ity. Rather than completely deprive consumers of the protection provided by state common law actions, the Supreme Court's MDA-related decisions have struck a balance — protecting consumer safety through a complementary system of federal regulation and state civil actions.

B. Habeas Corpus

Jurisdiction over Americans Held Overseas. — The rule of non-inquiry is a judge-made doctrine that bars courts reviewing extradition decisions from "investigating the fairness of a requesting nation's justice system" or the "procedures or treatment which await a surrendered fugitive" once surrendered.[1] It was adopted by the Supreme Court in the early twentieth century, in *Neely v. Henkel*[2] and *Glucksman v. Henkel*,[3] and is grounded on concerns for international comity, the prevention of multiple pronouncements on foreign relations, and comparative institutional competence.[4] But its reach and scope remain uncertain.[5] Some courts have held that the rule does not always prevent them from investigating allegations that extradition will lead to torture,[6] while others have left such determinations solely in the hands of the Executive.[7] More recently, courts have disagreed as to whether the rationales underlying the rule of non-inquiry apply to the government's decisions to transfer Guantánamo detainees to their home countries,[8] where they may face mistreatment.

Last Term, in *Munaf v. Geren*,[9] the Supreme Court ruled that habeas corpus provided no relief to two American citizens who hoped to enjoin their transfer to the Iraqi justice system, holding that courts could not disturb the Executive's assessment of the adequacy of a foreign judicial process.[10] The decision was narrow, and the Court pre-

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1 *See* Hoxha v. Levi, 465 F.3d 554, 563 (3d Cir. 2006) (internal citation and quotation marks omitted).

2 180 U.S. 109 (1901).

3 221 U.S. 508 (1911).

4 *See* Matthew Murchison, Note, *Extradition's Paradox: Duty, Discretion, and Rights in the World of Non-Inquiry*, 43 STAN. J. INT'L L. 295, 304–08 (2007).

5 *See id.*

6 *See, e.g.*, Mironescu v. Costner, 480 F.3d 664, 672–73 (4th Cir. 2007); Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960) ("We can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the [non-inquiry] principle set out above.").

7 *See, e.g.*, Hoxha v. Levi, 465 F.3d 554, 563–64 (3d Cir. 2006); Ahmad v. Wigen, 910 F.2d 1063, 1066–67 (2d Cir. 1990).

8 *Compare* Al-Anazi v. Bush, 370 F. Supp. 2d 188, 194–95 (D.D.C. 2005) (citing the rule of non-inquiry in declining to interfere in executive transfers from Guantánamo), *with* Alhami v. Bush, No. 05-359 (GK), at 3 (D.D.C. Oct. 2, 2007) (order granting preliminary injunction) (considering "evidence that [a Guantánamo habeas petitioner] would face a serious threat of torture if rendered to a Tunisian prison" in temporarily enjoining such a transfer).

9 128 S. Ct. 2207 (2008).

10 *Id.* at 2224–25.

sumably did not intend to affirmatively decide the non-inquiry question in the Guantánamo transfer context, where it is now arising in the lower courts.[11] But the principles outlined in *Munaf* do seem to apply to Guantánamo, and consistency with the opinion seems to require the lower courts to decline to interfere in transfers from Guantánamo. *Munaf* thus may signal a stopping point in the Court's regulation of the war on terrorism, one that sparks worries about potential mistreatment but that is ultimately grounded on practical considerations: the government will be in a difficult spot if it is forced to continue holding people whom it does not have enough evidence to try but whom no judicially approved country will accept.

Shawqi Ahmad Omar and Muhammed Munaf are American citizens who voluntarily traveled to Iraq some time after September 2001. Omar was detained in October 2004 by American military forces under the command of the Multinational Force-I (MNF-I) and accused of harboring terrorists.[12] After learning that the military planned to refer his case to the Central Criminal Court of Iraq, Omar filed a petition for a writ of habeas corpus, alleging that he might face torture by Iraqi authorities and seeking release and the prevention of a transfer.[13] In February 2006, the District Court for the District of Columbia preliminarily enjoined the United States from taking any action that would "remove" Omar from "United States or MNF-I custody."[14]

Shortly thereafter, another judge of the same district court rejected a habeas petition filed by Munaf, who had been tried and sentenced to death by an Iraqi court for helping organize a kidnapping, though he remained in MNF-I custody pending appeal of his conviction to the Iraqi Court of Cassation.[15] Munaf was in the custody either of Iraq or of the MNF-I, but the federal habeas statute, 28 U.S.C. § 2241, only applied to those in U.S. custody.[16] The court relied in part on *Hirota v. MacArthur*,[17] a per curiam opinion in which the Supreme Court denied the habeas petitions of Japanese citizens who were "in the physical custody of U.S. troops," but had been convicted by an Allied military tribunal and thus were not in U.S. custody for habeas purposes.[18]

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[11] *See* Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/wp/analysis-the-meaning-of-munaf (Aug. 26, 2008, 12:54) (noting that over one hundred pending cases turn on questions involving the courts' authority to limit transfers from Guantánamo).

[12] Omar v. Harvey, 479 F.3d 1, 3 (D.C. Cir. 2007).

[13] Omar v. Harvey, 416 F. Supp. 2d 19, 21–23, 28 (D.D.C. 2006).

[14] *See Omar*, 479 F.3d at 11 (emphasis omitted) (internal quotation marks omitted) (quoting the district court's preliminary injunction order).

[15] Munaf v. Geren, 482 F.3d 582, 582–83, 584 n.2 (D.C. Cir. 2007).

[16] Mohammed v. Harvey, 456 F. Supp. 2d 115, 122 (D.D.C. 2006).

[17] 338 U.S. 197 (1948) (per curiam).

[18] *Mohammed*, 456 F. Supp. 2d at 123.

Different panels of the D.C. Circuit reviewed the two cases. The court upheld the injunction against the transfer of Omar.[19] It distinguished *Hirota*, noting that Omar's case differed in two important respects: he was an American citizen, and he had not been criminally convicted in a foreign court.[20] As a result, "[h]abeas proceedings here run no risk . . . of judicial second-guessing of an international tribunal's final determination of guilt."[21] The court then concluded that Omar met § 2241's custody requirement because he was being "held" by U.S. forces.[22] The injunction, which the court believed prevented the military from transferring Omar or alerting the Iraqis if it planned to release him, was proper pending a determination of the lawfulness of the detention and proposed transfer.[23]

A different panel of the D.C. Circuit reviewed and affirmed the dismissal of Munaf's habeas petition. Relying upon the distinction drawn by the panel in *Omar*, the court found that *Hirota* barred its consideration of a habeas petition by a prisoner, even an American citizen, convicted by a foreign court.[24] If the charges against Munaf were dismissed but the U.S. military continued to hold him, the court might then have jurisdiction over a habeas claim, the court reasoned.[25]

The Supreme Court vacated both decisions. Writing for a unanimous Court, Chief Justice Roberts concluded that the habeas corpus statute provided jurisdiction over Munaf and Omar's claims, but that courts had no authority to grant the relief the petitioners sought and to prevent the United States from transferring them to Iraqi control.[26]

Chief Justice Roberts first dispatched with the government's arguments that Omar and Munaf were not covered by 28 U.S.C. § 2241 because they were being held "pursuant to international authority, not 'the authority of the United States.'"[27] The government's acknowledgment that the forces holding Munaf and Omar answered only to American commanders was "the end of the jurisdictional inquiry," Chief Justice Roberts concluded; the two detainees were in "*actual* custody" of the United States even if the United States was acting under the "color of the authority" of the MNF-I.[28] The Court distinguished the per curiam opinion in *Hirota*, noting that it was not clear in that decision whether the detainees were held by a force answering solely

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19 *Omar*, 479 F.3d at 3.
20 *Id.* at 7.
21 *Id.* at 8.
22 *Id.* at 9.
23 *Id.* at 11–13; *see also id.* at 15 (Brown, J., concurring in part and dissenting in part).
24 Munaf v. Geren, 482 F.3d 582, 583 (D.C. Cir. 2007).
25 *Id.* at 584. Judge Randolph wrote a brief opinion concurring in the judgment.
26 *Munaf*, 128 S. Ct. at 2213.
27 *Id.* at 2216 (quoting 28 U.S.C. § 2241(c)(1) (2006)).
28 *Id.* at 2216–17 (emphasis added).

to an American chain of command[29] and that, unlike in *Hirota*, the detainees in *Munaf* were citizens.[30] Thus, the Court concluded, "American citizens held overseas by American soldiers subject to a United States chain of command" can file habeas petitions.[31]

The Court next considered whether habeas could provide the petitioners with any relief. Chief Justice Roberts initially observed that the preliminary injunction granted in Omar's case was clearly inappropriate insofar as it banned the military from sharing information with the Iraqi courts, and in any case had been issued without any discussion of Omar's "likelihood of success" on the merits, a failure that itself warranted a reversal and remand.[32] Because the cases "implicate sensitive foreign policy issues in the context of ongoing military operations," however, the Court nevertheless continued on to discuss the merits of Munaf's and Omar's habeas claims.[33]

Noting that prohibiting the two transfers would "interfere with Iraq's sovereign right to 'punish offenses against its laws committed within its borders,'" the Court found that the petitioners were not entitled to habeas relief.[34] Chief Justice Roberts explained that "[h]abeas is at its core a remedy for unlawful executive detention," and that typically that remedy was release; in contrast, the Court observed, Munaf and Omar desired "a court order requiring the United States to shelter them from the sovereign government" seeking to try them.[35] Such a remedy was unavailable given the numerous cases "mak[ing] clear" that foreign governments have exclusive and plenary authority to try American citizens accused of committing crimes within their territory, the Chief Justice wrote.[36] Citing *Neely v. Henkel*, the Court found that principle to hold even where the foreign government accorded the American a different set of processes and rights than is found under U.S. law or where the prosecution might violate the Constitution.[37]

Though the petitioners had also styled their claim as one for "release," the Court found that since they wanted release "in a form that would avoid transfer," any injunction relating to release would of necessity interfere with Iraq's sovereign right to try them.[38] Further,

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[29] The per curiam opinion was distinguished in this respect from Justice Douglas's subsequently issued opinion concurring in the result, which did emphasize that they were so held. *See* Hirota v. MacArthur, 338 U.S. 197, 207 (1948) (Douglas, J., concurring).

[30] *Munaf*, 128 S. Ct. at 2217–18.

[31] *Id.* at 2218.

[32] *Id.* at 2218–19.

[33] *Id.* at 2220.

[34] *Id.* (quoting Wilson v. Girard, 354 U.S. 524, 529 (1957)).

[35] *Id.* at 2221.

[36] *Id.* at 2221–22.

[37] *Id.* at 2222–23.

[38] *Id.* at 2223.

since MNF-I was holding accused criminals for trial pursuant to Iraq's request, any release order directed at MNF-I, the Court reasoned, would be an illegitimate order "impose[d] . . . on the Iraqi Government."[39] Chief Justice Roberts then noted that the petitioners acknowledged that courts lack authority to collaterally review judgments by foreign tribunals, and concluded that the "same principles of comity and respect for foreign sovereigns" prevent our judiciary from interfering with ongoing proceedings.[40] Such interference is particularly inappropriate in situations where our executive branch is working with the foreign government to fight insurgency, he concluded.[41]

The Chief Justice turned finally to address Munaf's claim that he would be tortured if transferred to Iraqi custody.[42] An inquiry into such claims, the Court found, was for the political branches; diplomacy, not judicial decision, was the proper avenue to ensure that American citizens were accorded fair treatment by the courts of foreign sovereigns.[43] The Court noted the Executive could of its own accord "decline to surrender a detainee" for humanitarian reasons and observed that "this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway."[44] Indeed, the State Department had suggested that the Iraqi Justice Ministry was not a part of the government that was likely to commit abuses, and the Court explained that from an institutional perspective, "[t]he Judiciary is not suited to second-guess" executive determinations about foreign justice systems.[45] Because the issue had not been properly raised, the Court declined to consider the possible impact of the Foreign Affairs Reform and Restructuring Act of 1998[46] (the FARR Act). The statute bars the United States from returning a detainee to a country if there are "substantial grounds for believing" that torture would result.[47]

In a brief concurrence, Justice Souter[48] suggested that the Court's opinion was very narrow and held only that habeas provided no relief in situations involving circumstances like those of Munaf and Omar. He noted that those circumstances included voluntary travel, detention

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[39] *Id.* at 2223–24.

[40] *Id.* at 2224 (quoting Omar v. Harvey, 479 F.3d 1, 17 (D.C. Cir. 2007) (Brown, J., concurring in part and dissenting in part)).

[41] *Id.* at 2224–25.

[42] Omar, the Court noted, had not raised such a claim in his habeas petition.

[43] *Munaf*, 128 S. Ct. at 2225.

[44] *Id.* at 2226.

[45] *Id.*

[46] Pub. L. No. 105-277, div. G, 112 Stat. 2681, 2681-761 [hereinafter FARR Act].

[47] *Id.* § 2242(a), 112 Stat. 2681-822. The Court also rejected the petitioners' argument that the United States was required to but did not cite affirmative legal authority, such as a statute or treaty, that would permit a transfer of citizens to Iraqi authority. *Munaf,* 128 S. Ct. at 2227.

[48] Justice Souter was joined by Justices Ginsburg and Breyer.

in the territory of a United States ally in a time of hostilities involving American troops, a claimed violation that occurred in the sovereign nation's territory, and finally a determination by the government that mistreatment was unlikely.[49] He emphasized that substantive due process might provide some protections in a situation where the Executive had acknowledged the likelihood of torture upon transfer.[50]

Munaf was mostly overshadowed by the constitutional habeas decision that was released the same day, *Boumediene v. Bush*,[51] and its reach remains uncertain. Read narrowly, *Munaf* extends statutory habeas rights, but to a limited group — American citizens detained by American forces in Iraq in a noncombat situation — and curtails the relief available under habeas, but in a limited situation — where the United States is acting as the jailer for a sovereign nation seeking to try crimes on its own soil. The extension of statutory habeas does seem limited, especially given Chief Justice Roberts' note that it applied only in the "foregoing circumstances."[52] But a narrow reading on the second question seems more suspect, and its implications are more immediately pressing: even with jurisdiction, can a court applying *Munaf* enjoin the transfer of detainees to a foreign country where they might be subject to torture? Though *Munaf* was less than clear, its principles may imply a stopping point in Guantánamo litigation. The courts have been eager to review the government's treatment of detainees, but *Munaf* indicates that the Supreme Court has called a halt to judicial review of the handing off of detainees to other governments — and Guantánamo detainees may be out of luck.

The transfer of war-on-terror detainees to their home countries or to other countries that will accept them has become an increasingly important tool for the American government, especially as detention and trials at Guantánamo and in secret CIA prisons have come under criticism.[53] In the past two years, the United States has sent over 200 foreigners captured in Iraq and Afghanistan directly to their home countries for purposes of imprisonment or interrogation,[54] and since 2002 it has effected similar transfers of over 500 people who were captured abroad but initially detained at Guantánamo.[55] Many of the

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[49] *Munaf,* 128 S. Ct. at 2228 (Souter, J., concurring).

[50] *Id.*

[51] 128 S. Ct. 2229 (2008).

[52] *Munaf*, 128 S. Ct. at 2218. The quotation was a reference to similar language in *Hirota*.

[53] *See, e.g.*, Mark Mazzetti & Eric Schmitt, *Military Sending Foreign Fighters to Home Nations*, N.Y. TIMES, Aug. 28, 2008, at A1.

[54] *Id.* (suggesting the decision was taken after government officials realized that Guantánamo was a "strategic failure" (internal quotation mark omitted)).

[55] *See* Press Release, U.S. Dep't of Def., Detainee Transfer Announced (Aug. 26, 2008), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=12163.

prisoners left in Guantánamo are those whom no other country is willing to accept.[56]

Not surprisingly, the transfer policy has garnered criticism from human rights groups, centering on allegations that the recipient countries — countries like Saudi Arabia, Iran, and Libya[57] — torture the detainees, or at the least do not provide sufficient procedural protections prior to imposing long-term imprisonment.[58] Before the decision in *Munaf*, some courts had enjoined transfers from Guantánamo on those basic grounds, despite the general prohibition on inquiries into the workings of a foreign judicial system. For example, a district judge in the District of Columbia granted a preliminary injunction barring the government from sending a Tunisian citizen back to his home country to face a twenty-year jail sentence, noting that there were "serious doubts" about the validity of his Tunisian conviction and that he might be tortured in Tunisian jails.[59] And the D.C. Circuit remanded a habeas petition by a Guantánamo detainee who claimed he would be tortured if transferred to Algeria, albeit on slightly different grounds: it noted that the government might not have authority to transfer the detainee if a court found it had no authority to hold that detainee in the first place.[60]

One potential lasting effect of *Munaf* — at least in the near future — will be its impact on the more than one hundred pending cases of this type, cases where potential transferees from Guantánamo are attempting to use habeas to challenge their transfer. In a case recently argued in the D.C. Circuit, a group of ethnic Uighurs whom the United States sought to transfer to China argued *Munaf* did not preclude inquiry into their likely treatment there;[61] the government contended that protests grounded on potential treatment in a recipient country are, post-*Munaf*, indisputably beyond the province of the judiciary.[62] One commentator has noted that the question arising in that case is still undecided, observing that "[i]t seems unlikely, at a minimum, that the Supreme Court, in deciding *Munaf*, thought it was

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[56] *See* Carol J. Williams, *Guantanamo Detainees Face an Uncertain Future*, L.A. TIMES, Dec. 9, 2007, at A3.

[57] *Id.*

[58] *See, e.g.*, William Glaberson, *Judge Halts Plan To Transfer Guantánamo Detainee*, N.Y. TIMES, Oct. 10, 2007, at A20 (noting such criticism in the context of a judicial decision to halt a transfer to Tunisia).

[59] *See* Alhami v. Bush, No. 05-359 (GK), at 2–3 (D.D.C. Oct. 2, 2007) (order granting preliminary injunction); *see also* Glaberson, *supra* note 58 (noting the decision "appears to be the first ruling of its kind").

[60] *See* Belbacha v. Bush, 520 F.3d 452, 456 (D.C. Cir. 2008).

[61] *See* Supplemental Brief for Appellees/Cross-Appellants at 17–20, Kiyemba v. Bush, No. 05-5490 (D.C. Cir. Aug. 21, 2008), 2008 WL 3920739

[62] *See* Supplemental Brief for Appellants at 23–26, Kiyemba v. Bush, Nos. 05-5487, 05-5489 (D.C. Cir. Aug. 21, 2008), 2008 WL 3920738.

choosing up sides in that broad argument."[63] In fact, however, Chief Justice Roberts's decision gives three broad (and related) rationales where it outlines why inquiry into foreign treatment is inappropriate: international comity, concerns about shackling the Executive in the war on terrorism, and a conclusion that the executive branch is institutionally most competent to make such an inquiry. Despite differences between the now-arising Guantánamo cases and those of Munaf and Omar, these rationales largely apply to Guantánamo decisions. While the Court has been willing to step in to regulate the trial and treatment of detainees,[64] on some level *Munaf* may reflect a kind of prudent stopping point in the Court's regulation of the war on terrorism.

The Chief Justice's first justification had to do with Iraq's sovereign right to punish crimes committed on its own soil and the Court's belief that the United States could not be in the business of "harbor[ing] fugitives" because of disagreements about the quality of Iraq's judicial system.[65] Principles of international comity required the result: the idea is that where the government has agreed to an extradition treaty, it would be disrespectful to foreign sovereigns to find their judicial systems wanting and would "imperil . . . amicable relations" to decline to fulfill America's part of the extradition bargain.[66] Arguably, in at least some Guantánamo cases, the latter issue may present less of a concern, given that in some cases the United States is asking the recipient country to take the prisoners, rather than being asked for them; China has not charged the Uighurs detained at Guantánamo with any crime, for example. But the avoidance of disrespect, which courts have also said militates against "requiring a foreign nation . . . to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced,"[67] applies as much to the case of Guantánamo as to *Munaf*. Indeed, it suggests a more pragmatic reason why non-inquiry would make sense in the Guantánamo context — in the situation where the United States is asking a foreign country to take back a prisoner, that country may be much more reluctant to do so if it faces the prospect of an embarrassing ruling by a United States court as to its likelihood to commit torture.

The other justifications for non-inquiry, as described in *Munaf*, are even more generally applicable. The Justices were concerned with the

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[63] *See* Denniston, *supra* note 11.

[64] *See* Boumediene v. Bush, 128 S. Ct. 2229 (2008); Hamdan v. Rumsfeld, 542 U.S. 507 (2004).

[65] *See Munaf*, 128 S. Ct. at 2223–24.

[66] *See id.* at 2224 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 418 (1964)); Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1230–31 (1991).

[67] Ahmad v. Wigen, 910 F.2d 1063, 1067 (2d Cir. 1990) (citing Jhirad v. Ferrandina, 536 F.2d 478, 484–85 (2d Cir. 1976)).

pragmatic realities of the war on terrorism, noting that "MNF-I detention is an integral part of the Iraqi system of criminal justice"[68] and that it "would be more than odd if the Government had no authority to transfer them to the very sovereign on whose behalf, and within whose territory, they are being detained."[69] Inquiring into the conditions of Iraqi judicial treatment would thus interfere with "the Executive's ability to conduct military operations abroad"[70] and with the project of restoring order in Iraq. The considerations are different in the Guantánamo context, certainly, since the United States is not necessarily holding the detainees on anyone's behalf. But looking to the future, a decision preventing transfer could put the United States in an untenable situation where it could not arrest or hold suspected terrorists in war zones for fear that once it had them, it would be unable to get rid of them. This concern might explain why the Court chose to reach the merits of Munaf and Omar's habeas claims even though it did not have to do so:[71] the lower court's inquiry into expected treatment, and according arrogation of the power to stop a transfer, was so far beyond the powers of a federal court and represented such a threat to the successful prosecution of the war on terrorism that the Court believed it important to send a signal that enough was enough.

But most importantly, and most broadly, the Court chose non-inquiry because it found that the executive branch is more competent to assess the realities of another country's judicial system and its likelihood of committing torture. The judicial branch, in contrast, is "not suited to second-guess such determinations,"[72] particularly because the Executive might be relying on diplomatic assurances or other sensitive foreign communications. This finding, which has long driven the rule of non-inquiry,[73] clearly pertains in the context of Guantánamo, since the nature of a foreign government's interest in a war-on-terror detainee might not be something properly disclosed to a court, though it certainly bears on the potential for torture.

Whether this result is right is a more difficult question, particularly in light of the government's apparent willingness to countenance torture in its own prosecution of the war on terrorism. A concern that the Executive is the only stopgap against mistreatment is especially powerful in the context of the government's extraordinary rendition program. In one well-known rendition case, *Arar v. Ashcroft*,[74] the

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[68] *Munaf*, 128 S. Ct. at 2223.
[69] *Id.* at 2227.
[70] *Id.* at 2224.
[71] *Id.* at 2220.
[72] *Id.* at 2226.
[73] *See* Murchison, *supra* note 4, at 302.
[74] 532 F.3d 157 (2d Cir. 2008).

Second Circuit dismissed the lawsuit of a Canadian citizen who was sent to Syria by the U.S. government and then allegedly tortured.[75] The case will be reheard en banc,[76] and *Munaf* may well figure in the briefing or the decision, for its application of a non-inquiry rule suggests that courts should not halt transfers, even in cases like Arar's.

The Court did leave a sliver of light for detainees: it questioned but did not rule out the possibility that Munaf and Omar could have cognizable claims under the FARR Act, which implements the United Nations Convention Against Torture and bars the United States from returning detainees to countries where there are "substantial grounds" to believe they might face torture.[77] Chief Justice Roberts suggested two reasons why the statute might not apply in the context of *Munaf*: first, it may only cover detainees who face "return" to a country (Munaf and Omar were already in Iraq); and second, it may only permit claims in the context of immigration proceedings.[78] Guantánamo detainees presumably do face "return," but the Court's second caveat is more difficult to overcome. Indeed one circuit has already held that the FARR Act's language precludes its use outside of immigration cases.[79] Thus it is highly questionable whether the statute would be available in the Guantánamo context. Even if detainees can clear this hurdle, however, the United States has defined the FARR Act's "substantial grounds" language quite narrowly,[80] and courts adjudicating FARR Act claims in immigration cases have sometimes declined altogether to review factual findings about the likelihood of torture.[81] Following *Munaf*, then, the only real restraint on the transfer of prisoners to abusive foreign states may be the forbearance of the executive branch.

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[75] *Id.* at 162–63.

[76] Arar v. Ashcroft, No. 06-4216 (2d Cir. Aug. 12, 2008) (order granting hearing in banc).

[77] FARR Act, *supra* note 46, § 2242(a), 112 Stat at 2681-822.

[78] *See Munaf*, 128 S. Ct. at 2226 n.6.

[79] *See* Mironescu v. Costner, 480 F.3d 664, 676 (4th Cir. 2007) (citing FARR Act, *supra* note 46, § 2242(d), 112 Stat. at 2681-822). The Ninth Circuit has offered two conflicting but nonauthoritative opinions on the subject. *Compare* Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1013 (9th Cir. 2000) (finding that FARR Act review is available in a non-immigration context), *with* Cornejo-Barreto v. Siefert, 379 F.3d 1075, 1082, 1086 (9th Cir. 2004) (finding that it is not and noting that the prior *Cornejo-Barreto* decision was "advisory and thus, non-binding"), *vacated as moot*, 389 F.3d 1307 (9th Cir. 2004).

[80] *See* FARR Act, *supra* note 46, § 2242(f), 112 Stat. at 2681-822 to 2681-823 (stating that terms in § 2242 have the meanings of the same terms in the Convention Against Torture, subject to the same reservations); 136 CONG. REC. 36,198 (1990) (noting that for the purposes of the Convention Against Torture, "the United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' . . . to mean 'if it is more likely than not that he would be tortured'").

[81] *See* Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 690 (2006).