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NONREFOULEMENT UNDER THE CONVENTION AGAINST TORTURE: HOW U.S. ALLOWANCES FOR DIPLOMATIC ASSURANCES CONTRAVENE TREATY OBLIGATIONS AND FEDERAL LAW

“Freedom from torture is an inalienable human right These times of increasing terror challenge the world But we will not compromise the rule of law or the values and principles that make us strong. Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.”

-President George W. Bush¹

INTRODUCTION

Before the September 11th terrorist attacks on the U.S. and the ensuing “war on terror,” the word “torture” still carried the stigma of pre-Enlightenment hysteria, from the Spanish Inquisition to witch hunts in Italy, France, and Germany.² The United States, founded on the post-torture, Enlightenment concept of inalienable natural rights, has never been stained with this medieval blood.³ Yet, today, the United States faces intense criticism, both abroad⁴ and at home, for its methods of fighting terrorism.⁵ The question of whether preventing terrorist acts justifies torturing suspects to obtain information has become a topic of

1. President’s Statement on United Nations International Day in Support of Victims of Torture, 2003 WL 21471582 (White House)(June 26, 2005), *also available at* <http://www.state.gov/g/drl/rls/45738.htm#annex2>.

2. See John H. Langbein, *The Legal History of Torture*, in TORTURE: A COLLECTION 93 (Sanford Levinson ed., 2004); RICHARD S. DUNN, THE AGE OF RELIGIOUS WARS (1559-1715) 129, 132—133 (2d ed., 1979) (1970).

3. While America experienced its own witch hunts in Salem, in 1692, New England law followed the Anglo common law judicial system, which, having replaced the ordeal system of proof with the jury trial, did not investigate under torture. See Langbein, *supra* note 2, at 99. *But see* Jerome H. Skolnick, *American Interrogation: From Torture to Trickery*, in TORTURE: A COLLECTION, *supra* note 2, at 105 (asserting that torture *is*, contrary to popular belief, a feature of American heritage, evidenced by lynchings and use of “the third degree” in police interrogation).

4. See “Court Issues European Arrest Warrants for 22 CIA Agents,” *Los Angeles Times*, December 23, 2005; “Europe Fears Linger on US Torture,” *CNN.com*, December 9, 2005, <http://edition.cnn.com/2005/WORLD/europe/12/09/rice.europe.ap> (last visited December 24, 2005).

5. See, e.g., Bob Herbert, “Dangerous Territory,” *New York Times*, December 19, 2005.

enormous public outrage, controversy, and discourse in the United States. Convictions (and photos) of American soldiers torturing detainees at the Abu Ghraib military prison⁶ have thrust the American public into a roiling debate over the role of torture and international law in the U.S.'s war on terror.⁷ The debate has risen to the level of congressional investigations⁸ and legislation,⁹ fueled by reports of prisoner abuse at Guantanamo¹⁰ and accounts of secret "extraordinary renditions"¹¹ to countries

6. See Seymour Hersh, "The Gray Zone," *The New Yorker*, May 24, 2004; Seymour Hersh, "Torture at Abu Ghraib," *The New Yorker*, May 10, 2004. See also, "Prisoner Abuse Scandal: Full Coverage of the Investigations into the Mistreatment of Detainees by U.S. Soldiers in Iraq and Afghanistan," *Baltimore Sun*, <http://www.baltimoresun.com/news/nationworld/iraq/bal-prisonerabuse,0,382271.storygallery?coll=bal-iraq-storyutil> (last visited April 4, 2007); Edward Alden and Dmitri Sevastopulo, "One Year On, Public Disquiet on Abu Ghraib Reverberates," *Financial Times*, April 27, 2005; "All But One Top Officer Cleared on Abu Ghraib," *International Herald Tribune*, April 25, 2005.

7. See, e.g., *NewsHour with Jim Lehrer: Debating the Efficacy of Torture in Interrogation* (PBS television broadcast Dec. 2, 2005) (transcript available at http://www.pbs.org/newshour/bb/military/july-dec05/torture_12-02.html).

8. See, e.g., Committee on Oversight and Government Reform, Chairman Henry A. Waxman, 110th Congress, "Investigations, Abu Ghraib Prison Abuses," <http://oversight.house.gov/investigations.asp?Issue=Abu+Ghraib+Prison+Abuses> (last visited April 4, 2007); "Abu Ghraib: Congressional Investigation," SourceWatch, a project for the Center for Media & Democracy, http://www.sourcewatch.org/index.php?title=Abu_Ghraib:_Congressional_Investigation#Congressional_Calls_for_Action (last modified June 4, 2005).

9. See Torture Outsourcing Prevention Act, H.R. 952, 109th Cong. (2005) ("Markey Bill"), reintroduced, H.R. 1352, 110th Cong. (2007); The Convention Against Torture Implementation Act, S. 654, 109th Cong. (2005) ("Leahy Bill"). The Leahy Bill would supersede Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, Pub.L. No. 105-277, §2242, 112 Stat. 2681-761, 2681-822 (codified at 8 U.S.C. §1231)[hereinafter *FARRA*] and make written or verbal diplomatic assurances against torture, *infra* notes 22 and 23, insufficient to relieve the prohibition against returning a person to a place where there are substantial grounds to believe that he will be tortured. The Markey Bill would amend, not supersede, Section 2242 of FARRA, to require an independent judicial process whereby a person can challenge any diplomatic assurances against torture, and, specifically in the immigration context, to make the sole reliance on such assurances an insufficient basis for believing the person would not be tortured if removed to the country in question.

10. See Dan Eggen and R. Jeffrey Smith, "FBI Agents Allege Abuse of Detainees at Guantanamo Bay," *Washington Post*, December 21, 2004. See also, Eric Schmitt and Tim Golden, "Force-Feeding at Guantanamo is Now Acknowledged," *New York Times*, February 22, 2006; "Prisoner Abuse Scandal," *Baltimore Sun*, *supra* note 6.

11. Extraordinary rendition, as defined by a European Parliamentary committee in its investigation of CIA counterterrorism activities in Europe, is an "extra-judicial practice which contravenes established international human rights standards and whereby an individual suspected of involvement in terrorism is illegally abducted, arrested and/or trans-

with documented instances of state torture such as Egypt, Morocco, and Syria, and secret prisons.¹² The U.S. war on terrorism has also served as an impetus to tighten immigration laws and to interlock them with anti-terrorism measures.¹³ Not long after the attacks of September 11th, President George W. Bush issued a statement titled, “Combating Terrorism through Immigration Policies,”¹⁴ and the Immigration and Naturalization Service was made part of the newly created Department of Homeland Security.¹⁵ Still, Congress has recognized that while there may exist an

ferred into the custody of US officials and/or transported to another country for interrogation which, in the majority of cases, involves incommunicado detention and torture.” European Parliament, Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, *Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners*, ¶36, Doc A6-0020/2007 (January 30, 2007). Or, as one anonymous American official put it, “We don’t kick the [expletive] out of them. We send them to other countries so *they* can kick the [expletive] out of them.” Dana Priest and Barton Gellman, “U.S. Decries Abuse but Defends Interrogations,” *Washington Post*, December 26, 2002, A1. See also Guy Dinmore, “US Tries to Assure Allies that Extraordinary Renditions are Over,” *Financial Times*, December 27, 2006; Craig Whitlock, “Probe of Detainee Transfers Finds Many CIA Flights,” *Washington Post*, April 27, 2006, A20.

12. See Jane Mayer, “Outsourcing Torture,” *The New Yorker*, February 7, 2005. See also Demetri Sevastopulo, Guy Dinmore, Christopher Condon, “Brussels to Probe Claims of Secret CIA Jails,” *Financial Times*, November 3, 2005; Bob Herbert, “Our Friends, the Torturers,” *New York Times*, February 18, 2005; “Rice is Challenged in Europe over Secret Prisons,” *New York Times*, December 7, 2005.

13. Post September 11th, changes to immigration laws have been proposed and enacted as part of security and anti-terrorism bills. The REAL ID Act not only made changes to admission procedures at points of entry but also eliminated district courts’ jurisdiction over removable aliens’ habeas claims. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, §106, 119 Stat. 302 (*amending* 8 U.S.C. 1252(B)(4))[hereinafter *REAL ID Act*]. *But see* Enwonwu v. Chertoff, 376 F.Supp. 2d 42, 67 n.20 (D.Mass. 2005) (where alien habeas petitioner challenged the constitutionality of the government’s order of removal under substantive due process, the federal district court affirmed that “[d]espite the language of section 1252(g), federal courts retain ‘subject matter jurisdiction over habeas petitions brought by aliens facing removal to the extent that those petitions are based on colorable claims . . . that an alien’s statutory or constitutional rights have been violated’” (internal citation omitted). Most recently, the House of Representatives passed the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, which further amends the immigration regulations. H.R. 4437, 109th Congress, 1st Session. See also Margaret D. Stock, “United States Immigration Law in a World of Terror,” National Security White Papers, the Federalist Society, 2003, available at <http://www.fed-soc.org/Publications/Terrorism/immigration.htm>.

14. Presidential Directive on Combating Terrorism Through Immigration Policies, 37 PUB. PAPERS 44, Nov. 5, 2001), also available at <http://www.whitehouse.gov/news/releases/2001/10/20011030-2.html>.

15. See WHITE HOUSE, DEPARTMENT OF HOMELAND SECURITY, (2002), <http://www.whitehouse.gov/deptofhomeland/book.pdf>.

important nexus between immigration and terrorism,¹⁶ the government must still provide aliens with due process and fairness.¹⁷ It has, in addition, along with the President's Office and the judiciary, affirmed the United States' obligation and commitment under domestic and international law to stand against and prohibit torture under any circumstances.¹⁸

Numerous international organizations, human rights groups, and legal scholars¹⁹ have voiced concern that diplomatic assurances from countries that an alien will not be tortured do not adequately guarantee the right to be free from torture.²⁰ Under current immigration regulations, the U.S. cannot remove, or deport, an alien to a country where he faces a substan-

16. But see Hearing Before the Subcommittee on Immigration, Border Security, and Claims of the House Comm. on the Judiciary: Immigration Relief Under the Convention Against Torture For Serious Criminals and Human Rights Violators, 108th Congress. 3 (2003) (statement of Rep. Sheila Jackson Lee, Ranking Member of the House Subcommittee on the Judiciary), available at <http://judiciary.house.gov/legacy/88220.pdf> [hereinafter Immigration Relief Hearing] ("I always remind my colleagues that immigration does not equate to terrorism").

17. See War on Terrorism: Immigration Enforcement Since September 11, 2001: Hearing Before the Subcommittee on Immigration, Border Security, and Claims of the Committee on the H. Comm. on the Judiciary, 108th Congress (2003), available at <http://judiciary.house.gov/media/pdfs/printers/108th/86954.pdf> [hereinafter War on Terrorism Hearing Report].

18. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980) [hereinafter *Filartiga I*]; *Second Periodic Report of the United States of America to the Committee Against Torture* (2005), available at <http://www.state.gov/g/drl/rls/45738.htm>; see also Reuters, "House Passes Torture Ban, War Funding," *Washington Post.com*, December 19, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/19/AR2005121900801.html>.

19. The Secretary General, Interim Report of the Special Rapporteur of the Commission on Human Rights, delivered to the General Assembly, U.N. Doc A/60/316 (Aug. 30, 2005); The Association of the Bar of the City of New York, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions,"* 60 *The Record* 13, 47 n.100 (2005) [hereinafter ABCNY report]; MICHAEL JOHN GARCIA, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, *RENDITIONS: CONSTRAINTS IMPOSED BY LAWS ON TORTURE* (2005), <http://www.fas.org/spp/crs/natsec/RL32890.pdf>; Human Rights Watch report, *Empty Promises: Diplomatic Assurances No Safeguard Against Torture*, Vol. 16, No. 4D, April 2004, also available at <http://hrw.org/reports/2004/un0404/diplomatic0404.pdf> (last visited December 24, 2005) [hereinafter HRW Report].

20. See Breffni O'Rourke, "Rice Defends Terror Practices as Europe Faces Tough Questions," *RadioFreeEurope Radio Liberty*, December 6, 2005, <http://www.rferl.org/featuresarticle/2005/12/3fc7f75f-e6a8-4fe3-ab7f-833336b06ac2.html>; see also Michael John Garcia, *supra* note 19.

tial risk of torture.²¹ However, if the Secretary of State obtains diplomatic assurances from such a country that the alien will not be tortured and forwards the assurances to the Attorney General, then the alien may be removed without further administrative review.²² In addition, the diplomatic assurances may not be reviewed in federal courts.²³

This note will argue that the U.S.'s current use of diplomatic assurances must—but fails to—comply with Convention Against Torture

21. Implementation of the Convention Against Torture, 8 C.F.R. §208.18 (2005). The regulations implemented FARRA, *supra* note 9, congressional legislation enacting CAT. Section 2242(a) states:

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.

22. Diplomatic Assurances Against Torture Obtained by the Secretary of State, 8 C.F.R. §208.18(c) (2005)[hereinafter *Diplomatic Assurances*].

(1) The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.

(2) If the Secretary of State forwards assurances described in paragraph (c)(1) of this section to the Attorney General for consideration by the Attorney General or her delegates under this paragraph, the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention Against Torture. The Attorney General's authority under this paragraph may be exercised by the Deputy

Attorney General or by the Commissioner, Immigration and Naturalization Service, but may not be further delegated.

(3) Once assurances are provided under paragraph (c)(2) of this section, the alien's claim for protection under the Convention Against Torture shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

23. The Attorney General and Secretary of State determine whether diplomatic assurances against torture safeguard removal in compliance with CAT, 8 C.F.R. §§208.17(f), 208.18(c), (e) and such discretion is non-reviewable. Judicial Review of Orders of Removal, 8 U.S.C. §1252(a)(2)(B)(ii) ("no court shall have jurisdiction to review any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security. . .").

("CAT")²⁴ treaty obligations and customary international law.²⁵ Under the *Charming Betsy* doctrine,²⁶ the Supreme Court has long held that treaties, like statutes, are the "law of the land,"²⁷ and that subsequent laws cannot violate them without express Congressional intent.²⁸ Congress has *not* expressly stated any intention to derogate from its *non-refoulement* obligations under CAT;²⁹ in fact, recent bills and congressional hearings reaffirm Congress's intent to safeguard CAT's absolute protection against torture.³⁰ Therefore, current regulations must be amended, for the use of non-reviewable and insufficiently reliable diplomatic assurances, whether or not given in good faith, effectively derogates from CAT's prohibition against torture.³¹

24. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (1984) [hereinafter *CAT*].

25. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S., §702 (1987). Customary international law, once established by the practice of states that base that practice upon a sense of legal obligation, also binds those states that do not follow that practice and/or have not directly or tacitly expressed their consent to be bound by it. *See, e.g.* the *Lotus Case*, *France v. Turkey*, 1927 P.C.I.J., Ser. A, No. 10 (1926) (construing "principles of international law" as "the principles which are in force between all independent nations.>").

26. *Murray v. The Charming Betsy*, 6 U.S. 64, 2 Cranch 64 (1804).

27. *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). *See* U.S. CONSTITUTION art. 3 §2.

28. Courts must interpret federal statutes in a way that avoids violating international law. *See* *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (*citing* *Murray v. The Charming Betsy*, 6 U.S. 64, 2 Cranch 64 (1804) and *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963)), *cited and followed by* *Ma v. Reno*, 208 F.3d 815, 829 (9th Cir. 2000).

29. *CAT*, *supra* note 24, at art. 3. "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

30. *See, e.g.*, Markey Bill and Leahy Bill, *supra* note 9. *See also* Immigration Relief Under the Convention Against Torture for Serious Criminals and Human Rights Violators: Hearing Before the Subcommittee on Immigration, Border Security, and Claims of the House Comm. on the Judiciary, 108th Congress (2003), *available at* <http://judiciary.house.gov/legacy/88220.pdf>.

31. The UN Special Rapporteur Manfred Nowak concluded the following in his 2005 report to the UN General Assembly: "It is the view of the Special Rapporteur that diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are sought usually from States where the practice of torture is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated. The Special Rapporteur is therefore of the opinion that States cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be

Part I of this note will set forth the international law instruments prohibiting torture and the return of an individual to a substantial risk of torture. It will describe the U.S.'s obligations under international law and the various domestic laws it has implemented in order to fulfill these obligations. Part II will analyze these domestic laws and regulations under the *Charming Betsy* doctrine,³² the Administrative Procedure Act,³³ and constitutional law principles, ultimately concluding that U.S. law does not implement the U.S.'s international obligations and that they violate the Separation of Powers doctrine and due process.³⁴ Part III will argue for a judicial review mechanism of diplomatic assurances that fairly balances the various competencies and interests of the judiciary and the executive branch. Such a proposal is informed by current state practices outside the United States.

I. INTERNATIONAL LAW PROHIBITING TORTURE

Since World War II, the international community has formally prohibited torture through numerous treaties and declarations,³⁵ as well as mu-

in danger of being subjected to torture or ill-treatment upon return.” *Interim Report, supra* note 19. The European Court of Human Rights (ECHR) has held that CAT’s Article 3 prohibition of torture includes the principle of nonrefoulement in *Soering v. The United Kingdom*, [1989] Eur. Ct. H.R. 14038/88. The ECHR has also held that even diplomatic assurances that are given in good faith may be an inadequate guarantee of safety for return to a country where torture is a “recalcitrant and enduring problem.” *Chahal v. The United Kingdom*, [1996] Eur. Ct. H.R. 22414/93 ¶105. Even if the U.S. withdrew from the nonrefoulement provision of CAT, it would still be obligated to prohibit the return to torture under customary international law. Vienna Convention on the Law of Treaties, art. 43, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679. The Vienna Convention’s interpretive authority over treaties has been recognized and followed by the U.S. State Department and several federal appeals courts. See Maria Frankowska, *The Vienna Convention Before the United States Courts*, 28 VA. J. INT’L L. 281 (1988).

32. *Charming Betsy* doctrine, *supra* notes 26 and 28.

33. Administrative Procedure Act, 5 U.S.C. §§551-559, 701-706 (2000)[hereinafter *APA*]. The APA ensures that final agency action can be reviewed by the federal courts when no other remedy is available, 5 U.S.C. §704 (2000), except for several specified agencies, such as military agencies during wartime and political party agencies. Immigration agencies are not exempt from the APA.

34. *Infra* Section II(B)(3).

35. See, e.g., Convention Against Torture, *supra* note 24; International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 3rd Comm., 21st Sess., 1496th plen. Mtg. at 49, U.N. Doc. A/RES/2200A (XXI), at art. 7 (1966) (providing that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”); Universal Declaration on Human Rights, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316, at art. 5 (1948) (providing that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”).

nicipal (domestic) constitutions and laws.³⁶ According to the Restatement 3d of the Foreign Relations Law of the U.S., the prohibition against torture is also customary international law.³⁷ Finally, torture may also be considered a violation of peremptory international norms (*jus cogens*),³⁸ as its prohibition is found in “all comprehensive international instruments:”³⁹ the Geneva Conventions;⁴⁰ Universal Declaration of Human Rights;⁴¹ International Covenant on Civil and Political Rights;⁴² European Convention on Human Rights;⁴³ American Convention on Human

36. See, e.g., in the *United States*, 18 U.S.C. §2340(A); “Torture Victim Protection Act,” 8 C.F.R. §208.18 [hereinafter *TVPA*]; FARRA, *supra* note 9.

37. RESTATEMENT, *supra* note 25. Regarding torture in particular, “[e]ven persons who are not entitled to the protections of the 1949 Geneva Conventions (such as some detainees from third countries) are protected by the “fundamental guarantees” of article 75 of Protocol I of 1977 to the Geneva Conventions. The United States has long considered article 75 to be part of customary international law (a widely supported state practice accepted as law). Article 75 prohibits murder, “torture of all kinds, whether physical or mental,” “corporal punishment,” and “outrages upon personal dignity, in particular humiliating and degrading treatment, . . . and any form of indecent assault.” Human Rights Watch, *Summary of International and U.S. Law Prohibiting Torture and Other Ill-treatment of Persons in Custody*, May 24, 2004, available at <http://hrw.org/english/docs/2004/05/24/usint8614.htm>.

38. *Jus cogens*, or a peremptory norm of international law, is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, *supra* note 31, at art. 53. See also, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992)(“Under international law, . . . official torture violates *jus cogens*.”); 48 C.J.S. International Law §2 (2005)(“*Jus cogens* norms are norms of international law that are binding on states, or nations, even if they do not agree to them”).

39. See RESTATEMENT, *supra* note 25, at §702, reporter’s note 5.

40. Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287.

41. Universal Declaration of Human Rights, article 19, *adopted* Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810.

42. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, art. 7.

43. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Apr. 11, 1950, 213 U.N.T.S. 222, art. 3.

Rights;⁴⁴ and the African Charter of Human and Peoples' Rights.⁴⁵ Perhaps the most important of the international instruments prohibiting torture, however, CAT permits absolutely no exceptions to the prohibition on torture, stating that not even war or public emergency can justify torture.⁴⁶ Additionally, CAT forbids *refoulement*—the return, extradition, or expulsion of a person to another country where “there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁴⁷

President Reagan signed CAT on April 18, 1988 on behalf of the United States, subject to a declaration stating that Articles 1 through 16 were not self-executing⁴⁸ and thus required domestic legislation for implementation. The Senate ratified CAT, subject to various declarations and understandings,⁴⁹ on October 21, 1994, and the U.S. became a full party to the treaty in November 1994. Congress eventually passed the Foreign Affairs Reform and Restructuring Act (“FARRA”) in 1998,

44. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, art. 5(2).

45. African Charter on Human and Peoples' Rights, *opened for signature* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, art. 5 (1982).

46. CAT, *supra* note 24, at art. 2(2). “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” As of April 19, 2007, there were 74 signatories and 144 parties to CAT. United Nations, *Treaty Series*, vol. 1465, p. 85, available at <http://www.ohchr.org/english/countries/ratification/9.htm>. *But see* James Park Taylor, *Dancing with the Scavenger's Daughter: Torture, Rendition & the United States*, 30-JUL Mont. Law. 10, 38 (2005)(discussing arguments by Alan Dershowitz in favor of a judicial process to authorize limited derogation from CAT, found in WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002)).

47. CAT, *supra* note 24, at art. 3.

48. <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp>; Sen. Exec. Rpt. 101-30, Resolution of Advice and Consent to Ratification, (1990), available at <http://thomas.loc.gov/cgi-bin/ntquery/z?trty:100TD00020>.

49. The United States ratified CAT subject to the following declarations, reservations, and understandings: a declaration that CAT Articles 1 through 16 were not self-executing (and so required domestic legislation for implementation), *id.* at III.(2); a reservation that limited Article 16's binding authority over lesser forms of cruel and unusual punishment to the prohibitions of the U.S. Constitution's Fifth, Eighth, and/or Fourteenth Amendments, *id.* at I.(2); an opting-out of the arbitration provisions of Article 30, *id.* at I.(3); an understanding that acts of torture must be committed by or at the acquiescence of a public official or other person acting in an official capacity, *id.* at II.(1)(b); an understanding that mere noncompliance with applicable legal procedural standards does not automatically constitute torture, *id.* at II.(1)(e); an understanding specifying the “more likely than not” standard to be met in *nonrefoulement*,” *id.* at II.(2).

which implemented CAT's prohibition against torture⁵⁰ and *refoulement*.⁵¹ While the U.S. had already prohibited *refoulement* in the context of refugees and asylum seekers,⁵² FARRA broadened the class of protected persons, pursuant to CAT, to include individuals who lack a valid asylum claim⁵³ but who nevertheless are "more likely than not" to face a risk of torture.⁵⁴ This class of individuals is not eligible for permanent status in the United States and may be returned to another country on the strength of diplomatic assurances.⁵⁵

50. As codified in 8 C.F.R. §1208.18, an act of "torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person..." Torture "is an extreme form of cruel and inhuman treatment." The definition is consistent with Article 1 of CAT, except for the requirement of intentional infliction, which entered the statute by United States understandings.

51. FARRA, *supra* note 9, at §2242(a): "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.

52. Congress acceded to the 1967 United Nations Protocol relating to the Status of Refugees in 1968. G.A. Res. 2198 (XXI) (Nov. 18, 1966), U.N. Econ. & Soc. Council [ECOSOC] Res. 1186 (XLI) (Dec. 16, 1966). In 1980, in order to bring domestic law into compliance with the Protocol, Congress passed the Refugee Act of 1980. Pub.L. No. 96-212, 94 Stat. 102. The Act included a *nonrefoulement* provision, which has since been slightly modified by the Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA) and codified in the Immigration and Nationality Act §241(b)(3), 8 U.S.C. §1231(b)(3)(B).

53. Asylum applicants must prove persecution based on one of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion in the country in question. 8 U.S.C. §1158(b)(i) (2005).

54. FARRA delegated implementation of the U.S.'s obligations under Article 3 of CAT to "the appropriate agencies." Immigration and Naturalization Service (INS) and Executive Office for Immigration Review regulations interpreted FARRA's "substantial grounds for believing the person would be in danger of being subjected to torture" to require a "more likely than not" burden of proof of the applicant. Regulations Concerning the Convention Against Torture, 8 C.F.R. §208.16(c)(2) (2005).

55. See *Immigration Relief Hearing*, *supra* note 16, at 24 ("It is not and has never been an avenue for permanent residency, the Convention Against Torture relief. Unlike asylum, individuals granted Convention Against Torture relief have no right to remain permanently in the U.S. In fact, I would say that deferral of removal under the Convention Against Torture is the most precarious and restricted immigration relief under the Immigration and Nationality Act, but it has saved lives and it has prevented torture").

II. DIPLOMATIC ASSURANCES UNDER U.S. LAW

Treaties to which the United States has acceded have equal force of law as federal statutes.⁵⁶ In addition, the Supreme Court has long held that wherever possible, subsequent acts of Congress must be construed as consistent with treaty obligations.⁵⁷ Regulations, which also have the force of federal law, are constrained by the statutes that authorize their promulgation, and by the U.S. Constitution.⁵⁸

Under a constitutional law analysis, regulations which allow diplomatic assurances to block any further administrative or judicial review of a CAT claim overreach their implementing statutory authority and are manifestly contrary to the purpose of FARRA.⁵⁹ Also, regulations which grant such blanket discretionary power to the executive branch violate the Constitution's Separation of Powers doctrine and the Fifth Amendment's guarantee of due process.⁶⁰

A. Current Immigration Procedure for Aliens Fearing Torture

Under current immigration procedures, individuals fearing torture in their home countries may apply for withholding or deferral of removal under CAT.⁶¹ Unlike asylum applicants, CAT claimants are not barred from relief if they have committed a particularly serious crime or constitute a danger to the community of the United States.⁶² However, they are

56. See U.S. CONSTITUTION art. 3 §2; *Foster & Elam v. Neilson*, *supra* note 27, at 314.

57. See *Charming Betsy* doctrine, *supra* note 28. See also *Cook v. United States*, 288 U.S. 102, 120 (1933) (“[a] treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed”).

58. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

59. *Infra* Section II(B)(2).

60. *Infra* Section II(B)(3).

61. Note that withholding and deferral of removal under CAT are separate from withholding and deferral of removal in the traditional asylum context. An application for withholding or deferral of removal under CAT does not require proof of persecution based on any one of the five protected grounds; rather, the applicant must show that “it is more likely than not that he or she would be tortured if removed to the proposed country of removal.” 8 C.F.R. §§208.16(c), 208.17. From March 1999 through August 2002, the Justice Department processed 53,471 applications for CAT relief, of which less than 3% were granted. *Immigration Relief Hearing*, *supra* note 16, at 1, 9.

62. REGINA GERMAIN, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 80 (4th ed., 2005) *citing* 8 U.S.C. §§1158(b)(2)(A)(ii) and 1231(b)(3)(B)(ii). Section 241(b)(3)(B) of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 [hereinafter *INA*] set forth mandatory bars to the granting of CAT withholding of removal where:

only eligible for deferral of removal, which can be terminated more easily than withholding of removal.⁶³

Under immigration regulations, not the statutory language of FARRA itself,⁶⁴ the Secretary of State and Attorney General have, respectively, the power to seek and validate “diplomatic assurances” against torture from the country where a CAT applicant fears torture⁶⁵ and to thereby cut short further consideration of the CAT claim in the administrative channel. In other words, if the Secretary of State obtains reliable assurances and forwards them to the Attorney General, then the alien’s CAT claim cannot be further considered by any asylum officer, immigration judge, or the Board of Immigration Appeals.⁶⁶ Thus, while an alien can typically appeal a denial of his application for withholding or deferral of removal and obtain a *de novo* hearing with an immigration judge or the Board of Immigration Appeals,⁶⁷ once diplomatic assurances are accepted by the Attorney General, an alien has no further recourse, unless

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual’s race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious non-political crime outside the United States before the alien arrived in the United States; o

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

8 U.S.C. §1231(b)(3)(B).

63. GERMAIN, *supra* note 62, at 227. Deferral of removal does not grant an alien permanent legal status, nor does it confer derivative rights upon family members. Furthermore, it only prohibits the alien’s return to the country of risk, not to other non-risk countries. 8 C.F.R. §1208.17 (2005).

64. FARRA itself sets forth strong policy but leaves the details of actual regulations to “the heads of the appropriate agencies,” *supra* note 9, at §2242(b). The INS enacted implementing regulations in March 1999, creating withholding and deferral of removal and incorporating the Act’s restrictions on judicial review. 8 C.F.R. §§208.16-18.

65. Diplomatic Assurances, *supra* note 22.

66. 8 C.F.R. §208.18(c)(3).

67. The Department of Justice’s Executive Office of Immigration Review (EOIR) has adjudicatory authority over certain removal and detention decisions made by the Department of Homeland Security, the executive agency charged with the daily implementation and enforcement of immigration regulations. See ABCNY Report, *supra* note 19, at 47 n.100.

he can raise a constitutional law issue, or a question of law concerning his final order for removal.⁶⁸

Diplomatic assurances—their negotiation, reliability, sufficiency—are not subject to judicial review, for the initial determination of reliability or validity lies wholly in the protected discretion of the Secretary of State and the Attorney General.⁶⁹ The courts have upheld this non-reviewability of diplomatic assurances.⁷⁰

Although FARRA seems to achieve its goal of protecting those who may be ineligible for traditional asylum or withholding but nevertheless face a substantial risk of torture, its implementing regulations, which allow “diplomatic assurances” to summarily end any alien’s CAT claim, fatally undermine the statute’s purpose. Furthermore, the non-reviewability of what amounts to a blanket discretionary power of the executive branch effectively constitutes an agency-created exception to FARRA.⁷¹ These two effects of current regulations raise important constitutional issues.

68. REAL ID Act, *supra* note 13. Since President G.W. Bush signed the REAL ID Act into law on May 11, 2005, the Third, Fifth, Seventh, Ninth, and Eleventh Circuits have issued opinions adopting the interpretation that the Act granted them jurisdiction over errors of law in final removal orders, as well as constitutional claims. *See, e.g.* Papa-georgiou v. Gonzales, 413 F.3d 356 (3rd Cir. 2005); Kamara v. Attorney General, 420 F.3d 202 (3rd Cir. 2005); Rodriguez-Castro v. Gonzales, 2005 WL 2417048 (5th Cir. 2005); Baez v. Bureau of Immigration and Customs Enforcement, 2005 WL 2436835 (5th Cir. 2005); Vasile v. Gonzales, 417 F.3d 766 (7th Cir. 2005); Hamdan v. Gonzales, 2005 U.S. App. LEXIS 22058 (7th Cir. 2005); Fernandez-Ruiz v. Gonzales, 410 F.3d 585 (9th Cir. 2005); Chacon-Botero v. Attorney General, 2005 WL 2456877 (11th Cir. 2005). Interestingly, the Fourth Circuit made a point of noting in a footnote of its opinion in *Malm v. Gonzales*, 2005 WL 2534194, *3 (4th Cir. 2005), a case that ultimately did not require the court to decide the alien’s due process claim, “[w]e by no means suggest, however, that the REAL ID Act is constitutional in all of its applications by referring to its enactment in the context of deciding this case.”

69. *See* Diplomatic Assurances, *supra* note 22.

70. *See, e.g.*, Lukwago v. Ashcroft, 329 F.3d 157 (3rd Cir. 2003); Soliman v. U.S., 296 F.3d 1237, 1242 (11th Cir. 2002)(where the Circuit Court noted that it lacked jurisdiction to review the Attorney General’s decision to terminate the petitioner’s deferral of removal after securing diplomatic assurances against torture); Comejo-Barreto v. Seifert, 218 F.3d 1004, 1015 (9th Cir. 2000), *related proceeding at* 379 F.3d 1075 (9th Cir. 2004), *vacated by, rehearing, en banc, granted by* 386 F.3d 938 (9th Cir. 2004), *vacated by* 389 F.3d 1307 (9th Cir. 2004); Al-Anazi v. Bush, 370 F.Supp. 2d 188 (where the District Court rejected a Guantanamo Bay detainee’s motion for a preliminary injunction of transfer to foreign countries).

71. Regulations eliminating both administrative and judicial review of certain issues operate on a much larger scope than a jurisdictional statute, which “usually takes away no substantive right but simply changes the tribunal that is to hear the case.” *Landgraf v. Usi Film Prods.*, 516 U.S. 244, 258 (1994).

B. Due Process Analysis

The Supreme Court has long held that aliens who have entered the United States have liberty interests under the U.S. Constitution and are “persons”⁷² protected by the Fifth and Fourteenth Amendment guarantees of due process,⁷³ regardless of the legality of their presence in the country.⁷⁴ While circuit courts remain split over whether the U.S. Constitution grants aliens the right to judicial review of removal proceedings, they nevertheless unanimously hold that aliens must be given fair administrative hearings.⁷⁵ Thus, Congress’s plenary power over immigration

72. See *Zadyvdas v. Davis*, 533 U.S. 678, 693 (2001) (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent”); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (rejecting the argument that illegal aliens are not entitled to equal protection); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (affirming that even unlawful aliens have the right to due process to protect against the deprivation of life, liberty, or property). See also *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597 (1953) (regarding illegal aliens, “[a]lthough Congress may prescribe conditions for his expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard. Indeed, this Court has held that the Due Process Clause protects an alien subject to a final order of deportation . . . though the nature of that protection may vary depending upon status and circumstance . . .”).

73. See *Plyler v. Doe*, 457 U.S. 202 (1982); *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953); *Carlson v. Landon*, 342 U.S. 524, 542 (1952); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

74. See *Rasul v. Bush*, 542 U.S. 466 (2004); *Zadyvdas*, 533 U.S. 678 (2001); *INS v. St. Cyr*, 533 U.S. 289 (2001); *INS v. Chadha*, 462 U.S. 919 (1983); *Plyler v. Doe*, 457 U.S. 202 (1982).

75. In the past, the circuit courts have split over whether Congressional restrictions on judicial review of deportation orders of criminals under new legislation (AEDPA and IIRAIRA, *infra* note 144) violated due process. The vast majority of the circuits held that fair administrative proceedings were sufficient guarantees of due process. See *Ekasinta v. Gonzales*, 415 F.3d 1188, 1195 (10th Cir. 2005); *Hall v. INS*, 167 F.3d 852, 857 (4th Cir. 1999); *Duldulao v. INS*, 90 F.3d 396 (9th Cir. 1996). However, some among them also noted that their holdings were heavily influenced by the availability to aliens of habeas review. See, e.g., *Goncalves v. Reno*, 144 F.3d 110, 126 (1st Cir. 1998) (“In every circuit which has addressed constitutional challenges to this withdrawal of jurisdiction [IIRIRA], the court found that preclusion of all judicial review would present serious constitutional questions, and in every case those questions were avoided by noting the continuing availability of habeas review. Although the cases diverge in their approaches, they all agree on these two basic points—that Congress can constitutionally withdraw jurisdiction over such petitions for review under old INA § 106, but that some jurisdiction remains on habeas.”); *Mansour v. INS*, 123 F.3d 423 (6th Cir. 1997) (noting that the circuit courts have managed to avoid fully addressing the constitutional question of whether aliens are entitled to judicial review outside administrative hearings because habeas relief has been assumed). This assumption of the availability of habeas to aliens in removal proceedings is no longer viable under the recently passed REAL ID Act, for the Act expressly stripped the lower courts of habeas jurisdiction and have granted the circuit

law,⁷⁶ including its right to restrict judicial review under certain circumstances,⁷⁷ is limited by constitutional constraints⁷⁸ that are properly addressed by the courts.⁷⁹ Similarly, the Executive Branch's foreign policy initiatives, administrative enforcement of federal laws, and the formulation of uniform public policy in immigration matters⁸⁰ are subject to judicial review when they violate fundamental individual rights.⁸¹ Even when the nation is at war, for example, and executive powers expand significantly, the Separation of Powers doctrine preserves the role of the courts to ensure that power is not unlawfully "condensed" into a single branch of government.⁸²

A due process challenge of the use of diplomatic assurances may argue that immigration regulations' restrictions on administrative and judicial review of those assurances violate due process because they violate the Separation of Powers doctrine. Such a challenge raises the following questions: (1) whether immigration regulations concerning CAT claims are subject to judicial review; (2) whether those regulations granting the Secretary of State and Attorney General non-reviewable discretion to terminate a CAT claim are a reasonable interpretation of FARRA; and (3) whether that discretion is constitutional when it eliminates the possi-

courts jurisdiction over final orders of removal only on constitutional issues and pure questions of law. The circuit courts now face a new problem: determining whether they can review factual findings underpinning the administrative decisions on matters of law as they could under the old habeas provisions.

76. See *Demore v. Kim*, 538 U.S. 510 (2003); *Zadyvdas v. Davis*, 533 U.S. at 695; *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1983).

77. See *Zadyvdas*, 533 U.S. at 687.

78. *Id.*; see also art. 3, §2 of U.S. Constitution. There is a current controversy over whether Article III §2 authorizes Congress not only to establish lower federal courts but to define courts' jurisdiction. See Erwin Chemerinsky, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* §2.9 at 148 (Aspen Publishers, 2nd ed., 2002).

79. See *Zadyvdas*, 533 U.S. at 695, citing *INS v. Chadha*, 462 U.S. at 941-942 ("Congress must choose 'a constitutionally permissible means of implementing' that power"). See also *INS v. St. Cyr*, 533 U.S. at 300 ("...Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it").

80. See *Zadyvdas*, 533 U.S. at 700.

81. See *INS v. Chadha*, 462 U.S. at 940 ("the plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power"); *Filartiga I*, *supra* note 18; *Enwonwu v. Chertoff*, *supra* note 13, at 67, n.20 (where district court, in reviewing an order for forced removal of alien applicant to Nigeria, affirmed that his life and liberty interests in being free from torture are constitutionally protected). See also *Lynch v. Cannatella*, 810 F.2d 1363, 1375 (5th Cir. 1987).

82. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

bility of further administrative review, and is non-reviewable by an Article III court.

1. Jurisdiction over Administrative Acts

The Administrative Procedure Act of 2000 ("APA")⁸³ creates a presumption of judicial review of agency regulations⁸⁴ under existing subject matter jurisdiction-granting statutes or writs,⁸⁵ except in two cases: when a statute expressly precludes judicial review; and when agency action has been committed to agency discretion by law.⁸⁶ This latter exception is extremely narrow; it applies only to instances where the governing statute offers no meaningful standard or law for the courts against which to hold regulations.⁸⁷

Regulations allowing for diplomatic assurances and precluding judicial review of them are reviewable under the APA, for they do not fall under either of the two APA exceptions. First, FARRA expressly permits judi-

83. APA, 5 U.S.C. §§551-559, 701-706, *supra* note 33.

84. *See* *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds by* *Califano v. Sanders*, 430 U.S. 99 (1977) ("An 'agency action' includes any 'rule,' defined by the Administrative Procedure Act as an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy" *citing* 5 U.S.C. §§551 (4), 551(13)).

85. APA, 5 U.S.C. §703.

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

See also *Cornejo-Barreto v. Seifert*, 218 F.3d at 1015.

86. The APA does not guarantee judicial review of agency final actions under the following exceptions: when the governing statute expressly precludes judicial review, APA §701(a)(1); and when agency action has been committed to its discretion by law, APA §701(a)(2).

87. *See Cornejo-Barreto v. Seifert*, 218 F.3d at 1013(9th Cir. 2000)(finding that FARRA set a clear standard of non-discretionary protection against removal where there is a substantial likelihood of torture). *See also* *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)("The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)").

cial review of final orders of removal in both the administrative and Article III courts.⁸⁸ Second, while FARRA authorized the appropriate agencies to form implementing regulations, it also established a clear standard of law that those regulations must meet:

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.⁸⁹

That is, immigration authorities have the non-discretionary duty not to return an alien where he faces a substantial risk of torture.⁹⁰ Therefore, the APA presumption of judicial reviewability of immigration regulations⁹¹ stands, and challenges to diplomatic assurances are judiciable.⁹²

However, judicial review of executive regulations cannot center on “policy questions”⁹³ or foreign relations.⁹⁴ For example, where a statute

88. FARRA §2242(d) specifies that judicial review is appropriate under the INA, 8 U.S.C. §1252.

89. FARRA, *supra* note 9, at §2242(a).

90. *Cornejo-Barreto v. Seifert*, 218 F.3d at 1014.

91. *See Singh v. Moyer*, 867 F.2d 1035, 1037 (7th Cir. 1989)(citing APA, 5 U.S.C. 701(b)(1)(1982)). A new question raised by the enactment of the REAL ID Act is whether the Act’s prohibition of habeas petitions independent from review of final orders of removal leaves aliens without a statute to confer subject matter jurisdiction over their APA claims. The REAL ID Act specifies that nothing in the provision should be construed to deny judicial review of constitutional claims and questions of law of final orders of removal; therefore, it may be that aliens can claim that the REAL ID Act, or the resulting amended INA itself confers subject matter jurisdiction upon the circuit courts.

92. The Ninth Circuit’s first opinion in *Cornejo-Barreto v. Seifert*, *supra* note 70, a landmark challenge to diplomatic assurances, supports the position that the Secretary of State’s discretionary power under FARRA-enacting regulations are in fact reviewable. While a subsequent, related proceeding overruled that holding, deeming it non-binding dicta, the circuit court voted to rehear the case en banc. However, that grant was vacated, as well the court’s second opinion overruling the holding that is relevant here, for mootness when the foreign government requesting *Cornejo-Barreto*’s extradition withdrew its request.

93. In *Chevron v. Natural Resources*, where plaintiffs challenged Environmental Protection Agency (EPA) regulations, the Supreme Court ruled in favor of deference to the EPA’s interpretation of the key statutory term “source,” because it determined that plaintiffs brought their challenge in order to wage “a specific policy battle,” better left to legislators and administrators, rather than to challenge whether the regulations were a reasonable interpretation of ambiguous statutory language and implied intent. *Chevron*, 467 U.S. at 864. *See also Nixon v. United States*, 506 U.S. 224, 228 (1993)(characterizing the “political question doctrine” as partly concerning whether one political branch of government is constitutionally vested with final authority over a government function).

lacks clear language on an issue but expresses congressional intent, courts will defer to a reasonable administrative interpretation,⁹⁵ rather than make a policy determination that is better left to the legislature and executive branches.⁹⁶ Here, while FARRA's language is quite broad, it is not ambiguous, and Congress's intent in passing the law is expressly stated in the policy provision of FARRA. Therefore, a court reviewing regulations under FARRA would not have to avoid inappropriate policy-making by deferring to the executive's interpretation of the statute.

Similarly, while courts show the executive and legislature great deference where foreign relations are involved,⁹⁷ such as in extradition decisions⁹⁸ and "political questions,"⁹⁹ appropriate deference would not bar

94. See, e.g., *Cornejo-Barreto v. Siefert*, 379 F.3d at 1084 (discussing the "rule of non-inquiry," which is premised upon the notion that courts are ill-equipped as institutions, compared to the legislative and executive branches, to judge the workings of other countries' judicial systems).

95. *Chevron*, 467 U.S. at 844.

96. *Id.* at 864.

97. See, e.g., *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon the legislature. . ."); *Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424 (D. N.J. 1999) (where the district court held the plaintiff's World War II-related forced labor claims nonjudicial political questions and deferred to executive interpretation of the international treaty). But see *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In *Hamdi*, the Supreme Court rejected the Government's suggestion that courts review enemy combatant determinations under a "very deferential 'some evidence' standard" because of the courts' limited expertise regarding military decision-making). *Id.* at 598.

98. See, e.g., *Cornejo-Barreto*, *supra* note 70.

99. The political question doctrine renders certain issues non-judicial. Its principles were first set forth in *Marbury v. Madison*, 5 U.S. 137, 170 (1803), by Chief Justice Marshall. The doctrine was later expounded in *Baker v. Carr*, 369 U.S. 186, 217 (1962), which traced it to the Constitution's separation of powers. Also, courts often deem political questions non-judicial when foreign relations, entrusted by the Constitution to the President and Congress, are inextricably involved. See *Baker v. Carr*, 369 U.S. at 217 (1962):

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Unless one of these formulations is inextricable from

review of diplomatic assurance regulations. Deference on political questions is subject to the following constraints:¹⁰⁰ first, whether a non-judicial political question exists must be decided case-by-case;¹⁰¹ second, political questions that possibly exceed constitutional authority are necessarily judicial;¹⁰² and, third, the political question doctrine does not prescribe deference in the face of unconstitutional action.¹⁰³ While immigration regulations do represent a unique nexus of domestic and foreign policies,¹⁰⁴ the mere fact that a CAT-related issue would involve consideration of foreign nationals and governments does not render the issue a political question into which the courts should not inquire.¹⁰⁵ Finally, the courts are clearly authorized to construe treaties and to interpret federal legislation.¹⁰⁶ Indeed, in *Chevron v. NRDC*, the Supreme Court affirmed that “the judiciary is the final authority on issues of statu-

the case at bar, there should be no dismissal for non-justiciability on the ground of a political question’s presence

followed by, e.g., *Goldwater v. Carter*, 444 U.S. 996 (1979); *Ludecke v. Watkins*, 335 U.S. 160, 168 (1948).

In subsequent cases, the Court has relied primarily on the first two of the Baker criteria alone, considering the remaining criteria “prudential” factors. *Alperin v. Vatican Bank*, 410 F.3d 532, 545-546 (*citing* *Made in the USA Foundation v. U.S.*, 242 F.3d 1300, 1312-19 (11th Cir. 2001)).

100. *Baker v. Carr*, 369 U.S. at 211. *See also* *Zemel v. Rusk*, 381 U.S. at 17 (“This does not mean that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice”).

101. *Baker v. Carr*, 369 U.S. at 211; *Alperin v. Vatican Bank*, 410 F.3d at 537.

102. *Baker v. Carr*, 369 U.S. at 217 (“The courts cannot reject as ‘no law suit’ a bona fide controversy as to whether some action denominated ‘political’ exceeds constitutional authority”).

103. *Atkins v. U.S.*, 556 F.2d 1028, 1053, *cert denied*, 98 S.Ct. 718 (“[T]he rule of respect is not a prescription for deference in the face of unconstitutional action, which would be little more than an abdication of judicial responsibility.”).

104. Not only is foreign policy implicated in the government’s decision to ratify international treaties, but it has also determined specific domestic legislation. For example, Congress has passed legislation granting temporary protected status, which provides aliens with a temporary stay of removal, as well as work authorization, to aliens from Burundi, El Salvador, Honduras, Liberia, Nicaragua, Somalia, and Sudan. REGINA GERMAIN, *supra* note 62, Appendix 7D at 401.

105. *See Cornejo-Barreto*, 218 F.3d at 1009, n.5 (noting that FARRA “clearly supersedes” the rule of non-inquiry doctrine); *see also* *Mironescu v. Costner*, 2007 U.S. App. LEXIS 6622, at *25 (4th Cir. 2007)(holding that the district court lacked jurisdiction to review a decision by the Secretary of State that relied on diplomatic assurances to extradite a CAT-protected alien *not* because the rule of non-inquiry barred judicial review on habeas, but because the petitioner challenged his extradition, not removal).

106. U.S. Const. art. 3 §2.

tory construction and must reject administrative constructions which are contrary to clear congressional intent.”¹⁰⁷

Under *Chevron*, whenever considering the legality of implementing regulations under a governing statute, courts are to determine, first, whether Congress has directly addressed the question at issue, and, second, whether the agency’s interpretation of the statute is reasonable.¹⁰⁸ If Congress has not specifically commented on the question, either in the statute or the legislative history, then courts may rely on the expressed purpose(s) of the statute, the policy concerns that motivated the enactment, and a parsing of the statutory language and history for any discernible congressional “intent.”¹⁰⁹ Only if the regulations are found to be an unreasonable interpretation of the statute—that is, “arbitrary, capricious, or manifestly contrary to the statute”¹¹⁰—should a court substitute its own construction of the statute.¹¹¹

2. Administrative Acts and Regulations Must Not Be Manifestly Contrary to Congressional Statutes

FARRA and its legislative history¹¹² are silent on diplomatic assurances or any similar discretionary power to end a CAT application. Therefore, under the *Chevron* rule discussed above, INS regulations concerning diplomatic assurances must fall within a permissible construction of the statute.¹¹³ More specifically, they cannot be “arbitrary, capricious, or manifestly contrary to the statute.”¹¹⁴ If the regulations cannot be harmonized with the statutory program, they are considered null.¹¹⁵

107. *Chevron*, 467 U.S. at 843 n.9 (1984); followed in *I.N.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987)(where the Supreme Court declined to defer to BIA regulations that uniformly applied fear of persecution standard to asylum and withholding of removal claims despite clear congressional intent behind the two forms of relief called for distinct standards).

108. *Chevron*, 467 U.S. at 844.

109. See, e.g., *id.* at 862-863.

110. *Chevron*, 467 U.S. at 844.

111. See Kristine Cordier Karnezis, Construction and Application of “Chevron Deference” to Administrative Action by United States Supreme Court, 3 A.L.R. Fed. 2d 25, §11 (2005).

112. Sen. Exec. Rpt. 101-30, *supra* note 48.

113. *Chevron* rule, *supra* note 107.

114. See *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232, 239 (2004)(quoting *Chevron*, 467 U.S. at 843-44).

115. See *Rulemaking Defined and Distinguished*, 2 Fed. Proc., L. Ed. §2:69, citing *Dixon v. U.S.*, 381 U.S. 68, 74 (1965).

While the *concept* of reliable diplomatic assurances may not be manifestly contrary to FARRA,¹¹⁶ the *non-reviewability* of such diplomatic assurances appears to be so, for the Act implicitly guarantees full judicial review of final orders of removal in its provisions on “policy” and “review and construction.” First, subsection (d) of the Act provides that there can be no judicial review of the regulations adopted to implement the Act, claims raised directly under CAT or FARRA, or “any other determination made with respect to the application of the policy set forth,” *except* as part of the review of a final order of removal.¹¹⁷ The very enumeration of what courts *cannot* review outside the context of a final order of removal states what they *can* review in a challenge to a final removal order. The phrase “any other determination made with respect to the application of the policy set forth...” implies a quite broad palette of issues that are subject to judicial scrutiny,¹¹⁸ one that would include diplomatic assurances as well.¹¹⁹

The second area where Congress seems to have expressed the intent to safeguard judicial review of final orders of removal is to be found in subsection (c)—“exclusion of certain aliens.” This provision orders implementing regulations to exclude from the CAT protection of withholding of removal any aliens who have persecuted others, been convicted of a serious crime and who might be considered dangerous to society, been

116. FARRA, *supra* note 9, at §2242(c), allows the exclusion from CAT protection of aliens who have persecuted others; have been convicted of serious crime and considered dangerous; have been convicted of serious nonpolitical crimes outside the U.S., or threaten national security.

117. FARRA, *supra* note 9, at §2242(d).

118. Before the 1940s, the Supreme Court sought to balance constitutional concerns with the rising administrative state by applying what came to be known as the nondelegation doctrine. *See* *FMC v. S.C. State Ports Authority*, 535 U.S. 743, 773 (2002) (citing *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) for its “nondelegation doctrine”); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). This doctrine forbade Congress from delegating its essential legislative powers to administrative agencies. While Congress could leave the task of dealing with the “host of details with which the national legislature cannot deal directly,” it had to set clear standards and could not entrust policy choices to the agencies. *Panama Refining*, 293 U.S. at 421. In 1935, the Court struck down provisions of the National Industrial Recovery Act in *Panama Refining Co. v. Ryan* and *Schechter Poultry Corp. v. United States* on the strength of the nondelegation doctrine. Erwin Chemerinsky, *supra* note 78, at §3.10, 319-320. These two cases, and the doctrine itself, have never been directly overruled; however, no subsequent legislation has ever been struck down since on the basis of nondelegation.

119. Note that FARRA’s only limitation on judicial review in §2242(d) is that it must be of a final order of removal. It mentions no specific limitation of judicial review over certain *parts* of that order, such as administrative decisions or exercises of discretion; it simply covers “claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth...”

convicted of a serious nonpolitical crime outside the U.S., or constitute a danger to national security.¹²⁰ Notably, the provision still requires the exclusion to be consistent with CAT, as ratified by the U.S., “to the maximum extent,”¹²¹ and indeed such excluded aliens are not barred from being granted deferral of removal.¹²² The U.S. has made no reservation or declaration expressing, or implying, the intent to cut short or qualify the usual administrative hearing process, or to deny federal court review.¹²³ In light of FARRA’s stated purpose of implementing CAT,¹²⁴ these provisions together express a clear congressional intent to guarantee CAT claimants judicial review of final orders of removal and, impliedly, any determination that might result in non-compliance with CAT. Therefore, INS regulations which deny such review run manifestly contrary to FARRA, and constitute an unreasonable statutory construction.

3. The Separation of Powers Doctrine and Due Process Protection

Current INS regulations implementing FARRA also raise serious constitutional questions concerning separation of powers and due process, and therefore merit close scrutiny by the courts.¹²⁵ The regulations state that “once assurances are provided . . . the alien’s claim for protection under the Convention Against Torture shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer.”¹²⁶ This provision replaces the administrative hearing process

120. The exclusion in FARRA §2242(c) is defined by §241(b)(3)(B) of the INA, *supra* note 62.

121. FARRA §2242(c).

122. 8 C.F.R. §208.17

123. See Senate Exec. Rpt. 101-30, *supra* note 48. While the Senate Report included a comment that administrative authorities’ determinations would not be subject to judicial review in federal courts because the Convention was not self-executing, *id.* at 17-18, the enactment of FARRA implemented the Convention and did not carve out such an exception to judicial review.

124. Indeed, FARRA’s language mimics CAT in its definitions of key terms and policy statement. Compare CAT art. 3 (“No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”) with FARRA §2242(a) (“POLICY – 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”).

125. See *Chevron*, 467 U.S. 837. See also *Enwonwu v. Chertoff*, 367 F.Supp. 2d at 67, n.20 (stating that removal aliens have a liberty interest in being free from torture).

126. 8 C.F.R. §208.18(c)(3).

that is an alien's minimum due process right,¹²⁷ giving the Secretary of State and Attorney General extremely broad discretion to effectively return an alien to a substantial risk of torture. Furthermore, the regulations state that the Attorney General's use of discretion, or "any administrative decision," cannot be reviewed by the appellate courts.¹²⁸ Such deprivation of judicial review surpasses FARRA's limitation of judicial review to final orders of removal, and excessively blocks the courts from carrying out their constitutional duty to protect individuals' due process rights—even when the individuals are excludable aliens who are physically in the United States.¹²⁹

Consider the following hypothetical examples:

i. Alien X claims persecution based on membership in a social group—former informants in the Colombian drug trade—as well as fear of torture if he were sent back to Colombia. He asks for a granting of asylum or CAT protection. If the immigration officer denies his asylum claim because he doesn't believe that former drug informants are a valid social group under asylum law, then Alien X will be sent to an immigration judge for consideration of his CAT claim. If the immigration judge believes that Colombia might indeed practice torture generally, but that the evidence fails to show that Alien X, specifically, would be "more likely than not" to face torture if returned to Colombia, then Alien X will be ordered removed. At this point, Alien X may appeal to the Board of Immigration Appeals for a final review.

However, if the Secretary of State seeks and obtains diplomatic assurances, then the Attorney General will consult with the Secretary of State to decide whether these are sufficiently reliable¹³⁰ to accept. If the Attorney General accepts the assurances, Alien X will no longer be able to appeal to the Board of Immigration Appeals, where he could have claimed errors of fact or law.¹³¹ Instead, he will only be able to appeal on questions of law or a constitutional claim to the appropriate circuit court, which will be limited to reviewing the established administrative record.¹³² The circuit court will review the immigration judge's factual findings for substantial evidence, and any statutory interpretations *de*

127. See *supra* note 75. See also War on Terrorism Hearing Report, *supra* note 17.

128. 8 CFR §208.18(e). *But see* FARRA §2242(d)(which does *not* mention any restriction or prohibition of judicial review of administrative orders or decisions).

129. See *supra* note 76.

130. 8 CFR §208.18(c)(2).

131. See Germain, *supra* note 62, at 186, 188.

132. 8 U.S.C.A. §1252(b)(4)(A) ("the court of appeals shall decide the petition only on the administrative record on which the order of removal is based"); see also *Grass v. Gonzales*, 418 F.3d 876, 879 (8th Cir. 2005).

novo.¹³³ Decisions by the Attorney General are not reviewable under current regulations.¹³⁴

ii. Alien Y is barred from applying for asylum relief because he was a member of a rebel militia in Chechnya, a breakaway province in Russia. He applies for protection under CAT, though, because he fears torture if he is returned to Russia. Suppose that the immigration judge finds that Alien Y would in fact “more likely than not” face torture in Russia and grants him deferral of removal under CAT. If the Secretary of State were to seek and obtain diplomatic assurances from Russia that Alien Y would not be tortured there, the Attorney General could then terminate Alien Y’s deferral of removal. This would constitute a final order of removal, which Alien Y could appeal in a circuit court on the basis of a constitutional claim of a due process violation.¹³⁵

In these scenarios, the Attorney General has the discretionary power to deny what might be appropriate relief or to revoke properly granted relief;¹³⁶ however, this kind of discretion to terminate CAT claims has not been authorized directly by statute, unlike that for granting asylum,¹³⁷ and appears to be contrary to the agency’s own history. Congress has given the Attorney General broad positive discretion to *admit* aliens through the granting of asylum.¹³⁸ In addition, Congress has given the Attorney General power to admit aliens who are otherwise excludable, such as those previously convicted of crimes involving “moral turpitude”

133. See *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); *Celaj v. Gonzales*, 138 Fed. Appx. 710, 712 (6th Cir. 2005); *Sarr v. Gonzales*, 127 Fed. Appx. 815, 816 (6th Cir. 2005); *El Himri v. Ashcroft*, 378 F.3d 932, 936 (9th Cir. 2004).

134. See *supra* note 23.

135. See *Utah v. U.S. Att’y Gen.*, 192 Fed. Appx. 928, 932 (11th Cir.) (holding that although the circuit courts cannot review discretionary decisions by the Attorney General, they still retain jurisdiction over constitutional claims or questions of law).

136. Realistically, these kinds of discretionary decisions are often informed by policy considerations. In the first scenario, for example, the Attorney General and Secretary of State might want to guarantee some measure of protection for aliens who have helped U.S. law enforcement in the war on drugs or, conversely, to expel as many drug-dealing illegal aliens as possible. In the second scenario, the Executive may not want to welcome foreign rebels and possible Islamic terrorists. While acknowledging these political considerations, these do not render a challenge to the Attorney General’s power to make such discretionary decisions non-judicial. (If the question before us was merely to challenge an unpopular exercise of discretion, *that* might be non-judicial.)

137. INA §208(b). See also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423, 428 (1987). This discretion is non-reviewable unless manifestly contrary to law and abuse of discretion. 8 U.S.C. §1252(b)(4)(D). The Supreme Court has interpreted this standard to mean that a denial of discretionary relief is to be affirmed if it is supported by substantial evidence. *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

138. INA at §1158(b).

or narcotics, or to cancel removal of inadmissible or removable aliens.¹³⁹ In contrast, the Attorney General's discretionary power over CAT claims derives only from regulations, not statute. This newer, broader interpretation of the term "discretion" would not necessarily be impermissible¹⁴⁰ if it was part of a reasonable interpretation of the governing statute.¹⁴¹ However, for reasons discussed above,¹⁴² such an interpretation is *not* reasonable under FARRA, because CAT protection is not discretionary relief. Therefore, the Attorney General's discretionary power to terminate CAT claims is doubtful, and the courts should be able to review all underlying determinations in the denial of a CAT claim.¹⁴³

Up until recently, aliens whose challenges to denials of discretionary relief such as asylum were rejected by the Board of Immigration Appeals—either in the form of a denial to hear the appeal, or a ruling which upheld the immigration judge's decision—could still bring a habeas suit in the federal courts. While statutes and regulations have periodically limited aliens' rights to judicial review, the Supreme Court has, nevertheless upheld aliens' rights to federal habeas review. In *INS v. Saint Cyr*, the Supreme Court held that legislation that stripped courts of judicial review over petitions by aliens who had been classified as aggravated felons,¹⁴⁴ did not deprive them of habeas jurisdiction, because there was no such clear congressional intent to be found either in the statute or its history.¹⁴⁵ In so deciding, the Court relied on the "plain statement rule,"

139. See *INS v. Saint Cyr*, 533 U.S. at 293-297.

140. See *Chevron*, 467 U.S. at 863-864. ("The fact that the agency has from time to time changes its interpretation of the term 'source' does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis").

141. *Id.* at 866.

142. *Supra* Section II(B)(2).

143. See *Massieu v. Reno*, 91 F.3d 416, 425 (3rd Cir. 1996) ("While the asylum claim is within the discretion of the Attorney General, withholding of deportation *shall* be granted if the alien satisfies the relevant standards. 8 U.S.C. §1253(h)(1)").

144. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996)[hereinafter *AEDPA*]; Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996)[hereinafter *IIRIRA*]. AEDPA added a new provision to immigration laws, which stripped courts of judicial review over any final deportation orders based on the alien's having committed one of the laws' specified crimes. AEDPA §440(a), 110 Stat. at 1276. Passed a few months later, IIRIRA similarly stripped courts of appellate jurisdiction over final orders of removal based on an alien's prior commission of certain criminal offenses. IIRIRA §306(a), (codified at INA §242(a)(2)(C)), 8 U.S.C. §1252(a)(2)(C)).

145. *INS v. Saint Cyr*, 533 U.S. 289 (2001).

which requires Congress to unambiguously state any intention to invoke extraordinary constitutional powers—such as Congress’s ability to eliminate judicial review for a certain class—or to eliminate important constitutional protections like due process.¹⁴⁶ The rule is rooted in the strong presumption in favor of judicial review of administrative regulations¹⁴⁷ and Article III of the U.S. Constitution. In addition to the plain statement rule, the Court adhered to the “constitutional avoidance” principle,¹⁴⁸ which requires that, between a statutory interpretation which raises serious constitutional problems and a fairly possible alternative one, the courts must choose the latter.

Most circuit courts have followed the reasoning in *Saint Cyr* in holding that FARRA does not revoke habeas jurisdiction over CAT claims.¹⁴⁹ Congress expressly stripped courts of jurisdiction to review regulations implementing the Act, any decisions made in applying it, and any private CAT-related claim in a suit brought under FARRA—except in the context of a final removal order—but it did not expressly strip any court of habeas jurisdiction, nor did it prohibit *all* judicial review of regulations made pursuant to the Act.¹⁵⁰ FARRA simply stated that judicial review could take place only after administrative hearings had been exhausted.¹⁵¹

Since *Saint Cyr*, however, Congress has passed additional legislation that yet again raises separation of powers issues.¹⁵² The REAL ID Act of

146. *Id.* at 289, 298 (*citing* *Ex Parte Yerger*, 8 Wall. 85, 102 (1869) (“We are not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law”)).

147. *See* APA, *supra* note 33. The APA ensures that final agency action can be reviewed by the federal courts when no other remedy is available, 5 U.S.C. §704 (2000), except for several specified agencies, such as military agencies during wartime and political party agencies. 5 U.S.C. §701(b)(1). Immigration agencies are not exempt from the APA. *Id.*

148. *INS v. Saint Cyr*, 533 U.S. 289; *followed by* *Ogbudimpka v. Ashcroft*, 342 F.3d 207, 214 (3rd Cir. 2003).

149. *See, e.g.,* *Saint Fort v. Ashcroft*, 329 F.3d 191, 201 (1st Cir. 2003); *Singh v. Ashcroft*, 351 F.3d 435, 441 (9th Cir. 2003); *Ogbudimpka v. Ashcroft*, 342 F.3d at 213-214; *Cadet v. Bulger*, 377 F.3d 1173, 1182 (11th Cir. 2004).

150. FARRA §2242(d).

151. *See id.*

152. Real ID Act of 2005, *supra* note 13, at §106(a)(4) (“Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e)”).

2005 strips district courts of habeas jurisdiction over final orders of removal, and directs all habeas-like challenges to circuit courts instead.¹⁵³ The circuit courts are limited to deciding questions of law and constitutional claims and remain, as under pre-REAL ID amendments, prohibited from examining anything other than the administrative record supporting the appealed decision and from reviewing underlying factual findings unless “any reasonable adjudicator would be compelled to conclude to the contrary.”¹⁵⁴ However, REAL ID expressly states that nothing in the Act should be construed to deny the circuit courts of the authority to review questions of law and constitution claims.¹⁵⁵

Subsequent to the passage of the REAL ID Act, the circuit courts have split over whether the Act would prohibit courts from examining factual findings in the administrative record in deciding issues of law. The Act’s provision that limitations on judicial review are not to be construed “as precluding review of constitutional claims or questions of law” may seem to imply that circuit courts may review factual findings that underlie legal determinations.¹⁵⁶ If so, then the appellate courts may review whether determinations of the reliability of diplomatic assurances are supported by the evidence. However, the administrative record of a final order of removal is often silent on the reliability of forwarded diplomatic assurances, because the Attorney General’s consideration of them with the Secretary of State is not part of the administrative record. Furthermore, even if they were part of the record, such determinations would be non-reviewable, for current regulations preclude any judicial review of the Attorney General’s discretionary decisions or actions, except a granting of asylum.¹⁵⁷ Thus, INS regulations restricting the circuit courts to

153. *Id.*

154. Scope and Standard of Review, 8 U.S.C.A. §1252(b)(4)(A),(B).

155. Judicial Review of Certain Legal Claims, Real ID Act, *supra* note 13, at §106(a)(1)(A)(iii), amending 8 U.S.C. §1252 by adding a new provision, §1252(a)(2)(D): “Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.”

156. This would ensure conformity with the Supreme Court’s holding in *INS v. Chadha*, 462 U.S. at 937-39 that the courts may review a final order of removal and “all matters on which the validity of the final order is contingent.”

157. Courts do not have jurisdiction to review “any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this title [8 U.S.C.S. §§1151 et seq.] to be in the discretion of the Attorney General of the Secretary of Homeland Security, other than the granting of relief under section 208(a) [8 U.S.C.S. §1158(a).” 8 U.S.C.S. §1252(a)(2)(B)(ii). The exception to the general rule of non-reviewability, the Attorney General’s decisions to grant asylum may be re-

the administrative record on which the removal order is based may conflict with REAL ID's intent to safeguard judicial review of constitutional claims and questions of law.

III. JUDICIAL LIMITATIONS TO AVOID CONSTITUTIONAL INVALIDATION

While the government may legally infringe upon individual rights in certain circumstances,¹⁵⁸ the courts will, wherever possible, construe and even limit a statute in such a way as to avoid ruling on its constitutionality.¹⁵⁹ In keeping with this "constitutional avoidance" principle¹⁶⁰ and the Supreme Court's ruling in *Zadvydas v. Davis*,¹⁶¹ a constitutional challenge of the Attorney General's discretion over diplomatic assurances and CAT claims would likely trigger a statutory construction analysis of FARRA. Such an analysis would decide whether immigration regulations' interpretation of FARRA raised serious constitutional issues and whether a possible alternate interpretation could be upheld.

In *Zadvydas*, the Supreme Court faced the decision of whether aliens who had been found removable could be held in detention indefinitely or only for a "period *reasonably necessary* to secure the alien's removal."¹⁶² The statute itself specified only that an alien who was ordered removed and "determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal may be detained *beyond the removal period* and, if released, shall be subject to

viewed under an abuse of discretion or manifest contrariness to the law standard. 8 U.S.C. §1252(b)(4)(D).

158. The Supreme Court has long held that the government may infringe fundamental rights, including due process, under certain conditions. However, government actions will not go completely unchecked: depending on the government interest that motivates the challenged government action or program, the courts will apply rational, intermediate, or strict scrutiny. Government action that discriminates against aliens generally merits strict scrutiny; in other words, the government must demonstrate an important government interest, and its actions must be narrowly tailored to serving that interest. *See Graham v. Richardson*, 403 U.S. 365, 367 (1971). However, rational scrutiny will apply in several exceptions, such as classifications setting aliens apart in self-government situations and challenges to federal immigration law that has been passed by Congress. In other words, states need only prove that the action has a rational relationship to a valid state interest.

159. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided"), *quoted in Zadvydas*, 533 U.S. at 689.

160. *Id.*

161. *Zadvydas v. Davis*, 533 U.S. 678.

162. *Zadvydas v. Davis*, 533 U.S. at 682 [italics in original].

[certain] terms of supervision.”¹⁶³ The Court ultimately ruled that a “reasonable time” limitation applied, to be reviewable by the courts, because the government’s construction of the statute allowing indefinite detention, and promulgated in immigration regulations, would raise serious constitutional issues.¹⁶⁴ Specifically, given the fundamental liberty interest in avoiding indefinite detention, administrative proceedings that lacked “significant later judicial review”¹⁶⁵ for determining whether an alien was dangerous were deemed inadequate due process.¹⁶⁶ In the Court’s words, “the serious constitutional problem arising out of a statute that, *in these circumstances*, permits an indefinite, perhaps permanent deprivation of human liberty without any such protection is obvious.”¹⁶⁷ Thus, in keeping with its “constitutional avoidance” principle,¹⁶⁸ the Court decided the issue of post-removal detention without ruling on the validity of the statute itself.

A. Proposal

If Alien Y, *supra*, were to challenge the Attorney General’s power to terminate his CAT claim and protection through diplomatic assurances, he could claim that the government’s interpretation of FARRA violates his due process right to liberty from torture by granting the Attorney General improper discretion and without valid reason. While the government may point out that FARRA gives “the heads of the appropriate agencies” the task of formulating regulations “to implement the obligations of the United States under Article 3 of the United Nations Conven-

163. *Id.* citing 8 U.S.C. §1231(a)(6)(1994 ed., Supp. V).

164. *Id.* at 690—691. The Supreme Court applied a rational basis standard of review in finding that the government’s regulatory goal of “ensuring the appearance of aliens at future immigration proceedings” was “weak or nonexistent where removal seems a remote possibility at best,” and that its second goal of “[p]reventing danger to the community” was unrelated to an alien’s removable status when there was no accompanying special circumstance like mental illness or proven dangerousness. The Court also found that the administrative hearing process, which required the alien to prove that he was not dangerous, was inadequate protection of removable aliens’ fundamental liberty rights.

165. *Id.* at 692.

166. *Id.* (“This Court has suggested, however, that the Constitution may well preclude granting ‘an administrative body the unreviewable authority to make determinations implicating fundamental rights.’”) (“The Constitution demands greater procedural protection even for property”).

167. *Id.* at 692 (emphasis added).

168. *Id.* at 688, citing *Crowell v. Benson*, 285 U.S. 22, 62, (1932); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78; *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). *Comparing to* *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998) (“construction of statute that avoids invalidation best reflects congressional will”).

tion Against Torture,”¹⁶⁹ Article 3 contains no exceptions or overriding state interests to the prohibition of nonrefoulement: “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹⁷⁰ Also, Article 3 should not be interpreted or implemented in a way that contravenes other Articles in the Convention that the U.S. has ratified without objection.¹⁷¹ For example, no government interest could justify expelling even suspected terrorists to a country where they would be tortured, for that would violate Article 2(2), which states that “[n]o exceptional circumstances *whatsoever*, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹⁷²

Even if the government successfully established a valid state interest, it would still have to prove that its process was reasonably necessary to promoting that interest,¹⁷³ fell reasonably within the statute’s meaning,¹⁷⁴ and included adequate procedural safeguards of Alien Y’s liberty interest.¹⁷⁵ Failing that, as the Supreme Court ruled in both *Zadvydas* and in *Hamdi v. Rumsfeld*, the courts may impose judicial limitations on the government’s statutory interpretation when necessary to preserve “the proper constitutional balance.”¹⁷⁶ While the legislative and executive branches are constitutionally entrusted with power over war, foreign relations, and immigration policy, that power is “subject to important constitutional limitations.”¹⁷⁷ In cases concerning the indefinite detention of “enemy combatants” at Guantanamo and other U.S. military facilities, the Supreme Court has required the government to provide accused combatants a quasi-judicial forum where they can contest their enemy combatant status.¹⁷⁸

169. FARRA §2242(b).

170. CAT art. 3, *supra* note 24. Although Article 3(2) states that “for the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights,” this provision does not amount to a loophole for government policy to override individual protection.

171. Vienna Convention, *supra* note 31, at art. 31.

172. CAT, *supra* note 24, at art. 2(2) (emphasis added).

173. *See Zadvydas*, 533 U.S. at 689.

174. *See id.* at 699-700.

175. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Zadvydas*, 533 U.S. at 689.

176. *Hamdi v. Rumsfeld*, 542 U.S. at 533—534.

177. *See Zadvydas v. Davis*, 542 U.S. at 695, *citing INS v. Chadha*, 462 U.S. at 941-942.

178. *Hamdi v. Rumsfeld*, 542 U.S. at 533—534.

In the case of the Attorney General's broad discretion over diplomatic assurances and CAT claims, the courts could require the addition of such procedural safeguards as appellate review of the reliability of accepted diplomatic assurances: such review could be conducted *in camera* in order to ensure confidentiality,¹⁷⁹ and the government could benefit from a presumption of reliability, rebuttable by evidence presented by CAT claimants. Judicial review might in fact indirectly *aid* the negotiation of reliable assurances, as emerging standards may serve as an effective baseline and notice. In fashioning such limitations, the courts may find state practices abroad useful reference points.

B. Models of Judicial Review of Diplomatic Assurances Outside the U.S.

Numerous courts abroad have affirmed their role in reviewing diplomatic assurances and have demonstrated reluctance to defer absolutely to an executive branch.¹⁸⁰ In the United Kingdom, the High Court of Justice Queens Bench Division ruled in *Youssef v. The Home Office*¹⁸¹ that while the court "should make allowance for the way that government functions and be slow to second-guess the Executive's assessment of diplomatic negotiations,"¹⁸² it maintains judicial review over such assessments.¹⁸³

179. In *Mironescu v. Costner*, regarding the Government's concerns about the risk that judicial review of diplomatic assurances would pose to confidentiality and "sensitive communications" between the Executive branch and foreign governments, the Fourth Circuit found "no reason to doubt that district courts can adequately protect the confidentiality of such communications by considering them *in camera*..." *Mironescu v. Costner*, 2007 U.S. App. LEXIS at *27.

180. See *Youssef v. the Home Office*, 2004 WL 1640250, ¶63 (QBD)(2004); *Agiza v. Sweden*, Judgments Comm. Against Torture, 34th session, CAT/C/34/D/233/2003 (2005); *Suresh v. Canada*, 2002 SCC 1, File No. 27790, 2002 CarswellNat 7, also available at http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol1/html/2002scr1_0003.html. These courts have required the executive to secure agreements regarding systematic monitoring of the removed alien's custody and treatment by the removing state, or independent NGO monitoring.

181. See *Youssef v. the Home Office*, 2004 WL 1640250.

182. *Id.* at ¶63.

183. It is important to note that the government did not claim that the courts should play no role in deciding whether diplomatic assurances are sufficient. In fact, the Home Secretary and Her Majesty's Ambassador cited judicial standards to foreign authorities, as well as the UK Prime Minister, for what could be considered minimum reliable assurances in their negotiations. *Id.* at ¶21 ("The Ambassador re-emphasized to Mr. Al Baz that even if agreement could be reached on a set of assurances, the English courts might not accept them"). See also ¶23.

The court in *Youssef* rejected the government's argument that the High Court should follow the *Wednesbury* standard of review,¹⁸⁴ under which the courts only review the exercise of administrative discretion for unreasonableness.¹⁸⁵ Instead, the court held that, absent compelling reasons against it, the individual's liberty interest at stake warranted full judicial review.¹⁸⁶ In fact, the court examined Home Office, Embassy, and the Office of the Prime Minister correspondence and records in determining whether the government unlawfully detained the petitioner alien where government negotiations with Egypt for diplomatic assurances against torture were drawn-out and ultimately unsuccessful and not relied upon.¹⁸⁷ As a result, the High Court found that Egypt's lack of cooperation on the torture prohibition—namely, its assertions that national sovereignty disallowed UK monitors, and that Egypt's domestic prohibition on torture was sufficient assurance—ultimately failed to meet the Home Office's requisite level of minimum assurances, which were “those that the Home Office had been advised a UK court would expect if a case for deportation were to be reasonably argued.”¹⁸⁸

Since *Youssef*, the *Wednesbury* standard of reasonableness has been held to violate a claimant's right to an effective remedy under the European Convention of Human Rights. In *R. (Daly) v. Secretary of State for the Home Department*,¹⁸⁹ the House of Lords recognized that proportionality was the appropriate standard to apply where [C]onvention rights are at stake.¹⁹⁰ The *Daly* judgment relied heavily on the recent finding by the European Court of Human Rights in *Smith v. U.K.* that the *Wednesbury*

184. *Id.* at ¶62.

185. Richard B. Lillich, *The Soering Case*, 85 A.J.I.L. 128, n.16.

186. *Youssef v. The Home Office*, 2004 WL 1640250 at ¶62. The court added that, even under the argued-for *Wednesbury* standard of reasonableness, the government still would have failed to comply with the prohibition against torture: “[T]he Home Secretary's view that there remained after 25 June 1999 a real prospect of being able to remove Mr. Youssef in compliance with Article 3 of the European Convention on Human Rights was a view that was beyond the range of responses of a reasonable Secretary of State.” *Id.* at ¶80.

187. *Id.* at ¶¶72-81.

188. *Id.* at ¶¶14, 27. Pre-*Smith v. U.K.*, [1999] Eur. Ct. H.R. 33985/96, a deportation claim such as Youssef's would have had to meet the *Wednesbury* standard, whereby government action only needed to meet a reasonable standard to justify an infringement of an individual's fundamental right under the European Convention of Human Rights.

189. *Regina (Daly) v. Secretary of State for the Home Department*, [2001] 2 A.C. 532 (HL).

190. *Id.* at 546. See also Nicholas Bamforth, *Understanding the Impact and Status of the Human Rights Act 1998 within English Law*, at vi (Global Law Working Paper, 10/2004), available at http://www.nyulawglobal.org/workingpapers/documents/GLWP1004Bamforth_000.pdf.

standard of review inadequately protected individuals' rights to effective remedy under the Convention, suggesting that *Smith* "marked the 'quietus' of the view that proportionality and *Wednesbury* review in a human rights context were 'substantially the same.'"¹⁹¹ Under the proportionality standard, courts may review not only the reasonableness of the executive branch's assessment of diplomatic assurances, but balance competing factors of deference to the executive branch, legislative authority, and the individual's fundamental rights.¹⁹²

In a Canadian case, *Suresh v. Canada*,¹⁹³ the Supreme Court of Canada used what can be thought of as a "balance of convenience" standard—similar to the proportionality standard set out by the U.K. courts and the European Court of Human Rights—in reviewing the government's procedure of acquiring and guaranteeing the reliability of diplomatic assurances in a Sri Lankan refugee's application for a stay of removal.¹⁹⁴ In *Suresh*, the court held that "the [CAT] phrase 'substantial grounds' raises a duty to afford an opportunity to demonstrate and defend those grounds."¹⁹⁵ Therefore, "where the Minister is relying on written assurances from a foreign government that a person would not be tortured, the refugee must be given an opportunity to present evidence and make submissions as to the value of such assurances."¹⁹⁶

Under current immigration regulations in the United States, once diplomatic assurances are forwarded to the Attorney General, they are determinative and beyond the reach of judicial review of both administrative¹⁹⁷ and federal courts.¹⁹⁸ Although regulations preclude U.S. courts from reviewing diplomatic assurances, the courts may very well interpret those regulations to be constitutional only if they allow a judicial review mechanism: if so, these two international cases discussed above may provide useful models of how courts may uphold the customary law prohibition on torture.

191. *Regina v. Secretary of State*, *supra* note 189, at 549.

192. *Id.* at 547.

193. *Suresh v. Canada*, *supra* note 180.

194. *Id.*

195. *Id.* at ¶119.

196. *Id.* at ¶123.

197. §208.18(c)(3)

198. Diplomatic Assurances, *supra* notes 22 and 23.

IV. CONCLUSION

There unfortunately remain a number of countries that still employ torture on a widespread or systematic basis, most often in secrecy,¹⁹⁹ sometimes while paying lip-service abroad, and always in violation of international law.²⁰⁰ This has led some commentators to question the force and role of international law against human rights violations such as torture, as promulgated by international institutions such as the United Nations,²⁰¹ or through customary international law.²⁰² The courts have emphatically affirmed the force of the international prohibition against torture and rejected inconsistency of rhetoric and action as a basis for dismissing torture claims: as articulated in *Filartiga v. Pena-Irala*, “where a nation’s pronouncements form part of the consensus establishing an international law . . . it does not lie in the mouth of a citizen of that nation, though it professes one thing and does another, to claim that his country did not mean what it said . . . If there be hypocrisy, we can only say with La Rochefoucauld that ‘hypocrisy is the homage which vice pays to virtue.’”²⁰³ Nor must the gap between a state’s public profession of a universal norm, such as the prohibition of torture, and its internal laws and remedies frustrate efforts to fashion a remedy that vindicates the “repugnance of international wrongs”²⁰⁴ and furthers “the true progress that has been made.”²⁰⁵

Where domestic institutions exist to further compliance with the international prohibition against torture, strengthening such institutions can

199. Many countries that are known to torture routinely deny that they do so. See HRW Report, *supra* note 19, at 4. Also, it is often difficult to ascertain the truth: as a rule, torture is conducted in secret, and prison personnel, ranging from guards to doctors, are often complicit in using sophisticated techniques to leave few external marks on the body. *Id.*

200. Countries that have been criticized by the U.S. State Department in its most recent Human Rights Report for continuing to employ torture include: Egypt, Iran, Iraq, Jordan, Libya, Pakistan, Saudi Arabia, and Syria. 28 U.S. STATE DEPT. COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2004.

201. See Peter J. Spiro, “The New Sovereignists: American Exceptionalism and Its False Prophets,” FOREIGN AFF. 9, 12 (November/December 2000). See also, Eric A. Posner and John C. Yoo, “Commentary: Where’s the Old Bolton When We Need Him?” *Los Angeles Times*, April 19, 2005, also available at <http://www.law.uchicago.edu/news/posner-bolton.html>.

202. See Jack L. Goldsmith and Eric A. Posner, “Understanding the Resemblance Between Modern and Traditional Customary International Law,” 40 VA. J. INT’L L. 639, 672 (2000).

203. *Filartiga v. Pena-Irala*, 577 F.Supp. 860, 864 (E.D.N.Y. 1984) [*Filartiga II*].

204. *Tachiona v. Mugabe*, 234 F.Supp.2d at 417.

205. *Filartiga I*, 630 F.2d at 890.

have a “profound impact” on the international ban against torture.²⁰⁶ The U.S. has these means: a statute criminalizing torture and allowing for the prosecution of alien torturers upon their presence in the U.S.,²⁰⁷ as well as two civil remedies which similarly allow for a torturer to be brought to justice, even if the torture took place entirely abroad.²⁰⁸ The United States can do more than provide remedies for torture that has already been suffered, however: it has the structural capability to further *prevent* torture with impunity by ensuring that no individual with a valid claim of fear of torture is sent to face that fear on the strength of mere promises. Meaningful judicial review of diplomatic assurances can be formulated and carried out in a manner that both respects and strengthens the roles of the separate branches of government, allowing the U.S. not only to fulfill its duties under international law, but to reaffirm its founding principles of protecting and promoting the fundamental rights of the individual.

Jane C. Kim *

206. See Oona Hathaway, “The Promise and Limits of the International Law of Torture,” TORTURE: A COLLECTION, *supra* note 2, at 209.

207. 18 U.S.C.S. §2340A (2005)(creating criminal right of action in connection with U.S. accession to CAT).

208. TVPA, *supra* note 36, at §2; Alien Tort Claims Act, Judiciary Act of 1789, ch. 20, §9, 1 Stat. 73, 77, *codified at* 28 USCS §1350 (2005).

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