears to be little controversy surrounding the use of this principle because of its direct tie to territorial sovereignty and because of its long history. For many years, territorial jurisdiction was the only source of legitimate criminal jurisdiction over anything except for the high seas. See Ian Brownlie, Principles of Public International Law 303 (5th ed. 1998).
179. This is also known as the nationality principle. Shaw, supra note 145, at 584 ("Since every state possesses sovereignty and jurisdictional powers and since every state must consist of a collection of individual human beings, it is essential that a link between the two be legally established"). The Convention lists this principle second as a method for obtaining jurisdiction over torture crimes. Convention Against Torture, supra note 20, at art. 5(1)(b) (stating that a State must take measures to exercise jurisdiction "[w]hen the alleged offender is a national of that State").

The United States Supreme Court has recognized this principle for almost two centuries. The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens."); Johnson v. Eisentrager, 339 U.S. 763, 769 (1950) ("[c]itizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar."). In addition, several federal statutes grant U.S. Courts jurisdiction based on the nationality of the offender. These offenses include, among others, perjury, espionage, and tax evasion. Geoffrey R. Watson, Offenders Abroad: The Case for Nationality Based Criminal Jurisdiction, 17 Yale J. Int'l L. 41, 53 & nn.79-81 (1992) (citing 18 U.S.C. § 1621 (1988) (perjury); id. §§ 793-794 (espionage); 26 U.S.C. § 7201 (2006) (tax evasion)). This, however, does not mean that the principle has been universally recognized or applied by the international community. See Watson, supra at 41 (discussing the United States' past reluctance to employ the nationality principle); Edmund S. McAlister, Note, The Hydraulic Pressure of Vengeance: United States v. Alvarez-Machain and the Case for a Justifiable Abduction,
the victim, the Convention grants its signatories universal jurisdiction and requires all of them to participate in the prosecution of torture.

43 DePaul L. Rev. 449, 457-58 (1994) (noting that nations have taken different approaches to jurisdiction based on an offender’s nationality).

180. The authority to assert jurisdiction over crimes through the nationality of a victim is known as the passive personality principle. Shaw, supra note 145, at 589-91. (“Under this principle, a state may claim jurisdiction to try an individual for offences committed abroad which have affected or will affect nationals of the state.”). The Torture Convention lists this third among the methods of asserting jurisdiction over torture crimes. Convention Against Torture, supra note 20, at art. 5(1)(c) (stating that a State must take measures to exercise jurisdiction “when the victim is a national of that State”).

While the passive personality principle finds its place in the Convention Against Torture, it is a principle that generates quite a bit of controversy. See Howard S. Levi, Terrorism in War: the Law of War Crimes 231 (1993) (noting that passive personality has “long been an extremely controversial principle”); John G. McCarthy, The Passive Personality Principle and Its Use in Combating International Terrorism, 13 Fordham Int’l L.J. 298 (1980); Research in International Law Under the Auspices of the Faculty of the Harvard Law School: Jurisdiction with Respect to Crime, 29 AM. J. INT’L L. 443, 578-79 (Supp. 1935). According to the Commentary of Section 402 of Restatement (Third) of The Foreign Relations Law of the United States, the passive personality principle “has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state’s nationals by reason of their nationality, or to assassination of a state’s diplomatic representatives or other officials.” Restatement (Third) of The Foreign Relations Law of the United States § 402 cmt. g. (1987).

181. Convention Against Torture, supra note 20, at art. 5(2) (“Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him ...”). Under the universality principle, “each and every state has jurisdiction to try particular offences.” Shaw, supra note 145, at 592. Because of sovereignty issues, the exercise of universal jurisdiction tends to be rare. Without a treaty, it is generally only exercised in cases of piracy and war crimes. Id. at 593-97. A number of treaties, such as the Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, and the International Convention against the Taking of Hostages are notable extensions of universal jurisdiction through accords. Id. at 599-602. The drafters of the Torture Convention specifically looked to those three treaties as models for its own conferment of universal jurisdiction. Comm’n on Human Rights, Rep. of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/1984/72, ¶32 (Mar. 9, 1984).

In ratifying this treaty, the Senate included among its reservations that “it is the understanding of the United States that article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.” Convention Against Torture, supra note 20, at U.S. Reservations II.3, available at http://treaties.un.org/pages/ViewDetails.aspx?src=UNTEXTONLINE&tabid=2&mds_no=IV-9&chapter=4&lang=en. Interestingly, such a reservation is arguably illicit. According to the Vienna Convention on the Law of Treaties, reservations which are incompatible with the object and purpose of a treaty are illegitimate. Vienna Convention on the Law of Treaties art. 19, May 23, 1969, 1155 U.N.T.S. 331. If the Convention’s purpose was to expand the prosecutorial jurisdiction for torturers to a universal level, then this reservation would be contrary to the treaty’s purpose. Yet, the effect of an illicit reservation is not the nullity of the reservation but the nullity of that State’s adhesion to the Covenant. In addition, since the U.S. was permitted to adhere to the Convention without the protest and objection of other Signatories, it appears that the reservation stands as it is. Nevertheless, this reservation does not mean that the U.S. is prohibited from exercising universal jurisdiction to provide a forum for claims by aliens for torture occurring elsewhere. In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992), appeal after remand, 25 F.3d 1467 (9th Cir. 1994), appeal after remand, 94 F.3d 539 (9th Cir. 1996). Furthermore, even though it is not
In sum, the language contained in the Convention, and the documents that inspired it, are sufficient to establish the intent of the FARR Act's drafters. However, any uncertainty that might remain is quickly dispelled by the absurd results that ensue from an interpretation that does not limit intra-State transfers.

c. The absurdity of the loophole. According to Chief Justice Roberts, it is questionable whether the FARR Act, and consequently the Convention Against Torture, even applies to situations where an individual is already located within the country to whose authority he would be transferred. However, placing this interpretation of the Act within the context of the rest of the Convention's provisions creates absurd results—lending more weight to an expansive interpretation of the Act.

To illustrate, consider the following hypothetical: the United States exercises a broad police power within, and with the permission of, State X. As a result, State X allows the U.S. to both arrest and detain individuals alleged to have committed crimes within State X, subject to their eventual prosecution within State X's system. In addition, it is a well-known fact that when State X obtains custody of alleged criminals, it tortures them to obtain confessions. While on patrol in State X, the U.S. finds and arrests Abe, an American citizen, who was in the process of committing a crime. Eventually, State X requests that the U.S. give custody of Abe to the authorities of State X.

If the FARR Act does not prohibit Abe's transfer, the U.S., considering issues of comity and sovereignty, would likely surrender custody of Abe to State X. However, under this interpretation of the law, although the U.S. did not have authority to refuse to transfer custody of Abe, it would immediately gain the authority to prosecute those responsible for his imminent torture (i.e., State X) because Abe is an American citizen and because the Convention Against Torture grants universal jurisdiction to prosecute torture. To reach this conclusion, one would have to read the Convention as only addressing a State's post hoc authority to punish torture—ignoring the Convention's efforts to protect victims before their abuse by prohibiting States from engaging in torture or from transferring individuals to places where there is a substantial risk of torture.

Consequently, while Chief Justice Roberts' interpretation perhaps...
expresses doubt in a manner that leaves the question open for further review, any narrow interpretation that preserves the loophole would be tremendously incongruous with the overall intent of the Act's inspirational documents. It is irrational to think that a Convention which attempts to eliminate torture would only grant "protection" to someone in Abe's hypothetical situation after having been tortured. Such an absurd outcome hardly seems to fit with the provisions of, or the intent behind, the Act.

B. Interpreting the FARR Act in Light of Customary International Law

Even if arguments concerning the intentions behind the Convention and its implementing legislation do not persuade American courts to extend the FARR Act to include intra-state transfers of expatriate American citizens, these courts are nonetheless required to apply the FARR Act in that manner so as to avoid conflict with international law.

"Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."184 In this case, interpreting the FARR Act to allow for the transfer of American citizens into the hands of authorities that would likely torture them is against customary international law and therefore contrary to international law. International custom, which forms a primary source of international law,185 is derived from general practices among nations.186 Among the many practices to have attained the level of an enforceable law is the prohibition on torture.187 The plethora of international agreements is,

184. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114 (1987). Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . .").

185. Bodies such as the International Court of Justice (ICJ), as well as esteemed jurists worldwide, recognize the important primary function of customary international law. The ICJ identifies customary international law as a source of law only second to international treaties and conventions. See Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993; JAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6–14 (7th ed., 2008). But see ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 4 (1971) ("The questions of how custom comes into being and how it can be changed or modified are wrapped in mystery and illogic."); Michael Akehurst, Custom as a Source of International Law, 47 BRIT. Y. B. INT'L L. 1, 1 (1977) ("[I]nternational lawyers . . . invoke rules of customary international law every day, but they have great difficulty in agreeing on a definition. . ."); Mark A. Chinen, Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner, 23 MICH. J. INT'L L. 143, 178 (2001) ("[M]ost commentators acknowledge that opinio juris is a concept for which it is difficult to account with any consistency, even though most acknowledge the need for some concept that will distinguish behaviors that have legal consequences from those that do not."); Phillip R. Trimble, A Revisionist View of Customary International Law, 33 UCLA L. REV. 665, 709 (1986) ("[T]here are basic theoretical problems inherent in the idea of customary international law. . .").

186. BROWNIE, supra note 185, at 6

187. GAIL H. MILLER, DEFINING TORTURE 3 (2008), available at http://www.cardozo.yu.edu/cms/uploadedFiles/FLOERSHEIMER/Defining%20Torture.pdf ("Under customary international law, the prohibition of torture is jus cogens—a peremptory norm that is non-derogable under any circumstances. It is binding on all nations. This elevated status within international law places torture on par with slavery and genocide.") (citations omitted).
by itself, evidence of this. Essentially every international or regional governmental organization has taken a staunch stance against the use of torture. From the loosely confederated cultural organizations to closely-knit economic and political unions, not a single organization condones its use. In addition, the status of international customary law has also been extended to the principle that a State may not send individuals within its custody to a State that practices torture.

Therefore, any interpretation of the FARR Act which would allow the United States to transfer individuals to another State, where it is more likely than not that they will be tortured, would be contrary to customary international law. Consequently, courts must prohibit such transfers to avoid incongruities with international law—whether those transfers occur within the State receiving the individual in custody, or whether the individual must cross borders.

III. PROSECUTING THE CRIME: OBTAINING AND EXERCISING JURISDICTION


191. In much of international law, this principle is called non-refoulement and refers to the transfer of refugees and immigrants to States where there is a likelihood of torture. See Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, and the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267. However, customary international law has expanded this definition to include the transfer of any individual, whether he or she is an immigrant, refugee, or citizen of the transferring country, when there is a substantial risk of torture. Convention Against Torture, supra note 20, at art. 3 ("No State Party shall expel, return ("refouler") or extradite a person to another State. . .") (emphasis added). The Courts of England and Wales have already encountered this issue in the cases of B & Others v. Secretary of State for the Foreign & Commonwealth Office, [2004] EWCA Civ 1344 and R (Al-Saadoon and Mufdhi) v. Secretary of State for Defence, [2008] EWHC 3098 (Divisional Court). In Al-Saadoon, specifically, the petitioners were Iraqi citizens, detained in Iraq by British forces, for crimes they had committed in Iraq. There, the court reasoned that if the treatment to which the petitioners would be exposed in Iraq "was so harsh as to constitute a crime against humanity or . . . there is an immediate likelihood of their experiencing serious injury," then any duty that the United Kingdom had to transfer the petitioners to Iraqi custody would "fall away" as a result of its international obligations. Id. at § 94.
Lastly, critics may point to one more important obstacle to this Article’s theory—if a foreign government, which is often guilty of torturing prisoners in its charge, seeks the transfer or extradition of an American in U.S. custody in order to prosecute or punish him for a crime that he allegedly committed on its territory, and the United States denies that request, does that mean that the alleged criminal may escape prosecution for the crimes that he committed while abroad? Saving a criminal from torture only to let him go unpunished for any acts that he committed is contrary to justice and could generate additional opposition to a custodial State’s refusal to make an intra-territorial transfer of custody. Fortunately, American and international law have already anticipated these circumstances. The following section explains how this works by first showing that States that engage in torture surrender their jurisdiction to prosecute an alleged criminal. Second, this section explains how international law allows the United States to step in and fill the prosecutorial void left by the abusive State. The combined result is that Americans who commit crimes overseas can be brought to justice—even when no State maintains an unquestioned authority to prosecute because the State that normally would have jurisdiction over their crimes has failed to respect international Due Process norms.

A. Implied Consent to Surrender Jurisdiction

Under normal circumstances, American common law prohibits the U.S. government from interfering in the penal processes of foreign governments.

192. This was actually the case of Mr. Mohammad Munaf. While in Iraq, Munaf was allegedly involved in facilitating the kidnapping of a group of Romanian journalists and had even been convicted by Iraqi authorities at the time that his habeas petition reached the Supreme Court. Munaf v. Geren, 553 U.S. 674 (2008).

193. Id. at 697 (stating 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”).

194. It appears that every time an alleged criminal is permitted to escape prosecution because of his foreign citizenship under the doctrine of diplomatic immunity, this creates tension and opposition between the two implicated States and puts a strain on the use of the doctrine. See US embassy cables: US-Romania Relations Threatened by Musician’s Death, http://www.guardian.co.uk/world/us-embassy-cables-documents/130447 (stating that the vehicular homicide of Romanian rock star Teo Peter caused by Staff Sergeant Christopher Van Geothem, the Staff Sergeant’s use of diplomatic immunity, and his immediate flight from Romania were viewed by Romanians “as a slap in the face and an effort to shield the marine from justice,” each putting a significant strain on U.S.-Romanian relations); Rosalyn Higgins, The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience, 79 AM. J. INT’L L. 641, 643-45 (1985) (recounting the story of a woman constable who was shot by a gun fired from the Libyan Embassy and all of the ensuing problems); Tara Young, Diplomat Flees U.S. to Avoid Sex Charges, WASH. POST, Mar. 25, 2005, at B03 (reporting about an Emirati diplomat who was arrested during a sting operation to discover sexual predators). These problems are present even when each State has additional quid pro quo incentives to maintain the status quo for diplomatic immunity. See generally YTITHA SIMBEYE, IMMUNITY AND INTERNATIONAL LAW (2004). However, while refusing the intra-territorial transfer of an alleged criminal may generate that same kind of conflict, it lacks the reciprocal incentives that preserve the practice of diplomatic immunity.
The Supreme Court's *Neely v. Henkel* decision\(^9\) provides a clear example. In that case, Mr. Charles Neely petitioned the Supreme Court, through a writ of habeas corpus, to deny his extradition to Cuba where he was wanted on embezzlement charges.\(^6\) Neely felt that he deserved relief because the prosecution in Cuba would not preserve the rights guaranteed to him by the U.S. Constitution.\(^7\) Of course, the Court found that constitutional "provisions have no relation to crimes committed without the jurisdiction of the United States against the law of a foreign country."\(^8\) More importantly, the Court found that "[w]hen an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people."\(^9\) Essentially, when Americans commit crimes overseas, the foreign authority has exclusive jurisdiction to try them and they must submit to the punishment prescribed by that authority's laws.\(^0\)

However, while foreign authorities have exclusive jurisdiction over individuals who commit crimes within their territory, that jurisdiction is not necessarily absolute. According to the Supreme Court, "[a] sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction."\(^1\) Generally, States expressly consent to surrender their jurisdiction through bilateral agreements—such as a common Status of Forces Agreement.\(^2\) Unfortunately, courts are silent as to what exactly would be an implied surrender of jurisdiction.\(^3\)

Nevertheless, this Article's torture-threatened, expatriate American detainee provides a perfect example of when consent to surrender

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196. Id. at 114–15.
197. Id. at 114. Part of Neely's reasoning was based on the fact that, during the time of the alleged embezzlement and extradition order, Cuba was still under the occupation and control of the United States, much like Iraq during the *Munaf* case. Id. at 115.
198. Id. at 122.
199. Id. at 123.
200. Id.
202. See, e.g., Agreement on the withdrawal of United States Forces from Iraq and the organization of their activities during their temporary presence in Iraq art. 12(3), U.S.-Iraq, Nov. 17, 2008, available at http://graphics8.nytimes.com/packages/pdf/world/20081119_SOFA_FINAL_AGREED_TEXT.pdf ("The United States shall have the primary right to exercise jurisdiction over members of the United States Forces and of the civilian component for matters arising inside agreed facilities and areas; during duty status outside agreed facilities and areas; and in circumstances not covered by [a previous paragraph]."). Smallwood v. Clifford, 286 F. Supp. 97, 100 (D.D.C. 1968) (referring to a Status of Forces Agreement between the United States and the Republic of Korea as having granted a limited waiver of prosecutorial jurisdiction to the United States).
203. Numerous cases cite Wilson's language regarding the surrender of jurisdiction by a State, but none of them ever goes on to explain its dictum and what an implied surrender of jurisdiction may entail. See, e.g., U.S. v. Jho, 534 F.3d 398, 405 (5th Cir. 2008).
jurisdiction should be implied. As has been demonstrated above, U.S.
constitutional and federal law, as well as customary international law and
international treaties, specifically bar the United States from transferring
any detainee into the custody of a State that would likely torture him.\(^\text{204}\)
These laws have put foreign states on notice of the U.S.'s legal obligations
to both its citizens and the world community with respect to individuals in
its custody. In addition, the prohibition on torture has reached the status of
custody international law, and is binding on all States.\(^\text{205}\)

As a result, any State that allows torture to persist within its system,
and yet demands the return of a criminal in American custody, has both
violated international law and (at least) negligently put the U.S. at odds
with its own obligations. Complying with such a request would not only
require the U.S. to contravene its own laws, but it would also make it an
accomplice to the offending State's own criminal activity. Consequently,
States that allow the menace of torture to persist within their borders
should be considered to have impliedly consented to surrender their
jurisdiction to prosecute individuals in the custody of another State.

B. Exercising Prescriptive Jurisdiction

Furthermore, the fact that a detainee committed a crime while overseas
does not necessarily restrict American authorities from prosecuting that
crime in the United States. A State may exercise prescriptive jurisdiction
over the actions of its nationals, even when those nationals are beyond the
territorial jurisdiction of that State.\(^\text{206}\)

The Swedish case of Public Prosecutor v. Antoni\(^\text{207}\) illustrates the
international acceptance of this principle. In Antoni, the defendant, a
Swedish citizen, fell asleep at the wheel while driving in Germany.\(^\text{208}\) His
negligence caused an accident that seriously injured three people, and the
Swedish government decided to prosecute.\(^\text{209}\) The defendant argued that
the Swedish Traffic Penal Code could not be applied "to an act committed

\(^{204}\) See supra Parts I & II. This "more likely than not" standard is essentially a
preponderance of evidence standard. This standard would apply to the threatened individual,
although the endemic use of torture within a territory could contribute to the increased
likelihood of an individual's imminent torture. Detractors may fear the politicization of such a
standard. These fears, however, may be misplaced. Generally, if the Executive makes a
determination to refuse an intra-State transfer, such a decision would be the Executive's
prerogative and any second-guessing by the Judiciary would be overstepping its constitutional
limitations. Nevertheless, as with any foreign policy decision, the broad consequences that
such a refusal may have on foreign relations can temper the effect of politics. If, however, the
Executive were to decide to proceed with a transfer (even for reasons of political expediency),
the detainee would still have the right to challenge that transfer.

\(^{205}\) See supra Part II.B. But see discussion supra note 185.

\(^{206}\) RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987)
("[A] state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or
relations of its nationals outside as well as within its territory.").


\(^{208}\) See id. at 140.

\(^{209}\) See id.
outside of Sweden,"\(^{210}\) but the Swedish Supreme Court disagreed, finding that "in principle every crime committed by a Swedish citizen may be punished, even if committed abroad."\(^{211}\)

American courts have also affirmed the application of this principle. One recent example is the conviction of Chucky Taylor, an American citizen and the son of former Liberian President Charles Taylor, for torture, conspiracy to torture, and the use or possession of a firearm in connection with a crime of violence.\(^{212}\) Among other defenses, Mr. Taylor claimed that the United States could not prosecute him for crimes of torture committed outside of the United States,\(^{213}\) nor could he be prosecuted for the ancillary crime of using a firearm in connection with a violent crime for the same reason.\(^{214}\) The Eleventh Circuit, however, disagreed. According to the court, the United States has long maintained the power to exercise prescriptive jurisdiction over acts committed abroad by its citizens or by foreigners who enter within American territorial limits.\(^{215}\) In addition, the Torture Act, which aims to punish "whoever outside the United States commits . . . torture,"\(^{216}\) clearly targets acts committed by individuals when they are beyond American borders. Finally, because the only limitation that the Eleventh Circuit could find to the ancillary offense of using a firearm in connection with a violent crime, was that the crime must be one which can "be prosecuted in the United States,"\(^{217}\) it too was applicable to extra-territorial offenses.\(^{218}\)

It is important to note, however, that the exercise of extraterritorial prescriptive jurisdiction is not unrestricted. Prescriptive jurisdiction is limited by the reasonableness of its application.\(^{219}\) In the case of this Article’s hypothetical, the commission of a crime and the U.S.’s own legal obligations, which may forbid it from delivering a suspect to a State that would normally be responsible for prosecution, appears reasonable enough.\(^{220}\) Nevertheless, other legitimate reasons for exercising prescriptive

\(^{210}\) Id. at 141.

\(^{211}\) Id. at 145. For another example of a foreign State exercising jurisdiction over the crimes of its nationals committed while abroad, see Re Guitierrez, 24 I.L.R. 265 (Sup. Ct. Mex. 1957), where the Mexican government prosecuted one of its citizens for having stolen an automobile while in the United States.

\(^{212}\) See United States v. Belfast, 611 F.3d 783 (11th Cir. 2010), \textit{cert. denied}, 131 S. Ct. 1511 (2011).

\(^{213}\) See id. at 810.

\(^{214}\) See id. at 793.

\(^{215}\) See id. at 810 (citing United States \textit{v.} Baker, 609 F.2d 136, 136 (5th Cir. 1980) (observing that "[s]ince an early date, it has been recognized that Congress may attach extraterritorial effect to its penal enactments," and that "a nation’s ‘power to secure itself from injury may certainly be exercised beyond the limits of its territory.” (quoting Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234 (1804) (Marshall, C.J.)))


\(^{217}\) Belfast, 611 F.3d at 800 (citing 18 U.S.C. 924(c)(1)(A)).

\(^{218}\) Id.


\(^{220}\) Id. cmt. b. ("The list of considerations in [section 403(2)] is not exhaustive. No priority or other significance is implied in the order in which the factors are listed. Not all considerations have the same importance in all situations; the weight to be given to any
jurisdiction under these circumstances include: the nationality of the alleged criminal,\textsuperscript{221} and the importance of the regulation to the international political and legal systems.\textsuperscript{222}

Even though constitutional and federal law prohibit the U.S. government from transferring expatriate American detainees to States where they will more likely than not face torture, "[t]he United States [can] not be in the business of 'harbor[ing] fugitives.'"\textsuperscript{223} Fortunately, U.S. and international law have provided a means to prosecute American criminals, no matter where their crimes are committed. As a result, the United States can come away from this Article's hypothetical situation with a clear conscience in both senses—at ease knowing that it did not send an individual to face torture, and yet also ensuring that justice is served for any crimes that may have been committed.

CONCLUSION

"Freedom from torture is an inalienable human right."\textsuperscript{224} Indeed, no human being should ever have to suffer from its indignity. It is therefore almost unimaginable to think that in the United States, the issue of whether the government could permissibly surrender one of its expatriate citizens to a State where torture is more likely than not to occur, if that citizen is already located within that State, is unsettled. Yet, that is the opinion of America's Highest Court.\textsuperscript{225}

Nevertheless, this should be a non-issue, as U.S. federal and constitutional law are quite clear: the United States may never be responsible for the torture of American citizens in its custody, either actively through its own dealings, or passively by transferring that citizen into the custody of a foreign government—even in circumstances where the expatriate citizen is already located within the territory of the torturing sovereign. "Torture is wrong, no matter where it occurs, and the United States [should] continue to lead the fight to eliminate it everywhere."\textsuperscript{226} Let us all hope that the Judiciary finds that everywhere also applies to Americans while abroad.

\begin{itemize}
\item \textsuperscript{221} Leading Cases, Jurisdiction Over Americans Held Overseas, 122 HARV. L. REV. 415, 422 (2008) (referring to Munaf v. Geren, 553 U.S. 674 (2008)).
\item \textsuperscript{223} See Munaf, 553 U.S. at 703, n.6 ("It is not settled that the [FARR Act forbidding the transfer of individuals to likely torturers] addresses the transfer of an individual located in Iraq to the Government of Iraq.").
\item \textsuperscript{224} President Bush's Statement on United Nations International Day in Support of Victims of Torture, supra note 222.
\end{itemize}