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## IV. International Law

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***Kiobel v. Royal Dutch Petroleum Co.***

**10-1491**

**Ruling Below:** *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2011), *cert. granted*, 10-1491 (132 S.Ct. 472).

In 2002, 12 plaintiffs from the Ogoni area of the Niger Delta brought suit against Royal Dutch and other corporations pursuant to the Alien Tort Statute, which allows suits for violation of international law. The plaintiffs alleged that Royal Dutch and other corporations engaged in oil exploration and production that aided and abetted the Nigerian government between 1992 and 1995 in committing human rights abuses, including torture and extrajudicial executions. In 2006 the United States District Court for the Southern District of New York dismissed claims against corporate defendants in part, and certified entire order for interlocutory appeal. Both parties cross appealed.

**Questions Presented:** (1) Whether corporations are immune from tort liability for violations of the law of nations. (2) Whether the Alien Tort Statute allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States

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**Esther KIOBEL, individually and on behalf of her late husband, Dr. Barinem Kiobel, Bishop Augustine Numene John-Miller, Charles Baridorn Wiwa, Israel Pyakene Nwidor, Kendrick Dorle Nwikpo, Anthony B. Kote-Witah, Victor B. Wifa, Dumle J. Kunenu, Benson Magnus Ikari, Legbara Tony Idigima, Pius Nwinee, Kpobari Tusima, individually and on behalf of his late father, Clement Tusima, Plaintiffs-Appellants-Cross-Appellees,**  
**v.**  
**ROYAL DUTCH PETROLEUM CO., Shell Transport and Trading Company PLC, Defendants-Appellees-Cross-Appellants, Shell Petroleum Development Company of Nigeria, Ltd., Defendant.**

United States Court of Appeals for the Second Circuit

Filed September 17, 2010

[Excerpt: Some footnotes and citations omitted.]

**JOSÉ A. CABRANES, Circuit Judge:**

This appeal presents a question that has been lurking for some time in our ATS jurisprudence. Since our first case upholding claims brought under the ATS in 1980, our Court has never directly addressed whether our jurisdiction under the ATS extends to

civil actions against corporations. We have, in the past, decided ATS cases involving corporations without addressing the issue of corporate liability. But that fact does not foreclose consideration of the issue here. As the Supreme Court has held, “when questions of *jurisdiction* have been passed on in prior decisions *sub silentio*,” the Court

“has never considered itself bound when a subsequent case finally brings the jurisdictional issue before [it].”

In answering the question presented we proceed in two steps. First, we consider which body of law governs the question—international law or domestic law—and conclude that international law governs. Second, we consider what the sources of international law reveal with respect to whether corporations can be subject to liability for violations of customary international law. We conclude that those sources lead inescapably to the conclusion that the customary international law of human rights has not to date recognized liability for corporations that violate its norms.

### **I. Customary International Law Governs Our Inquiry**

The ATS grants federal district courts jurisdiction over claims “by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350.27 In 2004, the Supreme Court held in *Sosa* that the ATS is a jurisdictional statute only; it creates no cause of action, Justice Souter explained, because its drafters understood that “the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”

The Court in *Sosa* held that federal courts may recognize claims “based on the present-day law of nations” provided that the claims rest on “norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court had] recognized.”

We conclude—based on international law, *Sosa*, and our own precedents—that international law, and not domestic law, governs the scope of liability for violations of customary international law under the ATS.

### **A. International Law Defines the Scope of Liability for Violations of Norms**

That the subjects of international law are determined by international law, and not individual States, is evident from the decisions of the International Military Tribunal at Nuremberg (“Tribunal”) in the aftermath of the Second World War. The significance of the judgment of the Tribunal—and of the judgments of the tribunals established by the Allied Control Council pursuant to Council Control Law No. 10 (Dec. 20, 1945)—was not simply that it recognized genocide and aggressive war as violations of international law. The defining legal achievement of the Nuremberg trials is that they explicitly recognized *individual liability* for the violation of specific, universal, and obligatory norms of the customary international law of human rights. In its judgment the Tribunal noted that the defendants had argued that “international law is concerned with the actions of sovereign states, and provides no punishment for individuals.” The Tribunal rejected that view, however, declaring that “*international law* imposes duties and liabilities upon individuals as well as upon states” and that “individuals can be punished for violations of international law.”

### **B. *Sosa* and Our Precedent Require Us to Look at International Law to Determine the Scope of Liability**

In *Sosa* the Supreme Court instructed the

lower federal courts to consider “whether *international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.” That language requires that we look to *international law* to determine our jurisdiction over ATS claims against a particular class of defendant, such as corporations. That conclusion is reinforced by Justice Breyer’s reformulation of the issue in his concurring opinion: “The norm [of international law] must extend liability to the *type of perpetrator* (e.g., a private actor) the plaintiff seeks to sue.”

Our interpretation of *Sosa* is also consistent with Judge Katzmman’s separate opinion in *Khulumani*, 504 F.3d at 264, which this same panel (including Judge Leval) adopted as the law of the Circuit in *Presbyterian Church*. In *Khulumani*, Judge Katzmman observed that aiding and abetting liability—much like corporate liability—“does not constitute a discrete criminal offense but only serves as a more particularized way of identifying the persons involved’ in the underlying offense.” Judge Katzmman further explained that “[w]hile [footnote 20 of *Sosa*] specifically concerns the liability of non-state actors, its general principle is equally applicable to the question of where to look to determine whether the scope of liability for a violation of international law should extend to aiders and abettors. He therefore concluded that “to assure itself that it has jurisdiction to hear a claim under the [ATS], [a court] should first determine whether the alleged tort was in fact ‘committed in violation of the law of nations,’ 28 U.S.C. § 1350, and whether *this law would recognize the defendants’ responsibility for that violation.*”

Significantly, it was only because we looked to international law that we were able to

recognize a norm of aiding and abetting

liability under the ATS. In *Khulumani*, Judge Katzmman declined to rely on the usual presumption against aiding and abetting liability that applies in the interpretation of domestic statutes. Instead, Judge Katzmman concluded that *Central Bank* had no bearing on aiding and abetting liability under the ATS because, “[u]nder the [ATS] the relevant norm *is provided not by domestic statute but by the law of nations, and that law* extends responsibility for violations of its norms to aiders and abettors.” 504 F.3d at 282.

In sum, we have little difficulty holding that, under international law, *Sosa*, and our three decades of precedent, we are required to look to international law to determine whether corporate liability for a “violation of the law of nations,” 28 U.S.C. § 1350, is a norm “accepted by the civilized world and defined with a specificity” sufficient to provide a basis for jurisdiction under the ATS, *Sosa*, 542 U.S. at 725, 124 S.Ct. 2739. We have looked to international law to determine whether state officials, private individuals, and aiders and abettors, can be held liable under the ATS. There is no principled basis for treating the question of corporate liability differently.

## **II. Corporate Liability is not a Norm of Customary International Law**

To attain the status of a rule of customary international law, a norm must be “specific, universal, and obligatory.” Defining such norms “is no simple task,” as “[c]ustomary international law is discerned from myriad decisions made in numerous and varied international and domestic arenas.” *Flores*, 414 F.3d at 247. The sources consulted are therefore of the utmost importance. As the Supreme Court re-emphasized in *Sosa*, we

look to “those sources we have long, albeit cautiously, recognized”:

‘[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the *customs and usages of civilized nations*; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.’

542 U.S. at 733-34, 124 S.Ct. 2739.

## **A. International Tribunals**

Insofar as international tribunals are established for the specific purpose of imposing liability on those who violate the law of nations, the history and conduct of those tribunals is instructive. We find it particularly significant, therefore, that no international tribunal of which we are aware has *ever* held a corporation liable for a violation of the law of nations.

### **1. The Nuremberg Tribunals**

The Charter of the International Military Tribunal, commonly known as the “London Charter,” authorized the punishment of the major war criminals of the European Axis following the Second World War. The London Charter and the trials at Nuremberg that followed are collectively the single most important source of modern customary international law concerning liability for violations of fundamental human rights. As

Justice Jackson explained, the London Charter “is a basic charter in the International Law of the future,” and the Nuremberg trials took great strides in “ma[king] explicit and unambiguous” the human rights norms that had “theretofore . . . [been] implicit in International Law.” Jackson, *Final Report, ante*, at 342. And as Judge Katzmann noted in *Khuhumani*: “[C]ourts, international bodies, and scholars have recognized that the principles set out in the London Charter and applied by the International Military Tribunal are significant not only because they have garnered broad acceptance, but also because they were viewed as reflecting and crystallizing preexisting customary international law.” 504 F.3d at 271.

It is notable, then, that the London Charter, which established the International Military Tribunal at Nuremberg, granted the Tribunal jurisdiction over *natural persons only*.

Echoing the London Charter’s imposition of liability on natural persons only, the subsequent United States Military Tribunals, established under Control Council Law No. 10, prosecuted *corporate executives* for their role in violating customary international law during the Second World War, but not the corporate entities themselves. This approach to liability can be seen most clearly in the tribunal’s treatment of the notorious I.G. Farben chemical company.

The refusal of the military tribunal at Nuremberg to impose liability on I.G. Farben is not a matter of happenstance or oversight. This corporation’s production of, among other things, oil, rubber, nitrates, and fibers was harnessed to the purposes of the Nazi state, and it is no exaggeration to assert that the corporation made possible the war crimes and crimes against humanity perpetrated by Nazi Germany, including its



infamous programs of looting properties of defeated nations, slave labor, and genocide.

Twenty-four executives of Farben were charged, *inter alia*, with “Planning, Preparation, Initiation, and Waging of Wars of Aggression and Invasions of Other Countries”; “Plunder and Spoliation”; and “Slavery and Mass Murder.” But the I.G. Farben corporate entity was not charged, nor was it named in the indictment as a criminal organization. In issuing its judgment, the tribunal pointedly observed that “the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings.” 8 *The Farben Case, ante*, at 1153. The Tribunal emphasized:

We have used the term “Farben” as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed. But corporations act through individuals and, under the conception of *personal individual guilt* ... the prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an *individual defendant* was either a participant in the illegal act or that, being aware thereof, he authorized or approved it.

In declining to impose corporate liability under international law in the case of the most nefarious corporate enterprise known to the civilized world, while prosecuting the men who led I.G. Farben, the military tribunals established under Control Council Law No. 10 expressly defined liability under the law of nations as liability that could not be divorced from *individual* moral responsibility. It is thus clear that, at the time of the Nuremberg trials, corporate

liability was not recognized as a “specific, universal, and obligatory” norm of customary international law.

## 2. International Tribunals Since Nuremberg

Since Nuremberg, international tribunals have continually declined to hold corporations liable for violations of customary international law. For example, the charters establishing both the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda, or (“ICTR”) expressly confined the tribunals’ jurisdiction to “natural persons.”

The commentary contained in the Report of the Secretary-General of the United Nations on the ICTY reveals that jurisdiction over corporations was considered but expressly rejected: “[T]he ordinary meaning of the term ‘persons responsible for serious violations of international humanitarian law’ would be *natural persons to the exclusion of juridical persons*.” Moreover, unlike the International Military Tribunal at Nuremberg, the ICTY lacked the authority to declare organizations “criminal.” *Id.* ¶ 51 Thus, to the extent that the International Military Tribunal at Nuremberg possessed some limited authority to declare corporations criminal—which, as explained above, operated merely as an evidentiary rule for later trials imposing liability on *individuals*—subsequent tribunals have not retained that procedure.

More recently, the Rome Statute of the ICC also limits that tribunal’s jurisdiction to “natural persons.” Significantly, a proposal to grant the ICC jurisdiction over corporations and other “juridical” persons was advanced by the French delegation, but the proposal was rejected. As commentators

have explained, the French proposal was rejected in part because “criminal liability of corporations is still rejected in many national legal orders” and thus would pose challenges for the ICC’s principle of “complementarity.” *Id.* The history of the Rome Statute therefore confirms the absence of any generally recognized principle or consensus among States concerning corporate liability for violations of customary international law.

### **Conclusion**

The ATS provides federal district courts jurisdiction over a tort, brought by an alien only, alleging a “violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. When an ATS suit is brought under the “law of nations,” also known as “customary international law,” jurisdiction is limited to those cases alleging a violation of an international norm that is “specific, universal, and obligatory.”

No corporation has ever been subject to *any* form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights. Rather, sources of customary international law have, on several occasions, explicitly rejected the idea of corporate liability. Thus, corporate liability has not attained a discernable, much less universal, acceptance among nations of the world in their relations *inter se*, and it cannot not, as a result, form the basis of a suit under the ATS.

Accordingly, the September 29, 2006 order of the District Court is **AFFIRMED** insofar as it dismissed some of plaintiffs’ claims against the corporate defendants and **REVERSED** insofar as it declined to dismiss plaintiffs’ remaining claims against the corporate defendants.

### **LEVAL, Circuit Judge, concurring only in the judgment.**

The majority opinion deals a substantial blow to international law and its undertaking to protect fundamental human rights. According to the rule my colleagues have created, one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims’ claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form. Without any support in either the precedents or the scholarship of international law, the majority takes the position that corporations, and other juridical entities, are not subject to international law, and for that reason such violators of fundamental human rights are free to retain any profits so earned without liability to their victims.

Since *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980), was decided in 1980, United States courts, acting under the Alien Tort Statute (ATS), which was passed by the First Congress in 1789, have been awarding compensatory damages to victims of human rights abuses committed in violation of the law of nations. Many supporters of the cause of human rights have celebrated the *Filartiga* line of cases as an important advance of civilization. Not all, however, have viewed those cases with favor. Some see them as unwarranted meddling by U.S. judges in events that occurred far away, applying a body of law that we did not make, in circumstances carrying a potential, furthermore, to interfere with the President’s conduct of foreign affairs. In 2004, a substantial minority of the Supreme Court, in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, would have essentially nullified the ATS and overturned the

*Filartiga* line, by ruling that the ATS did no more than give courts jurisdiction, and that, absent further legislation establishing a legal claim, courts acting under ATS had no authority to grant any substantive relief. The majority of the Supreme Court, however, rejected that argument. The Court ruled that under the ATS, federal courts could award damages for violations of the law of nations. For those who believe the *Filartiga Sosa* line represents a meaningful advance in the protection of human rights, the majority's decision here marks a very bad day.

To understand this controversy, it is important to understand exactly what is the majority's rule, how it functions, and in what circumstances. To begin, their rule relates to the most abhorrent conduct—those acts that violate norms of the international law of human rights. The ATS gives U.S. courts jurisdiction to award tort damages to aliens who are victims of such atrocities. According to the majority, in cases where the norms of the law of nations were violated by a corporation (or other juridical entity), compensatory damages *may be awarded under the ATS against the corporation's employees*, natural persons who acted in the corporation's behalf, *but not against the corporation* that commanded the atrocities and earned profits by committing them. The corporation, according to my colleagues, has not violated international law, and is indeed incapable of doing so because international law does not apply to the conduct of corporations.

Accordingly, a corporation which has earned profits by abuse of fundamental human rights—as by slave trading—is free to retain those profits without liability.

While my colleagues see nothing strange or problematic in this conclusion, their position is that in any event they have no

responsibility for it. They invoke the rule simply because, in their contention, it is commanded by the law of nations.

But there is no basis for this contention. No precedent of international law endorses this rule. No court has ever approved it, nor is any international tribunal structured with a jurisdiction that reflects it. (Those courts that have ruled on the question have explicitly rejected it.) No treaty or international convention adopts this principle. And no work of scholarship on international law endorses the majority's rule. Until today, their concept had no existence in international law.

The majority contend, nevertheless, that unambiguous jurisprudence “lead[s] inescapably” to their conclusion. Maj. Op. 125. However, the reasoning that supports the majority's argument is, in my view, illogical, misguided, and based on misunderstandings of precedent.

The argument depends on its observation that international *criminal* tribunals have been established without jurisdiction to impose *criminal punishments* on corporations for their violations of international law. From this fact the majority contend an inescapable inference arises that international law does not govern corporations, which are therefore free to engage in conduct prohibited by the rules of international law with impunity.

There is no logic to the argument. The reasons why international tribunals have been established without jurisdiction to impose *criminal* liability on corporations have to do solely with the theory and the objectives of *criminal punishment*, and have no bearing on civil compensatory liability. The view is widely held among the nations of the world that criminal punishments

(under domestic law, as well as international law) are inappropriate for corporations. This view derives from two perceptions: First, that criminal punishment can be theoretically justified only where the defendant has acted with criminal intent—a condition that cannot exist when the defendant is a juridical construct which is incapable of having an intent; and second, that criminal punishments are pointless and counterproductive when imposed on a fictitious juridical entity because they fail to achieve the punitive objectives of criminal punishment. For these reasons many nations in their domestic laws impose criminal punishments only on natural persons, and not on juridical ones. In contrast, the imposition of civil liability on corporations serves perfectly the objective of civil liability to compensate victims for the wrongs inflicted on them and is practiced everywhere in the world. The fact that international tribunals do not impose *criminal punishment* on corporations in no way supports the inference that corporations are outside the scope of international law and therefore can incur no *civil compensatory liability* to victims when they engage in conduct prohibited by the norms of international law.

The majority next contend that international law does not distinguish between criminal and civil liability. This is simply incorrect. International law distinguishes clearly between them and provides differently for the different objectives of criminal punishment and civil compensatory liability.

The majority then argue that the absence of a universal practice among nations of imposing civil damages on corporations for violations of international law means that under international law corporations are not liable for violations of the law of nations. This argument is as illogical as the first and

is based on a misunderstanding of the structure of international law. The position of international law on whether civil liability should be imposed for violations of its norms is that international law takes no position and leaves that question to each nation to resolve. International law, at least as it pertains to human rights, consists primarily of a sparse body of norms, adopting widely agreed principles prohibiting conduct universally agreed to be heinous and inhumane. Having established these norms of prohibited conduct, international law says little or nothing about how those norms should be enforced. It leaves the manner of enforcement, including the question of whether there should be private civil remedies for violations of international law, almost entirely to individual nations. While most nations have not recognized tort liability for violations of international law, the United States, through the ATS, has opted to impose civil compensatory liability on violators and draws no distinction in its laws between violators who are natural persons and corporations. The majority's argument that national courts are at liberty to award civil damages for violations of international law solely against natural persons and not against corporations has no basis in international law and, furthermore, nullifies the intention of international law to leave the question of civil liability to be decided separately by each nation.

The majority's asserted rule is, furthermore, at once internally inconsistent and incompatible with Supreme Court authority and with our prior cases that awarded damages for violations of international law. The absence of a universally accepted rule of international law on tort damages is true as to defendants who are natural persons, as well as to corporations. Because international law generally leaves all aspects

of the issue of civil liability to individual nations, there is no rule or custom of international law to award civil damages in any form or context, either as to natural persons or as to juridical ones. If the absence of a universally accepted rule for the award of civil damages against corporations means that U.S. courts may not award damages against a corporation, then the same absence of a universally accepted rule for the award of civil damages against natural persons must mean that U.S. courts may not award damages against a natural person. But the majority opinion concedes (as it must) that U.S. courts may award damages against the corporation's employees when a corporation violates the rule of nations. Furthermore, our circuit and others have for decades awarded damages, and the Supreme Court in *Sosa* made clear that a damage remedy does lie under the ATS. The majority opinion is thus internally inconsistent and is logically incompatible with both Second Circuit and Supreme Court authority.

**I. The improbability that the humanitarian law of nations, which is based in moral judgments reflected in legal systems throughout world and seeks to protect fundamental human rights, would espouse a rule which undermines that objective and lacks any logical justification**

**A. The opposition of the majority's rule to the objectives of international law.**

Rules of international law are not, like rocks, mountains, and oceans, unexplained natural phenomena found on the surface of the earth. The rules of international law have been created by a collective human agency representing the nations of the world *with a purpose to serve desired objectives*. Those rules express the consensus of nations on

goals that are shared with virtual unanimity throughout the world. Prior to World War II, the enforcement of international law focused primarily on relations among States and problems relating to the sovereign interests of States. It involved, for example, the inviolability of ambassadors in foreign lands, safe conducts, and the outlawing of piracy, which threatened the shared interest of all nations in trade on the high seas. Worldwide revulsion at the Nazi atrocities in the period of World War II, however, focused attention on humanitarian values—values so fundamental that they were seen as shared by the “civilized nations” of the world. *Filartiga*, 630 F.2d at 881. Beginning with the Nuremberg trials, the focus of international law thus broadened beyond practical concerns of sovereign nations toward universally shared moral objectives. Acts so repugnant that they violated the morality shared by the civilized world were recognized as violations of international law. The law of nations thus came to focus on humanitarian, moral concerns, addressing a small category of particularly “heinous actions—each of which violates definable, universal and obligatory norms”—conduct so heinous that he who commits it is rendered “*hostis humani generis*, an enemy of all mankind.” *Sosa*, 542 U.S. at 732, 124 S.Ct. 2739. These acts are generally understood to include such extreme, universally condemned conduct as genocide, exploitation of slaves, war crimes, and, in certain circumstances, imprisonment without cause and torture. The law of nations undertakes an emphatic stance of opposition to such acts.

The majority's interpretation of international law, which accords to corporations a free pass to act in contravention of international law's norms, conflicts with the humanitarian objectives of that body of law.

## **II. The majority's mistaken claim that corporations are not "subjects" of international law**

The majority attempt to bolster their argument by employing the arcane terminology of international law. They assert that a corporation is not a "subject" of international law. Maj. Op. 125-26. The majority explain the significance of this term to be that only subjects of international law have "rights, duties, and liabilities" under international law. Maj. Op. 118. Because, according to the majority, a corporation is not a subject of the law of nations, it may neither bring suit for violations of the law of nations nor be sued for offenses under the law of nations.

The majority, however, cites no authority in support of their assertion that a corporation is not a subject of international law and is therefore incapable of being a plaintiff or a defendant in an action based on a violation of the law of nations. And there is strong authority to the contrary.

The idea that an entity was or was not a "subject" of international had greatest prominence when the rules of international law focused on the sovereign interests of States in their relations with one another. To the extent that a particular rule of international law pertains only to the relationship among States, it can be correct to say that only States are subjects. However, as the law of nations evolved to recognize that "individuals and private juridical entities can have any status, capacity, rights, or duties given them by international law or agreement," Restatement (Third) of the Foreign Relations Law of the United States, pt. II, introductory note, that terminology has come to mean nothing more than asking whether the particular norm applies to the

type of individual or entity charged with violating it, as some norms apply only to States and others apply to private non-state actors.

As early as the Nuremberg trials, which represented the dawn of the modern enforcement of the humanitarian component of the law of nations, courts recognized that corporations had obligations under international law (and were therefore subjects of international law). In at least three of those trials, tribunals found that corporations violated the law of nations and imposed judgment on individual criminal defendants based on their complicity in the corporations' violations.

Two opinions of the Attorney General of the United States further refute the majority's view that corporations have neither rights nor obligations under international law. In 1907, the Attorney General rendered an opinion that an American corporation could be held liable under the ATS to Mexican nationals if the defendant's "diversion of the water [of the Rio Grande] was an injury to substantial rights of citizens of Mexico under the principles of international law or by treaty." 26 Op. Att'y Gen. 252, 253 (1907). And in 1795, shortly after the enactment of the ATS, the Attorney General opined that a British corporation could pursue a civil action under the ATS for injury caused to it in violation of international law by American citizens who, in concert with a French fleet, had attacked a settlement managed by the corporation in Sierra Leone in violation of international law.

This court similarly recognized claims on behalf of juridical entities (a corporation, a trust, and a partnership) against Cuba, premised on Cuba's expropriation of their property in violation of international law.

These decisions cannot be reconciled with the majority's contention that corporations are not subjects of under international law.

**III. The Complaint must be dismissed because its factual allegations fail to plead a violation of the law of nations.**

Although I do not share my colleagues' understanding of international law, I am in complete agreement that the claims against Appellants must be dismissed. That is because the pertinent allegations of the Complaint fall short of mandatory standards established by decisions of this court and the Supreme Court. We recently held in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir.2009), that liability under the ATS for *aiding and abetting* in a violation of international human rights lies only where the aider and abettor acts *with a purpose* to bring about the abuse of human rights. *Id.* at 259. Furthermore, the Supreme Court ruled in *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S.Ct.

1937, 173 L.Ed.2d 868 (2009), that a complaint is insufficient as a matter of law unless it pleads specific facts that "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949. When read together, *Talisman* and *Iqbal* establish a requirement that, for a complaint to properly allege a defendant's complicity in human rights abuses perpetrated by officials of a foreign government, it must plead specific facts supporting a reasonable inference that the defendant acted with a purpose of bringing about the abuses. The allegations against Appellants in these appeals do not satisfy this standard. While the Complaint plausibly alleges that Appellants knew of human rights abuses committed by officials of the government of Nigeria and took actions which contributed indirectly to the commission of those offenses, it does not contain allegations supporting a reasonable inference that Appellants acted with a purpose of bringing about the alleged abuses.

## “Supreme Court to Rule on Corporate Personhood for Crimes Against Humanity”

*The Huffington Post*

October 17, 2011

Mike Sacks

The Supreme Court on Monday morning agreed to hear a case over whether corporations can be sued in federal courts for human rights violations occurring overseas.

The case, *Kiobel v. Royal Dutch Petroleum*, arises out of a suit by a dozen Nigerian plaintiffs claiming that Royal Dutch and two of its Shell Oil subsidiaries worked with the Nigerian government to torture and extrajudicially execute individuals protesting against the companies’ oil exploration.

The plaintiffs filed suit in United States district court under the Alien Tort Statute, which empowers the federal courts to hear cases by “an alien” bringing a civil suit for wrongs committed “in violation of the law of nations.” The first Congress passed the ATS into law in 1789.

While the ATS indicates who can sue, it does not say who or what can be sued. In *Kiobel*, the 2nd Circuit Court of Appeals held, by a 2-1 vote, that only natural persons, and not corporations, may be held liable under the ATS. “Corporate liability is not discernible” under the ATS, wrote the majority, because “no corporation has ever been subject to any form of liability (whether civil or criminal) under the customary international law of human rights.”

The D.C. Circuit and 7th Circuit split with the 2nd Circuit shortly after its *Kiobel* decision. Judge Richard Posner of the 7th

Circuit, in his opinion for a unanimous panel, found the “factual premise of the majority opinion in the *Kiobel* case incorrect,” citing the allied powers’ dissolution of German corporations that had aided the Nazi government in violation of customary international law.

Even so, Posner continued, that fact “has nothing to do with the issue of corporate liability.” Rather, as the D.C. Circuit put it, courts should look to whether the cause of action—in *Kiobel*, a claim such as torture—is “clearly established in the law of nations,” and then ask whether corporations are generally held liable in domestic lawsuits.

The Supreme Court will now step in to resolve the circuit split, but *Kiobel*’s outlier status does not signal an easy reversal. The D.C. Circuit’s dissenter, Judge Brett Kavanaugh, agreed with the 2nd Circuit’s approach in *Kiobel* and found that “customary international law does not recognize corporate liability.” Kavanaugh’s dissents in the past have served as clarion calls for the Court’s conservatives, so what he believes may be a good indicator for how the justices may come out. And Kavanaugh, a former clerk for Justice Anthony Kennedy, believed that “it would be quite odd for a U.S. court to allow a customary international law-based ATS claim against a corporation when no international tribunal has allowed a customary international law claim against a corporation.” Yet for many, it would also be quite odd for the Court, which found in *Citizens United* that the Framers intended the First Amendment to apply to corporate



persons, to reject the concept when it comes to corporate liability for crimes against humanity under a Founding-era statute.

The Court will likely schedule oral argument in *Kiobel* for February, with a decision to be handed down by late June.

## “Supreme Court Seeks Clarification on Jurisdiction in a Human Rights Case”

*The New York Times*

March 6, 2012

Adam Liptak

Six days after hearing arguments in a major human rights case about whether corporations may be sued for complicity in torture abroad, the Supreme Court on Monday instructed the parties to address an even broader question.

The court called for additional briefs to be filed by June and a reargument to be held during the court’s next term, which starts in October.

The original question in the case, *Kiobel v. Royal Dutch Petroleum Company*, No. 10-1491, was whether corporations might be sued in United States courts for human rights violations under a 1789 law.

At the argument last Tuesday, it emerged that several justices were interested in a larger question.

They wanted to know whether American courts might ever hear disputes under the law for human rights abuses abroad, whether the defendant was a corporation or not.

The case was brought by 12 Nigerian plaintiffs who said the defendants, foreign oil companies, had been complicit in human rights violations committed against them by the Abacha dictatorship in Nigeria.

“What business does a case like that have in the courts of the United States?” Justice Samuel A. Alito Jr. asked at the argument. “There’s no connection to the United States

whatsoever.”

Monday’s order instructed the parties to file briefs on the question of “whether and under what circumstances the Alien Tort Statute” allows courts to hear claims based on “violations of the law of nations occurring within the territory of a sovereign other than the United States.”

The Alien Tort Statute is not a model of clarity. It allows federal courts to hear “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

The law was largely ignored until the 1980s, when federal courts started to apply it in international human rights cases. A 2004 Supreme Court decision, *Sosa v. Álvarez-Machain*, left the door open to some claims under the law, as long as they involved violations of international norms with “definite content and acceptance among civilized nations.”

Requests for reargument can foreshadow major decisions.

In 2009, for instance, the justices asked for a second set of briefs and arguments in *Citizens United v. Federal Election Commission*, broadening what had been a quirky case into one that would give rise to the 2010 campaign finance blockbuster allowing unlimited corporate and union spending in candidate election.

## **“Supreme Court Says Torture Victim Law Applies Only to People, Not Organizations”**

*The Washington Post*

April 18, 2012

Robert Barnes

The Supreme Court ruled unanimously Wednesday that a federal law that allows torture victims to sue their overseas assailants does not permit suits against corporations or political groups such as the Palestine Liberation Organization.

The justices said the Torture Victim Protection Act of 1991 authorized lawsuits only against individuals responsible for torture and killing. “The text of the TVPA convinces us that Congress did not extend liability to organizations, sovereign or not,” Justice Sonia Sotomayor wrote for the united court.

“There are no doubt valid arguments for such an extension. But Congress has seen fit to proceed in more modest steps in the act, and it is not the province of this branch to do otherwise.”

The legislation authorizes lawsuits in U.S. courts against “an individual” who “under actual or apparent authority, or color of law, of any foreign nation” tortures a person or takes part in an “extrajudicial” killing.

The case before the court involves a lawsuit filed by the family of Palestinian American Azzam Rahim. Rahim immigrated to the United States in the 1970s and returned to the West Bank in 1995. His family alleged that he was arrested by Palestinian Authority intelligence officers and imprisoned, tortured and eventually killed in a Jericho prison.

Rahim’s survivors filed suit in 2005 against the PLO and the Palestinian Authority. A district judge and the U.S. Court of Appeals for the

D.C. Circuit dismissed the case, saying only people can be sued under the language of the TVPA. But other lower courts have said that such suits could proceed against corporations and other entities.

Human rights organizations had argued that the law was “toothless” if suits were limited to individuals rather than entities that might have controlled the torture or killings.

Sotomayor acknowledged that that might be true but wrote that “Congress appeared well aware of the limited nature of the cause of action it established in the act.”

Although the law does not define the word “individual,” she noted, Congress seemed to go out of its way to make sure that the term referred only to people.

The legislation’s text “evinces a clear intent not to subject non-sovereign organizations to liability,” she wrote.

The case is part of an effort by human rights groups to use U.S. courts to avenge torture and killings overseas. Foreign governments are largely protected from suits in the United States because of the Foreign Sovereign Immunities Act. But dozens of suits have been filed against multinational corporations under the TVPA and a 1789 act, the Alien Tort Statute.

The Supreme Court heard an argument this year about whether the ATS allows corporations to be held liable for human rights abuses committed abroad in which they might

have been complicit. But the justices put off a decision to look at a broader question next term: whether anyone can be sued under the

statute for violations of international law that occur in other countries.

## “U.S. Urges Narrowing Human Rights Claims”

*SCOTUSblog*  
June 13, 2012  
Lyle Denniston

The Obama Administration urged the Supreme Court on Thursday to close the U.S. courts to most lawsuits involving claims that a foreign corporation helped a foreign government engage in human rights abuses in that country. While arguing that the door to American courts should be left somewhat ajar to allow some abuse claims, the options that would remain would appear to be quite narrow, with a variety of legal hurdles to overcome. The government’s new reaction to lawsuits under the Alien Tort Statute, first enacted in 1789, was expressed in a brief filed in *Kiobel v. Royal Dutch Petroleum* (docket 10-1491). That specific lawsuit, the brief argued, should not be permitted.

That case, heard by the Justices in February, is due to be reheard in the new Term starting October 1. The new issue to be explored then—a question raised by the Court itself in March—is whether and under what circumstances an ATS lawsuit should be allowed based on international law violations that had occurred in a foreign land. Technically, that is the issue of “extraterritorial application” of the ATS. Previously, the *Kiobel* case had focused only on whether corporations could be sued in U.S. courts under the ATS for foreign violations of global law.

The supplemental government brief offered a complex argument, attempting to move between a sharply negative view of lawsuits by private individuals that focus on foreign conduct, and an unwillingness to say that no ATS lawsuit should ever be allowed in a

U.S. court for overseas breaches of international law. The views appeared to have been strongly influenced by State Department concerns that opening U.S. courts for many claims that involved foreign government actions would disrupt foreign policy and complicate diplomatic relations, and perhaps expose the U.S. to reprisals abroad. The ultimate conclusion was that the Court need not resolve all issues surrounding ATS claims in this one lawsuit, but that the Justices should embrace some controlling principles that generally would work against U.S. courts’ fashioning new ATS claims for breaches of international law.

However, there was no mistaking the clarity of this statement: American courts “should not create a cause of action that challenges the actions of a foreign sovereign in its own territory, where the [sued party] is a foreign corporation of a third country that allegedly aided and abetted the foreign sovereign’s conduct.” Beyond that, the brief added, the Court should not go, leaving open the questions of whether an ATS lawsuit could proceed against a U.S. national or U.S. corporation, whether such a suit could be brought where the alleged misconduct of a foreign government had occurred outside its own territory, or where the lawsuit targeted the conduct of others within the U.S. or on the high seas.

The brief did claim that the Obama Administration had softened the federal government’s past opposition to ATS lawsuits. It noted that the government “in

recent years has advanced a more categorical rule against extraterritoriality before this Court and the courts of appeals,” referring to one brief in 2004 in which the Justice Department had argued that no lawsuit should be recognized under the ATS for the conduct of foreign individuals in foreign countries, and another brief in 2009 arguing against an ATS lawsuit aimed at conduct occurring in a foreign country. The new brief added: “As explained in this brief, the government urges the Court not to adopt such a categorical rule here.”

Even so, the opening that the new brief would leave for ATS claims was tightly circumscribed. It was focused, as is the *Kiobel* case in particular, on when the courts should create, on their own initiative, a right to sue for violations of international law. Accepting that Congress has wider power to create a right to sue for foreign abuses, as the lawmakers did in 1991 in the Torture Victim Protection Act, the brief suggested that there should be a “general assumption” that creating a right to sue for private individuals under ATS was “better left to legislative judgment.”

The filing did accept (and noted that the State Department, too, had accepted) that a right to sue had been properly recognized by the Second Circuit Court in 1980, in the case of *Filartiga v. Pena-Irala*. That was the decision that is generally credited with launching a wave of new lawsuits under the ATS after that law had languished for decades. But note the key features of the *Filartiga* ruling that the Justice and State Departments now endorse as valid claims: while that case involved a claim by Paraguayan individuals against a Paraguayan individual for abuses committed in that Latin American country, the claim was for torture, and the sued individual had actually been found living in the U.S., and

that suggested that maybe the U.S. government could be accused of harboring him. And, the brief added, those Paraguayan individuals if suing now would be able to do so under the anti-torture law, the TVPA.

Turning to the *Kiobel* case itself, the new filing flatly urged that it be rejected. It involved, the brief noted, Nigerian nationals suing Dutch and British corporations for allegedly helping the Nigerian military and police forces to commit torture, killings, “crimes against humanity,” and arbitrary arrest and detention—all of which had occurred inside Nigeria. In those circumstances, the brief said, “the United States cannot be thought responsible in the eyes of the international community for affording a remedy for the company’s actions, while the nations directly concerned could.”

Even when circumstances might arise that would justify bringing an ATS lawsuit in the U.S. courts for abuses that occurred in foreign lands, the brief said, there should be strict requirements that those who sued should first have to have tried to get some legal relief in the courts or the government of that country, and, if there is an international claims agency available, to try for a remedy there. Such lawsuits, it added, also should be limited by the notion that a U.S. court might well be an inconvenient forum, in which it was more difficult or costly for a foreign government or foreign corporation to mount a defense many miles from its own shores.

Those two limiting requirements should be imposed “at the outset of the litigation,” and should be applied “with special force,” the brief argued. In particular, when the link to the U.S. “is slight,” the filing contended, “a U.S. court applying U.S. law should be a forum of last resort, if available at all.”

The *Kiobel* plaintiffs have already filed their supplemental brief on the overseas reach of ATS, urging that the Justices allow such an application of that law in their case. The two oil companies sued in the case are due to file their briefs on that issue in August. After that, the *Kiobel* parties will have a chance to file a reply brief.

The Justice Department has been taking part in the *Kiobel* case since briefing began. In an earlier brief filed in December, it

supported the *Kiobel* plaintiffs and urged the Court to rule that corporations could be sued under the ATS for overseas human rights abuses, saying there was nothing in the history of that old law that provided a basis for applying it only to natural persons. Its new position against the *Kiobel* claims is bound to draw criticism of the government from human rights activists, who had been hoping that the Justice Department would not file a brief against the claims in this case.

***Clapper v. Amnesty International USA***

**11-1025**

**Ruling Below:** *Amnesty International USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011), *cert. granted*, 2012 WL 526046 (U.S. 2012).

The Foreign Intelligence Surveillance Act (FISA) was enacted in 1978 to remedy abuses of electronic surveillance conducted for national security. FISA was amended in 2008 and codified as 50 U.S.C. 1881a, establishing procedures that allow the Attorney General and Director of National Intelligence’s to target foreign persons for surveillance without individualized identification in order to acquire “foreign intelligence information.” The day this amendment was enacted, attorneys, journalists, human rights organizations, and others brought a facial challenge to Section 1881a, seeking a declaration that the provision is unconstitutional (under Article III and the First and Fourth Amendments) and an injunction permanently enjoining any foreign-intelligence surveillance from being conducted under the section. The case has not yet reached its merits as the District Court for the Southern District of New York granted summary judgment for the government, holding that the groups did not have standing to pursue their claim. On appeal, the Court of Appeals for the Second Circuit reversed, holding that the organizations had standing based upon a reasonable fear of being monitored based on a “realistic understanding of the world” and the costs incurred to avoid that injury. In a 6-6 split, the Second Circuit refused to rehear the decision en banc.

**Question Presented:** Whether respondents lack Article III standing to seek prospective relief because they proffered no evidence that the United States would imminently acquire their international communications using 50 U.S.C. 1881a-authorized surveillance and did not show that an injunction prohibiting Section 1881a-authorized surveillance would likely redress their purported injuries.

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**AMNESTY INTERNATIONAL USA, Global Fund for Women, Global Rights, Human Rights Watch, International Criminal Defence Attorneys Association, The Nation Magazine, PEN American Center, Service Employees International Union, Washington Office on Latin America, Daniel N. Arshack, David Nevin, Scott McKay, Sylvia Royce, Plaintiffs–Appellants,**

**v.**

**James R. CLAPPER, Jr., in his official capacity as Director of National Intelligence, Keith B. Alexander, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service, Eric H. Holder, Jr., in his official capacity as Attorney General of the United States, Defendants–Appellees.**

United States Court of Appeals for the Second Circuit

Decided March 21, 2011

[Excerpt; some text, footnotes and citations omitted.]



## **LYNCH, Circuit Judge**

Attorneys, journalists, and labor, legal, media, and human rights organizations brought this action facially challenging the constitutionality of Section 702 of the Foreign Intelligence Surveillance Act of 1978 (“FISA”), which was added to FISA by Section 101(a)(2) of the FISA Amendments Act of 2008 (the “FAA”), and codified at 50 U.S.C. § 1881a. Section 702 creates new procedures for authorizing government electronic surveillance targeting non-United States persons outside the United States for purposes of collecting foreign intelligence. The plaintiffs complain that the procedures violate the Fourth Amendment, the First Amendment, Article III of the Constitution, and the principle of separation of powers because they “allow[] the executive branch sweeping and virtually unregulated authority to monitor the international communications . . . of law-abiding U.S. citizens and residents.”

The merits of the plaintiffs’ claims are not before us. The *only* issue presented by this appeal is whether the plaintiffs are legally in a position to assert these claims in a federal court, not whether the claims are to any degree valid. Their merit is an issue for another court on another day. The district court (Koeltl, *J.*) granted the government summary judgment because it found that the plaintiffs lacked standing. On appeal, the plaintiffs argue that they have standing because the FAA’s new procedures cause them to fear that their communications will be monitored, and thus force them to undertake costly and burdensome measures to protect the confidentiality of international communications necessary to carrying out their jobs. Because standing may be based on a reasonable fear of future injury and costs incurred to avoid that injury, and the

plaintiffs have established that they have a reasonable fear of injury and have incurred costs to avoid it, we agree that they have standing. We therefore reverse the district court’s judgment.

## **BACKGROUND**

### **I. Statutory Scheme at Issue**

In 1978, Congress enacted FISA to establish procedures under which federal officials could obtain authorization to conduct electronic surveillance for foreign intelligence purposes, including surveillance of communications between persons located within the United States and surveillance of communications between persons located within the United States and persons located outside the United States. The 2008 FAA amends FISA. It leaves much of the preexisting surveillance authorization procedure intact, but it creates new procedures for the authorization of foreign intelligence electronic surveillance targeting non-United States persons located outside the United States. The plaintiffs complain that the new procedures unlawfully permit broader collection of intelligence with less judicial oversight. . . .

### **B. Surveillance Authorization Procedures After the FAA**

The FAA leaves much of the FISA framework intact, but the new Section 702 creates new procedures for the authorization of foreign intelligence surveillance targeting non-United States persons located outside the United States.

The FAA, in contrast to the preexisting FISA scheme, does not require the government to submit an individualized application to the FISC identifying the

particular targets or facilities to be monitored. Instead, the Attorney General (“AG”) and Director of National Intelligence (“DNI”) apply for a mass surveillance authorization by submitting to the FISC a written certification and supporting affidavits attesting generally that “a significant purpose of the acquisition is to obtain foreign intelligence information” and that that information will be obtained “from or with the assistance of an electronic communication service provider.” The certification must also attest that adequate targeting and minimization procedures have been approved by the FISC, have been submitted to the FISC for approval, or are being submitted with the certification. “Targeting procedures” are procedures designed to ensure that an authorized acquisition is “limited to targeting persons reasonably believed to be located outside the United States,” and is designed to “prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.” “Minimization procedures” for electronic surveillance under the FAA must meet the definition of minimization procedures for electronic surveillance under FISA, set out in 50 U.S.C. § 1801(h). The government’s certification must further attest that the surveillance procedures, which must be included with the certification, comply with the Fourth Amendment.

In addition, the certification must attest that the surveillance complies with statutory limitations providing that it:

(1) may not intentionally target any person known at the time of acquisition to be located in the United States;

(2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States;

(3) may not intentionally target a United States person reasonably believed to be located outside the United States;

(4) may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States; and

(5) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.

The FISC must review the government’s certification, and targeting and minimization procedures, and if it finds that the certification includes all of the required elements, it must issue an order authorizing the government to conduct the requested surveillance. At that point, the AG and DNI “may authorize jointly, for a period of up to 1 year . . . , the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.”

If the FISC rejects an application, the government may appeal the denial to the Court of Review. During the pendency of that appeal, including any subsequent rehearing en banc, the government may continue to conduct the requested surveillance.

Under the FAA, in contrast to the preexisting FISA scheme, the FISC may not monitor compliance with the targeting and minimization procedures on an ongoing basis. Instead, that duty falls to the AG and DNI, who must submit their assessments to the FISC, as well as the congressional intelligence committees and the Senate and House Judiciary Committees. In its summary judgment submissions, the government asserted that “[s]hould such reporting reveal particular minimization procedures to be ineffective in any respect, the FISC has the authority to disapprove such procedures in future § 1881a proceedings.” But the government has not asserted, and the statute does not clearly state, that the FISC may rely on these assessments to revoke earlier surveillance authorizations.

The head of each element of the intelligence community acquiring communications by means of authorized surveillance also must review the ongoing surveillance procedures by conducting “an annual review to determine whether there is reason to believe that foreign intelligence information has been or will be obtained from the acquisition.” These reviews of authorized acquisitions must indicate how many United States persons were overheard or were referred to in intercepted communications that were collected under surveillance designed to target non-United States persons. The relevant intelligence heads who conduct such annual reviews must use them “to evaluate the adequacy of the minimization procedures,” and they must provide these annual reviews to the FISC, the AG, the DNI, the congressional intelligence committees, and the Senate and House Judiciary Committees.

### **C. Comparison of Pre- and Post-FAA Surveillance Authorization Procedures**

The plaintiffs highlight two differences between the pre- and post-FAA surveillance authorization procedures. First, whereas under the preexisting FISA scheme the government had to submit an individualized application for surveillance identifying the particular target, facility, type of information sought, and procedures to be used, under the FAA, the government need not submit a similarly individualized application—it need not identify the particular target or facility to be monitored. Second, whereas under the preexisting FISA scheme the FISC had to find probable cause to believe both that the surveillance target is a “foreign power” or agent thereof and that the facilities to be monitored were being used or about to be used by a foreign power or its agent, under the FAA the FISC no longer needs to make any probable cause determination at all. Instead, the FISC simply verifies that the government has made the proper certifications.

In practice, these new authorization procedures mean that surveillance orders can be significantly broader under the FAA than they previously could have been. Prior to the FAA, surveillance orders could only authorize the government to monitor specific individuals or facilities. Under the FAA, by contrast, the plaintiffs allege that an acquisition order could seek, for example, “[a]ll telephone and e-mail communications to and from countries of foreign policy interest—for example, Russia, Venezuela, or Israel—including communications made to and from U.S. citizens and residents.” Moreover, the specific showing of probable cause previously required, and the

requirement of judicial review of that showing, have been eliminated. The government has not directly challenged this characterization.

An additional distinction concerns who monitors compliance with statutory limitations on the surveillance procedures. The preexisting FISA scheme allowed ongoing judicial review by the FISC. But under the FAA, the judiciary may not monitor compliance on an ongoing basis; the FISC may review the minimization procedures only prospectively, when the government seeks its initial surveillance authorization. Rather, the executive—namely the AG and DNI—bears the responsibility of monitoring ongoing compliance, and although the FISC receives the executive’s reports, it cannot rely on them to alter or revoke its previous surveillance authorizations.

## **II. Prior Proceedings**

### **A. Parties**

The plaintiffs are attorneys and human rights, labor, legal, and media organizations whose work requires international communications with individuals they believe the government will likely monitor under the FAA. The plaintiffs sued the DNI, the AG, and the Director of the National Security Agency (“NSA”) in their official capacities (collectively, “the government”).

### **B. Complaint**

On July 10, 2008, the same day Congress enacted the FAA, the plaintiffs filed their complaint alleging that the FAA “allows the executive branch sweeping and virtually unregulated authority to monitor the international communications . . . of law-abiding U.S. citizens and residents.” The

plaintiffs alleged that they feared that under the FAA the government would intercept their sensitive international communications that were necessary to carrying out their jobs, and that they therefore had to take costly and burdensome measures to protect the confidentiality of those communications. They sought declaratory and injunctive relief, alleging that the FAA facially violates the Fourth Amendment, the First Amendment, Article III of the Constitution, and the principle of separation of powers.

### **C. Summary Judgment Filings**

In September and October 2008, the parties cross-moved for summary judgment. The plaintiffs sought a declaration that the FAA is unconstitutional. The government, in addition to defending the FAA’s constitutionality on the merits, argued that the plaintiffs lacked standing to challenge the facial validity of the statute, contending that the Act could be challenged only by persons who had been electronically surveilled in accordance with its terms and the plaintiffs could not show that they had been so surveilled. The plaintiffs advanced what they characterized as two independent bases for standing to challenge the FAA’s constitutionality: first, that they have an actual and well-founded fear that their communications will be monitored in the future; and, second, that in light of that fear they have taken costly and burdensome measures to protect the confidentiality of certain communications.

In support of their standing arguments, the plaintiffs filed declarations and a Statement of Undisputed Facts pursuant to Local Rule 56.1 (“56.1 Statement”). The plaintiffs’ evidence tended to show that their work “requires them to engage in sensitive and sometimes privileged telephone and e-mail communications with colleagues, clients,

journalistic sources, witnesses, experts, foreign governmental officials, and victims of human rights abuses located outside the United States.” The individuals with whom the plaintiffs communicate include “people the U.S. Government believes or believed to be associated with terrorist organizations,” “political and human rights activists who oppose governments that are supported economically or militarily by the U.S. government,” and “people located in geographic areas that are a special focus of the U.S. government’s counterterrorism or diplomatic efforts.”

The plaintiffs assert that in their electronic communications with these individuals they exchange information that “constitutes ‘foreign intelligence information’ within the meaning of the FAA.” The plaintiffs believe that, because of the nature of their communications with these individuals, the communications will likely be “acquired, retained, analyzed, and disseminated” under the FAA.

Their fear of future surveillance, according to the plaintiffs, inflicts present injuries. For instance, in order to protect the confidentiality of sensitive and privileged communications the plaintiffs have “ceased engaging in certain conversations on the telephone and by e-mail,” which, in turn, “compromises [their] ability to locate witnesses, cultivate sources, gather information, communicate confidential information to their clients, and to engage in other legitimate and constitutionally protected communications.” In addition, the FAA has “force[d] plaintiffs to take costly and burdensome measures,” such as traveling long distances to meet personally with individuals.

The attorney plaintiffs assert that they are obligated to take these measures in order to

comply with their “ethical obligation to avoid communicating confidential information about client matters over telephone, fax, or e-mail if they have reason to believe that it is likely to be intercepted by others.” In support of this assertion, the plaintiffs filed a declaration from Professor Stephen Gillers, an expert in legal ethics, stating that it is “the duty of a lawyer to safeguard confidential information.”

Gillers attested that “[d]eterminative of how the lawyer may proceed is . . . whether the lawyer has good reason to believe that his or her communications are reasonably likely to be intercepted, even if the interception is lawful.” He then opined that the FAA gives the attorneys sufficient reason to believe their communications will be intercepted:

My opinion is that the lawyers have good reason for this belief [that their communications with clients and third parties in connection with client matters will be intercepted] because of the status of their clients, the identity and location of witnesses and sources, and the broad authority that the FAA grants the government. The lawyers’ decision to avoid electronic means of communication is not discretionary. It is obligatory.

The government did not submit any evidence of its own either in opposition to the plaintiffs’ submissions, or in support of its own summary judgment motion. Additionally, at oral argument on the summary judgment motions, the government said it accepted the factual submissions of the plaintiffs as true for purposes of those motions. We therefore must accept the plaintiffs’ evidence as undisputed explanations of how the FAA has affected them.

## D. District Court's Summary Judgment Opinion

The district court held that the plaintiffs lacked standing to challenge the FAA, and therefore granted summary judgment for defendants without reaching the merits of the plaintiffs' claims. After identifying the three constitutional requirements for standing—an injury in fact, a causal connection between the injury and the challenged statute, and redressability—the court stated that “[t]his case turns on whether the plaintiffs have met the irreducible constitutional minimum of personal, particularized, concrete injury in fact.” The court denied standing because it found that neither of the plaintiffs’ asserted injuries—their actual and well-founded fear of being monitored, and the resulting professional and economic costs they have incurred to protect the confidentiality of their communications—constituted the requisite injury in fact.

### 1. Fear of Future Surveillance

The district court found the plaintiffs’ fear of future surveillance too speculative to confer standing. It stated:

The plaintiffs have failed to establish standing to challenge the constitutionality of the FAA on the basis of their fear of surveillance. . . . Indeed, the FAA neither authorizes surveillance nor identifies on its face a class of persons that includes the plaintiffs. Rather the FAA authorizes specified federal officials to seek a surveillance order from the FISC. That order cannot target the plaintiffs and whether an order will be sought that affects the plaintiffs’ rights, and whether such an order would be

granted by the FISC, is completely speculative.

To arrive at this conclusion, the district court relied on three lines of cases. First, the court looked to cases where plaintiffs have sought standing to challenge electronic surveillance schemes, namely *United Presbyterian Church in the U.S.A. v. Reagan* and *ACLU v. NSA*. Both of these cases rejected the plaintiffs’ standing arguments, which were based on their fear of future injuries, because the plaintiffs’ respective fears were too speculative. The district court found those cases apposite and persuasive.

Second, the court examined “‘physical surveillance cases’ where the Supreme Court reached the merits of challenges to laws or policies authorizing drug or alcohol testing for specific classes of persons, without requiring that the plaintiffs had actually submitted to such testing before bringing such challenges.” The district court held that those cases have “no application to this case, where the plaintiffs are not required to do anything or to submit to anything, and where there is no showing that the Government has authorized any action against [a class of persons including] the plaintiffs.”

Finally, the district court examined standing cases outside the surveillance context, and said those cases: “stand for the proposition that a plaintiff may challenge a specific law or regulation before it is enforced against the plaintiff if the plaintiff is subject to that law or regulation and has a well-founded fear that it will be so enforced. . . . Moreover, the FAA does not authorize surveillance of the plaintiffs’ communications and the plaintiffs have made no showing that the Government has sought any such surveillance pursuant to the general framework set forth in the statute

or that such surveillance has been authorized.”

## **2. Economic and Professional Costs Incurred to Protect Communications**

As for the plaintiffs’ economic and professional costs, the court found that those injuries are “not truly independent of the [plaintiffs’] first basis” for standing, because those costs “flow directly from the plaintiffs’ fear of surveillance.” The court said that “[t]o allow the plaintiffs to bring this action on the basis of such costs would essentially be to accept a repackaged version of the first failed basis for standing.” Moreover, the court held that “because the plaintiffs have failed to show that they are subject to the FAA and that they face a threat of harm from its enforcement, the chilling of their speech that they attribute to the statute is actually the result of their purely subjective fear of surveillance.” The court went on to state that the Supreme Court has held in *Laird v. Tatum*, that such a subjective chill “is insufficient to support standing.”

## **DISCUSSION**

This opinion addresses only the question of whether plaintiffs have standing to challenge the FAA. It does not address the FAA’s constitutionality. The district court did not reach that issue, and the parties did not brief it. The question before this Court is only whether the plaintiffs may maintain this lawsuit, a question that “in no way depends on the merits of the plaintiffs contention that particular conduct is illegal” “We review questions of standing *de novo*.”

### **I. Elements and Principles of Standing**

Article III of the United States Constitution

empowers federal courts to hear only “cases” and “controversies.” U.S. Const. art. III, § 2. Standing doctrine determines “whether the plaintiff has made out a ‘case or controversy’ between himself and the defendant within the meaning of Art. III,” and is therefore “entitled to have the court decide the merits of the dispute or of particular issues.” A citizen who dislikes a particular law may not require a court to address its constitutionality simply by stating in a complaint his belief, however deeply held, that the law is inconsistent with some provision of the Constitution. “[T]he [Supreme] Court has rejected all attempts to substitute abstract concern with a subject . . . for the concrete injury required by Art. III.”

The plaintiff must be affected by the law in some concrete way. “Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution.” The critical question is whether “the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction.”

The Supreme Court has said that “the irreducible constitutional minimum of standing contains three elements”:

First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third

party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

“The party invoking federal jurisdiction bears the burden of establishing these elements.” These requirements “assure[] that there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.”

Standing doctrine serves a number of purposes. The Supreme Court has said standing is “built on a single basic idea—the idea of separation of powers.” “[T]he judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts.” By limiting the exercise of judicial review of other branches of government to cases where it is necessary to protect a complaining party’s interests, standing doctrine is “founded in concern about the proper—and properly limited—role of the courts in a democratic society.” If we had no standing doctrine and instead simply allowed the courts to “oversee legislative or executive action,” that would “significantly alter the allocation of power away from a democratic form of government.”

Standing doctrine also serves to improve judicial decision making by ensuring that a concrete case informs the court of the consequences of its decisions, and by ensuring that the party bringing the case has “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”

## **II. Plaintiffs’ Asserted Grounds for Standing**

On appeal, the plaintiffs reassert that they have suffered two types of injuries. First, they claim that they fear that the government will intercept their sensitive international communications, because the FAA “plainly authorizes the acquisition of [their] international communications,” and their communications are “likely to be monitored under it.” Second, they claim that anticipation of this future injury also inflicts a present injury “by compelling them to take costly and burdensome measures to protect the confidentiality of their international communications” and by compromising their “ability to locate witnesses, cultivate sources, gather information, communicate confidential information to their clients, and to engage in other legitimate and constitutionally protected communications.” The district court and the parties have focused on whether the plaintiffs’ asserted injuries satisfy the injury-in-fact component of the standing inquiry. Although they are correct that the plaintiffs’ first asserted injury—the possibility of being monitored in the future—raises a question of injury in fact, because probabilistic injuries constitute injuries in fact only when they reach a certain threshold of likelihood, the plaintiffs’ second asserted injury alleges the most mundane of injuries in fact: the expenditure of funds. The plaintiffs’ declarations, which, as discussed above, we must accept as true, establish that they have already incurred professional and economic costs to avoid interception. Having accepted the truthfulness of the plaintiffs’ declarations for purposes of the summary judgment motion, the government cannot now dispute whether the plaintiffs genuinely fear being intercepted, or whether the plaintiffs have



actually incurred the costs they claim to have incurred. Thus, we have little doubt that the plaintiffs have satisfied the injury-in-fact requirement.

As to the second asserted injury—their present-injury theory—that the plaintiffs have demonstrated injuries in fact is not sufficient in itself to establish standing. The plaintiffs must also prove that the injuries are caused by the challenged statute and that a favorable judgment would redress them. The government’s challenge to the plaintiffs’ standing based on their incurred professional and economic costs focuses on whether there is a “causal connection between [the plaintiffs’] injury and the [legislation] complained of.” The causal chain can be broken where a plaintiffs self-inflicted injury results from his “unreasonable decision . . . to bring about a harm that he knew to be avoidable.” However, “[s]tanding is not defeated merely because the plaintiff has in some sense contributed to his own injury. . . . Standing is defeated only if it is concluded that the injury is so completely due to the plaintiffs own fault as to break the causal chain.”

If the plaintiffs can show that it was not unreasonable for them to incur costs out of fear that the government will intercept their communications under the FAA, then the measures they took to avoid interception can support standing. If the possibility of interception is remote or fanciful, however, their present-injury theory fails because the plaintiffs would have no reasonable basis for fearing interception under the FAA, and they cannot bootstrap their way into standing by unreasonably incurring costs to avoid a merely speculative or highly unlikely potential harm. Any such costs would be gratuitous, and any ethical concerns about not taking those measures would be unfounded. In other words, for the

purpose of standing, although the plaintiffs’ economic and professional injuries are injuries in fact, they cannot be said to be “fairly traceable” to the FAA—and cannot support standing—if they are caused by a fanciful, paranoid, or otherwise unreasonable fear of the FAA. “If causation is to be required at all, it should demand a meaningful level of probability,” but “[a]s with other elements of standing, the showing required might be tailored to the other facts that make it more or less appropriate to decide the case.”

Here, the plaintiffs’ actions were “fairly traceable” to the FAA. Because, as we shall explain, the plaintiffs’ fears were reasonable even under the stringent reasonableness standards found in *future-injury* cases, and because the plaintiffs incurred these professional and economic costs as a direct result of that reasonable fear, their present injuries in fact clearly satisfy the requirements for standing. We therefore need not and do not decide whether the degree of likelihood necessary to establish a causal relationship between an actual present injury and the challenged governmental action is as stringent as that necessary for a potential harm in itself to confer standing. However, the line of future-injury standing cases provides a helpful framework for analyzing the plaintiffs’ present-injury arguments. Those cases bolster our conclusion that the professional and economic harms the plaintiffs suffered here were fairly traceable to the FAA, and were not the result of an “unreasonable decision” on their part “to bring about a harm that [they] knew to be avoidable.”

In addition to their present-injury theory, the plaintiffs advance a future-injury theory of standing. A future injury or threat of injury does not confer standing if it is “conjectural or hypothetical” and not “real and

immediate.” To determine whether the plaintiffs have standing under their future-injury theory, we would need to determine whether the FAA creates an objectively reasonable likelihood that the plaintiffs’ communications are being or will be monitored under the FAA. As noted above, we conclude that the future injuries alleged by the plaintiffs are indeed sufficiently likely to confer standing under the test established in the case law for basing standing on the risk of future harm.

The government’s first argument against the plaintiffs’ standing—on both theories—is that the FAA does not create a sufficiently high likelihood that those communications will be monitored. In our judgment, however, for the reasons set forth in Part III, below, the plaintiffs have established that they reasonably fear being monitored under the allegedly unconstitutional FAA, and that they have undertaken costly measures to avoid it. Those present injuries—fairly traceable to the FAA and likely to be redressable by a favorable judgment—support the plaintiffs’ standing to challenge the statute.

The government next argues that the plaintiffs lack standing because any injury they suffer is indirect. That is, the government contends that because the FAA does not directly target the plaintiffs, any injury the plaintiffs suffer is a result of their reaction to the government’s potential monitoring of third parties. The government essentially argues that this indirectness defeats the plaintiffs’ standing because it attenuates the causal chain linking the plaintiffs’ injuries to the FAA. For the reasons set forth in Part IV, below, we disagree.

### III. Likelihood of Government Action

The government argues that the plaintiffs can obtain standing only by showing either that they have been monitored or that it is “effectively certain” that they will be monitored. The plaintiffs fall short of this standard, according to the government, because they “simply speculate that they will be subjected to governmental action taken pursuant to [the FAA].”

But the government overstates the standard for determining when a present injury linked to a contingent future injury can support standing. The plaintiffs have demonstrated that they suffered present injuries in fact—concrete economic and professional harms—that are fairly traceable to the FAA and redressable by a favorable judgment. The plaintiffs need not show that they have been or certainly will be monitored. Indeed, even in cases where plaintiffs allege an injury based solely on prospective government action, they need only show a “realistic danger” of “direct injury;” and where they allege a prospective injury to First Amendment rights, they must show only “‘an actual and well-founded fear’ “of injury, an arguably less demanding standard.

#### A. Standard

When a plaintiff asserts a *present* injury based on conduct taken in anticipation of *future* government action, we evaluate the likelihood that the future action will in fact come to pass. To determine whether the present injury “fairly can be traced to the challenged [future] action,” we must consider whether a plaintiffs present injury resulted from some irrational or otherwise clearly unreasonable fear of future

government action that is unlikely to take place. Such a disconnect between the present injury and predicted future government action would break the causal chain required for standing.

In this context, cases that discuss whether a potential *future* harm is sufficiently likely such that the chance of that future harm constitutes an injury in fact can provide some guidance for determining whether the plaintiffs have satisfied the causation requirement for standing where their assertions of present and ongoing injuries stem, in part, from a desire to avoid potential future injuries.

In *Lyons*, the seminal case on standing based on probabilistic or prospective harm, the plaintiff sued the City of Los Angeles and certain police officers alleging that officers stopped him for a traffic violation and, without provocation, applied a choke-hold, rendering him unconscious and damaging his larynx. In addition to seeking damages, he sought to enjoin police officers' use of chokeholds.

The Court said, "Lyons' standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers," emphasizing that "[t]he reasonableness of [the plaintiffs] fear [of future injury] is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct. It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiffs subjective apprehensions."

The Court held that Lyons lacked standing to pursue injunctive relief, because he did not show a sufficient likelihood that he would be injured. It said, "[w]e cannot agree that the odds that Lyons would not only

again be stopped for a traffic violation but would also be subjected to a chokehold without any provocation whatsoever are sufficient to make out a federal case for equitable relief." Without a "sufficient likelihood that he will again be wronged in a similar way," Lyons was "no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional."

Although the plaintiff in *Lyons* lacked standing, that case clearly articulated the principle that a plaintiff may obtain standing by showing a sufficient likelihood of future injury. Indeed, the Court stated that Lyons would have established standing if he had been able to allege facts that would have made his injury sufficiently likely—such as another encounter with the police or a city policy authorizing police officers to engage in the conduct he feared.

This Court has articulated the principle of *Lyons* as requiring an inquiry into the probability of future harm. In *Curtis v. City of New Haven*, where plaintiffs sought to enjoin police officers' use of mace in certain circumstances because officers stopped them, maced them, and gave them no treatment afterward, we denied standing, holding that "the Court made clear in *Lyons* that the critical inquiry is the *likelihood* that these plaintiffs will again be illegally assaulted with mace."

Assessing whether a threatened injury, by itself, is sufficiently probable to support standing is a "qualitative, not quantitative" inquiry that is "highly case-specific." "[T]he question of whether anticipated future injury suffices to establish standing is approached as a question of judgment and degrees."

Indeed, in future-injury cases, we have said that “the risk of harm necessary to support standing cannot be defined according to a universal standard.”

One factor that bolsters a plaintiff's argument that the injury is likely to come to pass, according to both the Supreme Court and this Court, is the existence of a policy that authorizes the potentially harmful conduct. However, the cases do not establish any talismanic, dispositive facts a plaintiff must plead in order to establish a certain threshold of probability. Some cases suggest that the risk of that harm need not be particularly high. The probability required “logically varies with the severity of the probable harm.” Ultimately, courts consider the totality of the circumstances, and where a “plaintiff's interpretation of a statute is ‘reasonable enough’ and under that interpretation the plaintiff ‘may legitimately fear that it will face enforcement of the statute,’ then the plaintiff has standing to challenge the statute.”

## **B. Application**

The plaintiffs have established that they suffered *present* injuries in fact—economic and professional harms—stemming from a reasonable fear of *future* harmful government conduct. They have asserted that the FAA permits broad monitoring through mass surveillance orders that authorize the government to collect thousands or millions of communications, including communications between the plaintiffs and their overseas contacts. The FAA is susceptible to such an interpretation, and the government has not controverted this interpretation or offered a more compelling one.

It is significant that the injury that the plaintiffs fear results from conduct that is

authorized by statute. This case is not like *Lyons*, where the plaintiff feared injury from officers who would have been acting outside the law, making the injury less likely to occur. Here, the fact that the government has authorized the potentially harmful conduct means that the plaintiffs can reasonably assume that government officials will actually engage in that conduct by carrying out the authorized surveillance. It is fanciful, moreover, to question whether the government will ever undertake broad based surveillance of the type authorized by the statute. The FAA was passed specifically to permit surveillance that was not permitted by FISA but that was believed necessary to protect the national security. That both the Executive and the Legislative branches of government believe that the FAA authorizes new types of surveillance, and have justified that new authorization as necessary to protecting the nation against attack, makes it extremely likely that such surveillance will occur.

Furthermore, the plaintiffs have good reason to believe that their communications, in particular, will fall within the scope of the broad surveillance that they can assume the government will conduct. The plaintiffs testify that in order to carry out their jobs they must regularly communicate by telephone and e-mail with precisely the sorts of individuals that the government will most likely seek to monitor—i.e., individuals “the U.S. government believes or believed to be associated with terrorist organizations,” “political and human rights activists who oppose governments that are supported economically or militarily by the U.S. government,” and “people located in geographic areas that are a special focus of the U.S. government’s counterterrorism or diplomatic efforts.” The plaintiffs’ assessment that these individuals are likely targets of FAA surveillance is reasonable,

and the government has not disputed that assertion.

On these facts, it is reasonably likely that the plaintiffs' communications will be monitored under the FAA. The instant plaintiffs' fears of surveillance are by no means based on "mere conjecture," delusional fantasy, or unfounded speculation. Their fears are fairly traceable to the FAA because they are based on a reasonable interpretation of the challenged statute and a realistic understanding of the world. Conferring standing on these plaintiffs is not tantamount to conferring standing on "any or all citizens who no more than assert that certain practices of law enforcement offices are unconstitutional." Most law-abiding citizens have no occasion to communicate with suspected terrorists; relatively few Americans have occasion to engage in international communications relevant to "foreign intelligence." These plaintiffs however, have successfully demonstrated that their legitimate professions make it quite likely that their communications will be intercepted if the government—as seems inevitable—exercises the authority granted by the FAA. The government argues the plaintiffs have failed to establish standing because the FAA does not itself authorize surveillance, but only authorizes the FISC to authorize surveillance. As a result, the government says the plaintiffs must speculate about at least two intervening steps between the FAA and any harm they might suffer as a result of the government conducting surveillance: first, that the government will apply for surveillance authorization under the FAA, and, second, that the FISC will grant authorization.

But this argument fails. The presence of an intervening step does not, as a general rule, by itself preclude standing. Nor do the

particular intervening steps the government identifies here—the government's seeking authorization and the FISC's approving it—preclude standing. With respect to the first step, as discussed above, it is more than reasonable to expect that the government will seek surveillance authorization under the FAA. We therefore cannot say that uncertainty about this step significantly attenuates the link between the FAA and the plaintiffs' harms.

Nor does the second intervening step add significant uncertainty. As discussed above, under the FAA the FISC must enter an order authorizing surveillance if the government submits a certification that conforms to the statutory requirements. The FAA does not require or even permit the FISC to make an independent determination of the necessity or justification for the surveillance. It verges on the fanciful to suggest that the government will more than rarely fail to comply with the formal requirements of the FAA once it has decided that the surveillance is warranted.

Empirical evidence supports this expectation: in 2008, the government sought 2, 082 surveillance orders, and the FISC approved 2, 081 of them. We do not know how many of these applications, if any, came after the FAA was enacted on July 10, 2008. At the very least, though, the evidence does not show that the FISC actually rejects a significant number of applications for FAA surveillance orders. Without a stronger showing that the FISC interposes a significant intervening step, we cannot find that the mere existence of this intervening step prevents the plaintiffs from obtaining standing to challenge the FAA.

Because the plaintiffs' undisputed testimony clearly establishes that they are suffering injuries in fact, and because we find those

injuries are causally connected to the FAA—because they are taken in anticipation of future government action that is reasonably likely to occur—and are redressable by a favorable judgment, we find the plaintiffs have standing.

#### **IV. Indirectness of Harm**

The plaintiffs’ asserted economic and professional costs incurred to protect the confidentiality of their communications can be characterized as indirect injuries, because the FAA does not target the plaintiffs themselves and the plaintiffs incur injuries due to their responses, and the responses of the third-party individuals with whom they communicate, to the anticipated FAA-authorized surveillance of those individuals. The government argues that the indirectness of these injuries defeats the plaintiffs’ standing. We disagree.

##### **A. Standard**

The Supreme Court has made clear that “when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded.” But a plaintiff who is indirectly harmed by a regulation needs to show more than does a plaintiff who is directly regulated by the challenged law:

When the suit is one challenging the legality of government action . . . , the nature and extent of facts that must be averred (at the summary judgment stage) . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action . . . at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment

preventing or requiring the action will redress it. When, however, . . . a plaintiffs asserted injury arises from the government’s allegedly unlawful regulation . . . of *someone else*, much more is needed.

It is therefore “ordinarily substantially more difficult” to establish standing based on indirect injuries than on direct injuries.

As a fundamental requisite to establishing standing, a plaintiff seeking standing on the basis of indirect injury must satisfy the three constitutional requirements for standing discussed above: (1) an injury in fact (2) that is causally related to the challenged statute or conduct and (3) is likely to be redressed by a favorable judicial decision. Despite not being directly regulated, a plaintiff may establish a cognizable injury in fact by showing that he has altered or ceased conduct as a reasonable response to the challenged statute. If the plaintiff makes such an allegation, he must identify the injury with “specificity,” and he “must proffer some objective evidence to substantiate his claim that the challenged conduct has deterred him from engaging in protected activity,”

The plaintiffs have satisfied these requirements through their uncontroverted testimony that they have altered their conduct and thereby incurred specific costs in response to the FAA. As discussed above, we must accept that undisputed testimony, so the plaintiffs have established the first constitutional requirement for standing—an injury in fact.

The heart of the government’s challenge to the plaintiffs’ standing based on the indirectness of their injury—much like the government’s challenge to the plaintiffs’ standing based on the likelihood of future

injury—goes to whether the plaintiffs’ injuries are causally connected to the challenged legislation. The causal chain linking the plaintiffs’ indirect injuries to the challenged legislation is similar to that discussed above: it turns on the likelihood that the plaintiffs’ communications with the regulated third parties will be monitored. If the FAA does not make it likely that the plaintiffs’ communications with regulated third parties will be monitored, then the costs the plaintiffs have incurred to avoid being monitored are the product of their own decisions and are not sufficiently linked to the FAA; for this reason, they would not be “fairly traceable to the challenged action.” Conversely, if the plaintiffs’ communications with regulated third parties will likely be monitored despite the fact that the FAA does not directly regulate the plaintiffs, then those costs are sufficiently tied to the FAA to support standing.

The Supreme Court and this Court have frequently found standing on the part of plaintiffs who were not directly subject to a statute, and asserted only indirect injuries. Most notably, in *Meese v. Keene* (1987), the Supreme Court found standing in a plaintiff who, like the instant plaintiffs, was not directly regulated by the statute, and alleged only indirect injuries. The plaintiff, a lawyer and state legislator, challenged a statute that required certain films to be labeled “political propaganda.” The district court in that case made clear that “[a]ccording to the authoritative agency interpretation of the Act and the regulations, plaintiff [wa]s free to remove the [‘political propaganda’] label before exhibiting the films.” Hence, as in the instant case, the *Meese* statute did not directly regulate the plaintiff or require him to do, or refrain from doing, anything at all. The *Meese* plaintiff, however, was injured indirectly. He wanted to show three labeled films, but because he did “not want the

Department of Justice and the public to regard him as the disseminator of foreign political propaganda,” he abstained from screening the films. He sued to enjoin the application of the statute to these films.

That the statute did not regulate him directly was no barrier to standing. The Court found he had established a cognizable harm by alleging “the need to take . . . affirmative steps to avoid the risk of harm to his reputation.” This reaction was reasonable and was causally linked to the statute, because the plaintiff averred, with support from expert affidavits, that if he showed the films “his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired.” The Court approved the district court’s conclusion that “the Act puts the plaintiff to the Hobson’s choice of foregoing the use of the three Canadian films for the exposition of his own views or suffering an injury to his reputation.” Either way, the statute affected him in such a way as to give him standing to challenge it.

More recently, in *Friends of the Earth v. Laidlaw*, the Supreme Court recognized plaintiffs’ standing to challenge a corporation’s alleged Clean Water Act violation. The plaintiffs did not claim that the defendant took direct actions against them. Instead, they showed that because they feared exposure to the defendant’s pollution they had ceased to engage in certain recreational activities in the area, such as swimming, camping, and birdwatching. The Court found that the plaintiffs’ decision to curtail those activities was “enough for injury in fact,” and found that the plaintiffs’ reactions were reasonable responses to the threat of exposure to pollution.

These cases establish that a plaintiff has standing to challenge a statute that does not regulate him if he can show that the statute reasonably caused him to alter or cease certain conduct. In the instant case, the key to determining whether the plaintiffs have standing based on the indirect injuries they suffer is determining whether someone who wants to protect the privacy of his communications would reasonably take the measures these plaintiffs took not to be overheard.

## **B. Application**

First, it is reasonable for the plaintiffs to take measures to avoid being overheard. The plaintiffs have established that, because of their legitimate needs to communicate with persons who will likely be subject to government surveillance under the FAA, they are likely to be monitored. Moreover, the various groups of plaintiffs—attorneys, journalists, and human rights, labor, legal, and media organizations—have established that they have legitimate interests in not being monitored. Since the plaintiffs allege that the FAA is unconstitutional, if the plaintiffs' legal theory is correct, any search authorized by the FAA would be an illegal search that the plaintiffs would reasonably try to avoid.

Moreover, each of the plaintiffs has alleged that the risk of being monitored causes additional injuries beyond the mere fact of being subjected to a putatively unconstitutional invasion of privacy. The risk of being monitored by the government threatens the safety of their sources and clients, impedes their ability to do their jobs, and implicates the attorneys' ethical obligations. Journalists Klein and Hedges, for example, assert that if their communications with their sources were overheard, those sources' identities, political

activities, and other sensitive information would be disclosed, which would expose them to violence and retaliation by their own governments, non-state actors, and the U.S. government. Likewise, attorney Mariner asserts that if her communications with human rights abuse victims on behalf of Human Rights Watch are monitored, the victims will draw unwanted attention to themselves and might risk further abuse. Attorneys Royce and McKay, who represent Guantanamo Bay prisoners and others, assert that they risk disclosing litigation strategies to the opposing party (the U.S. government) and violating ethical obligations if their communications with co-counsel, clients and their family members, experts, and investigators around the world are monitored. The plaintiffs act reasonably in trying to avoid these injuries.

Since it is reasonable for the plaintiffs to seek to avoid being monitored, we must consider whether the particular measures they took were reasonable. They were. In some instances the plaintiffs did not communicate certain information they otherwise would have communicated by e-mail or telephone; and in other instances they incurred the costly burdens of traveling to communicate or to obtain that information in person rather than electronically. These are not overreactions to the FAA; they are appropriate measures that a reasonably prudent person who plausibly anticipates that his conversations are likely to be monitored, and who finds it important to avoid such monitoring, would take to avoid being overheard. The plaintiffs have therefore established that those injuries are linked to the statute they challenge.

In sum, the FAA has put the plaintiffs in a lose-lose situation: either they can continue to communicate sensitive information electronically and bear a substantial risk of



being monitored under a statute they allege to be unconstitutional, or they can incur financial and professional costs to avoid being monitored. Either way, the FAA directly affects them.

The Supreme Court has said that “the gist of the question of standing” is whether “the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” The instant plaintiffs are not merely random citizens, indistinguishable from any other members of the public, who want to test in court the abstract theory that the FAA is inconsistent with the Constitution; rather, these plaintiffs have shown that, regardless of which course of action they elect, the FAA affects them. We therefore conclude that they have a sufficient “personal stake” to challenge the FAA. That does not mean that their challenge will succeed; it means only that the plaintiffs are entitled to have a federal court reach the merits of their challenge. We need not “decide whether appellants’ allegations . . . will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it.”

#### **V. Laird v. Tatum**

The government’s principal arguments against the above analysis rest on a single case, *Laird v. Tatum* (1972). *Laird* is unquestionably relevant to this case, as it is the only case in which the Supreme Court specifically addressed standing to challenge a government surveillance program. Because *Laird* significantly differs from the present case, however, we disagree with the government’s contention that *Laird* controls the instant case, and that *Laird* created different and stricter standing requirements

for surveillance cases than for other types of cases.

In *Laird*, the plaintiffs challenged a surveillance program that authorized the Army to collect, analyze, and disseminate information about public activities that had potential to create civil disorder. The Army collected its data from a number of sources, but most of it came from “the news media and publications in general circulation” or from “agents who attended meetings that were open to the public and who wrote field reports describing the meetings.” The Court noted that the court of appeals had characterized the information gathered as “nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand.” Roughly sixty government agents around the country participated in the surveillance program.

The plaintiffs sought to enjoin the program. They claimed that they “disagreed with the judgments” made by the Executive Branch about the scope of the surveillance program, and they argued that “in the future it is possible that information relating to matters far beyond the responsibilities of the military may be misused by the military to [their] detriment,” But the Court stated that the plaintiffs

[did] not attempt to establish this as a definitely foreseeable event, or to base their complaint on this ground. Rather, [the plaintiffs] contend[ed] that the present existence of this system of gathering and distributing information, allegedly far beyond the mission requirements of the Army, constitute[d] an impermissible burden on [them] and other persons similarly situated which exercise[d] a

present inhibiting effect on their full expression and utilization of their First Amendment rights.

The Court noted the court of appeals's observation that the plaintiffs "have some difficulty in establishing visible injury. . . . They freely admit that they complain of no specific action of the Army against them. . . . There is no evidence of illegal or unlawful surveillance activities." The Court stated that any alleged chilling effect arose from the plaintiffs' "perception of the system as inappropriate to the Army's role under our form of government," or the plaintiffs' "beliefs that it is inherently dangerous for the military to be concerned with activities in the civilian sector," or the plaintiffs' "less generalized yet speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to respondents." Moreover, the Court noted that the plaintiffs had cast "considerable doubt" on whether the surveillance program had actually chilled them, and the plaintiffs did not identify any concrete harm inflicted by the program.

The Court therefore considered:

whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, *without more*, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose.

The Court denied plaintiffs standing. It held that the plaintiffs' complaints about "the

very existence of the Army's data-gathering system" and their "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." The Court noted that although previous cases have found governmental regulations unconstitutional based on their "chilling" effect,

[i]n none of these cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual. Rather, in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging.

The government argues that "[t]his case is directly governed by *Laird*," because the only specific present harms the plaintiffs allege flow from a subjective chill. *Laird*, however, differs dramatically from this case. In *Laird*, the plaintiffs did not clearly allege any injuries whatsoever. They did not claim that the government surveillance they sought to challenge, which relied principally on monitoring through publicly available sources activities conducted entirely in public, harmed them. They did not claim that they, or anyone with whom they regularly interacted, would be subject to any illegal or unconstitutional intrusion if the program they challenged was allowed to continue. Rather, they claimed only that they

*might* be injured *if* the information lawfully collected by the military were misused in some unspecified way at some unspecified point in the future, and they alleged that the surveillance scheme had a chilling effect, while essentially admitting that they themselves had not been chilled, and that the program not altered their behavior in any way.

By contrast, the instant plaintiffs clearly have alleged specific and concrete injuries. Unlike the *Laird* plaintiffs, they do not challenge a program of information gathering that they concede is lawful, on the theory that the information gathered may be misused in the future by government agents acting illegally and without authorization; rather, they challenge a specific statute that expressly authorizes surveillance that they contend is in itself unconstitutional. They do not vaguely allege that they might be subject to surveillance under the program; rather, they set forth specific, concrete reasons to believe they are likely to be overheard, because their legitimate activities bring them into contact with the very types of people who are the professed targets of the statutorily authorized surveillance. And far from alleging an undefined “chill” that has not affected their own behavior in any way, they detail specific, reasonable actions that they have taken to their own tangible, economic cost, in order to carry out their legitimate professional activities in an ethical and effective manner, which can be done only by taking every precaution to avoid being overheard in the way that the challenged statute makes reasonably likely. This case is a far cry from *Laird*. In this case, as demonstrated above, the plaintiffs allege injuries that establish their standing consistent with the standing jurisprudence of the Supreme Court and this Court. In *Laird*, by contrast, the plaintiffs alleged no such injuries. Indeed, because the *Laird* plaintiffs

offered so little by way of concrete injury, direct or indirect, *Laird* has little or nothing to say about the critical issue in this case: the reasonableness of the plaintiffs’ fear of future injury from the FAA, and the causal relation of the challenged statute to the tangible costs the plaintiffs claim they have incurred.

The government next argues, however, that even if *Laird* does not directly govern this case, it created special standing rules for surveillance cases that are stricter than those that apply to other types of cases, and that those special rules preclude standing in this case. We disagree.

First, the government argues that under *Laird* a plaintiff may challenge a surveillance statute only if he is “subject to” that statute, meaning that he belongs to a narrow class of individuals the statute, on its face, identifies as targets. In support of this claim, the government relies on *Laird’s* comment that some previous plaintiffs who obtained standing to challenge a regulation that did not explicitly target them were able to do so because they were or would soon be “subject to the regulations, proscriptions, or compulsions” they challenged. The government thus argues that the instant plaintiffs cannot obtain standing to challenge the FAA, because the FAA “does not direct intelligence gathering activities against the plaintiffs. Nor does it authorize plaintiffs to be targeted.”

Second, the government argues that *Laird* precludes standing based on chilling-effect injuries. The government notes that the *Laird* plaintiffs alleged that the existence of the Army’s surveillance program produced a chilling effect upon the exercise of their First Amendment rights, and the Court rejected that allegation as a ground for standing. The government adopts *United*

*Presbyterian's* interpretation of *Laird*, which says that in order to obtain standing plaintiffs must show that they “suffer[] some concrete harm (past or immediately threatened) *apart from* the ‘chill’ itself,” such as denial of admission to the bar or termination of employment. Relying on this interpretation of *Laird*, the government dismisses the economic and professional costs the plaintiffs have incurred because they “flow directly from the ‘subjective chill’ on plaintiffs’ speech caused solely by the existence of [the FAA].” The government says those injuries are “nothing more than a repackaged version of the ‘subjective chill’ that the Supreme Court found insufficient to establish standing in *Laird*.”

We are not persuaded that *Laird* created either of these special standing rules for surveillance cases. Since *Laird* is the only Supreme Court precedent in which a plaintiff who had not been surveilled claimed standing to challenge a surveillance scheme, it is natural to look to it for guidance. However, the government reads far more into *Laird* than either its facts or its language permit. In doing so, it loses sight of the general principles of standing.

First, the *Laird* plaintiffs so obviously lacked standing that the Court did not need to create stricter standing rules in the surveillance context in order to deny plaintiffs standing. The *Laird* plaintiffs identified no injury that they had suffered or would likely suffer. In the absence of any clear alleged injury, the Court could not find that the plaintiffs had satisfied the normal standing requirements, and it therefore did not need to invent new rules to reach that outcome. As we have demonstrated at length above, the facts of *Laird* are simply not comparable to those presented in the instant case. That the *Laird* plaintiffs were held to

lack standing does not imply that the instant plaintiffs similarly have failed to allege injury. Any statement in *Laird* of a general rule applicable to all surveillance cases could only be dictum.

Second, *Laird* in fact contains no such purported special rules for surveillance cases. Nothing in *Laird* supports the conclusion that the Court intended to change the standing rules, nor does it explain any need to create standing rules for surveillance cases distinct from the rules applicable in other contexts. To the contrary, *Laird's* final sentence makes clear that the result in that case was dictated by the well-established general principles of standing:

[T]here is nothing in our Nation’s history or in this Court’s decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

The language quoted by the government—that some previous plaintiffs who obtained standing to challenge a regulation were or would soon be “subject to the regulations, proscriptions, or compulsions” they challenged,—does not purport to establish a fixed requirement for standing in the surveillance context or in any other; it merely contrasts the situation of the *Laird* plaintiffs with those of other plaintiffs who were found to have standing.

Third, while the government relies heavily on *ACLU v. NSA* and *United Presbyterian* to support its interpretation of *Laird*, those cases do not bind us, and they are factually distinguishable from the instant case. Moreover, we do not find their interpretations of *Laird* to be persuasive.

They read *Laird* essentially the same way the government does, without explaining why we should read *Laird* to have ratcheted up the standing requirements in surveillance cases, sub silentio, where the plaintiffs at issue clearly lacked standing under the normal rules. We do not see any reason why the law of standing should be stricter or different in the surveillance context, and those cases do not offer any such reasons.

Under the traditional, well-established rules of standing, the plaintiffs here have alleged that they reasonably anticipate direct injury from the enactment of the FAA because, unlike most Americans, they engage in legitimate professional activities that make it reasonably likely that their privacy will be invaded and their conversations overheard—unconstitutionally, or so they argue—as a result of the surveillance newly authorized by the FAA, and that they have already suffered tangible, indirect injury due to the

reasonable steps they have undertaken to avoid such over-hearing, which would impair their ability to carry out those activities. Nothing more is required for standing under well-established principles. And nothing in *Laird*, where the plaintiffs alleged no comparable injury, purports to change those principles.

## CONCLUSION

The plaintiffs' uncontroverted testimony that they fear their sensitive international electronic communications being monitored and that they have taken costly measures to avoid being monitored—because we deem that fear and those actions to be reasonable in the circumstances of this case—establishes injuries in fact that we find are causally linked to the allegedly unconstitutional FAA. We therefore find that plaintiffs have standing to challenge the constitutionality of the FAA in federal court.

## **“Supreme Court Agrees to Hear Case on Electronic Surveillance”**

*The Washington Post*  
May 21, 2012  
Robert Barnes

The Supreme Court will decide next term whether a group of lawyers, human rights activists and journalists may challenge the federal government’s widespread use of electronic surveillance to monitor suspected terrorist activities overseas.

The Americans challenging the program say they have a “well-founded fear” that their phone calls and other communications with overseas clients and sources are swept up in the “dragnet surveillance.”

But the justices, in the term beginning in October, will not rule on whether the 2008 law that authorized the program violates the Americans’ Fourth Amendment right to protection from unreasonable searches.

Instead, the question is whether such a fear, and the actions the plaintiffs have taken because of the law, give them a right—which courts call “standing”—to proceed in challenging the law.

A federal judge in New York ruled that they did not. But a panel of the U.S. Court of Appeals for the Second Circuit disagreed, and a request by the government that the entire court overturn that decision failed on a tie vote.

U.S. Solicitor General Donald B. Verrilli Jr. asked the high court to step in. He said the concerns of the plaintiffs, who are represented by the American Civil Liberties Union, reflect only “bare conjecture that the government will choose to expend its

limited resources to target respondents’ foreign contacts.”

The program began during the nation’s response to the attacks of Sept. 11, 2001, and eventually led to a broadening of the Foreign Intelligence Surveillance Act, which said the government generally must obtain a search warrant from a judge to listen in to conversations in the United States involving people suspected of being spies or terrorists.

The *New York Times* revealed in 2005 that President George W. Bush had approved an extensive program of “warrantless wiretapping” to intercept international phone conversations and e-mails that began or terminated in the United States, in order to monitor potential plots.

In 2008, Congress responded to criticism that the program was unconstitutional by approving amendments to FISA. They gave the attorney general and the director of national intelligence broad powers to monitor communications in the United States, as long as one party in the communication was abroad and the targets were foreigners believed to be outside the United States.

The ACLU filed its lawsuit the day the amendments became law, saying the secret orders permitted by the law would undoubtedly ensnare Americans. Its clients regularly spoke on the phone or exchanged e-mails with those who might be included in such surveillance orders.

The law “allows the government to collect these communications en masse without specifying the individuals or facilities to be monitored; without observing meaningful limitations on the retention, analysis, and dissemination of acquired information; without individualized warrants based on criminal or foreign intelligence probable cause; and without prior judicial or even administrative determinations that the targets of surveillance are foreign agents or connected in any way, however remotely, to terrorism,” the ACLU told the court.

The group said the lower court was correct in agreeing that its clients had standing to

challenge the law because they had a reasonable fear that their communications would be targeted and disseminated. And it said these clients had suffered “concrete” damages because of the law, such as having to travel overseas to meet their contacts in person rather than communicating on the phone or via e-mail.

If the plaintiffs have no standing to question the program, the ACLU said, there could be no judicial oversight of the law.

The case is *Clapper v. Amnesty International USA*.

## “Standing to Challenge Wiretap Law Divides Circuit”

*New York Law Journal*

September 22, 2011

Mark Hamblett

The constitutionality of an amended national security wiretapping law has triggered a sharp split at the U.S. Court of Appeals for the Second Circuit.

In a decision that sets up a trip to the U.S. Supreme Court, the Second Circuit by the narrowest of margins voted yesterday to deny hearing en banc a decision recognizing that lawyers, journalists and human rights groups have standing to challenge amendments to the Foreign Intelligence Surveillance Act (FISA) because they fear their conversations are being, or will be, intercepted by the U.S. government.

With a majority of the full panel of active judges needed to win rehearing, judges in favor of en banc review fell one vote short, with the panel splitting 6-6.

Judges Debra Ann Livingston, Dennis Jacobs, Jose Cabranes, Reena Raggi and Richard Wesley dissented, delivering or joining in three opinions arguing that the full court should rehear the case. The sixth vote came from Judge Peter Hall, who did not join the other dissenting opinions but said he believed en banc review was merited because the case involved a question of “exceptional importance.”

The plaintiffs’ facial challenge to the statute should be rejected because they cannot be targeted under the statute, the dissenters said, and they charged the original panel that issued its decision in March in *Amnesty International United States v. Clapper*, 09-

4112-cv, had turned the standard for standing on its head.

Judge Gerard Lynch issued the lone opinion defending the denial of rehearing. He first agreed that the case met the “exceptional importance” standard and acknowledged that the original opinion “may be in tension” with those of other circuits.

“But I dispute the dissenters’ assertions that *Amnesty* somehow distorts the law of standing, or, in Judge Livingston’s words, ‘threatens a sub silentio transformation of this Circuit’s case law,’” he said.

Judge Lynch was on the original panel that decided the case last spring along with Senior Judges Robert Sack and Guido Calabresi. That decision reversed Southern District Judge John Koeltl, who had ruled in 2009 that the plaintiffs lacked standing.

The other active judges on the circuit who joined Judge Lynch in denying rehearing are Rosemary Pooler, Robert Katzmann, Denny Chin, Raymond Lohier and Susan Carney.

Judge Lynch said the original opinion spoke for itself and he was writing only to respond to points raised by the dissent.

In March, the panel said lawyers, journalists, human rights groups, labor groups and others could challenge §702 of FISA, 50 U.S.C. §1881a, a provision that was added in the FISA Amendments Act of 2008 (FAA) and set new procedures for electronic



surveillance of non-U.S. citizens abroad.

It allows the executive branch to apply to the Foreign Intelligence Surveillance Court for mass surveillance authorization instead of making an individualized application focused on specific targets or facilities, requiring only a certification that “a significant purpose of the acquisition is to obtain foreign intelligence information” and that the information will be obtained “from or with the assistance of an electronic communication service provider.”

Plaintiffs argue the statute’s provisions for “targeting” to ensure authorization is limited to people outside the United States and “minimization procedures” designed to ensure compliance with the Fourth Amendment are inadequate.

Jameel Jaffer of the American Civil Liberties Union argued before the Second Circuit in 2010 that the new monitoring regime had a chilling effect on the plaintiffs’ speech, as the fear of having their conversations with their clients taped forced them to take steps, such as traveling, to avoid being overheard by the U.S. government.

Douglas Letter, an appellate litigation counsel with the U.S. Department of Justice, argued that plaintiffs had no standing because the contended injury to them was too speculative.

In March, the three-judge panel said the plaintiffs had alleged a “reasonable fear of future injury and costs incurred to avoid that injury.”

### **‘Unprecedented’ Rule**

Yesterday, Judge Raggi issued a 40-page dissent to the denial of en banc review,

joined in by all of the dissenters save Judge Hall.

She said the March panel found standing “even though plaintiffs cannot be targeted for surveillance under that statute, cannot demonstrate actual or imminent interception of any of their communications, and may in fact never experience such interception.”

She added, “A rule that allows a plaintiff to establish standing simply by incurring costs in response to a not-irrational fear of challenged conduct is unprecedented. On that theory, every mobster’s girlfriend who pays for a cab to meet with him in person rather than converse by telephone would be acting on a not-irrational fear of a Title III interception, and, therefore, have standing to challenge.”

The Supreme Court, she said, has held “that subjective fear of challenged government conduct is insufficient to support standing, and that forbearance action can only do so when a plaintiff would otherwise *certainly* be subject to the challenged conduct.”

Judge Livingston, joined by the same four judges, said the March panel threatened to upset case law regarding “‘probabilistic harm’ meaning the narrow circumstances in which this court has recognized injury in fact to exist based on the risk of some future harm.”

The panel, she said, “did not explain its disregard of the Supreme Court’s requirement that injury must be actual or imminently threatened,” expressed in *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

Judge Jacobs, speaking for himself, said the plaintiffs’ averments on harm “seem to me inadequate, implausible, and illusory.”

He said it was a “defect” in the panel opinion to avoid even a glance at merits review that is needed to determine a Fourth Amendment violation.

Such a review, he said, “refutes harm and redressability, and should therefore have defeated standing.”

The judge took aim at the “supposed anxieties” of the plaintiffs.

Of those plaintiffs who submitted affidavits, Judge Jacobs said, only two were lawyers who represent clients: Scott McKay and Sylvia Royce, who represent Guantánamo detainees. But Mr. McKay did not specify a single trip he took to avoid monitoring and Ms. Royce took only one trip—to New York to meet another lawyer for a conversation she could have had by phone, Judge Jacobs said, a call that would not have been subject to the act.

In closing, Judge Raggi took issue with Judge Lynch’s statement that denying standing would “close” courthouse doors.

“Rather, it is our remaining colleagues who decline to consider whether a questionable standing standard should become the law of this circuit,” she said. “There is, however, another courthouse, and those of us here in dissent can only hope that its doors will be opened for further discussion of this case.”

In his opinion, Judge Lynch took issue with the “theme that runs through all the dissents”—that the panel should have been more skeptical about the plaintiffs’ averments.

He said the case came to the panel on summary judgment, where a court must take the allegations as true.

He agreed that, where subject matter jurisdiction is at issue, there was an independent obligation to question even undisputed facts.

“Certainly, parties cannot confer jurisdiction on the court by stipulating to facts that are false,” Judge Lynch said. “But this is hardly an example of collusive stipulation to facts that, as Chief Judge Jacobs would have it, are fanciful,” he said, adding that the reasons for plaintiffs’ belief that their “communications are likely to be intercepted by the government” under the amended act “are anything but implausible.”

### **Broadened Risk**

Judge Lynch continued, “As the panel opinion explains, the FAA indisputably and significantly broadens the risk of interception, lowers the government’s probable-cause burden, and decreases the oversight role of the Foreign Intelligence Surveillance Court.”

Before, he said, the Foreign Intelligence Surveillance Court would issue a warrant only if it saw probable cause that the target was a foreign power or its agent and that the target was using or about to use the facility to be monitored. The court, he said, “had to find probable cause for each specific search, and maintained a continuing oversight role after each probable cause determination.”

But no longer, he said. Under the current administration, the FISA court does not monitor the “targeting” and “minimization” procedures—that is left to the attorney general, the Director of National Intelligence and the Senate and House Judiciary committees.

Judge Lynch said that, contrary to the

dissents, the panel's opinion did anything but muddle the well-established requirements of "injury in fact, causation and redressability."

He said the dissents "seem to misunderstand our injury analysis," as the panel had addressed both present and future injury.

Despite Judge Jacobs emphasis on two lawyers, he said the panel made it "abundantly clear" that it went beyond lawyers and found "all of the plaintiffs incurred professional and economic costs in order to protect clients or sources."

Judge Lynch said it was "hard to take seriously" the dissents' charge that the plaintiffs' assertion their overseas contacts are likely to be government targets was "speculative."

"As the opinion explains, the plaintiffs

overseas contacts include, for example, alleged al Qaida members (and Guantánamo detainees) Khalid Sheik Mohammed and Mohammedou Ould Salahi, as well as those men's families," he wrote.

Judge Lynch said the plaintiffs faced "a difficult road" in proving that the law violates the Fourth Amendment in the face of the "paramount necessity of protecting the nation's security against very real and dangerous external threats." But the argument should be heard in open court, he said.

"To reject the plaintiffs' arguments not because they lack merit, but because we refuse to hear them, runs a much graver risk than whatever invasion of plaintiffs' privacy might be occasioned by the surveillance authorized by the challenged statute," he said.

## **“*Amnesty International USA v. Clapper* and Standing to Challenge Secret Surveillance Regimes”**

*The Volokh Conspiracy*

March 24, 2011

Orin Kerr

On Monday, the Second Circuit handed down a very important decision on standing to challenge secret surveillance programs in *Amnesty International USA v. Clapper*. The decision, by Judge Gerard Lynch and joined by Judges Calabresi and Sack, offers a very easy way for plaintiffs to have Article III standing to challenge secret surveillance statutes. The opinion strikes me as puzzling, however, and it appears to be in conflict with other Courts of Appeals cases on standing to challenge surveillance regimes. I suspect Supreme Court review is a serious possibility.

The new decision holds that the plaintiffs have established Article III standing to challenge Section 702 of the Foreign Intelligence Surveillance Act, which creates new procedures for authorizing government electronic surveillance targeting non-United States persons outside the United States for purposes of collecting foreign intelligence. The plaintiffs in the case are attorneys, journalists, and labor, legal, media, and human rights organizations who claim to believe that they may be monitored in the future pursuant to the statute, and they are claiming that their fear of surveillance—and costly measures they have taken to circumvent the monitoring that they think is likely—gives them Article III standing to challenge the surveillance program. Article III standing requires three elements: (1) injury in fact, which means an invasion of a legally protected interest that is concrete and particularized; (2) a causal relationship between the injury and the challenged conduct, which means that the injury fairly

can be traced to the challenged action of the defendant, and (3) a likelihood that the injury will be redressed by a favorable decision.

The opinion is pretty complicated, but here's the basic idea as I understand it. According to Judge Lynch, there is obviously injury in fact: By spending money to avoid surveillance, the plaintiffs suffered an injury-in-fact of losing money. Judge Lynch then concludes that the injury is fairly traceable to the surveillance if the plaintiffs' belief that they are going to be monitored is reasonable. Here's the key passage:

If the plaintiffs can show that it was not unreasonable for them to incur costs out of fear that the government will intercept their communications under the FAA, then the measures they took to avoid interception can support standing. If the possibility of interception is remote or fanciful, however, their present-injury theory fails because the plaintiffs would have no reasonable basis for fearing interception under the FAA, and they cannot bootstrap their way into standing by unreasonably incurring costs to avoid a merely speculative or highly unlikely potential harm. Any such costs would be gratuitous, and any ethical concerns about not taking those measures would be unfounded. In other words, for the purpose of standing, although the plaintiffs' economic and professional injuries are injuries in fact, they

cannot be said to be “fairly traceable” to the FAA—and cannot support standing—if they are caused by a fanciful, paranoid, or otherwise unreasonable fear of the FAA.

Of course, no one really knows who is being monitored or when. But Judge Lynch concludes that the plaintiffs have standing because their fear of being monitored does not seem fanciful based on “a realistic understanding of the world.” From the opinion:

The plaintiffs have established that they suffered present injuries in fact—economic and professional harms—stemming from a reasonable fear of future harmful government conduct. They have asserted that the FAA permits broad monitoring through mass surveillance orders that authorize the government to collect thousands or millions of communications, including communications between the plaintiffs and their overseas contacts. The FAA is susceptible to such an interpretation, and the government has not controverted this interpretation or offered a more compelling one. . . . The [plaintiff’s] fears are fairly traceable to the FAA because they are based on a reasonable interpretation of the challenged statute and a realistic understanding of the world. . . . These plaintiffs . . . have successfully demonstrated that their legitimate professions make it quite likely that their communications will be intercepted if the government—as seems inevitable—exercises the authority granted by the FAA.

The government argues the plaintiffs have failed to establish standing because the FAA does not itself authorize surveillance, but only authorizes the FISC to authorize surveillance. As a result, the government says the plaintiffs must speculate about at least two intervening steps between the FAA and any harm they might suffer as a result of the government conducting surveillance: first, that the government will apply for surveillance authorization under the FAA, and, second, that the FISC will grant authorization.

But this argument fails. The presence of an intervening step does not, as a general rule, by itself preclude standing. Nor do the particular intervening steps the government identifies here—the government’s seeking authorization and the FISC’s approving it—preclude standing. With respect to the first step, as discussed above, it is more than reasonable to expect that the government will seek surveillance authorization under the FAA. We therefore cannot say that uncertainty about this step significantly attenuates the link between the FAA and the plaintiffs’ harms. Nor does the second intervening step add significant uncertainty. . . . It verges on the fanciful to suggest that the government will more than rarely fail to comply with the formal requirements of the FAA once it has decided that the surveillance is warranted.

How do the judges know these things? As best I can tell, they just sort of know, based

on some news stories, an occasional FISA report, and their “realistic understanding of the world.”

If this new decision is right, then challenging secret surveillance statutes would seem to be pretty easy—in stark contrast with the previous understanding that it was extremely difficult. Other courts have held that standing requires a showing of actually being monitored. Under that standard, it is almost impossible to challenge new statutory surveillance authorities under the Fourth Amendment.

According to Judge Lynch, however, a reasonable fear of being monitored is enough. Since no one knows what the new secret programs actually are, but lots of people fear that they are very broad, you just need to get a broad class of people together who are really afraid of the surveillance, and then have them spend some money. On summary judgment, the plaintiff’s facts will be treated as true. Since the Government

won’t say what the new secret surveillance program is, but the news reports usually report the scope of surveillance programs as extremely broad, no one will rebut the fears of surveillance and the judges will find the fears reasonable, creating Article III standing. True, the judges won’t know what the program is, either. But because they believe their own opinions are realistic, their lack of actual knowledge is no longer a barrier to standing. If this new decision holds, Article III standing to challenge surveillance programs would seem to now be pretty simple.

Whether you like the new decision or not, I suspect it’s not the last we’ve heard on this issue. The opinion strikes me as in pretty direct tension with cases like *ACLU v. NSA*, the 6th Circuit’s case rejecting standing for the NSA’s warrantless surveillance program during the Bush years. Given the importance of the issue, and the tensions among the circuits, I would suspect this case may be headed upstairs.

## “Why Clapper Matters: The Future of Programmatic Surveillance”

*Lawfare*  
May 22, 2012  
Steve Vladeck

In light of the Supreme Court’s grant of certiorari yesterday to review the Second Circuit’s decision in *Clapper v. Amnesty International*, I thought I’d put together a background post trying to explain why, in my view, *Clapper* is such an important case. To be sure, the Justices are only being asked to decide a technical legal question, *i.e.*, whether these plaintiffs have Article III standing to challenge the key provisions of the FISA Amendments Act of 2008. But as is often the case with standing, I think the Justices’ view of the merits may have a lot to say about whether or not they agree with the Second Circuit that this suit should be allowed to go forward. And so some discussion of the merits seems (for lack of a better word) warranted:

### **I. FISA and the FISA Amendments Act**

When it was enacted in 1978, the Foreign Intelligence Surveillance Act was designed to serve as a compromise—between individual privacy values enmeshed within the Fourth Amendment and the government’s need to be able to conduct clandestine foreign intelligence surveillance. Thus, although the Supreme Court had repeatedly held that search warrants could only issue upon a showing of individualized suspicion, one of the central moves of FISA was to shift the requisite burden: instead of demonstrating probable cause to believe that the surveillance will produce evidence of criminal activity (the ordinary standard for “Title III” warrants), FISA requires the government only to demonstrate probable cause to believe that the target of the

surveillance is a foreign power or an agent thereof. In other words, “FISA warrants” are still predicated upon individualized suspicion, but suspicion to believe that the target is an agent of a foreign power, not that s/he is actively engaged in specific criminal activity. As a helpful CRS memo put it, FISA orders are based “upon the probability of a possibility; the probability to believe that the foreign target of the order may engage in spying, or the probability to believe that the American target of the order *may* engage in criminal spying activities.” Thus, whatever else might be said about FISA, this lesser probable cause requirement has been repeatedly upheld by lower courts [although never the Supreme Court] against Fourth Amendment challenges, largely because it still requires a particular form of individualized suspicion.

Although this is largely speculation, I think it’s widely believed that the individualized suspicion requirement is a big part of why the Bush Administration went around FISA (and the FISA Court) in conducting the Terrorist Surveillance Program (TSP). After all, it’s difficult to reconcile programmatic surveillance (wherein the government intercepts *all* communications going through particular nodes) with the individualized suspicion and minimization requirements of FISA. And so when Congress stepped back into the fray, first in the Protect America Act of 2007, and then in the FISA Amendments Act of 2008, it was to provide statutory authority for such programmatic surveillance, as well.

The centerpiece of the FISA Amendments Act is new 50 U.S.C. § 1881a(a) (also known as “section 702(a)”), which provides that “the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.” In other words, without having to seek the approval of the FISA Court (which merely reviews certifications to ensure that they—and not the surveillance itself—comply with the various statutory requirements), the AG and the DNI can engage in sweeping programmatic surveillance for one year at a time.

To be sure, the FISA Amendments Act includes a series of limitations on such sweeping authority, lest the government run roughshod over individual privacy interests. Thus, 50 U.S.C. § 1881a(b) provides that:

An acquisition authorized under subsection (a)—

(1) may not intentionally target any person known at the time of acquisition to be located in the United States;

(2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States;

(3) may not intentionally target a United States person reasonably believed to be located outside the United States;

(4) may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States; and

(5) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.

In other words, the programmatic surveillance cannot be *designed* to acquire communications within the United States or communications by U.S. persons outside the United States. But the statute says nothing about *accidentally* acquiring communications within the United States or by U.S. persons through overbreadth or overzealousness; it just bars *intentional targeting* of such communications. Thus, so long as the government isn’t intentionally trying to target U.S. persons or U.S. communications, the first four limitations won’t matter no matter how many of such communications are actually intercepted. Instead, the fifth limitation—the Fourth Amendment—is the key (and would’ve been even had the statute not expressly said so).

## **II. The Fourth Amendment and the Foreign Intelligence Surveillance Exception**

Yet even the Fourth Amendment may not be the constraint we’d expect. . . . Thanks to the Supreme Court’s 1990 decision in *Verdugo-Urquidez*, non-citizens outside the United States are going to have a very hard time arguing that programmatic surveillance violates the Fourth Amendment as applied to *their* communications. But individuals within the United States, and U.S. citizens everywhere, are another matter. Thus, to the



extent section 1881a(a) authorizes warrantless programmatic surveillance that intercepts communications within the United States or by U.S. citizens abroad, it seems inconsistent with the Fourth Amendment in general, and the Warrant Clause, in particular.

In 2008, the FISA Court of Review sidestepped this problem in its *In re Directives* decision, formally recognizing for the first time a “foreign intelligence surveillance” exception to the Fourth Amendment. Specifically, the court held that “a foreign intelligence exception to the Fourth Amendment’s warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States.” Just to be clear, such an exception dovetails perfectly with section 1881a(a), and, if sustained, would render the Fourth Amendment limitation on such surveillance entirely nugatory.

But it’s hardly a given that such an exception *should* be sustained given the consequences—*i.e.*, massive and effectively unreviewable programmatic surveillance, including the almost certain widespread interception of *U.S.* communications. And this, finally, is where the *Clapper* litigation comes in. Decisions by the FISA Court of Review are not adversarial. As a result, it is exceedingly difficult (if not impossible) to challenge them directly (as the ACLU learned in trying to contest the Court of Review’s 2003 decision in *In re Sealed Case*, and in unsuccessfully trying to intervene in proceedings under the FISA Amendments Act). Thus, unless someone could challenge the existence of such an exception in some *other* judicial proceeding, it seemed likely that the limits on the

government’s authority under section 1881a(a) would be entirely political.

Enter Amnesty International and the other plaintiffs in *Clapper*. At its core, the claim on the merits is that section 1881a(a) is unconstitutional to the extent it authorizes the government to obtain the plaintiffs’ international communications, both because it violates the Fourth Amendment and because it will have a chilling effect on the plaintiffs’ First Amendment speech rights. And resolving the Fourth Amendment claim necessarily turns on the existence (vel non) of the foreign intelligence surveillance exception recognized by the FISA Court of Review in *In re Directives*. In other words, for better or worse, the central merits issue in *Clapper* is whether there will be a foreign intelligence surveillance exception going forward. If courts reach the merits, and disagree with the FISA Court of Review over the existence of such an exception, then the Fourth Amendment could indeed become a significant constraint on the scope of section 1881a(a)—and the future of programmatic (as opposed to individualized) foreign intelligence surveillance.

### **III. Article III Standing in *Clapper***

Thus far, of course, the lower courts haven’t gotten to the merits in *Clapper*. The district court granted summary judgment to the government based on the plaintiffs’ lack of standing, and a unanimous panel of the Second Circuit reversed. As Judge Lynch explained, “Because standing may be based on a reasonable fear of future injury and costs incurred to avoid that injury, and the plaintiffs have established that they have a reasonable fear of injury and have incurred costs to avoid it, we agree that they have standing.” There’s more to say about the substance of the Court of Appeals’ standing analysis (with which I largely agree),

although I'll save that for later. For now, let me just note that, as I've suggested before, there is here (unlike in the *ACLU v. NSA* case, in which the Sixth Circuit rejected standing in a challenge to the TSP) "a specific (and public) statutory authorization for surveillance that necessarily gives some fairly strong clues (to both private parties and the courts) as to how those whom the statute bars the government from targeting could nevertheless end up having their communications intercepted." Indeed, as we noted last week in our discussions of the *Hedges* case, one can hardly blame courts for finding standing when the government refuses to concede that it will not undertake the measures to which plaintiffs fear they may be subjected.

But at a more fundamental level, there's one more point worth making: Readers are likely familiar with Alex Bickel's *Passive Virtues*, and his thesis that, especially on such sensitive questions where constitutional rights intersect with national security, courts might do best to rely on justiciability doctrines to duck the issue—and to thereby avoid passing upon the merits one way or the other. [Think Joshua at the end of

*WarGames*: "The only winning move is not to play."] And at first blush, this looks like the perfect case for Bickel's thesis, given the implications in either direction on the merits: recognizing a foreign intelligence surveillance exception and thereby endorsing such sweeping, warrantless interceptions of previously protected communications vs. removing this particular club from the government's bag. . . .

And yet, the foreign intelligence surveillance exception only exists because it has *already been recognized* by a circuit-level federal court, to wit, the FISA Court of Review. Whether the passive virtues might otherwise justify judicial sidestepping in such a contentious case, the fact of the matter is that this is a problem largely (albeit not entirely, thanks to the FISA Amendments Act) of the *courts'* making. To duck at this stage would be to let the FISA Court of Review—the judges of which are selected by the Chief Justice—have the last word on such a momentous question of constitutional law. In my view, at least, that would be unfortunate, and it's certainly not what Bickel meant. . . .

## *Chaidez v. United States*

11-820

**Ruling Below:** *Chaidez v. United States*, 655 F.3d 684 (7th Cir. 2011), cert. granted, 2012 WL 1468539 (U.S. 2012).

In 2003 Chaidez, a lawful permanent resident of the United States since 1977, became involved in an insurance scheme in which she falsely claimed to have been a passenger in a car collision and received \$1,200 in the scheme. She pleaded guilty to fraud, but claimed that her attorney at the time never informed her that by doing so would result in automatic deportation. In 2010, Chaidez filed a petition for writ of error coram nobis arguing that her attorney was required to inform her of the consequences of pleading guilty to fraud. The court found that the Supreme Court's holding in *Padilla v. Kentucky*, applied to this case retroactively and therefore her attorney was required to inform her of those consequences.

**Questions Presented:** Whether the holding in *Padilla v. Kentucky* requiring counsel to inform a defendant of immigration consequences of guilty plea applied retroactively.

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**Roselva CHAIDEZ, Petitioner–Appellee,**  
v.  
**UNITED STATES of America, Respondent–Appellant.**

United States Court of Appeals for the Seventh Circuit

Decided August 23, 2010

[Excerpt: Some footnotes and citations omitted.]

**FLAUM, Circuit Judge:**

In *Padilla v. Kentucky*, — U.S. —, 130 S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010), the Supreme Court held that an attorney provides ineffective assistance of counsel by failing to inform a client that a guilty plea carries a risk of deportation. The district court concluded that *Padilla* did not announce a new rule under the framework set forth in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and consequently applied its holding to

Petitioner Roselva Chaidez's collateral appeal. Because we conclude that *Padilla* announced a new rule that does not fall within either of *Teague's* exceptions, we reverse the judgment of the district court.

**I. Background**

Chaidez entered the United States from her native Mexico in 1971, and became a lawful permanent resident in 1977. In June 2003, Chaidez was indicted on three counts of mail fraud in connection with a staged

accident insurance scheme in which the loss advice of counsel, Chaidez pled guilty to two counts on December 3, 2003. She was sentenced to four years' probation on April 1, 2004, and judgment was entered in her case on April 8, 2004. Chaidez did not appeal.

Federal law provides that an alien who is "convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). Chaidez's plea of guilty to a fraud involving a loss in excess of \$10,000 rendered her eligible for removal from the United States as an aggravated felon. *See* 8 U.S.C. § 1101(a)(43)(M)(i). The government initiated removal proceedings in 2009, after Chaidez unsuccessfully filed an application for U.S. citizenship.

In an effort to avoid removal, Chaidez sought to have her conviction overturned. To that end, she filed a motion for a writ of coram nobis in her criminal case on January 25, 2010. She alleges ineffective assistance of counsel in connection with her decision to plead guilty, claiming that her defense attorney failed to inform her that a guilty plea could lead to removal. Chaidez maintains that she would not have pled guilty if she had been made aware of the immigration consequences of such a plea.

On March 31, 2010, while Chaidez's motion was pending before the district court, the Supreme Court issued its decision in *Padilla*. In a thoughtful opinion, Judge Gottschall acknowledged that this case presents a close call. She concluded that *Padilla* did not announce a new rule for *Teague* purposes, but rather was an application of the Court's holding in *Strickland v. Washington*, 466 U.S. 668 (1984). Having concluded that *Padilla* applied to Chaidez's case, the district court considered the merits of her coram nobis

to the victims exceeded \$10,000. On the petition. The court granted the petition and vacated Chaidez's conviction. The government appeals the district court's underlying ruling regarding the retroactive effect of *Padilla*.

## II. Discussion

The writ of coram nobis, available under the All Writs Act, 28 U.S.C. § 1651(a), provides a method for collaterally attacking a criminal conviction when a defendant is not in custody, and thus cannot proceed under 28 U.S.C. § 2255. *United States v. Folak*, 865 F.2d 110, 112–13 (7th Cir.1988). The writ is an extraordinary remedy, allowed only where collateral relief is necessary to address an ongoing civil disability resulting from a conviction. Because a writ of error coram nobis affords the same general relief as a writ of habeas corpus, we proceed as we would in a habeas case. Our review is de novo.

In *Padilla*, the Court considered the petitioner's claim that his counsel provided ineffective assistance by erroneously advising him that pleading guilty to a drug distribution charge would not impact his immigration status. The Kentucky Supreme Court had rejected *Padilla*'s claim, concluding that advice regarding the collateral consequences of a guilty plea ("i.e., those matters not within the sentencing authority of the state trial court"), including deportation, is "outside the scope of representation required by the Sixth Amendment." 130 S.Ct. at 1481. As the *Padilla* Court noted, many state and federal courts had similarly concluded that a defendant's Sixth Amendment right to effective assistance of counsel was limited to advice about the direct consequences of a guilty plea (i.e., length of imprisonment), and did not extend to information regarding

collateral consequences (i.e., deportation). Justice Stevens, the *Padilla* Court concluded that “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.” 130 S.Ct. at 1482. Noting that it had “never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland*,” the Court declined to consider the appropriateness of the direct/collateral distinction generally. *Id.* at 1481. Rather, it found such a distinction “ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation.” *Id.* at 1481–82.

The majority based that conclusion on “the unique nature of deportation”—specifically, its severity as a penalty and its close relationship to the criminal process. *Id.* at 1481. The Court noted that recent changes in federal immigration law, including the Immigration Act of 1990 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), had served to further “enmesh[ ] criminal convictions and the penalty of deportation,” by making “removal nearly an automatic result for a broad class of noncitizen offenders.” *Id.* at 1478–81. Those changes convinced the Court that “deportation is an integral part . . . of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes,” and cannot be “divorce[d] . . . from the conviction.” *Id.* at 1480–81. As a result, the Court concluded that *Strickland* applied to *Padilla*’s ineffective assistance claim.

The Court went on to consider the first *Strickland* prong—whether *Padilla* had established that his counsel’s representation fell below an objective standard of reasonableness. In order to determine what constituted reasonable representation under

However, in a majority opinion authored by the circumstances, the Court looked to prevailing professional norms set forth by the American Bar Association and numerous other authorities. The Court found that, dating back to the mid–1990s, those authorities had been in agreement that counsel must advise his or her client regarding the risk of deportation. Thus, the Court held that defense counsel provides constitutionally deficient representation by failing to inform a defendant that a guilty plea carries a risk of deportation.

Chaidez seeks to have *Padilla* applied to her case on collateral review, despite the fact that the criminal case against her was final on direct review when *Padilla* was decided. *Teague* governs our analysis. Under *Teague*, a constitutional rule of criminal procedure applies to all cases on direct and collateral review if it is not a new rule, but rather an old rule applied to new facts. A new rule applies only to cases that still are on direct review, unless one of two exceptions applies. In particular, a new rule applies retroactively on collateral review if (1) it is substantive or (2) it is a “‘watershed rul[e] of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.”

The parties agree that if *Padilla* announced a new rule neither exception to non-retroactivity applies. Therefore, whether *Padilla* announced a new constitutional rule of criminal procedure is the sole issue before us. The district courts that have addressed that issue—including those in this circuit—are split. The Third Circuit recently became the first of our sister circuits to weigh in, holding that *Padilla* simply applied the old *Strickland* rule, such that it is retroactively applicable on collateral review.

A rule is said to be new when it was not

“dictated by precedent existing at the time *Teague*, 489 U.S. at 301. That definition of what constitutes a new rule reflects the fact that *Teague* was developed in the context of federal habeas, which is designed “to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine.” Thus, the Court has explained that *Teague* “validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.” *Saffle v. Parks*, 494 U.S. 484, 488 (1990) The pertinent inquiry here is whether *Padilla*’s outcome was “susceptible to debate among reasonable minds.” *Butler*, 494 U.S. at 415. Put differently, “our task is to determine whether a . . . court considering [Chaidez’s] claim at the time [her] conviction became final”—pre-*Padilla*—“would have felt compelled by existing precedent to conclude that [*Padilla*] was required by the Constitution.” *Saffle*, 494 U.S. at 488.

That task is a “difficult” one where, as here, the decision at issue “extends the reasoning of . . . prior cases,” as opposed to “explicit[ly] overruling . . . an earlier holding.” However, the Court’s retroactivity jurisprudence provides guidance. In assessing whether the outcome of a case was susceptible to reasonable debate, the Court has looked to both the views expressed in the opinion itself and lower court decisions. Lack of unanimity on the Court in deciding a particular case supports the conclusion that the case announced a new rule. Similarly, if the lower courts were split on the issue, the Court has concluded that the outcome of the case was susceptible to reasonable debate. These considerations convince us that *Padilla* announced a new rule.

the defendant’s conviction became final.”

The majority opinion in *Padilla* drew a concurrence authored by Justice Alito and joined by Chief Justice Roberts, as well as a dissenting opinion authored by Justice Scalia and joined by Justice Thomas. That the members of the *Padilla* Court expressed such an “array of views” indicates that *Padilla* was not dictated by precedent. *O’Dell*, 521 U.S. at 159. Moreover, the views expressed in each of the opinions support that conclusion. Statements in the concurrence leave no doubt that Justice Alito and Chief Justice Roberts considered *Padilla* to be ground-breaking. And the two dissenting Justices, who expressed the view that the majority’s extension of the Court’s Sixth Amendment jurisprudence lacked “basis in text or in principle,” certainly did not see *Padilla* as dictated by precedent. Even the majority suggested that the rule it announced was not *dictated* by precedent, stating that while *Padilla*’s claim “follow[ed] from” its decision applying *Strickland* to advice regarding guilty pleas in *Hill v. Lockhart*, 474 U.S. 52 (1985), *Hill* “does not control the question before us.” It seems evident from Supreme Court precedent that *Padilla* cannot be an old rule simply because existing case law “inform[ed], or even control[led] or govern[ed],” the analysis. *Saffle*, 494 U.S. at 488. Nor will the rule of *Padilla* be deemed old because precedent lent “general support” to the rule it established, *Sawyer*, 497 U.S. at 236, or because it represents “the most reasonable . . . interpretation of general law,” *Lambrix v. Singletary*, 520 U.S. 518, 538 (1997). *Padilla* can only be considered an old rule if Supreme Court precedent “compel[led]” “the result. *Saffle*, 494 U.S. at 490. The majority’s characterization of *Hill* suggests that it did not understand the rule set forth in *Padilla* to be dictated by precedent.

Our conclusion that *Padilla* announced a new rule finds additional support in pre-*Padilla* decisions by state and federal courts. Prior to *Padilla*, the lower federal courts, including at least nine Courts of Appeals, had uniformly held that the Sixth Amendment did not require counsel to provide advice concerning any collateral (as opposed to direct) consequences of a guilty plea. Courts in at least thirty states and the District of Columbia had reached the same conclusion. 87 CORNELL L.REV. at 699. Such rare unanimity among the lower courts is compelling evidence that reasonable jurists reading the Supreme Court's precedents in April 2004 could have disagreed about the outcome of.

In concluding that *Padilla* did not announce a new rule, the Third Circuit downplayed the significance of the contrary lower court decisions, reasoning that they generally predated the adoption of the professional norms relied on by the *Padilla* Court. *Orocio*, 645 F.3d at 639-40. Not so. While Justice Alito cited primarily pre-1995 cases in his concurrence, in the years preceding *Padilla*, the lower federal courts consistently reaffirmed that deportation is a collateral consequence of a criminal conviction and that the Sixth Amendment does not require advice regarding collateral consequences. In doing so, three Courts of Appeals explicitly rejected the argument that the enactment of the IIRIRA altered the calculus.

We acknowledge that “the mere existence of conflicting authority does not necessarily mean a rule is new.” *Williams v. Taylor*, 529 U.S. 362, 410 (2000). But, in our view, “an objective reading of the relevant cases” demonstrates that *Padilla* was not dictated by precedent. *Stringer v. Black*, 503 U.S. 222, 237 (1992). It is true that, unlike so many lower courts, the Supreme Court has

“never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland*.” *Padilla*, 130 S.Ct. at 1481. As such, prior to *Padilla*, the Court had not foreclosed the possibility that advice regarding collateral consequences of a guilty plea could be constitutionally required. But neither had the Court required defense counsel to provide advice regarding consequences collateral to the criminal prosecution at issue.

Moreover, the distinction between direct and collateral consequences was not without foundation in Supreme Court precedent. It can be traced to the Court's jurisprudence regarding the validity of guilty pleas. To be valid, a guilty plea must be both voluntary and intelligent. *Brady v. United States*, 397 U.S. 742, 747 (1970). The Court has long held that a plea is voluntary where the defendant is “fully aware of the direct consequences” of the plea. The Court also has said that where “a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice ‘was within the range of competence demanded of attorneys in criminal cases.’” *Hill*, 474 U.S. at 56. At least some lower courts extrapolated from these holdings that counsel performs effectively by advising a client as to the direct consequences of conviction.

Therefore, we “cannot say that the large majority of federal and state courts that ha[d] rejected” ineffective-assistance-of-counsel claims based on advice about the deportation consequences of a plea were “unreasonable” in their reading of existing Supreme Court precedent. *Saffle*, 494 U.S. at

490. We consequently remain persuaded by 2004, a jurist could reasonably have reached a conclusion contrary to the holding in *Padilla*, such that *Padilla* announced a new rule for purposes of *Teague*.

As the Massachusetts Supreme Judicial Court recently noted, “[t]here is no question that the holding in *Padilla* is an extension of the rule in *Strickland*,” “[n]or is there any question that the Supreme Court was applying the first prong of the *Strickland* standard when it concluded that the failure of counsel to provide her client with available advice about an issue like deportation was constitutionally deficient.” *Clarke*, 460 Mass. at 37, 949 N.E.2d 892. However, we disagree with that court’s conclusion that, because “the opinion in *Padilla* relies primarily on citation to *Strickland* itself,” *Padilla* was dictated by *Strickland*. *Id.* at 44, 949 N.E.2d 892. Under *Teague*, a rule is old only if it sets forth the sole reasonable interpretation of existing precedent. *Lambrix*, 520 U.S. at 538. The fact that *Padilla* is an extension of *Strickland* says nothing about whether it was new or not.

We recognize that the application of *Strickland* to unique facts generally will not produce a new rule. However, that guiding principle is not absolute. We believe *Padilla* to be the rare exception. Before *Padilla*, the Court had never held that the Sixth Amendment requires a criminal defense attorney to provide advice about matters not directly related to their client’s criminal prosecution. In *Padilla*, the Court held that constitutionally effective assistance of counsel requires advice about a civil penalty imposed by the Executive Branch (now the Department of Homeland Security, formerly the Immigration and Naturalization Service) after the criminal case is closed. In our view, that result was sufficiently novel to qualify

the weight of lower court authority that, in as a new rule. Indeed, if *Padilla* is considered an old rule, it is hard to imagine an application of *Strickland* that would qualify as a new rule. Perhaps in the future the Court will conclude, given the breadth and fact-intensive nature of the *Strickland* reasonableness standard, that cases extending *Strickland* are never new. But until that time, we are bound to apply *Teague* in the context of *Strickland*.

The specific contours of the *Padilla* holding further indicate that it is a new rule. Under the rule set forth in *Padilla*, the scope of an attorney’s duty to provide immigration-related advice varies depending on the degree of specialization required to provide such advice accurately. In particular, the Court held that “when the deportation consequence [of a guilty plea] is truly clear,” counsel has a duty to “give correct advice.” 130 S.Ct. at 1483. But “[w]hen the law is not succinct and straightforward,” such that “the deportation consequences of a particular plea are unclear or uncertain,” “a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” That nuanced, new analysis cannot, in our view, be characterized as having been dictated by precedent.

The district court relied on the fact that *Padilla* itself was before the Court on a motion for post-conviction relief for its conclusion that the Court intended for *Padilla* to apply retroactively to cases on collateral appeal. In light of the fact that Kentucky did not raise *Teague* as a defense in *Padilla*, we do not assign the significance to *Padilla*’s procedural posture that the district court did. While “[r]etroactivity is properly treated as a threshold question,” *Teague* “is not ‘jurisdictional’ in the sense



that [the] Court . . . *must* raise and decide the 497 U.S. 37, 40–41 (1990). Therefore, if a State does not rely on *Teague*, the Court has no obligation to address it, and can consider the merits of the claim. We believe it is more likely that the Court considered *Teague* to be waived, than that it silently engaged in a retroactivity analysis.

Finally, the district court reasoned that the best way to make sense of the *Padilla* Court’s discussion (and dismissal) of concerns that its ruling would undermine the finality of plea-based convictions was to conclude that the majority intended *Padilla* to apply retroactively. 130 S.Ct. at 1484–85. The Third Circuit reached a similar conclusion. That is a reasonable reading, and certainly is the most compelling argument that *Padilla* is an old rule. However, we are hesitant to depart from our application of the test set forth in *Teague* and its progeny—which points clearly in the direction of new rule—based on inferences from indirect language. Moreover, to the extent that we attempt to discern whether members of the Court understood *Padilla* to be a new rule, we find the clearest indications in the concurrence and dissent, which leave no doubt that at least four Justices view *Padilla* as new.

### III. Conclusion

The Supreme Court has defined the concept of an old rule under *Teague* narrowly, limiting it to those holdings so compelled by precedent that any contrary conclusion must be deemed unreasonable. While determining whether a rule is new can be challenging, and this case provides no exception, we conclude that the narrow definition of what constitutes an old rule tips the scales in favor of finding that *Padilla* announced a new rule. Moreover, that numerous courts had failed to anticipate the holding in *Padilla*,

issue *sua sponte*.” *Collins v. Youngblood*, though not dispositive, is strong evidence that reasonable jurists could have debated the outcome. For the foregoing reasons, we REVERSE the judgment of the district court and **REMAND** the case for further proceedings.

### WILLIAMS, Circuit Judge, dissenting.

At the time Roselva Chaidez, a lawful permanent resident since 1977, entered her plea, prevailing professional norms placed a duty on counsel to advise clients of the removal consequences of a decision to enter a plea of guilty. I would join the Third Circuit in finding that *Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), simply clarified that a violation of these norms amounts to deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). As such, *Padilla* did not announce a “new rule” under *Teague v. Lane*, 489 U.S. 288 (1989), and is therefore retroactively applicable to Chaidez’s coram nobis petition seeking to vacate her guilty plea on the grounds that her counsel was ineffective. For the reasons set forth below, I dissent.

I do not disagree that *Teague* holds that a “case announces a new rule when it breaks new ground or imposes a new obligation on the States or Federal Government,” and “if the result was not *dictated* by precedent existing at the time the [petitioner’s] conviction became final.” *Teague*, 489 U.S. at 301. I do, however, disagree with the majority as to how *Teague*’s holding applies in the context of *Strickland v. Washington*.

In *Padilla*, the Court found that because “deportation is a particularly severe ‘penalty,’ . . . advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.”

The Court then stated that the first inquiry representation “fell below an objective standard of reasonableness,” *Strickland*, 466 U.S. at 688, is “necessarily linked to the practice and expectations of the legal community.” *Padilla*, 130 S.Ct. at 1482. Noting that *Strickland*’s standard looked to “reasonableness under prevailing professional norms,” the *Padilla* Court held that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.

By citing and relying on *Strickland*, and applying that case to *Padilla*’s claim, the Court “broke no new ground in holding the duty to consult also extended to counsel’s obligation to advise the defendant of the immigration consequences of a guilty plea.” *United States v. Orocio*, 645 F.3d at 639. The decision “is best read as merely recognizing that a plea agreement’s immigration consequences constitute the sort of information an alien defendant needs in making ‘important decisions’ affecting ‘the outcome of the plea process,’ and thereby come within the ambit of the ‘more particular duties to consult with the defendant’ required of effective counsel.” Under such a reading, *Padilla* was a mere application of *Strickland* to the facts before the Court, and therefore not a “new rule.”

Following *Teague*, the early Supreme Court retroactivity cases cast the “new rule” inquiry as whether or not “reasonable jurists” would agree that a rule was not “dictated” by precedent. But this narrow conception of the “dictated” language from *Teague* is not the relevant inquiry in the *Strickland* context. “The often repeated language that *Teague* endorses ‘reasonable, good-faith interpretations’ by state courts is an explanation of policy, not a statement of law.” *Williams v. Taylor*, 529 U.S. 362, 383

under *Strickland*, whether counsel’s (2000). As the Court has stated, and as the majority today recognizes, “the *Strickland* test provides sufficient guidance for resolving *virtually all* ineffective-assistance-of-counsel claims.” “[W]here the starting point is a rule of general application such as *Strickland*, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent,” *Wright v. West*, 505 U.S. 277, 308–09 (1992). Given this clear language regarding *Teague*’s applicability in the *Strickland* context, I cannot find that the Supreme Court’s retroactivity cases where *Strickland* is not implicated compel a finding that the rule announced in *Padilla* is “new.”

In *Williams*, the Court was addressing *Strickland* under the “clearly established law” requirement of 28 U.S.C. § 2254(d)(1), which a plurality found codified *Teague*’s requirement that federal habeas courts must deny relief that is contingent upon a rule of law not “clearly established” at the time the state conviction became final. 529 U.S. at 379–80. Parts I, III, and IV of the opinion were on behalf of a majority. The opinion of the Court stated:

It is past question that the rule set forth in *Strickland* qualifies as “clearly established Federal law, as determined by the Supreme Court of the United States.” That the *Strickland* test “of necessity requires a case-by-case examination of the evidence,” *Wright*, 505 U.S., at 308, 112 S.Ct. 2482, obviates neither the clarity of the rule nor the extent to which the rule must be seen as “established” by this Court. This Court’s precedent “dictated” that the Virginia Supreme Court apply the *Strickland* test at the time that court entertained *Williams*’ ineffective-

assistance claim. . . . And it can right to effective counsel “breaks new ground or imposes a new obligation on the States.”

529 U.S. at 391. Where such a “case-by-case examination” is required, “we can tolerate a number of specific applications without saying that those applications themselves create a new rule.” *Wright*, 505 U.S. at 308–09.

This case is one of those “specific applications” that does not create a new rule. In applying *Strickland* to this particular set of facts, the Court found that prevailing professional norms in place at the time of the defendant’s plea required counsel to act in accordance with those norms, and that the advice required was clear and apparent. *Padilla*, 130 S.Ct. at 1482. That the Padilla Court began by addressing whether *Strickland* applied to Padilla’s claim is of no consequence. As the Third Circuit recognized, the true question addressed by *Padilla* is whether counsel has been constitutionally adequate in advising a criminal defendant as to whether or not to accept a plea bargain. *Orocio*, 645 F.3d at 637–38. The analytical mechanism by which the Court applied *Strickland* does not detract from the fact that *Strickland* is the general test governing ineffective assistance claims, and that the Padilla Court did no more than recognize that removal is the type of consequence that a defendant needs to be informed of when making the decision of whether to plea.

Given how *Teague* and *Strickland* co-exist, I would not find that the concurring and dissenting views in *Padilla* compel a finding that the majority’s opinion is a “new rule.” Despite using dissenting views to inform the analysis of whether reasonable jurists could differ on whether precedent dictates a

hardly be said that recognizing the particular result, the Court has “not suggest[ed] that the mere existence of a dissent suffices to show that the rule is new.” *Beard v. Banks*, 542 U.S. 406, 416 n. 5 (2004). And where the Court has relied on an “array of views” to find a rule “new,” the underlying case that the petitioner sought to have applied in fact had no majority opinion. The existence of concurring and dissenting views does not alter the fact that the prevailing professional norms at the time of Chaidez’s plea required a lawyer to advise her client of the immigration consequences of a guilty plea. Even in light of dissenting views, “*Strickland* did not freeze into place the objective standards of attorney performance prevailing in 1984, never to change again.” *Orocio*, 645 F.3d at 640. The concurring and dissenting opinions do not alter the straightforward application of *Strickland* that the majority engaged in. In *Padilla*, even the concurring Justices agreed that counsel must, at the very least, advise a noncitizen “defendant that a criminal conviction may have adverse immigration consequences.” And Justices have disagreed on whether an outcome was “dictated” by precedent where a majority found that a novel application of an old precedent was not a “new rule.”

The strongest argument that the government and majority opinion make is the unanimity among the lower courts prior to *Padilla* that the Sixth Amendment does not require counsel to warn clients of the immigration consequences of a guilty plea. The early cases, however, relied on the categorization of removal or deportation as a “collateral” consequence. This is a classification that the *Padilla* court specifically rejected. The Court found that deportation is “intimately related to the criminal process,” and that “[o]ur law has enmeshed criminal convictions and the penalty of deportation

for nearly a century.” The Court also found have made removal nearly an automatic result for a broad class of noncitizen offenders.” The Court therefore found it “‘most difficult’ to divorce the penalty from the conviction in the deportation context.”

Despite the drastically changed immigration landscape following the passage of IIRIRA in 1996, more recent lower court decisions did not revisit earlier holdings regarding deportation’s collateral nature, and declined to find deportation any less collateral. These cases, however, cannot change the fact that the Supreme Court itself “never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland*, . . .” *Padilla*, 130 S.Ct. at 1481, a more relevant inquiry for *Teague* purposes. Not only did the Supreme Court never make this distinction, but in 2001 the Court stated that “preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” *INS v. St. Cyr*, 533 U.S. 289, 323 (2001). The flaw in the collateral versus direct consequences distinction was known at the time of Chaidez’s plea. And as the majority recognizes, “the mere existence of conflicting authority does not necessarily mean a rule is new.” *Williams*, 529 U.S. at 410. The only question for *Teague* purposes in the *Strickland* context is whether counsel was constitutionally adequate in advising a criminal defendant as to whether or not to accept a plea bargain. *Orocio*, 645 F.3d at 637–38. Relying on lower court decisions to the contrary would overlook *Strickland*’s straightforward language that “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms”—professional norms that the *Padilla* Court found had been in place for at least fifteen years prior to its

that “recent changes in our immigration law holding. I would therefore not find the unanimity among the lower courts predating *Padilla* “compelling” for purposes of our current *Teague* analysis.

My colleagues downplay the plain language in *Padilla* that itself signals anticipated retroactive application. The majority in *Padilla* specifically stated that its decision will not “open the floodgates” to challenges of convictions and further stated that “[i]t seems unlikely that our decision today will have a significant effect on those convictions *already* obtained as the result of plea bargains.” This floodgates argument is a clear reference to petitions such as the one at hand that challenge the past deficient performance of counsel. The Court’s use of the past tense in *Padilla* forecloses an argument that it was only referring to prospective challenges, especially when the two subsequent sentences of the opinion speak of professional norms over the “*past 15 years*” and that courts should presume that counsel satisfied their obligation “at the time their clients *considered* pleading guilty.” Such a discussion would be unnecessary if the Court intended that *Padilla* only apply prospectively. The government argues that the floodgates discussion referred only to state post-conviction proceedings, as states are free to offer post-conviction relief without regard to *Teague*. However, in its floodgates discussion, the *Padilla* Court relied on research that included both state *and federal* post conviction proceedings when citing how many habeas petitions filed arise from guilty pleas.

As the Court in *Padilla* signaled, if mere applications of *Strickland* are “old rules,” it does not necessarily follow that every petitioner will be able to take advantage of those mere applications. First, the *Padilla*

Court relied on the professional norms in Padilla’s counsel “could have easily determined that his plea would make him eligible for deportation simply from reading

the text of the statute. . . .” Not every noncitizen who pled to an offense will be in that position. Additionally, *Strickland* also requires a showing of prejudice. Showing prejudice, much like deficient performance, is adjudicated depending on the facts of each particular case, and the fact that courts must engage in such case-by-case analysis should not influence whether or not the rule itself is “new.”

place at the time of plea, and the fact that We can rest assured that defense lawyers will now advise their clients prior to pleading guilty about the immigration consequences of such a plea, as the Court has clarified that such advice is required under the Sixth Amendment. But given today’s holding, this is of no consequence to Roselva Chaidez despite the fact that professional norms in place at the time of her plea placed the same duty on her counsel. Because I find that *Padilla* simply extended the Supreme Court’s holding in *Strickland*, and itself signaled an intent to be applied to noncitizens in Chaidez’s position, I respectfully dissent.

## “New Look at Lawyers’ Advice”

*SCOTUSblog*  
April 30, 2012  
Lyle Denniston

The Supreme Court on Monday agreed to settle a dispute among lower courts on whether to give more immigrants the benefit of a ruling that requires their lawyers to advise them more clearly on what can happen if they plead guilty to a crime. At issue in the new case of *Chaidez v. United States* (11-820) is the potential retroactivity of the Court’s 2010 ruling in *Padilla v. Kentucky*. This was the only new case granted on Monday; it will be heard and decided in the new Term starting October 1.

In the *Padilla* decision, the Court ruled that the Sixth Amendment right to counsel includes a right for a non-citizen living in the U.S. to be advised by a lawyer of the consequences under immigration law of pleading guilty to a crime that could lead to deportation. The majority noted that, under dramatic changes recently in immigration law, deportation is virtually automatic after one is convicted of an “aggravated felony.”

Relying on the constitutional standard that a lawyer’s professional advice to clients must satisfy a minimum level of performance, the Court in *Padilla* found that prevailing standards dictate that a lawyer for a non-citizen faced with a criminal charge must advise that individual of the risk of being deported if a plea of guilty is entered. If the immigration law outlook is not clear, the Court said, the lawyer at least must tell the client that there could be adverse immigration consequences.

The sequel case arose before the *Padilla* decision was issued, and the Seventh Circuit

Court ruled that the non-citizen involved—Roselva Chaidez, now living in Chicago—could not take advantage of that precedent because it did not apply retroactively. The *Padilla* decision came down on March 31, 2010, and the Seventh Circuit said that it established a new rule of criminal law and thus, under Supreme Court precedent, it could not apply to any case in which a guilty plea had been entered prior to that March 2010 date.

Chaidez, a native of Mexico, came to the U.S. in the 1970s, and became a lawful permanent resident in 1977. She has three children and three grandchildren, all of whom are U.S. citizens. She had been involved in an insurance fraud scheme, in which others had persuaded her to claim falsely that she had been a passenger in a car involved in a collision; she had received \$1,200 for her role. In 2003, she was charged with two counts of mail fraud for two separate billings after the underlying dispute was settled out of court.

Her lawyer did not advise her about the risk of deportation if she pleaded guilty, and did not seek to negotiate a plea deal for her. She pleaded guilty. It is not disputed that, had she known of the deportation prospect, she would not have pleaded guilty. She was sentenced to four years on probation and ordered to pay the insurance company a total of \$22,500. Her conviction became final in 2004. Three years later, federal officials became aware of her conviction, and moved to deport her. She challenged that in federal court, claiming that her lawyer had failed to

advise her fully. That was the claim the Seventh Circuit rejected. Other federal courts, however, disagree on the retroactivity point.

While the U.S. Solicitor General argued to

the Supreme Court that the Seventh Circuit was correct in denying retroactivity, it nevertheless urged the Court to hear the case to clear up the conflict among lower courts. The Justices accepted that advice.

## “7<sup>th</sup> Circuit Holds Lawyer Rule on Impact of Guilty Plea for Immigrants not Retroactive”

*The Indiana Lawyer*

August 24, 2011

Michael Hopkins

A three-judge panel for the 7th Circuit Court of Appeals has determined a landmark decision from the Supreme Court of the United States last year isn't retroactive. That rule required criminal defense attorneys to advise clients about the immigration impact of signing a guilty plea, and this means past cases wouldn't benefit from that holding even if those individuals had been deprived of that Sixth Amendment right.

The ruling came Tuesday in *Roselva Chaidez v. U.S.*, No. 10-3623, a Northern District of Illinois case involving a woman from Mexico who entered the United States and became a lawful resident in the 1970s. She was indicted in 2003 on mail fraud in connection with a staged accident insurance scheme that took more than \$10,000 from the victims. On the advice of her counsel, Chaidez pleaded guilty to two counts and received a sentence of four years probation.

The federal government began deportation proceedings in 2009 because the law dictates that for anyone convicted of an aggravated felony. In an attempt to halt the deportation, Chaidez tried to have her conviction overturned despite not originally appealing the conviction and sentence. Filing a motion for the court to correct a previous error that couldn't be fixed by any other remedy, Chaidez in January 2010 alleged ineffective assistance of counsel in connection with her decision to plead

guilty, and she claimed that her defense attorney failed to inform her that a guilty plea could lead to her deportation.

While the motion was pending before the Northern District of Illinois, the Supreme Court on March 31, 2010, decided *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010). The holding in that case upheld the argument Chaidez was trying to make.

Considering that new holding, U.S. Judge Joan Gottschall in Illinois ruled later in the year that this was a close call but that *Padilla* didn't announce a new rule and should apply retroactively to Chaidez's case. The District judge applied that ruling to this case and granted the petition, vacating Chaidez's conviction.

The federal government appealed that ruling regarding the retroactive effect of *Padilla*, an issue that multiple District and Circuit courts have addressed recently and ruled on differently. Now, the 7th Circuit has chimed in, with the full Circuit rejecting a request to rehear the case en banc despite objections from Judges David Hamilton, Ilana Diamond Rovner, Diane Wood, and Ann C. Williams, who would have reheard the case. Judges William Bauer and Joel Flaum were in the majority reversing the lower District court, while Judge Williams disagreed and penned a lengthy dissent.



Despite the court's division, the holding is now in place for Illinois, Indiana, and Wisconsin: *Padilla* is not retroactive prior to March 31, 2010.

Specifically under SCOTUS precedent from 1989, a constitutional rule of criminal procedure applies to all cases on direct and collateral review if it's not a new rule but rather is an old rule applied to new facts. That is what the federal courts are debating about *Padilla*, and whether that holding is a new rule that should apply to future cases.

Examining pre-*Padilla* caselaw from nine federal appellate courts, the two-judge majority for the 7th Circuit panel found that those other jurisdictions had uniformly held that the Sixth Amendment did not require counsel to provide advice about collateral consequences of guilty pleas.

The 7th Circuit panel described Judge Gottschall's rationale as reasonable and compelling—that the SCOTUS majority intended *Padilla* to apply retroactively because of concerns that its ruling would undermine the finality of plea-based convictions. But the majority hesitated to turn away from its long-established application of the test it had used prior to the SCOTUS decision and found that it was a new groundbreaking rule that couldn't have been anticipated and should not be retroactive.

“While determining whether a rule is new can be challenging, and this case provides no exception, we conclude that the narrow definition of what constitutes an old rule tips the scales in favor of finding that *Padilla* announced a new rule,” Judge Flaum wrote. “Moreover, that numerous courts had failed to anticipate the holding in *Padilla*, though not dispositive, is strong evidence that reasonable jurists could have debated the outcome.”

In her 12-page dissent, Judge Williams wrote that *Padilla*'s plain language indicates it anticipated retroactivity because it used past tense and discussed application to convictions already obtained, not only prospective challenges.

“We can rest assured that defense lawyers will now advise their clients prior to pleading guilty about the immigration consequences of such a plea, as the Court has clarified that such advice is required under the Sixth Amendment. But given today's holding, this is of no consequence to Roselva Chaidez despite the fact that professional norms in place at the time of her plea placed the same duty on her counsel,” Judge Williams wrote. “Because I find that *Padilla* simply extended the Supreme Court's holding (from 1984) and itself signaled an intent to be applied to noncitizens in Chaidez's position, I respectfully dissent.”

## “Opening the Gate to Criminal Alien Appeals”

UPI

May 6, 2012

Michael Kirkland

Is the U.S. Supreme Court about to open the appeal floodgates for legal aliens who committed crimes in the United States, pleaded guilty but weren't told they would face deportation under federal law?

Maybe. Argument on the issue will be heard next term, which begins on the first Monday of October.

The genesis of the dispute arose in 2010, when the Supreme Court ruled in *Padilla vs. Kentucky* that non-citizens who pleaded guilty to felonies, but weren't advised by their lawyers they automatically would be deported, were unconstitutionally deprived of their Sixth and 14th Amendment rights to effective counsel.

The vote was 7-2.

Now the Supreme Court has agreed to review whether the *Padilla* ruling should be made retroactive. In other words, should it be applied to any non-resident who pleaded guilty to a felony without effective counsel from 1996, when the deportation law was passed, to 2010, when the decision was handed down.

How big a universe would be affected is up for speculation.

In urging that the new case, *Chaidez vs. USA*, be reviewed to resolve conflicting rulings in the lower courts, the Obama administration told the Supreme Court: “Many non-citizens are now attempting

to overturn their long-final convictions based on this court's decision in *Padilla*. These collateral proceedings threaten society's interest in the finality of criminal convictions.”

The issue, the administration said, “also will have a significant impact on the federal government's efforts to enforce this nation's immigration laws against those who have become removable as a result of pre-*Padilla* criminal convictions.”

A friend-of-the-court brief filed by the National Association of Criminal Defense Lawyers, the National Immigration Project of the National Lawyers Guild, the Immigrant Legal Resource Center and the Immigrant Defense project, refers to “countless” defendants.

“The lack of a remedy [for pre-*Padilla* ineffective counsel] imposes intolerably harsh consequences on countless non-citizens facing detention and deportation as a result of wrongfully procured plea-based convictions,” the brief said. “For these non-citizens and their families—which often include both citizen and non-citizen children—the grave misfortune of a pre-*Padilla* final conviction in a federal judicial circuit that does not recognize a remedy for such *Padilla* violations, is deeply unjust and damaging: It can separate long-time residents from their loved ones and communities; tear apart families; impair children's health and education; and

cause severe economic hardship. Moreover, the conflict creates a regrettable disuniformity in the enforcement of federal immigration law.”

Another friend-of-the-court brief filed in support of the defendant in the new case points out that the rights involved have a deep history.

The brief by the Constitutional Accountability Center, based in Washington, cites the “landmark English Treason Act of 1696, which first affirmed a right of counsel, explicitly spoke of [c]ounsel learned in the law.”

It also cites James Madison, a founding father and one of principal drafters of the Constitution who argued against the Alien and Sedition Act.

“If the banishment of an alien . . . be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the names can be applied,” Madison wrote.

Even if the number of non-U.S. citizens who would be affected by applying Padilla retroactively is just a small fraction of those aliens being held in detention for deportation, the number itself could be large.

The Esperanza Immigrant Rights Project, a program of Catholic Charities, says the “number of non-citizens who are arrested, detained and placed into removal proceedings is rising every year. In 2010 approximately 400,000 non-citizens were detained by Immigration and Customs Enforcement.”

*The Dallas Post* also reported last week

the number of deportations “has steadily increased over the past few years, rising from 291,060 in fiscal year 2007 to 396,906 in fiscal year 2011, according to ICE.”

The number being detained pending deportation “has also skyrocketed. At the end of fiscal year 2002 the average daily population of detainees was 19,922. That rose to 33,330 in fiscal year 2011.”

*The Post* said there were 32,191 immigrants detained nationwide as of last Feb. 20, at an average cost of \$122 per day. The newspaper said that equates to \$3.9 million each day, or \$1.43 billion for this year.

Though most illegal immigrants who have received a final removal order are deported within a month, the American Civil Liberties Union says “there are hundreds of cases, particularly those involving immigrants seeking political asylum and those convicted of criminal charges, that can take a year or more,” the *Post* reported.

The new case accepted by the Supreme Court for next term involves Roselva Chaidez, who was born in Mexico but has lived in the United States since the 1970s. She has been a lawful permanent U.S. resident since 1977 and lives in Chicago with her three U.S.-citizen children and two U.S.-citizen grandchildren, her petition to the high court says.

“Several years ago, Chaidez became involved in an insurance scheme,” the petition says. “As the government explained, she was ‘not aware of the specifics of the scheme,’ but others persuaded her to falsely claim to have

been a passenger in a car involved in a collision. . . . Chaidez received \$1,200 for her minor role. . . . [and] the insurance company paid a total of \$26,000 to settle the claims that Chaidez and others made.”

That was enough to push the fraud into “aggravated felony” territory under a 1996 federal law. Prosecutors charged Chaidez in 2003 with two counts of mail fraud for two separate mailings related to collecting her settlement. Her attorney recommended she accept a plea bargain offered by the government.

Her petition said Chaidez was not told by her attorney if she pleaded guilty she would be deported, as required by law. She pleaded guilty, was sentenced to probation and ordered to pay \$22,000 restitution.

When she later applied for U.S. citizenship, drawing the attention of officials, the government began deportation proceedings. After the lower courts ruled against her, she asked the Supreme Court for review.

Chaidez’ case is one of a dozen or so accepted by the Supreme Court for argument next term. Given the 7-2 vote in *Padilla*, her chances of success at the high court level may be quite good.

But first her lawyers will have to get through Justice Antonin Scalia, who dissented in *Padilla* and was joined by Justice Clarence Thomas.

“In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised,” Scalia wrote in the 2010 dissent. “The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.

“The Sixth Amendment guarantees the accused a lawyer for his defense against a ‘criminal prosecutio[n]’—not for sound advice about the collateral consequences of conviction.”

## **“On the Two Year Anniversary of *Padilla v. Kentucky*, Preziosi Says Supreme Court Decision’s Significance Still Debated”**

*PRWeb*

March 28, 2012

While the United States Supreme Court ruled on *Padilla v. Kentucky* nearly two years ago, courts in New York and around the country have made little progress on implementing the decision. So says Stephen Preziosi, New York Criminal Appeals Lawyer, who now tries to offer a framework for moving forward.

“It has been almost two years since the Supreme Court’s ruling in *Padilla v. Kentucky* (130 S.Ct. 1473176 (2010)), and courts across the State of New York and across the Nation are still struggling and disagreeing on how the holding in the *Padilla* case should be applied,” said Preziosi. “Some courts say it is a new rule and should not be applied retroactively, with some exceptions; other courts say that it is an old rule being applied to a new set of facts and should be applied retroactively; finally, there are various courts that say it is a rule that should only be applied retroactively on cases of direct appellate review and not on collateral review. I believe the correct interpretation is that the decision applies retroactively.” This is an important concept in both federal criminal appeals and state criminal appeals.

“The retroactive application of the rule in *Padilla* is significant for many cases working their way through the court systems in New York right now. This means that many noncitizens should have the opportunity to have their cases

re-opened by submitting an Article 440 motion to the trial court to request that the conviction be vacated.

In the majority opinion offered by Justice Stevens, the Supreme Court held that if an attorney fails to warn a client about adverse immigration consequences of a plea in a criminal case, this fulfills the first part of the two-part test for ineffective assistance of counsel outlined in *Strickland v. Washington* (*Strickland v. Washington*, 466 U.S. 668 (1984)). The question becomes whether all defendants agreeing to plea deals under these circumstances should have their cases reconsidered, or if that reconsideration should be extended to only certain of these defendants.

“Two important cases that were decided shortly after *Padilla* shed light on how I believe the law will be applied,” said Preziosi. “Although neither of them received equivalent acclaim, they may help to clear the air on the subject of retroactivity of the *Padilla* rule, and on the issue of applicability of that rule on direct versus collateral review.”

In both *Santos-Sanchez v. United States*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 2340, 176 L.Ed.2d 559 (2010) and *Chapa v. United States*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 3504, 177 L.Ed.2d 1086 (2010), the Supreme Court vacated the decision of the Fifth Circuit Court of Appeals and remanded the cases to be decided in light of *Padilla v. Kentucky*.

In the *Santos-Sanchez* case the defendant had been a legal resident of the United States since 2001. According to court documents, he was arrested in 2003 and charged with aiding and abetting the illegal entry of an alien into the US. He pleaded guilty after consulting with an Assistant Public Defender and was sentenced to one year of probation. As a result of his guilty plea the Department of Homeland Security found Santos-Sanchez removable because of his plea in the criminal case.

He filed a Writ of Errors Coram Nobis (collateral review) before a Magistrate Judge in the Southern District of Texas who granted the writ and vacated the conviction; however, the District Court for the Southern District of Texas eventually vacated the Magistrate's ruling and denied the petition for a Writ of Errors Coram Nobis; Santos-Sanchez appealed.

The Fifth Circuit Court of Appeals held that deportation is a collateral consequence of the plea in the criminal case and that the defendant's attorney was, therefore, not obligated to inform him of the immigration consequences of his guilty plea, and his counsel was therefore not ineffective. *Santos-Sanchez v. U.S.*, 548 F.3d 327 (2008).

The U.S. Supreme Court granted certiorari (just one week after *Padilla v. Kentucky* was decided) and vacated the judgment of the Fifth Circuit and remanded the case with an order that it be re-decided in light of the holding in *Padilla v. Kentucky*—the Supreme Court's direction to the Fifth Circuit Court of Appeals was to retroactively apply the *Padilla* holding in a case that

was on collateral review.

Approximately three months after the Supreme Court decided *Padilla v. Kentucky* they decided the case of *Chapa v. United States*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 3504, 177 L.Ed.2d 1086 (2010).

In the *Chapa* case the defendant argued on direct appeal that her plea counsel had failed to warn her that it was a virtual certainty she would be deported because of her plea. The Fifth Circuit Court of Appeals, citing to its prior decision in *Santos-Sanchez*, held that counsel was not ineffective in failing to warn his client of the immigration consequences of a plea in a criminal case and affirmed the conviction.

The U.S. Supreme Court granted certiorari and vacated the Fifth Circuit's judgment and remanded the case for it to be decided in light of the holding of *Padilla v. Kentucky*, again, directing that the holding in *Padilla* be applied retroactively to a case that was on direct appellate review.

"In both cases, the U.S. Supreme Court found that the holding in *Padilla* is applicable retroactively, and furthermore, it is applicable on both direct appellate review and on collateral review of criminal cases," said Preziosi.

In New York the issue of the retroactive application has not yet reached the appellate courts and has yet to be definitively decided. New York Criminal Appeals Lawyer Stephen Preziosi will be arguing two cases in the Appellate Division with regard to issue of retroactivity of *Padilla* in the coming months.

*Moncrieffe v. Holder*

11-702

**Ruling Below:** *Moncreiffe v. Holder*, 662 F.3d 387 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1857 (2012).

Born in Jamaica, Adrian Moncrieffe became a lawful permanent resident of the United States in 1984. In Georgia in 2008, he was arrested and pleaded guilty to possession of marijuana with intent to distribute. Two years later, the Department of Homeland Security began removal proceedings, arguing that Moncrieffe should be removable as an alien convicted of an aggravated felony. The Immigration Judge and the Board of Immigration Appeals endorsed felony classification of Moncrieffe’s act, holding that the Georgia state law he was convicted under was analogous to a section of the Controlled Substances Act that makes possession of marijuana with intent to distribute a felony. Moncrieffe petitioned the Court of Appeals for the Fifth Circuit for review, arguing that the conviction was not an aggravated felony but rather equivalent to a misdemeanor due to the small amount, thus he would not be removable. The Fifth Circuit denied Moncrieffe’s petition, holding that Moncrieffe bore the burden of proof in establishing a misdemeanor over a felony, and he failed to meet this burden at the immigration hearing. The deportation order was upheld.

**Questions Presented:** Whether a conviction under a provision of state law that encompasses but is not limited to the distribution of a small amount of marijuana without remuneration constitutes an aggravated felony, notwithstanding that the record of conviction does not establish that the alien was convicted of conduct that would constitute a federal felony.

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**Adrian Phillip MONCRIEFFE, Petitioner,**  
**v.**  
**Eric H. HOLDER, Jr., U.S. Attorney General, Respondent.**

United States Court of Appeals for the Fifth Circuit

Decided November 8, 2011; As Corrected November 14, 2011

[Excerpt: Some footnotes and citations omitted]

**EDITH H. JONES, Chief Judge**

Adrian Moncrieffe petitions for review of a removal order of the Board of Immigration Appeal’s (“BIA”). After he pled guilty to possessing marijuana with intent to distribute in Georgia, the Department of Homeland Security (“DHS”) charged

Moncrieffe with being removable for this crime, which it contends should be considered a felony under the Controlled Substances Act (“CSA”) and an “aggravated felony” under immigration law. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). The immigration judge (“IJ”) agreed, and on appeal, the BIA endorsed the felony classification and

dismissed Moncrieffe's appeal. For the following reasons we DENY the Petition for Review.

## BACKGROUND

Moncrieffe, a native of Jamaica, entered the United States legally as a permanent resident in 1984 at the age of three. Moncrieffe pled guilty to "Possession of Marijuana With Intent to Distribute" under Georgia law in 2008 and was sentenced to five years probation. Because of his guilty plea, DHS charged Moncrieffe with being removable under both 8 U.S.C. § 1227(a)(2)(B) relating to controlled substances offenses and under § 1227(a)(2) "as an aggravated felon" because the conviction was for a "drug trafficking crime" as defined by 18 U.S.C. § 924(c). DHS produced the Georgia judgment and charging document at the immigration hearing in support of its position. The IJ ruled that the state conviction was analogous to a federal felony under 21 U.S.C. § 841(a)(1) and that Moncrieffe was thus removable as an aggravated felon.

Moncrieffe appealed to the BIA arguing that the Georgia crime should not be considered an aggravated felony. Moncrieffe argued that GA. CODE § 16-13-30(j) punishes acts that are equivalent to misdemeanors under the CSA. Specifically, distribution of "a small amount of marijuana for no remuneration" falls under the Georgia provision but is only a misdemeanor under 21 U.S.C. § 841(b)(4). The charging document and Georgia judgment did not indicate how much marijuana Moncrieffe possessed. Because the government did not prove that there was remuneration or more than a small amount of marijuana, Moncrieffe argued that his conviction should be considered a federal misdemeanor. In an unpublished Fifth

Circuit case, *Jordan v. Gonzales*, 204 Fed.Appx. 425 (5th Cir. 2006), this court held that a conviction for possession of marijuana with intent to distribute was considered a federal misdemeanor under 21 U.S.C. § 841(b)(4) in the absence of proof of remuneration or of more than a small amount of marijuana.

The BIA was not swayed by *Jordan*. Under BIA precedent, a state conviction for possessing an indeterminate amount of marijuana with intent to distribute is considered an aggravated felony under the CSA. *In re Matter of Aruna*, 24 I. & N. Dec. 452, 2008 WL 512678 (BIA Feb. 26, 2008). The BIA found no reversible error in the IJ's decision to follow its precedent rather than an unpublished, non-precedential circuit court opinion. Moncrieffe petitions for a review of the BIA decision dismissing his appeal.

## STANDARD OF REVIEW

This court has jurisdiction to review questions of law in petitions from the BIA. 8 U.S.C. § 1252(a)(2). We review such questions *de novo*. *Omagah v. Ashcroft*, 288 F.3d 254, 258 (5th Cir. 2002). Whether a prior state conviction falls within the federal definition of aggravated felony is also reviewed *de novo* because "[d]etermining a particular federal or state crime's elements lies beyond the scope of the BIA's delegated power or accumulated expertise." *Id.* We review only the BIA decision "unless the IJ's decision has some impact on the BIA's decision." *Mikhael v. INS*, 115 F.3d 299, 306 (5th Cir. 1997). Factual findings are reviewed for substantial evidence and are overturned only if "the evidence is so compelling that no reasonable factfinder could reach a contrary conclusion." *Chen v. Gonzales*, 470 F.3d 1131, 1134 (5th Cir. 2006).



## DISCUSSION

An alien who is convicted of an “aggravated felony” is removable. 8 U.S.C. § 1227(a)(2)(A)(iii). “Drug trafficking crimes” are considered “aggravated felonies.” 8 U.S.C. § 1101(a)(43)(B). “Drug trafficking crimes” include any felony punishable under the CSA, see 18 U.S.C. § 924(c)(2), even if the offense is a misdemeanor under state law. *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006) (noting that there “is no reason to think Congress meant to allow the States to supplant its own [misdemeanor/felony] classifications when it specifically constructed its immigration law to turn on them”). Felonies under § 924(c)(2) are those crimes that are punishable by more than one year in prison. *Lopez*, 549 U.S. at 56 n. 7.

The Fifth Circuit uses a categorical approach to determine whether a state conviction qualifies as a felony under the CSA. *Omari v. Gonzales*, 419 F.3d 303, 307 (5th Cir. 2005). Under the categorical approach, the court considers whether the elements of the state statute are analogous to a federal felony instead of looking at the underlying facts of the crime. *Id.* If a state statute is divisible, meaning that some conduct would be punished as a felony but other conduct only punished as a misdemeanor under the CSA, then some evidence of the underlying criminal act can be considered in the determination. *Id.* at 308. We have limited the government to presenting evidence approved in *Shepard v. United States*, 544 U.S. 13 (2005), to determine whether a guilty plea conviction under a divisible state law was an aggravated felony. *Omari*, 419 F.3d at 308. Acceptable evidence includes the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge

to which the defendant assented.” *Shepard*, 544 U.S. at 16.

Ordinarily, convictions for possession with intent to distribute are felonies under the CSA. See 21 U.S.C. § 841. A subsection of the provision, however, provides for misdemeanor treatment for distribution of small amounts of marijuana without remuneration. 21 U.S.C. § 841(b)(4). When a state criminal statute covers both the felony and misdemeanor conduct proscribed by § 841, the courts of appeals are split on whether the conviction, if lacking specifics of the underlying criminal conduct, should be treated as a felony or a misdemeanor. The First and Sixth Circuits hold that the default punishment under § 841 is a felony, while the Second and Third Circuits hold that the default punishment is a misdemeanor. In an unpublished opinion preceding these circuit cases, *Jordan*, 204 FedAppx. 425, this court held that when there was no evidence of how much marijuana was involved or of remuneration, the state conviction could not be considered a federal felony. *Jordan*, however, conflicts with published Fifth Circuit precedent construing the CSA. We decline to follow it and adopt the First and Sixth Circuits’ approach.

While acknowledging the circuit split, the Sixth Circuit recently ruled that the felony provision, not the misdemeanor sub-section (§ 841(b)(4)), is “the default provision for punishing possession of the drug with intent to distribute.” *Garcia*, 638 F.3d at 516. The amount of marijuana is not, the court noted, an element that prosecutors must establish for conviction under the felony provision. *Id.* (citing *United States v. Bartholomew*, 310 F.3d 912, 925 (6th Cir. 2002)). As a result, the misdemeanor provision “is ‘best understood as a mitigating sentencing

provision’ and not ‘a standalone misdemeanor offense.’” *Id.* (quoting *Juice*, 530 F.3d at 34-36).

The Second and Third Circuits, in contrast, focus on the doctrine of “least culpable offense.” *Martinez*, 551 F.3d 113; *Jeune*, 476 F.3d 199. The Second Circuit emphasized that “only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant” to the categorical approach. *Martinez*, 551 F.3d at 118 (quoting *Gertsenshteyn v. Mukasey*, 544 F.3d 137, 143 (2d Cir. 2008)). Because a New York statute covered offenses involving only two grams of marijuana, the court concluded that the conviction at issue could possibly have been a non-remunerative transfer of a small amount of marijuana and therefore should be treated as a misdemeanor under § 841(b)(4). *Id.* at 120.

Published Fifth Circuit case law compels us to reject the Second Circuit’s approach and agree with the First and Sixth Circuits. In *United States v. Walker*, 302 F.3d 322, 324 (5th Cir. 2002), this court held that the default sentencing range for a marijuana distribution offense is the CSA’s felony provision, § 841(b)(1)(D), rather than the misdemeanor provision. Prior to *Walker*, this court held that for sentencing purposes, when no jury determination of drug quantity is available, the default punishment is a felony-based maximum of five years under § 841(b)(1)(D). *United States v. Garcia*, 242 F.3d 593, 599 (5th Cir. 2001). The First Circuit relied on *Walker* as evidence that the default punishment for any possession of marijuana with intent to distribute is equivalent to a felony under the CSA and that the defendant bears the burden of producing mitigating evidence in order to qualify for misdemeanor treatment. *Juice*,

530 F.3d at 35. We adopt the same interpretation of § 841 for immigration purposes as for sentencing purposes. *United States v. Hernandez-Avalos*, 251 F.3d 505, 509 (5th Cir. 2001) (“We fail to see the validity of interpreting this statute differently based on this distinction between sentencing and immigration cases; it is, after all, the same words of the same phrase from the same statute that is being interpreted in each instance.”), *overruled on other grounds*, *Lopez*, 549 U.S. at 60; *see also Lopez*, 549 U.S. at 58 (concluding that Congress incorporated “its own statutory scheme of felonies and misdemeanors” in the immigration removal context). While this approach conflicts with the unpublished opinion in *Jordan*, it is important to follow our published Fifth Circuit sentencing cases. *See Garcia*, 638 F.3d at 517-18 (Sixth Circuit “declin[ing] to interpret a drug-based aggravated felony differently in immigration and criminal-sentencing contexts”). *But see Martinez*, 551 F.3d at 121 (Second Circuit acknowledges conflict between its own sentencing and immigration cases interpreting § 841).

Based on this reading of § 841, we deny Moncrieffe’s Petition for Review. He pled guilty to possession of marijuana with intent to distribute under GA. CODE § 16-13-30(j). Even if that section of the Georgia code could cover conduct that would be considered a misdemeanor under § 841(b)(4), Moncrieffe bore the burden to prove that he was convicted of only misdemeanor conduct. *In re Matter of Aruna*, 24 I. & N. Dec. at 457. Otherwise, as is true for federal defendants charged under § 841, his crime is equivalent to a federal felony. The petitioner’s other arguments are without merit.

Petition **DENIED**.

## “Supreme Court to Review *Moncrieffe v. Holder*”

*Bromberg, Kohler Maya & Maschler*

May 1, 2012

Jennifer Miller

On April 2, 2012, the U.S. Supreme Court granted certiorari in *Moncrieffe v. Holder* to review the judgment of the U.S. Court of Appeals for the Fifth Circuit. The Supreme Court will decide whether a conviction under state law that encompasses but is not limited to the distribution of a small amount of marijuana without remuneration constitutes a “drug trafficking crime” within the meaning of the Immigration and Nationality Act, as well as an “aggravated felony.”

In 2008, Georgia police arrested Adrian Moncrieffe, a Lawful Permanent Resident (LPR) for possessing 1.3 grams of marijuana (about the weight of a paperclip). Mr. Moncrieffe pleaded guilty to the offense of “Possession of Marijuana With Intent To Distribute,” pursuant to Ga. Code Ann. §16-13-30(j)(1). This statute is not limited to a minimum amount of marijuana and does not require proof that Mr. Moncrieffe obtained payment in exchange for the drugs.

In April of 2010, the Department of Homeland Security charged that Mr. Moncrieffe had been convicted in Georgia of an aggravated felony, which under the Immigration and Nationality Act (INA) subjects any noncitizen to removal (deportation), and initiated removal proceedings against him. A state law offense may constitute an aggravated felony if it is the equivalent of a felony punishable under the Controlled Substances Act (CSA), 8 U.S.C. §1101(a)(43)(B); 18 U.S.C. § 924(c)(2). Under the CSA, while a person who possesses with intent to distribute less than 50 kilograms of marijuana commits a

felony and is subject to up to five years imprisonment, 21 U.S.C. § 841, an offense involving distributing a small amount of marijuana for no remuneration is viewed as simple possession, a misdemeanor, *id.* §§ 841(b)(4), 844, thus not being considered an aggravated felony and not triggering removal proceedings.

Although it may seem that Mr. Moncrieffe committed a misdemeanor under the CSA because the amount of marijuana he possessed was so small, and because there was no evidence in the record of conviction that Mr. Moncrieffe’s offense involved payment, the immigration judge held that Mr. Moncrieffe had committed the aggravated felony of drug trafficking, a decision upheld by the BIA and then by the Fifth Circuit. Despite the Court’s recognition that the courts of appeals are split on whether a conviction that lacks the details of the criminal conduct should be presumed to be a felony or a misdemeanor, the Court did not disturb the finding that Mr. Moncrieffe had been convicted of an aggravated felony. Mr. Moncrieffe then filed the petition for a writ of certiorari in order for the Supreme Court to review the case.

This case highlights discrepancies between state and federal immigration laws and the injustice that can result from these differences. It is unconscionable that the Court would deem Mr. Moncrieffe’s possession of 1.3 grams of marijuana to be an aggravated felony, which would make a long-term LPR not only removable, but also ineligible for discretionary relief,

permanently barred from readmission to the U.S., ineligible for asylum, and barred from establishing “good moral character” for the rest of his life. Mr. Moncrieffe’s case also highlights the importance of having criminal

and immigration attorneys confer in reaching a plea and/or establishing the record of conviction. Our office awaits the Supreme Court’s decision in this case, which will be argued in the fall of 2012.

## “Supreme Court to Revisit ‘Aggravated Felony’ Provision: Is a Crime That Might be a Federal Misdemeanor a Drug Trafficking Offense?”

*crImmigration*

April 2, 2012

César Cuauhtémoc García Hernández

Having just decided in February that two tax crimes constitute aggravated felonies under the Immigration and Nationality Act, the U.S. Supreme Court will again jump into the messy nuances of the aggravated felony provision in *Moncrieffe v. Holder*, in which the court granted certiorari today. *Moncrieffe v. Holder*, No. 11-702 (see order granting cert). This time the Court will decide whether possession of marijuana with intent to distribute comes within this broad category of offenses that significantly decreases a non-citizen’s ability to remain in the United States.

Last November, the U.S. Court of Appeals for the Fifth Circuit held that a Georgia conviction for possessing marijuana with intent to distribute constitutes a drug trafficking type of aggravated felony. *Moncrieffe v. Holder*, 662 F.3d 387, No. 10-60826, slip op. (5th Cir. Nov. 8, 2011) (Jones, Haynes, and Crone, JJ.). Chief Judge Jones wrote the panel’s opinion.

This case involved a lawful permanent resident who pleaded guilty to possessing marijuana with intent to distribute, Ga. Code § 16-13-30(j). Originally, the Department of Homeland Security alleged that this was both a controlled substances offense (CSO), INA § 237(a)(2)(B), and a drug trafficking aggravated felony, INA § 101(a)(43)(B). Because the Board of Immigration Appeals (BIA) only decided the aggravated felony issue, however, the Fifth Circuit had no need to address the CSO charge. *Moncrieffe*, No. 10-60826, slip op. at 2.

Thus, the Fifth Circuit began its analysis by explaining that “[d]rug trafficking crimes’ include any [crime that would constitute a] felony punishable under the CSA [Controlled Substances Act], see 18 U.S.C. § 924(c)(2), even if the offense is a misdemeanor under state law.” *Moncrieffe*, No. 10-60826, slip op. at 4 (citing *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006)). In *Lopez*, the Supreme Court determined that while “[m]ere possession is not . . . a felony under the federal CSA,” possession with intent to distribute is. *Lopez*, 549 U.S. at 53. The only exception to this rule is for possession with intent to distribute “small amount[s]” of marijuana, which is classified as a misdemeanor. 21 U.S.C. § 841(b)(4).

The Fifth Circuit was then left with the challenge of determining whether *Moncrieffe*’s conviction under Georgia law was for conduct that fell within the misdemeanor or felony provision of the federal CSA. To do this, the court stated that it applied “a categorical approach to determine whether a state conviction qualifies as a felony under the CSA.” *Moncrieffe*, No. 10-60826, slip op. at 4.

Despite the court’s reference to a “categorical” analysis, it actually applied a modified categorical approach. The categorical approach allows a court to consider only the state statute of conviction in comparison with the relevant federal provisions, while the modified categorical approach allows consideration of the record of conviction in state court as well. Indeed,

it is appropriate that the Fifth Circuit applied a modified categorical approach because the Georgia statute is divisible—that is “some conduct would be punished as a felony,” thus coming within the drug trafficking definition of aggravated felony, “but other conduct only punished as a misdemeanor under the CSA,” thus not constituting a drug trafficking type of aggravated felony. *Moncrieffe*, No. 10-60826, slip op. at 4.

Here, Moncrieffe’s record of conviction did not specify the quantity of marijuana involved in his conviction. This fact is critical because “[o]rdinarily, convictions for possession with intent to distribute are felonies under the CSA,” but the federal statute “provides for misdemeanor treatment for distribution of small amounts of marijuana without remuneration.” *Moncrieffe*, No. 10-60826, slip op. at 5 (citing 21 U.S.C. § 841(b)(4)).

If Moncrieffe were convicted for possession of a quantity of marijuana that would constitute a federal misdemeanor, then his conviction would not be an aggravated felony. If, however, he were convicted for an amount punishable as a federal felony, then his conviction would be an aggravated felony. Even if, on remand, he is found to have been convicted of a CSO, which the Georgia offense almost certainly is, not falling within an aggravated felony provision has real consequences for his chance to remain in the country. An aggravated felony conviction would render him removable and ineligible for the most charitable form of relief from removal that currently exists in immigration law, cancellation of removal, relief that would still be available if his conviction is only for a CSO. INA § 240A(a).

Because the record of conviction did not indicate the amount of marijuana involved,

the Fifth Circuit had to determine whether not knowing the amount means that the conviction should be treated as a misdemeanor or felony. After recognizing a circuit split on this issue (with the “First and Sixth Circuits hold[ing] that the default punishment under § 841 is a felony, while the Second and Third Circuits hold that the default punishment is a misdemeanor.”), the Fifth Circuit chose to treat the conviction as a felony. *Moncrieffe*, No. 10-60826, slip op. at 5.

Relying on the Sixth Circuit’s approach, the Fifth Circuit determined that “the misdemeanor provision [of the federal possession with intent to distribute offense] ‘is best understood as a mitigating sentencing provision’ and not a stand alone misdemeanor offense.” *Moncrieffe*, No. 10-60826, slip op. at 6 (quoting *United States v. Bartholomew*, 310 F.3d 912, 925 (6th Cir. 2002)).

Borrowing from the comparable criminal sentencing context involving the same federal statute, the Fifth Circuit explained that it previously held “the default sentencing range for a marijuana distribution offense is the CSA’s felony provision, § 841(b)(1)(D), rather than the misdemeanor provision.” *Moncrieffe*, No. 10-60826, slip op. at 6 (discussing *United States v. Walker*, 302 F.3d 322, 324 (5th Cir. 2002)).

Following this logic, the Fifth Circuit went on to hold that the burden is on the LPR to show that his conviction involved an amount of marijuana that would fall within the misdemeanor provision rather than require the government to show that the conviction involved a felony amount. In the court’s words, “Even if that section of the Georgia code could cover conduct that would be considered a misdemeanor under § 841(b)(4), Moncrieffe bore the burden to

prove that he was convicted of only misdemeanor conduct.” *Moncrieffe*, No. 10-60826, slip op. at 7. The court placed the burden on Moncrieffe despite the INA’s explicit provision that the government bears the “burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable.” INA § 240(c)(3).

Thus, the Supreme Court will decide whether a state possession with intent to distribute conviction that includes distribution of small amounts of marijuana constitutes an aggravated felony “notwithstanding that the record of conviction does not establish that the alien was convicted of conduct that would constitute a federal law felony.” Petition for Writ of Certiorari, *Moncrieffe v. Holder*, No. 11-702 (Dec. 7, 2011).

Attesting to the nebulous state of many crime-based immigration law provisions, today’s grant follows two decisions already issued this Term about other aspects of the intersection of criminal law and immigration law: *Vartelas v. Holder*, 566 U.S. —, No. 10-1211, slip op. (March 28 2012), and *Kawashimi v. Holder*, 565 U.S. —, No. 10-577, slip op. (Feb. 21, 2012). Hovering above all of these cases, of course, is the Court’s much anticipated consideration of *Arizona v. United States*, Arizona’s attempt to revive its controversial immigration law (Senate Bill 1070), scheduled for oral argument on April 25.

Arizona is likely to be a blockbuster decision, no matter what the Court decides. Moncrieffe won’t get the media attention of Arizona, but it will ensure that the Court’s efforts to make sense of Immigration law will continue.

***Garcia v. Thomas***

**Ruling Below:** *Garcia v. Benov*, 395 Fed.Appx. 329 (9th Cir. 2010), *rehearing en banc granted*, *Garcia v. Thomas*, 683 F.3d 952 (9<sup>th</sup> Cir. 2012).

Hedelito Trinidad y Garcia was charged in the Philippines with kidnapping for ransom. He was arrested by FBI agents at his residence in Los Angeles, California in 2004. Former Secretary of State Condoleezza Rice had ordered his return to the Philippines for prosecution, but a Federal District Court in California ruled that a transfer would violate his rights under the anti-torture treaty, and ordered him released. The Ninth Circuit initially agreed. The case went to rehearing en banc.

**Question Presented:** Whether an extraditee like Trinidad may challenge the Secretary of State’s decision to extradite him based on the conditions he expects to face upon return to the requesting country.

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**Hedelito TRINIDAD Y GARCIA, Petitioner–Appellee,**  
**v.**  
**Linda THOMAS, Warden, Metropolitan Detention Center–Los Angeles,**  
**Respondent–Appellant.**

United States Court of Appeals for the Ninth Circuit

Argued and Submitted En Banc June 23, 2012

[Excerpt: Some footnotes and citations omitted.]

**PER CURIAM:**

Trinidad y Garcia alleges that his extradition to the Philippines would violate his rights under the Convention Against Torture (CAT) and the Fifth Amendment’s Due Process Clause. The CAT is a treaty signed and ratified by the United States, but is non-self-executing. Congress, however, has implemented the treaty by statute as part of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA). 8 U.S.C. § 1231 note. That statute declares it “the policy of the United States not to . . . extradite . . . any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture.” The statute

requires that “the appropriate agencies . . . prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture.”

The appropriate agency is the Department of State, and it adopted regulations specifying that, “[i]n each case where allegations relating to torture are made . . . , appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant.” 22 C.F.R. § 95.3(a). An extraditee may be surrendered only after the Secretary makes a determination regarding possible torture. *Id.* § 95.2–.3.



1. The district court had jurisdiction over the action pursuant to 28 U.S.C. § 2241, which makes the writ of habeas corpus available to all persons “in custody in violation of the Constitution or laws or treaties of the United States,” and under the Constitution. 28 U.S.C. § 2241(c)(3). The writ of habeas corpus historically provides a remedy to non-citizens challenging executive detention.

2. Neither the REAL ID Act (8 U.S.C. § 1252(a)(4)) nor FARRA (8 U.S.C. § 1231 note) repeals all federal habeas jurisdiction over Trinidad y Garcia’s claims, as the government asserts. A statute must contain “a particularly clear statement” before it can be construed as intending to repeal habeas jurisdiction. Even if a sufficiently clear statement exists, courts must determine whether “an alternative interpretation of the statute is ‘fairly possible’ “before concluding that the law actually repealed habeas relief.

FARRA lacks sufficient clarity to survive the “particularly clear statement” requirement. The REAL ID Act can be construed as being confined to addressing final orders of removal, without affecting federal habeas jurisdiction. Given a plausible alternative statutory construction, we cannot conclude that the REAL ID Act actually repealed the remedy of habeas corpus. The government also suggests that the rule of non-inquiry precludes the exercise of habeas jurisdiction. But the rule implicates only the *scope* of habeas review; it does not affect federal habeas *jurisdiction*.

3. The CAT and its implementing regulations are binding domestic law, which means that the Secretary of State *must* make a torture determination before surrendering an extraditee who makes a CAT claim. FARRA and its regulations generate

interests cognizable as liberty interests under the Due Process Clause, which guarantees that a person will not be “deprived of life, liberty, or property, without due process of law.”

4. The process due here is that prescribed by the statute and implementing regulation: The Secretary must consider an extraditee’s torture claim and find it not “more likely than not” that the extraditee will face torture before extradition can occur. 22 C.F.R. § 95.2. An extraditee thus possesses a narrow liberty interest: that the Secretary comply with her statutory and regulatory obligations.

5. The record before us provides no evidence that the Secretary has complied with the procedure in Trinidad y Garcia’s case. The State Department has submitted a generic declaration outlining the basics of how extradition operates at the Department and acknowledging the Department’s obligations under the aforementioned treaty, statute and regulations, but the Department gives no indication that it actually complied with those obligations in this case.

Trinidad y Garcia’s liberty interest under the federal statute and federal regulations entitles him to strict compliance by the Secretary of State with the procedure outlined in the regulations. He claims that the procedure has not been complied with, and the Constitution itself provides jurisdiction for Trinidad y Garcia to make this due process claim in federal court.

In the absence of any evidence that the Secretary has complied with the regulation, we lack sufficient basis in the record to review the district court’s order granting Trinidad y Garcia’s release. We remand to the district court so that the Secretary of State may augment the record by providing

a declaration that she has complied with her obligations. Counsel for the government represented that the Secretary would provide such a declaration if the court so instructs. We so instruct.

6. If the district court receives such a declaration, it shall determine whether it has been signed by the Secretary or a senior official properly designated by the Secretary. If so, the court's inquiry shall have reached its end and Trinidad y Garcia's liberty interest shall be fully vindicated. His substantive due process claim is foreclosed by *Munaf v. Geren*, 553 U.S. 674 (2008). The doctrine of separation of powers and the rule of non-inquiry block any inquiry into the substance of the Secretary's declaration. To the extent that we have previously implied greater judicial review of the substance of the Secretary's extradition decision other than compliance with her obligations under domestic law, we overrule that precedent.

7. The district court's order is vacated, and the case is remanded to the district court for proceedings consistent with this opinion.

**THOMAS, Circuit Judge, concurring, with whom WARDLAW, Circuit Judge, joins and BERZON, Circuit Judge, joins as to Part I:**

I concur in the Per Curiam opinion. I write separately to express my views on jurisdiction and the scope of our habeas review.

## I

The district court had jurisdiction over Trinidad y Garcia's claims pursuant to 28 U.S.C. § 2241 and the Constitution of the United States.

## II

Once a federal court has completed its extradition determinations under 18 U.S.C. § 3184, the Secretary of State in her discretion may determine whether the alien should be surrendered to the custody of the requesting state. We have long held that it is the Secretary's role, not the courts', to determine "whether extradition should be denied on humanitarian grounds or on account of the treatment that the fugitive is likely to receive upon his return to the requesting state." However, certain aspects of the Secretary's decision are reviewable. The Convention Against Torture (CAT), as implemented by FARRA and State Department regulations, is binding domestic law. Before finalizing an extradition order, the Secretary of State has a clear and nondiscretionary duty pursuant to the implementing regulations to consider whether a person facing extradition from the U.S. "is more likely than not" to be tortured in the State requesting extradition when determining whether to surrender a fugitive to a foreign country by means of extradition.

In assessing whether the Secretary has complied with her statutory and regulatory obligations, our review differs from the ordinary analysis that we apply to petitions for review of decisions on CAT claims by the Board of Immigration Appeals. Immigrations judges and the BIA are charged with deciding CAT claims on the evidence presented. Therefore, in reviewing BIA decisions, we have a developed administrative record before us.

Our role in reviewing the Secretary's extradition determinations is far different because the surrender of a person to a foreign government is within the Executive's powers to conduct foreign

affairs and the Executive is “well situated to consider sensitive foreign policy issues.” The Judiciary is “not suited to second-guess such determinations” because the Executive “possess[es] significant diplomatic tools and leverage the judiciary lacks.” Therefore, the proper separation of powers among the branches prevents us from inquiring into the merits of the Secretary’s extradition decision.

Although we cannot review the merits of the Secretary’s internal extradition review, the Secretary’s legal obligation to comply with the CAT, as implemented by FARRA and accompanying State Department regulations, is not a part of that review process. Therefore, the scope of habeas review allows courts to examine whether the Secretary has complied with her non-discretionary obligations. This limited review process of simply determining that the Secretary has complied with the law is the least intrusive method of maintaining the delicate balance between the competing concerns of respecting executive prerogative in foreign relations and ensuring that the law has been followed.

Once the district court determines that the Secretary has complied with her legal obligations, its review ends. Any further inquiry into the executive branch’s internal extradition review process would exceed our proper role under the Separation of Powers doctrine.

### III

In this case, there is nothing in the record to indicate that the Secretary has fulfilled her non-discretionary obligations. The government suggested in briefing that the Secretary’s signature on the surrender warrant itself should be considered as proof of her determination that Trinidad y Garcia

is not likely to be tortured. But the surrender warrant is not in the record.

Trinidad y Garcia has alleged in his habeas petition that the Secretary has not complied with FARRA’s implementing regulations and violated his right to due process. In the absence of any evidence that the Secretary has complied with the regulation, we lack sufficient basis in the record to review the district court’s order granting Trinidad y Garcia’s release. Therefore, the appropriate remedy is to vacate the district court order and remand the case to the district court with directions that the government may be afforded the opportunity to supplement the record with an appropriate declaration that the Secretary has complied with her non-discretionary statutory and regulatory duties.

**TALLMAN, Circuit Judge, with whom Circuit Judges CLIFTON, M. SMITH, and IKUTA join, dissenting:**

#### A

Trinidad raises two distinct rationales for why he may not be extradited. First, he contends that he may “invoke the writ to challenge the Secretary’s decision to surrender him in violation of his substantive due process right to be free from torture” at the hands of a foreign government. Alternatively, he asserts that even in the absence of a constitutionally protected interest to be free from the specter of foreign torture, he possesses a statutory right under the Convention and the FARR Act that precludes the United States from extraditing him to a country where torture is “more likely than not” to occur.

Long ago, the Court established that extraditees may not oppose their extraditions on the ground that the law of the receiving country does not provide them the full

panoply of rights guaranteed them by the Constitution of the United States. *Minaf*, 553 U.S. at 696–97 (discussing *Neely*).

Trinidad’s second claim is not so easily resolved, however. As the Court recognized in *Valentine*, the Executive does not possess plenary power to extradite. Accordingly, extradition proceedings “must be authorized by law” and comport with pertinent statutory limits. Thus, Trinidad is correct insofar as he argues that we must determine whether any of the pertinent statutory limits on which he relies actually limit Executive authority under the relevant treaty.

Trinidad misjudges the effect of that inquiry, however. Even were we to agree that either the Convention, the FARR Act, or the regulations limit Executive authority, it does not necessarily follow that the scope of our habeas review would grow in kind. Rather, because the Rule of Non–Inquiry remains, these limits would only establish the concerns that *might* be cognizable on habeas review. It is only when Congress pairs a limitation on the Secretary’s extradition authority with an express invitation for judicial review that the Rule of Non–Inquiry retracts to permit that review.

The scope of our habeas review in the extradition context wholly depends on the will of Congress. The judiciary participates in the extradition process only by congressional invitation, and thus our power extends no further than the bounds of that invitation. When, as under the 1890 form of § 5270, Congress prefers that the courts play a minimal role, our review is just that, minimal.

## 1

There are a number of indicators that Congress intended § 1252(a)(4) to be

applicable only in the immigration context. Among other things, Congress enacted § 1252(a)(4) as part of the REAL ID Act. And, as the House Committee Report explicitly states, Congress did not intend to “preclude habeas review over challenges to detention that are independent of challenges to removal orders. Finally, the section title itself, “Judicial review of orders of removal,” and the subchapter title, “Immigration,” only further reaffirm this cabining of the section’s effect.

## 2

Having concluded that we have habeas jurisdiction, I move to the first merits question: whether, as Trinidad contends, Congress actually intended to restrict the Executive’s extradition authority via the Convention, the FARR Act, or the implementing regulations. To resolve that question, I consider each in turn.

### i

The Convention satisfies neither condition. The Senate expressly conditioned its ratification of the Convention on the fact that it was “not self-executing.” And, as I will explain shortly, the FARR Act did not implement the Convention in a manner that curtails the Secretary’s authority to extradite. The Convention therefore cannot affect the Executive’s authority under § 3184 except to the extent directed by the relevant regulations.

### ii

The FARR Act requires greater scrutiny. In relevant detail, it provides:

**(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.

Subsection (a) “is too thin a read to support the rights and obligations read into it by” Trinidad. It only “fits” as part of a “harmonious whole” with the entirety of the Act if interpreted as a “nudge” by Congress indicating Congress’ “preference” that when implementing the mandated regulations, the agency heads bear in mind the general 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.” It does no more.

### iii

Finally, we reach those regulations promulgated to *implement* the obligations of the United States under the Convention: 22 C.F.R. §§ 95.1–95.4.

*Decisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review.* Furthermore, pursuant to section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998, P.L. 105–277, notwithstanding any other provision of law, no court shall have jurisdiction to review these regulations, and nothing in section 2242 shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or section 2242, or any other determination made with respect to the application of the policy set forth in section 2242(a), except as part of the review of a

final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252), which is not applicable to extradition proceedings.

In sum, neither the Convention, the FARR Act, nor the implementing regulations alter the historically recognized discretion accorded to the Secretary by Congress to determine whether “to surrender [a] fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions.”

### **BERZON, Circuit Judge, concurring in part and dissenting in part, with whom Judge W. FLETCHER joins:**

I begin by outlining the basic building blocks of Trinidad’s substantive, statute-based claim.

First, we may grant a writ of habeas corpus where a prisoner is “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241(c)(3).

Second, Article 3 of the Convention Against Torture (CAT), which entered into force for the United States in 1994, states:

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.

United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, adopted by unanimous agreement of the U.N. General Assembly.

Contrary to Judge Kozinski’s assertion, Trinidad’s claim is *not* that he is entitled to

habeas because of the treatment he is likely to face in the Philippines. Rather, his claim is a claim that because the FARR Act prohibits extradition if, on the information available to the Secretary, he more likely than not will be tortured, the Secretary's decision to extradite him would be illegal under positive, Congressionally enacted federal law.

Neither the Supreme Court's decision in *Munaf* nor the rule of non-inquiry *entirely* forecloses our ability to review the lawfulness of an extradition decision by the Executive. I would hold, therefore, that we have the authority—and, indeed, the obligation—to review the Secretary of State's determination and to decide—under a standard highly deferential to the Secretary and procedures carefully tailored to ensure the protection of the Secretary's diplomatic concerns—whether it is more likely than not that petitioners such as Trinidad will be tortured if extradited. For that purpose, it may be that in many circumstances a declaration such as the one the majority requires will suffice.

**Chief Judge KOZINSKI, dissenting in part:**

1. The federal habeas statute, 28 U.S.C. § 2241, simultaneously provides jurisdiction to hear habeas petitions and remedies for successful ones. Just because someone in custody files a document styled “habeas petition” doesn't mean a federal court has jurisdiction to entertain it. Instead, the petitioner must allege a type of claim cognizable on habeas. In the extradition context, habeas corpus isn't available to challenge just any aspect of the executive branch's authority an extraditee seeks to question. Rather, the case law—including our own opinion in *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1009–10 (9th

Cir.2000)—makes clear that an extraditee may raise only certain claims on habeas.

Trinidad y Garcia fails to make out a claim cognizable on habeas by invoking the Convention Against Torture (“CAT”) and alleging that, if extradited, he'll face torture at his destination. What's been historically cognizable on habeas review in the extradition context is (1) whether the executive branch has the authority to detain the extraditee in the first place and whether the judicial branch has exercised proper jurisdiction over him, all of which has already been litigated and resolved against Trinidad; (2) whether the executive is operating under a valid treaty authorizing extradition, which isn't disputed here; and (3) whether the extraditee's crime falls into the political offense exception, which Trinidad doesn't allege.

There's absolutely no authority supporting Trinidad's claim that habeas review is available to challenge the destination to which a detainee is to be extradited based on how he might be treated there. He therefore fails to present a claim for which the federal habeas statute provides jurisdiction.

*INS v. St. Cyr*, 533 U.S. 289 (2001), on which my colleagues rely heavily in their various opinions, stands in marked contrast. *St. Cyr* challenged the executive's authority to continue to detain and then deport him. The Court found abundant historical evidence that such a challenge was traditionally cognizable on habeas review.

Also in contrast is *Munaf v. Geren*, 553 U.S. 674 (2008), where the Supreme Court found habeas jurisdiction to consider a challenge to petitioners' transfer based on the treatment they'd receive, then rejected that challenge on the merits. The only claims entertained in *Munaf* were constitutional ones. And *Munaf*

does *not* suggest there's statutory habeas jurisdiction for claims of this kind.

There's thus no need to assess the effect of the FARR Act, 8 U.S.C. § 1231 note, or the REAL ID Act, 8 U.S.C. § 1252(a)(4). Both statutes explicitly disavow any congressional intent to create jurisdiction for review of CAT claims outside a limited immigration context.

*St. Cyr* urged against “adopting a [statutory] construction that would raise serious constitutional questions” by “preclud[ing] judicial consideration on habeas,” but recognizing our lack of jurisdiction here does no such thing. A serious constitutional question would arise only if we interpreted a statute to preclude the type of habeas review protected by the Constitution's Suspension Clause. But, unlike *St. Cyr*, Trinidad doesn't present a claim implicating this type of habeas review, because his claim isn't cognizable on habeas. How Trinidad will be treated by the government of another country after he leaves the United States doesn't implicate any of his rights under the United States Constitution. In finding his challenge outside the bounds of the federal habeas statute, there's no judicial consideration to “preclude” and thus no constitutional problem to “avoid.”

The per curiam thus rightly overrules *Cornejo–Barreto*, 218 F.3d at 1015–16, which held in the context of a CAT challenge to extradition that, “since potential extraditees meet the other requirements for habeas standing under 28 U.S.C. § 2241 (2000), a habeas petition is the most appropriate form of action for fugitives seeking review of the Secretary's extradition decisions.” *Cornejo–Barreto* somehow found jurisdiction in the federal habeas statute via the Administrative Procedure Act (“APA”), 5 U.S.C. § 703. But, as *Cornejo–*

*Barreto* itself acknowledged, “[t]he APA is not an independent grant of jurisdiction.” Because there's no jurisdiction under the habeas statute, there can be no jurisdiction under the APA.

While, as in *Munaf*, we have jurisdiction to hear Trinidad's due process claim, I agree with the per curiam that the claim is foreclosed by *Munaf* itself, which found that identical claims in the transfer context “do not state grounds upon which habeas relief may be granted.”

2. The per curiam offers little explanation for finding jurisdiction to entertain Trinidad's CAT claim, instead simply asserting that “[t]he writ of habeas corpus historically provide[d] a remedy to non-citizens challenging executive detention.”

This characterizes Trinidad's claim at too high a level of generality and therefore conflate Trinidad's particular claim with other claims that are cognizable on habeas review in the extradition context. Trinidad, in fact, challenges something very specific: the destination to which the executive seeks to extradite him, based on his potential treatment there. As the Second Circuit has explained, “consideration of the procedures that will or may occur in the requesting country is not within the purview of a habeas corpus judge.” That leaves Trinidad beyond the scope of habeas review—and, because the federal habeas statute predicates the exercise of habeas jurisdiction on the existence of a cognizable habeas claim, that also leaves Trinidad beyond the scope of our habeas jurisdiction.

Starting from a mistaken characterization of Trinidad's claim leads my colleagues to an equally mistaken conclusion about the role of the FARR and REAL ID Acts. Because they erroneously view habeas jurisdiction

over Trinidad’s claim as preexisting and presupposed, they ask the wrong question: whether these statutes have clearly “preclude[d]” or “repeal[ed]” such jurisdiction.

Consider *In re Metzger*, 46 U.S. (5 How.) 176 (1847). After receiving an extradition request, the President referred it to a district judge, who approved Metzger’s extradition. Metzger then filed a habeas petition with the Supreme Court. The Court found that it had no jurisdiction to grant habeas relief. Its reasoning was somewhat technical—the district judge had been acting in chambers rather than exercising Article III judicial power—but the result is instructive for our case: The Court saw no constitutional problem whatsoever in finding the absence of any jurisdiction, whether appellate or original, over Metzger’s habeas petition challenging his extradition. That’s because extraditees have no free-floating right to challenge their extradition via habeas petition. If an extraditee isn’t challenging one of the few issues deemed by Congress to be suitable for judicial inspection, a federal court lacks jurisdiction over the challenge—and that raises no constitutional problem.

3. I note the thoughtful views of our colleague on the D.C. Circuit, Judge Griffith, on similar issues that have confronted his court. Starting in *Kiyemba v. Obama* (*Kiyemba II*), 561 F.3d 509 (D.C.Cir.2009), Judge Griffith has asserted in the context of detainee transfers “that jurisdiction to hear the petitioners’ claims against unlawful transfer—a fundamental and historic habeas protection—is grounded in the Constitution.” What concerned Judge Griffith in *Kiyemba II* was very different from what’s before our court: He addressed whether the transfer of the prisoners “will result in continued detention on behalf of the United States in a place where the writ does

not run.” Judge Griffith’s concern that the United States would maintain control over the prisoners while evading judicial review doesn’t apply to our case, where the United States seeks to extradite Trinidad and relinquish all control over him. Trinidad doesn’t allege otherwise—indeed, his motivating concern is precisely that he’ll be mistreated once he’s no longer in American custody and instead in Filipino hands.

Judge Griffith expanded on his earlier position with his dissent in *Abdah v. Obama*, 630 F.3d 1047 (D.C.Cir.2011). In support of his assertion of “the long-established right of a prisoner to question his jailer’s authority to transfer him to a place where it would be difficult or impossible to execute the writ,” Judge Griffith provides the history of habeas challenges to the executive transferring a prisoner beyond the writ’s reach in order to evade habeas jurisdiction. None of his examples, however, involves extradition, in which the executive transfers a prisoner abroad, not to evade habeas review, but to deliver him pursuant to an extradition treaty to a country seeking to prosecute him for crimes he allegedly committed there. Judge Griffith’s examples of American colonial state laws demonstrate an extradition exception to the general prohibition on transfers and, accordingly, an exception to the reviewability of such transfers via habeas petition.

Most recently, Judge Griffith concurred in *Omar*, 646 F.3d 13, 646 F.3d 13, where he “disagree[d] with the majority’s suggestion that we have no jurisdiction to consider [the transferee’s] claim” because “the Constitution’s guarantee of habeas corpus entitles him to assert any claim that his detention or transfer is unlawful.” Judge Griffith thus finds constitutional habeas jurisdiction to hear CAT claims. But his assertion that there’s constitutional habeas



jurisdiction for “any claim” of unlawful detention or transfer suffers from the same flaw that afflicts the analysis of Judges Thomas and Tallman here: It’s too broad. Centuries of extradition case law have carved out the specific types of challenges an extraditee may raise on habeas review. To say an extraditee can find jurisdiction in the federal habeas statute to raise “any claim” would be a radical departure from those centuries of unbroken precedent.

4. While federal habeas jurisdiction is enshrined in a federal statute, the writ of habeas corpus remains a common law writ. And, like all creatures of the common law, it can and should evolve over time. What yesterday may have failed to qualify as a cause of action seeking habeas relief may qualify tomorrow. Because, in the habeas context, a cause of action and the jurisdiction to hear it are inextricably linked, federal habeas jurisdiction also can evolve through common law decision-making.

This raises the question: Even if habeas jurisdiction has never before included the

type of claim Trinidad raises, why not start today? That is, why shouldn’t we embrace the evolution of habeas review so as to encompass a claim that challenges extradition on the basis of the conditions the extraditee may face in the receiving country?

I’m a firm believer in robust federal habeas review where it’s appropriate. But the federal habeas statute is not an open-ended invitation for federal judges to join the party whenever they’re invited by someone who happens to be “in custody.” 28 U.S.C. § 2241(c), (d). Petitioning for the Great Writ, like filing most lawsuits, requires a cognizable cause of action. Exercising federal jurisdiction to hear a habeas petition requires the same. Centuries of case law show that Trinidad fails to present such a claim, and my colleagues show why there’s wisdom in that practice. They simply fail to take that teaching to its logical conclusion. I therefore dissent as to Trinidad’s CAT claim, and would order the district court to dismiss that claim for lack of jurisdiction.

## “*Munaf* Sequel on Way to Court”

*SCOTUSblog*

July 9, 2012

Lyle Denniston

A Philippine national who fears he will be tortured if he is returned to his home country will be asking the Supreme Court this summer to hear his challenge—a case that would put before the Justices a major test of what they meant in the unanimous decision in *Munaf v. Geren* four years ago. The Ninth Circuit Court has blocked his transfer for 90 days to allow his lawyers to file at the Supreme Court.

The case involves Hedelito Trinidad y Garcia, who has been charged in the Philippines with kidnapping for ransom. His lawyers submitted evidence to the Ninth Circuit when his extradition was under review that five other men accused in the same criminal case have been tortured by Philippine officials. The Circuit Court also accepted a State Department report asserting that torture is common among the security forces and police in that country. His attorneys are relying upon a 1984 treaty, the Convention Against Torture, that has been in force in the U.S. since 1994.

While the Circuit Court has allowed Trinidad y Garcia’s attorneys to put before Secretary of State Hillary Clinton their best case for barring his extradition under that treaty, the decision actually leaves Clinton almost complete discretion to turn down the plea. All she needs to do is to file with a District Court judge a formal paper saying that she has done her legal duty to weigh his claim, that she has considered his evidence, and that she had made a ruling. Justice Department attorneys told the Circuit Court that Clinton would do just that when the case got back to her. Under the Circuit

Court ruling, the federal judge has no authority to inquire in any way into whether the Secretary’s decision was justified or satisfied the anti-torture treaty. That is the conclusion that his attorneys will be challenging in their forthcoming plea to the Supreme Court.

The Circuit Court decision is based in large part on the 2008 *Munaf* decision, which was not an extradition case, as such. Rather, it involved a request by the government of Iraq to turn over to its custody, for criminal prosecution, two U.S. citizens who were being held by the U.S. military in Iraq. They had been accused of violating Iraq’s criminal laws and were wanted for trial there. The Supreme Court concluded that, while a U.S. court had the authority to hear the challenge by the two citizens to being handed over, an American judge had no authority to second-guess the validity of Iraq’s planned prosecution.

The Supreme Court decided the *Munaf* case on the same day in June 2008 that it decided the more famous case of *Boumediene v. Bush*, giving detainees at Guantanamo Bay a constitutional right to challenge their captivity in a U.S. habeas court. That decision far overshadowed *Munaf* when the two rulings came out. Since then, however, *Munaf* has turned out to have more staying power, and, in fact, a considerable capacity to expand in scope. It has been used to bar habeas judges from second-guessing U.S. decisions on when a detainee may leave Guantanamo, and now, in the Trinidad y Garcia case, to bar a federal judge from second-guessing the Secretary of State’s

rulings on when to allow an accused non-citizen to be sent home even in the face of a claim of potential torture. In the meantime, the D.C. Circuit Court has taken away much of the meaning of *Boumediene*, leaving federal habeas judges with only a kind of advisory role to the Executive Branch on when a detainee at Guantanamo is being lawfully held, and with no power to order directly that a detainee be released in the face of Executive Branch objection.

In the Philippine extradition case, former Secretary of State Condoleezza Rice had ordered his return for prosecution, but a federal District judge ruled that a transfer would violate his rights under the anti-torture treaty, and ordered him released. The Ninth Circuit initially agreed in a three-judge panel decision, but then the *en banc* Circuit Court, dividing 8-3, overturned the release order, and directed that the case go to Clinton, the current Secretary, for final action.

In asking the Ninth Circuit for a stay, Trinidad y Garcia's attorneys argued that his case "involves critical issues regarding the ability of a person facing torture to obtain meaningful judicial review." They added that the Circuit Court ruling "addresses separation of powers concerns and the availability of 'the Great Writ' and undoubtedly presents an important question of federal law."

The stay motion also noted that three Supreme Court Justices, in a dissent in a Guantanamo transfer case involving a detainee who had a fear of being tortured if sent abroad, that such a dispute raised "important questions" about what the *Munaf* precedent meant for habeas corpus law, issues that the Supreme Court had not resolved in *Munaf* itself. Those three were Justice Ruth Bader Ginsburg, who was joined in dissent by Justices Stephen G. Breyer and Sonia Sotomayor.

## **“DoJ to Seek Extradition of No. 3 Kidnapper”**

*The Philippine Star*

October 12, 2004

Aurea Calica

The government will seek the extradition of Hedelito Trinidad, the country's No. 3 most wanted kidnapper, who was arrested in the U.S. last week, Justice Secretary Raul Gonzalez said yesterday.

Gonzalez said he has asked the Department of Foreign Affairs to cancel the passport of Trinidad and put him under the watchlist of the Bureau of Immigration.

The DOJ chief said he has also asked the Philippine consulate in Los Angeles to coordinate with the US Federal Bureau of Investigation for the early return of Trinidad.

He said the DOJ would prepare the extradition request to be sent to the US government.

Trinidad, a dentist, allegedly financed kidnap gangs in the country and had an P850,000 bounty on his head.

He was arrested by the FBI agents at his residence in West Covina near Los Angeles, California on Thursday.

Officials of the Department of the Interior and Local Government said Trinidad was arrested while trying to sell a van to an FBI agent who posed as buyer.

The National Anti-Kidnapping Task Force (Naktf) and the FBI had been working since March to capture Trinidad.

They got a break last month after members of the Filipino community in West Covina told them their prey was engaged in the vehicle buy-and-sell business in the area as a cover, officials said.

Trinidad did not resist arrest when five FBI agents went on Thursday to his Los Angeles home pretending to buy his van.

Philippine National Police (PNP) chief Director General Edgar Aglipay said Trinidad was this year's biggest catch in the government's anti-kidnapping efforts.

Several Philippine courts issued arrest warrants for Trinidad, who is the alleged mastermind of six kidnappings in 2001 alone, Aglipay said.

## “Why the ‘Munaf Sequels’ Matter: A Primer on FARRA, REAL ID, and The Role of the Courts in Transfer/Extradition Cases”

*Lawfare*  
June 12, 2012  
Steve Vladeck

Yesterday’s news out of the Supreme Court may well have obscured another significant detainee-related legal development: As Lyle Denniston has noted over at SCOTUSblog, on Friday, the en banc Ninth Circuit handed down a thoroughly fractured decision in *Garcia v. Thomas*, a complicated extradition-related habeas case raising the question whether courts may inquire into Executive Branch assurances that an individual facing extradition will not be tortured or otherwise mistreated by the country to which his extradition is being sought. To make a (as we’ll see, very) long story short, the Court of Appeals held that, while the federal courts have *jurisdiction* to entertain such habeas claims, they may not provide relief so long as the Secretary of State complies with her statutory and regulatory obligations, *i.e.*, she avers that it is *not* “more likely than not” that the detainee in question will be tortured subsequent to his transfer. In other words, merely by filing a piece of paper, the Executive Branch can make these cases go away, albeit on the merits.

In the process, the Ninth Circuit simultaneously (1) embraced the D.C. Circuit’s logic in “*Kiyemba II*,” which so held in the context of the Uighurs; (2) thereby compounded the *Kiyemba II* panel’s (in my view, egregious) misreading of the Supreme Court’s 2008 decision in *Munaf v. Geren* in applying it to an entirely ordinary extradition case; and (3) created a circuit split with a different D.C. Circuit opinion (“*Omar II*”), which had held that the REAL ID Act of 2005 divested the federal courts of

jurisdiction in such cases. Even without trying to count the votes from the 110 pages worth of concurring and dissenting opinions in *Garcia*, I think it’s safe to say that the Ninth Circuit has only made a complicated legal issue that much murkier, and it may well be time for the Supreme Court to pay attention... Below the fold, I try to explain how the pieces all unfold (with my apologies in advance for the preposterous length; my hope is to bring some clarity to the complexity).

### I. CAT and FARRA

What’s behind all of these cases is the U.N. Convention Against Torture (CAT), Article 3 of which provides that “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” There are no exceptions to Article 3’s “nonrefoulement” principle, and there is substantial authority for the proposition that nonrefoulement is itself a “jus cogens” norm of customary international law. Regardless, although the United States has taken the position that CAT is non-self-executing, we implemented most of our obligations under CAT (including Article 3’s “nonrefoulement” mandate) through the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), which provides that “It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being

subjected to torture, regardless of whether the person is physically present in the United States.”

Although there is therefore no question that non-citizens in removal proceedings may invoke FARRA/CAT defensively as a basis for relief from deportation, the harder question is whether FARRA may be enforced offensively in civil litigation, especially habeas, by those who can't raise a FARRA/CAT claim in a removal proceeding (including individuals facing extradition and military transfer, as opposed to deportation). This issue is complicated by section 2242(d) of FARRA, which provides that “nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, . . . except as part of the review of a final order of removal pursuant to [the immigration laws].”

Importantly, though, that FARRA doesn't *provide* jurisdiction should not matter in habeas cases, since a different federal statute already confers power upon the federal courts in such cases so long as the petitioner claims detention “in violation of the Constitution or laws or treaties of the United States.” The question is whether FARRA *takes away* habeas jurisdiction over FARRA/CAT claims. And at least initially, every circuit court to reach the issue answered that question in the negative, holding that nothing in FARRA provided the kind of “clear statement” that the Supreme Court's *St. Cyr* decision required to find that Congress meant to take away habeas jurisdiction. Thus, at least until 2005, **it was settled that U.S. detainees facing transfer or extradition (or non-citizens facing removal who couldn't pursue relief in immigration proceedings) could raise FARRA/CAT as a basis for habeas relief, and numerous litigants did so.**

## II. The REAL ID Act of 2005

As part of the judicial review provisions of the REAL ID Act of 2005, the purpose of which was to streamline judicial review in immigration cases, Congress enacted new 8 U.S.C. § 1252(a)(4):

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, 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) of this section.

Because the point of REAL ID was to channel review of immigration claims into the direct review process, it is thoroughly unlikely that Congress thereby intended to take away *all* jurisdiction in cases in which such review was unavailable (e.g., detainee transfer and extradition cases). Put another way, it seems difficult to read a provision designed to deal only with immigration cases as also applying to claims that could never arise in deportation proceedings. Nevertheless, the categorical language of REAL ID *does* appear to satisfy *St. Cyr*'s “clear statement” requirement, and thereby raises a constitutional question about whether the Suspension Clause protects the ability of individuals facing transfer or extradition to challenge their transfer or extradition via habeas. . . .

## III. *Munaf v. Geren*

Ironically, that constitutional question went wholly unaddressed by the Supreme Court

in its 2008 decision in *Munaf v. Geren*—which raised the substantive question of what, exactly, federal courts reviewed in cases in which an individual objected to their potential transfer based on torture. Writing for a unanimous Court, Chief Justice Roberts suggested that, although the Court clearly had jurisdiction over a claim brought by two U.S. citizens detained in Iraq, the merits were settled by the State Department’s assurance that the two detainees would not be tortured in Iraqi custody. As he explained,

Petitioners here allege only the possibility of mistreatment in a prison facility; this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway. . . . In these cases the United States explains that, although it remains concerned about torture among some sectors of the Iraqi Government, the State Department has determined that the Justice Ministry—the department that would have authority over *Munaf* and Omar—as well as its prison and detention facilities have “‘generally met internationally accepted standards for basic prisoner needs.’” . . .

The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government’s ability to speak with one voice in this area.

Although the Chief’s opinion thereby seemed to suggest that there was nothing for courts to do in such cases once the Executive Branch made the relevant assurance, there were two critical caveats: *First*, as he noted, “this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him

anyway.” (As Justice Souter noted in his concurrence, “I would extend the caveat to a case in which the probability of torture is well documented, even if the Executive fails to acknowledge it”). *Second*, the Court specifically sidestepped the possibility that FARRA might require relief in such cases notwithstanding the Executive Branch’s assurance. As the Chief explained, “Neither petitioner asserted a FARR Act claim in his petition for habeas, and the Act was not raised in any of the certiorari filings before this Court. . . . Under such circumstances we will not consider the question.” (In a footnote, the Chief raised two potential shortcomings with a FARRA claim in that case, but didn’t resolve either of them.) In other words, ***Munaf* required deference to the Executive Branch, but did not address whether such deference could ever be overcome, whether in a case where the detainee’s claim arose under FARRA or otherwise.**

#### IV. *Kiyemba II*

This is where we finally get to the Guantanamo litigation. In *Kiyemba II*, the Uighurs detained at Guantanamo filed suit seeking notice and a hearing before their transfer to a third-party country, in order to ensure an opportunity to contest that transfer on the ground that they credibly feared torture. A divided panel of the D.C. Circuit held that *Munaf* pretermitted such claims, in light of the government’s blanket (and not country-specific assurance) that it doesn’t transfer to torture. I’ve previously explained in some detail why, as Judge Griffith explained in his partial concurrence / partial dissent, this result simply doesn’t follow from *Munaf*, including that (1) unlike in *Munaf*, the government’s assurance didn’t address the conditions in a specific country; (2) *Munaf* didn’t deal with claims arising under FARRA; and (3) *Munaf* itself wasn’t

categorical (as noted above), leaving open the possibility that the detainee might introduce evidence contradicting the government's own conclusion.

For present purposes, the relevant point is that the D.C. Circuit's rationale went to the merits: the misreading of *Munaf* aside, Judge Ginsburg's logic was that the government's assurances foreclosed relief, not that the courts were otherwise powerless to intervene. The D.C. Circuit declined to revisit that conclusion by a 6-3 vote, and the Supreme Court denied certiorari (although in a related case, Justice Ginsburg noted for herself and Justices Breyer and Sotomayor that they would have granted a stay of a detainee's involuntary repatriation to Algeria "to afford the Court time to consider, in the ordinary course, important questions raised in this case and not resolved in *Munaf*."

## V. *Omar II*

Okay. So far, we've introduced the statutory background, *Munaf*, and the D.C. Circuit's perversion thereof in *Kiyemba II*. In one sense, that's all one needs to understand Friday's decision in *Garcia*, because the heart of the en banc Ninth Circuit's per curiam opinion is its agreement with *Kiyemba II*—the courts have jurisdiction, but once the Secretary of State makes the relevant promises, that's the end of the matter. But earlier this summer, the D.C. Circuit went one significant step further, and here the Ninth Circuit has now created a circuit split:

In "*Omar II*," which is the case of the *other* detainee in *Munaf* on remand from the Supreme Court, Judge Kavanaugh wrote for a divided panel (the same panel that decided *Kiyemba II*) that the REAL ID Act does in fact divest the federal courts of habeas

jurisdiction over CAT/FARRA claims, and that, in the process, it does *not* violate the Suspension Clause. I won't rehash here my detailed series of posts on why *Omar II* fails to persuade. For present purposes, the relevant point is that on this point, the Ninth Circuit has now created a circuit split. Here's what the per curiam opinion in *Garcia* says:

Neither the REAL ID Act nor FARRA repeals all federal habeas jurisdiction over Trinidad y Garcia's claims, as the government asserts. A statute must contain "a particularly clear statement" before it can be construed as intending to repeal habeas jurisdiction. Even if a sufficiently clear statement exists, courts must determine whether "an alternative interpretation of the statute is 'fairly possible'" before concluding that the law actually repealed habeas relief.

FARRA lacks sufficient clarity to survive the "particularly clear statement" requirement. The REAL ID Act can be construed as being confined to addressing final orders of removal, without affecting federal habeas jurisdiction. Given a plausible alternative statutory construction, we cannot conclude that the REAL ID Act actually repealed the remedy of habeas corpus.

Thus, *Garcia* does two very different things: (1) it endorses *Kiyemba II*'s misreading of *Munaf* as categorically foreclosing *on the merits* CAT/FARRA claims in cases in which the Executive Branch promises that the detainee will not be transferred to torture; and (2) it rejects *Omar II*'s holding that the REAL ID Act deprives the federal



courts of jurisdiction in such cases (and thereby sidesteps the constitutional question that *Omar II* resolved).

## VI. Taking Stock

If you've made it this far, congratulations! You may be wondering why all of this matters. . . . Let me suggest two reasons:

1. The law governing detainee transfers is going to continue to matter at least until and unless we're no longer holding individuals in military detention at Guantanamo or inside the United States. To that end, understanding whether courts may hear such claims on the merits, and what the appropriate standard is, is a pretty big deal—and there's now arguably a circuit split on the subject. Ultimately, whatever the right answers are (is there jurisdiction? can detainees attempt to rebut the government's assurances?), clarity would be useful.

2. Reasonable people may disagree with me (and Judge Griffith) that *Kiyemba II* badly misreads *Munaf*. But assume for the moment that we're right—and that it does. One could possibly have dismissed *Kiyemba II* as a Guantanamo-specific decision, and therefore one that could largely be ignored going forward. The Ninth Circuit's decision in *Garcia* converts *Kiyemba II* into generally applicable law that will prevent litigants in even totally conventional extradition cases from attempting to vindicate claims under FARRA/CAT (at least so long as it is official U.S. policy not to transfer to torture), and may therefore put the United States in violation of its obligations under CAT. To the extent that this is not what the Justices had in mind in *Munaf* (or Congress in the REAL ID Act), this is a pretty big deal...

## **“Blocking Parts of Arizona Law, Justices Allow Its Centerpiece”**

*New York Times*  
June 25, 2012  
Adam Liptak

The Supreme Court on Monday delivered a split decision on Arizona’s tough 2010 immigration law, upholding its most hotly debated provision but blocking others on the grounds that they interfered with the federal government’s role in setting immigration policy. The court unanimously sustained the law’s centerpiece, the one critics have called its “show me your papers” provision, though they left the door open to further challenges. The provision requires state law enforcement officials to determine the immigration status of anyone they stop or arrest if they have reason to suspect that the individual might be in the country illegally.

The justices parted ways on three other provisions, with the majority rejecting measures that would have subjected illegal immigrants to criminal penalties for activities like seeking work.

The ruling is likely to set the ground rules for the immigration debate, with supporters of the Arizona law pushing for “show me your papers” provisions in more states and opponents trying to overturn criminal sanctions for illegal immigrants.

Writing for the majority, Justice Anthony M. Kennedy said, “Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the state may not pursue policies that undermine federal law.”

Justice Antonin Scalia summarized his dissent from the bench, a rare move that

indicated his deep disagreement. Rarer still, he criticized a policy that was not before the court: President Obama’s recent announcement that his administration would not deport many illegal immigrants who came to the United States as children.

Justice Scalia’s point was a narrow one—that the states should have the right to make immigration policy if the federal government is not enforcing its own policies—but it continued a charged back and forth between the conservative justices and Mr. Obama. In his 2010 State of the Union address, Mr. Obama criticized the court’s Citizens United campaign finance ruling, which the court reiterated in a separate ruling on Monday.

The court also announced that it was extending its term until Thursday, signaling that it would issue its much-anticipated ruling on Mr. Obama’s health care law then. Both Mr. Obama and Mitt Romney, the presumptive Republican presidential nominee, quickly responded to the immigration ruling. Mr. Romney—traveling, by coincidence, in Arizona—said in a brief statement that states had the right and the duty to secure their borders.

Mr. Obama emphasized his concern that the remaining provision could lead to racial profiling, an issue that the court may yet consider in a future case. “No American should ever live under a cloud of suspicion just because of what they look like,” Mr. Obama said in a statement, adding that he was “pleased” about the parts that were

struck down.

In her own statement, Gov. Jan Brewer of Arizona, a Republican, said she welcomed the decision to uphold what she called the heart of the law. The decision, she said, was a “victory for the rule of law” and for “the inherent right and responsibility of states to defend their citizens.”

Still, the ruling was a partial rebuke to state officials who had argued that they were entitled to supplement federal efforts to address illegal immigration.

The Obama administration argued that federal immigration law trumped—or pre-empted, in legal jargon—the state’s efforts. Last year, the United States Court of Appeals for the Ninth Circuit, in San Francisco, blocked the four provisions on those grounds, including the one the Supreme Court upheld.

In its challenge, the administration did not argue that it violated equal-protection principles. At the Supreme Court argument in April, Solicitor General Donald B. Verrilli Jr. acknowledged that the federal case was not based on racial or ethnic profiling.

In the majority opinion, Justice Kennedy wrote that the ruling did not foreclose other “constitutional challenges to the law as interpreted and applied after it goes into effect.”

Meanwhile, Attorney General Eric H. Holder Jr. said on Monday that the federal government would “continue to vigorously enforce federal prohibitions against racial and ethnic discrimination.”

Five other states have enacted tough measures to stem illegal immigration, more

or less patterned after the Arizona law: Alabama, Georgia, Indiana, South Carolina and Utah. But most states avoided creating new crimes for immigration violations, as Arizona did in two provisions that were struck down.

Lower courts have stayed the carrying out of parts of those laws, and they will now revisit those decisions.

In upholding the requirement that the police ask to see people’s papers, the court emphasized that state law enforcement officials already possessed the discretion to ask about immigration status. The Arizona law merely makes that inquiry mandatory if the police have reason to suspect a person is an illegal immigrant.

In a concurring opinion, Justice Samuel A. Alito Jr. called the administration’s attack on the provision “quite remarkable.”

“The United States suggests,” he wrote, “that a state law may be pre-empted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency’s current enforcement priorities.”

Justice Kennedy added that the state law contained safeguards, including ones instructing officials not to consider race or national origin unless already permitted by law.

Further restricting the sweep of the majority opinion, Justice Kennedy wrote that “detaining individuals solely to verify their immigration status would raise constitutional concerns.” The decision left open, he said, “whether reasonable suspicion of illegal entry or other immigration crime would be a legitimate basis for prolonging a detention, or whether this too would be pre-

empted by federal law.”

Chief Justice John G. Roberts Jr. and Justices Ruth Bader Ginsburg, Stephen G. Breyer and Sonia Sotomayor joined Justice Kennedy’s majority opinion. Justice Elena Kagan disqualified herself from the case, *Arizona v. United States*, No. 11-182, presumably because she had worked on it as the solicitor general.

Had the case ended in a 4-to-4 tie, the appeals court’s ruling blocking all four aspects of the Arizona law would have stood.

Three justices dissented in part, each writing separately and only for himself. Justices Scalia and Clarence Thomas said they would have sustained all three of the blocked provisions. Justice Alito would have sustained two of them while overturning one that makes it a crime under state law for immigrants to fail to register with the federal government.

The two other provisions blocked by the majority were one making it a crime for illegal immigrants to work or to try find work and another allowing the police to arrest people without warrants if they have probable cause to believe they have done things that would make them deportable under federal law.

Scholars who have followed the work of the court for decades said they could not recall an instance similar to Justice Scalia’s commentary on a political dispute outside the record of the case under consideration. “After this case was argued and while it was under consideration,” Justice Scalia said in

his written dissent, “the secretary of homeland security announced a program exempting from immigration enforcement some 1.4 million illegal immigrants.” This month, the Obama administration said it would let younger immigrants—the administration estimates the number at 800,000—who came to the United States as children avoid deportation and receive working papers as long as they are not over the age of 30 and have clean criminal records, among other conditions.

“The president said at a news conference that the new program is ‘the right thing to do’ in light of Congress’s failure to pass the administration’s proposed revision of the Immigration Act,” Justice Scalia went on. “Perhaps it is, though Arizona may not think so. But to say, as the court does, that Arizona contradicts federal law by enforcing applications of the Immigration Act that the president declines to enforce boggles the mind.”

He added that Arizona and other states should not be left helpless before the “evil effects of illegal immigration.”

Justice Kennedy responded that “federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the nation’s borders.”

“The national government has significant power to regulate immigration,” he wrote. “The sound exercise of national power over immigration depends on the nation’s meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse.”

## “S.B. 1070: In Plain English”

*SCOTUSblog*

June 25, 2012

Amy Howe

The Court didn't rule on the health care cases today, but it still issued a blockbuster: its decision in *Arizona v. United States*, the federal government's challenge to Arizona's controversial immigration law. And although Arizona prevailed last year at the Court in a case involving a different effort to regulate immigration (in that case, by punishing businesses that hire illegal immigrants), it did not fare as well this year. Instead, the decision was largely (but not entirely) a victory for the federal government: the Court held that three of the four provisions of the law at issue in the case cannot go into effect at all because they are “preempted,” or trumped, by federal immigration laws. And while the Court allowed one provision—which requires police officers to check the immigration status of anyone whom they detain or arrest before they release that person—to go into effect, even here it left open the possibility that this provision would eventually be held unconstitutional if not applied narrowly in Arizona.

### **Background**

As I explained before the oral argument, the Arizona legislature believed that the federal government was not doing enough to fight illegal immigration. So it took matters into its own hands by passing S.B. 1070, which seeks to put so many restrictions on illegal immigrants in the state that they will give up and go home—a policy known as “attrition by enforcement.”

But before S.B. 1070 could go into effect, the United States went to federal court to

block it, arguing that the law violates the Constitution (and therefore cannot be valid) because it is trumped by federal immigration laws. (The federal government's suit did not present the question whether the statute exhibited racial discrimination.) The lower courts agreed that four provisions of S.B. 1070 were invalid:

- Section 2(B), popularly known as “show me your papers,” which requires police officers to check the immigration status of anyone whom they arrest or detain and allows them to stop and arrest someone if they believe that he is an undocumented immigrant;
- Section 3, which makes it a crime to be in Arizona without valid immigration papers;
- Section 5(C), which makes it a crime to apply for or hold a job without proper immigration papers; and
- Section 6, which allows a police officer to arrest someone, without a warrant, if the officer believes that he has committed – at some point in time—a crime that could cause him to be deported.

### **Decision**

Justice Kennedy wrote the opinion for the Court, which had the full support of the Chief Justice and Justices Ginsburg, Breyer, and Sotomayor. (Justice Elena Kagan did not participate in the case, presumably because she was involved in earlier stages of the case while she served as the Solicitor General of the United States.) So the fifth

vote of the Chief Justice was critical to having an actual ruling by the Supreme Court; otherwise, the Court would have tied four-to-four on three provisions of S.B. 1070, leaving no final Supreme Court decision.

Before turning to the specific provisions of the law at issue, the Court began with an overview of the federal government's near-exclusive authority over immigration issues that left the reader with little doubt that much—if not all—of S.B. 1070 would be struck down: while the Court acknowledged that Arizona had valid concerns about the effects of illegal immigration, the Court explained that the federal government's power to regulate immigration is "extensive and complex." Among other things, the Court emphasized that it is "fundamental" that foreign countries be able to communicate with just one government—the federal government—about immigration issues; equally important is the "broad discretion" that the federal government has when it decides whether and how to enforce immigration laws.

With that groundwork laid, the Court then turned to the four provisions of S.B. 1070 at issue in this case. First up was Section 3 of the law, which makes it a crime to fail to carry valid immigration papers while in Arizona. The state had argued that this provision should survive because it essentially does the same thing as federal law, which also requires immigrants to carry valid papers. But the majority of the Court was unconvinced. First, the Court explained that Congress had already made clear that it would provide the full (and only) set of standards to govern when and how immigrants must register with the federal government—a concept known as "field preemption." When Congress has provided this full set of standards, the Court

continued, state efforts to govern the same thing cannot be valid, even if the state laws and regulations are identical to the federal ones. So it wouldn't matter if Section 3 did the exact same thing as the federal laws. But in any event, the Court continued, it doesn't, because the penalties for a violation of Section 3 are different from (and tougher than) those imposed by federal law.

The Court next turned to Section 5(C) of S.B. 1070, which would make it a crime to apply for or hold a job in Arizona unless you have valid immigration papers. Unlike Section 3, Section 5(C) has no counterpart in federal law. But the Court again relied on the concept of "field preemption" to hold Section 5(C) invalid, explaining that Congress had set up a comprehensive system to deal with employment of undocumented workers. Although Arizona argued that Section 5(C) does not conflict with any federal laws because the federal system only deals with employers, and does not make it a crime for undocumented workers to work in this country, the Court was unmoved. To the contrary, it explained, Congress made a "deliberate choice" not to criminalize the very conduct that Arizona now seeks to make a crime.

The third and final provision that the Court struck down was Section 6 of S.B. 1070, which received virtually no attention at the oral argument in April. It would allow police officers to arrest someone without a warrant if the police officer has probable cause to believe that the individual has done something that would justify his deportation from the United States. Here too the Court emphasized the federal government's control of the process of deporting (also known as removing) undocumented immigrants from the United States. Under the federal system, an undocumented immigrant can only be arrested and held for

possible removal if there is a warrant for his arrest or if he is likely to escape before police can get a warrant. Because Section 6 would give state law enforcement officials a much broader power to make arrests than under the federal system, the Court concluded, it cannot stand.

Much of the late April oral argument in the case focused on Section 2(B) of S.B. 1070, labeled by opponents as the “show me your papers” provision, which requires police officers to check the immigration status of anyone whom they arrest or detain and allows them to stop and arrest someone if they believe that he is an undocumented immigrant. At oral argument in April, it seemed likely that the provision could survive, and it did—at least for now. The Court relied heavily on the fact that Section 2(B) requires police officers to contact the federal government to verify an individual’s immigration status, which is something that police officers could do on their own initiative anyway (and which Congress has in fact encouraged state and local governments to do).

Citing language in the Arizona law that prohibits police officers from considering race or national origin, the Court held that the provision could at least go into effect for now. But it left open the possibility that opponents of the law could return to court to challenge it once it has been enforced and Arizona courts have a chance to interpret it.

The Supreme Court made quite clear that the key to the provision surviving in the future will be whether it is interpreted in a way that does not prolong detentions of people who are stopped by police. The upshot is that if a person is arrested, Arizona can check his immigration status while it holds him. But if the person is merely detained—for example, at a traffic stop—the immigration check will

probably take too long and he will probably have to be released. The check can then continue without the individual there.

Three Justices—Scalia, Thomas, and Alito—agreed with the other five members of the Court that Section 2(B) was not trumped by federal law and could go into effect, but they disagreed with other aspects of the majority’s conclusions. Justice Scalia’s opinion (which represented his views alone) was by far the most strongly worded of the three, with the same mix of scorn and disbelief that he displayed at oral argument. And the overarching theme of his dissent was the same as well: as a sovereign state, Arizona has a right to keep out people who aren’t supposed to be in this country, much less in Arizona. And S.B. 1070 only applies to people who aren’t supposed to be here at all.

Justice Scalia singled out for special criticism the federal government’s argument that it needs sole control over immigration issues because it needs “to allocate scarce enforcement resources wisely.” Given the myriad problems that illegal immigration has created for Arizona, Justice Scalia asked, why on earth should this mean that Arizona can’t spend its own money and resources to combat illegal immigration? But what Justice Scalia seemed to find particularly galling was the President’s recent announcement—made after the oral arguments in this case—that it would allow some young adults who came to the country illegally as children to remain here indefinitely if they can meet certain criteria. The administration of the new program, Justice Scalia predicted, will entail “considerable” costs that “will necessarily be *deducted* from immigration enforcement”—casting doubt on the validity of the federal government’s lament

regarding the need to conserve scarce resources.

Justices Thomas and Alito filed opinions that were both shorter and more reserved than Justice Scalia's. Like Justice Scalia, Justice Thomas would have allowed all of the provisions of S.B. 1070 to go into effect, based on his own narrow views about federal preemption generally. Justice Alito, by contrast, agreed with the Court that Section 2(B) should be allowed to go into effect and that Section 3 is trumped by

federal immigration laws, but he disagreed with the majority's conclusion that Sections 5(C) and 6 were trumped as well.

After today's decision in this case, the Court recessed until Thursday morning at ten, setting the stage for an all-but-certain announcement of the Court's decision in the challenges to the Affordable Care Act. We'll be back at nine that morning to cover the release in our Live Blog; later on that day, we'll report on the opinion in Plain English. Once again, stay tuned . . . .



## “Raising Arizona: Supreme Court’s Immigration Decision Creates More Questions Than It Answers”

*The Huffington Post*

July 19, 2012

Ginny Sloan

Last month, the U.S. Supreme Court decided *Arizona v. United States*, a closely watched case in which the federal government challenged Arizona’s controversial immigration law, SB 1070. The decision and its impact has since been dissected in both legal and media circles. Perhaps more than anything, however, the immediate aftermath of *Arizona* highlights the host of difficult questions around state and local immigration enforcement that the Supreme Court didn’t answer.

Specifically at issue in *Arizona* were four provisions of SB 1070: Section 3, which criminalizes willful failure to complete or carry immigration papers; Section 5, which makes it a crime for undocumented noncitizens to work; Section 6, which authorizes the warrantless arrest of any person police have probable cause to believe is removable from the United States; and Section 2B, which requires law enforcement officials to verify the immigration status of any person lawfully stopped or detained when they have reason to suspect that the person is here unlawfully.

The Court cautiously upheld Section 2B—at least for now—but struck down sections 3, 5, and 6. The fallout was immediate.

Arizona Governor Jan Brewer claimed victory, not just for Arizona but for the 10th Amendment, explaining that by upholding “the heart of SB 1070” the Court had reaffirmed “the inherent right and responsibility of states to defend their citizens.” The Department of Homeland

Security (DHS) responded by promptly terminating agreements that had authorized Arizona state and local law enforcement agents, under federal supervision, to enforce immigration law in the field. DHS also set limits on when its immigration officials should respond to a scene at the request of Arizona law enforcement, and set up a hotline to report civil rights violations. Governor Brewer railed against the “disarmament” of Arizona’s immigration enforcement capabilities, calling the actions “a new low” for the Obama administration.

It bears emphasizing that the *only* question before the Court in this case was whether four provisions of SB 1070 were “preempted;” that is, whether Arizona overstepped its bounds by passing state legislation that undermines federal immigration law. Many other questions remain: Can “show me your papers” laws like Section 2B be implemented without racial profiling? What aspects of copycat laws now subject to constitutional challenges in states like Alabama, South Carolina, Georgia, Utah and Indiana will survive post-*Arizona*? And, in particular, how free are states and local jurisdictions across the country to choose a different path?

A longstanding battle being waged at both the state and local level over the government’s Secure Communities program is in many ways the flip side of the Arizona fight. Under Secure Communities, fingerprints collected during the booking process that are regularly sent to the FBI to

be checked against its criminal databases are also sent to DHS to be checked against its immigration databases. If there is an immigration “hit,” Immigration and Customs Enforcement (ICE) is automatically notified. ICE can then issue a “detainer,” or a request to local law enforcement to hold the person up to 48 hours beyond when he or she would otherwise be released so that ICE can assume custody.

The government describes Secure Communities as a simple information sharing mechanism. Some critics believe it’s a dangerous deportation dragnet. The rub is that the federal government says the Secure Communities is mandatory—and will be extended to all jurisdictions in the country by 2013—notwithstanding that some states and localities simply don’t want it. Just last week, the Washington D.C. City Council passed legislation limiting the circumstances under which the District will honor immigration detainers. Other localities across the country have adopted, or are considering, similar limits on their cooperation with federal enforcement efforts. At the state level, the California Senate recently passed the Trust Act, legislation that would prohibit California law enforcement from complying with an immigration detainer unless the arrestee was convicted of a serious or violent felony and the detaining agency has adopted a plan to guard against racial profiling and other potentially damaging consequences of Secure Communities.

In contrast to Arizona, these and other states’ and localities’ view certain federal

immigration enforcement efforts as overly harsh or detrimental and don’t want to participate, at least not on the federal government’s terms. What’s the scope of their right to resist (rooted in the 10th Amendment or otherwise)?

The questions raised in *Arizona* and that remain in its aftermath lie at the heart of a series of ongoing tugs of war between the federal government and states and localities that are playing—and in the absence of comprehensive immigration reform will continue to play—a critical role in setting the boundaries of immigration enforcement. In *Arizona*, Justice Kennedy urged that these struggles take the form of a “searching, thoughtful, rational civic discourse.” We at The Constitution Project (TCP) couldn’t agree more, and in an effort to make a meaningful contribution to such a discourse, TCP has assembled a new Immigration Committee that includes members with widely divergent views and experiences who are eager to heed Justice Kennedy’s call.

Although TCP has already made a few forays into immigration policy—calling for reform of both the immigration detention system and the ways in which we use immigration law as a counterterrorism tool—it is clearly an area where TCP’s approach to assembling a panel of issue experts from across the ideological spectrum, then asking them to develop bipartisan, consensus-based solutions to tough constitutional questions, can be more fruitfully brought to bear. We look forward to being a part of the national conversation on this important issue.

**“Statement of Attorney General Eric Holder on the Supreme Court’s  
Ruling on Arizona v. The United States”**

*Department of Justice*  
June 25, 2012

Attorney General Eric Holder issued the following statement today:

“I welcome the Supreme Court’s decision to strike down major provisions of Arizona’s S.B. 1070 on federal preemption grounds. Today’s ruling appropriately bars the State of Arizona from effectively criminalizing unlawful status in the state and confirms the federal government’s exclusive authority to regulate in the area of immigration.

“While I am pleased the Court confirmed the serious constitutional questions the government raised regarding Section 2, I remain concerned about the impact of Section 2, which requires law enforcement officials to verify the immigration status of any person lawfully stopped or detained when they have reason to suspect that the person is here unlawfully. As the Court itself recognized, Section 2 is not a license to engage in racial profiling and I want to assure communities around this country that the Department of Justice will continue to

vigorously enforce federal prohibitions against racial and ethnic discrimination. We will closely monitor the impact of S.B. 1070 to ensure compliance with federal immigration law and with applicable civil rights laws, including ensuring that law enforcement agencies and others do not implement the law in a manner that has the purpose or effect of discriminating against the Latino or any other community.

“We will also work to ensure that the verification provision does not divert police officers away from traditional law enforcement efforts in order to enforce federal immigration law, potentially impairing local policing efforts and discouraging crime victims, including children of non-citizens, victims of domestic violence, and asylum seekers, from reporting abuses and crimes out of fear of detention or deportation. We will continue to use every federal resource to protect the safety and civil rights of all Americans.”

## “Closing Guantanamo Fades as a Priority”

*The New York Times*

June 25, 2010

Charlie Savage

Stymied by political opposition and focused on competing priorities, the Obama administration has sidelined efforts to close the Guantánamo prison, making it unlikely that President Obama will fulfill his promise to close it before his term ends in 2013.

When the White House acknowledged last year that it would miss Mr. Obama’s initial January 2010 deadline for shutting the prison, it also declared that the detainees would eventually be moved to one in Illinois. But impediments to that plan have mounted in Congress, and the administration is doing little to overcome them.

“There is a lot of inertia” against closing the prison, “and the administration is not putting a lot of energy behind their position that I can see,” said Senator Carl Levin, the Michigan Democrat who is chairman of the Senate Armed Services Committee and supports the Illinois plan. He added that “the odds are that it will still be open” by the next presidential inauguration.

And Senator Lindsey Graham, a South Carolina Republican who also supports shutting it, said the effort is “on life support and it’s unlikely to close any time soon.” He attributed the collapse to some fellow Republicans’ “demagoguery” and the administration’s poor planning and decision-making “paralysis.”

The White House insists it is still determined to shutter the prison. The administration argues that Guantánamo is a symbol in the Muslim world of past detainee abuses, citing military views that its continued operation helps terrorists.

“Our commanders have made clear that closing the detention facility at Guantánamo is a national security imperative, and the president remains committed to achieving that goal,” said a White House spokesman, Ben LaBolt.

Still, some senior officials say privately that the administration has done its part, including identifying the Illinois prison—an empty maximum-security center in Thomson, 150 miles west of Chicago—where the detainees could be held. They blame Congress for failing to execute that endgame.

“The president can’t just wave a magic wand to say that Gitmo will be closed,” said a senior administration official, speaking on condition of anonymity to discuss internal thinking on a sensitive issue.

The politics of closing the prison have clearly soured following the attempted bombings on a plane on Dec. 25 and in Times Square in May, as well as Republican criticism that imprisoning detainees in the United States would endanger Americans. When Mr. Obama took office a slight majority supported closing it. By a March 2010 poll, 60 percent wanted it to stay open.

One administration official argued that the White House was still trying. On May 26, Mr. Obama’s national security adviser, James Jones, sent a letter to the House Appropriations Committee reiterating the case.

But Mr. Levin portrayed the administration as unwilling to make a serious effort to exert

its influence, contrasting its muted response to legislative hurdles to closing Guantánamo with “very vocal” threats to veto financing for a fighter jet engine it opposes.

Last year, for example, the administration stood aside as lawmakers restricted the transfer of detainees into the United States except for prosecution. And its response was silence several weeks ago, Mr. Levin said, as the House and Senate Armed Services Committees voted to block money for renovating the Illinois prison to accommodate detainees, and to restrict transfers from Guantánamo to other countries—including, in the Senate version, a bar on Yemen, Saudi Arabia, Afghanistan, Pakistan and Somalia. About 130 of the 181 detainees are from those countries.

“They are not really putting their shoulder to the wheel on this issue,” Mr. Levin said of White House officials. “It’s pretty dormant in terms of their public positions.”

Several administration officials expressed hope that political winds might shift if, for example, high-level Qaeda leaders are killed, or if lawmakers focus on how expensive it is to operate a prison at the isolated base.

A recent Pentagon study, obtained by *The New York Times*, shows taxpayers spent more than \$2 billion between 2002 and 2009 on the prison. Administration officials believe taxpayers would save about \$180 million a year in operating costs if Guantánamo detainees were held at Thomson, which they hope Congress will allow the Justice Department to buy from the State of Illinois at least for federal inmates.

But in a sign that some may be making peace with keeping Guantánamo open, officials also praise improvements at the

prison. An interagency review team brought order to scattered files. Mr. Obama banned brutal interrogations. Congress overhauled military commissions to give defendants more safeguards.

One category—detainees cleared for release who cannot be repatriated for their own safety—is on a path to extinction: allies have accepted 33, and just 22 await resettlement. Another—those who will be held without trials—has been narrowed to 48.

Still, the administration has faced a worsening problem in dealing with the prison’s large Yemeni population, including 58 low-level detainees who would already have been repatriated had they been from a more stable country, officials say.

The administration asked Saudi Arabia to put some Yemenis through a program aimed at rehabilitating jihadists but was rebuffed, officials said. And Mr. Obama imposed a moratorium on Yemen transfers after the failed Dec. 25 attack, planned by a Yemen-based branch of Al Qaeda whose members include two former Guantánamo detainees from Saudi Arabia.

As a result, the Obama administration has been further entangled in practices many of its officials lamented during the Bush administration. A judge this month ordered the government to release a 26-year-old Yemeni imprisoned since 2002, citing overwhelming evidence of his innocence. The Obama team decided last year to release the man, but shifted course after the moratorium. This week, the National Security Council decided to send the man to Yemen in a one-time exception, an official said on Friday.

Meanwhile, discussions have faltered between Mr. Graham and the White House

aimed at crafting a bipartisan legislative package that would close Guantánamo while bolstering legal authorities for detaining terrorism suspects without trial.

Mr. Graham said such legislation would build confidence about holding detainees, including future captures, in an untainted prison inside the United States. But the talks lapsed.

“We can’t get anyone to give us a final answer,” he said. “It just goes into a black hole. I don’t know what happens.”

In any case, one senior official said, even if the administration concludes that it will never close the prison, it cannot acknowledge that because it would revive Guantánamo as America’s image in the Muslim world.

“Guantánamo is a negative symbol, but it is much diminished because we are seen as trying to close it,” the official said. “Closing Guantánamo is good, but fighting to close Guantánamo is O.K. Admitting you failed would be the worst.”

## “What’s Left of the Guantanamo Litigation? Nothing.”

*The Huffington Post*

June 11, 2012

Shayana Kadidal

Four years ago tomorrow, the Supreme Court ruled that Guantanamo detainees have a right to challenge the legality of their detention in federal court. The case, *Boumediene v. Bush*, was at the time hailed as a landmark separation-of-powers decision, routinely assigned as required reading in law schools now as part of the first-year curriculum. Today, the Supreme Court effectively undid that decision.

In the four years since the *Boumediene* decision, detainees have won approximately two-thirds of the cases that have been heard by federal trial courts (the “district” courts). However, the Court of Appeals for the D.C. Circuit, the most conservative court of appeals in the nation, has reversed every single detainee victory that the government has chosen to appeal. Seven detainees had petitioned the Court to hear their appeals from D.C. Circuit decisions in the last few months, and the Court had gathered the cases for consideration over the last few weeks. Today, the Court announced that it would not review any of them—without even so much as a peep of dissent from any of the nine justices.

Most of the detainees in Guantanamo are not litigating their cases because they have already been cleared for release—87 of the remaining 169. In the few dozen contested cases occupying the middle ground between “cleared” and “likely to be charged in military commission,” many detainees won rulings that their detention was unlawful throughout 2009 and 2010. But the Court of Appeals, in the course of a few months,

ruled that hearsay was broadly admissible in these cases. That was enormously significant because, as numerous newspaper accounts over the last four years have demonstrated, a small number of prisoners at Guantanamo lodged accusations against hundreds of fellow detainees (often while suffering clear symptoms of mental illness or post-abuse trauma, and reportedly receiving benefits like video game systems). Their years-old hearsay statements during interrogations could now be taken seriously without giving the accused’s lawyers a chance to cross-examine them. Nearly every detainee ever held at Guantánamo faces hearsay allegations that they were, for example, seen at one of the numerous hostels where other foreigners suspected of ties to the Taliban also stayed. The Court of Appeals has opined that that in itself is “overwhelming” evidence of detainability. And it has robbed the trial courts of an age-old prerogative—to judge the testimony of the accused more trustworthy than the hearsay from his accusers—by ruling in one case that a mass of such hearsay must outweigh the judge’s determination that the accused was telling the truth. The leading case in the group of seven seeking review by the court today, *Latif v. Obama*, challenged a Court of Appeals decision allowing that a government intelligence report should be presumed to be accurate. That document was the government’s primary evidence justifying Latif’s detention, and the district judge found in Latif’s favor despite it, but two judges of the Court of Appeals reversed that ruling. In dissent, Judge Tatel stated that the ruling “moving the goal posts” and

“calls the game in the government’s favor.”

The net effect is that it is now next to impossible to win a case through appeal—a fact confirmed by a concurring opinion from a D.C. Circuit judge stating baldly that he doubted “any of [his Court of Appeals] colleagues will vote to grant a petition” if the government could “muster even ‘some evidence’” (no matter how dubious the source) against the detainee. Because of the skewed legal standards created by the appeals court, only one of the last 12 cases before the trial courts has resulted in a detainee victory. As Judge Tatel said in *Latif*, “it is hard to see what is left of the Supreme Court’s command in *Boumediene*.”

Since *Boumediene*, the Supreme Court has not heard argument in another Guantánamo case. Up till now we had assumed that was largely because Justice Kagan, as an administration insider, had recused herself from hearing detainee cases. There seemed grounds for hope in the possibility that she would eventually stop recusing herself and vote in favor of review on one of these cases. But in today’s votes she did not recuse herself—and we still lost.

In the wake of the justices’ continued silence, the judges of the D.C. Circuit have been left with the last word in Guantánamo cases. They have used it to openly mock the Supreme Court’s authority, with one claiming that *Boumediene* made “airy suppositions” about the practicality of providing judicial review, another stating “taking a case [for review] might obligate [the Supreme Court] to assume direct responsibility” for the decision, and a third comparing the Justices to Tom and Daisy Buchanan in *The Great Gatsby* as “careless people, who smashed things up” and who

“let other people clean up the mess they made.”

In *Boumediene* the Supreme Court’s stated that Guantánamo detainees must receive “meaningful review of both the cause for detention and the Executive’s power to detain.” But that great victory in *Boumediene* now means next to nothing to our clients, because the D.C. Circuit is playing the part Arkansas Governor Orval Faubus played at Little Rock. The problem for us is that no one is playing the part of Dwight Eisenhower or the Warren Court.

Ironically, today has proved that the D.C. Circuit’s scalding criticism of the Supreme Court was largely correct—the high court is happy to lay down platitudes, without the courage or commitment to follow through on enforcing the details as the Warren Court did in *Cooper v. Aaron*, when it forced school desegregation down the throat of an intransigent Arkansas state government. Perhaps the real loser today, as now-departed Justice Stevens said after *Bush v. Gore*, “is the Nation’s confidence in the judge as an impartial guardian of the rule of law.”

That this happened without a single dissent is even more shocking (and probably a sign of what the Court has lost with the departure of Justices Stevens and Souter). Put to one side concerns about granting everyone a day in court, and fair process. Innocence, after all, is what caused most people to care about Gtmo in the first place—the fact that hundreds of detainees were sold into custody by bounties paid to warlords and corrupt Pakistani police, and held based on no real evidence. Surely the Court knows that this still characterizes the typical detainee rotting in Guantanamo today. The majority of detainees today are cleared for release—87



in total—and they have been detained now for three years since the interagency Task Force cleared them by unanimous consent of the CIA, FBI, DOD, State and Justice Departments. Yet only two detainees have been released by the Obama administration since January 2011. Ultimately the fate of the rest is in the hands of the president, who seems utterly uninterested in fulfilling the promise he made on his second day in office to close what is the most infamous prison in the world.

Lost in all of this is what motivated President Bush and candidates McCain and Obama to call for closure of the prison back in 2008—not humane concerns for men wrongly held for nearly 10 years (for the three reasons above, politicians need not pretend to care about that anymore), not the \$700,000 cost per year *per prisoner* of continuing to hold all those cleared detainees (which, in a sign of the cynicism

of the American public, seems to be the talking point with the most traction), but rather the impact the whole system of indefinite detention without charge (of which Guantánamo is merely the prime symbol) has on the international perception of the United States. The cost of a false positive may in fact be higher than the cost of a wrongful release when our government's announced enemies in the "war on terror" are first and foremost seeking to convert young men to their political cause. Yet the most significant political upheaval in the Muslim world—the many revolutions of the Arab Spring—moves forward without any perceptible influence from an administration desperate for credibility with the democratic movements on the ground. As long as the reality at Guantánamo is so far out of sync with our aspirational values as a nation, that is as it should be.

## “D.C. Circuit: Last Stop for Detainees?”

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For almost four years, the Supreme Court has left it to lower courts to sort out the legal review that the Justices mandated for prisoners held by the U.S. military at Guantanamo Bay, Cuba, with a remarkable result: the detainees very often win in District Court, but not one has ever gotten released from confinement by court order. The reason: the government has never lost any of its appeals in the D.C. Circuit Court, and that series of rulings has been accompanied by caustic criticism of the Supreme Court by three of the Circuit Court’s judges. The Supreme Court has never reacted, but lawyers in eight new cases are now urging it to do so.

Based on actual experience since the Court’s historic ruling in 2008 in *Boumediene v. Bush*, one of two things appears to be true: the Court is satisfied with the results and essentially has taken itself out of the Guantanamo controversy, or the Court has not found a suitable new case that four Justices want to review and is still waiting. In the meantime, the Executive Branch, though frustrated by frequent efforts in Congress to control the fate of the 171 men still at Guantanamo on the theory that most if not all of them are terrorists, has not again suffered a courthouse setback like the one in *Boumediene* and in three other Supreme Court decisions before that.

Last Term, the Court opted not to hear any of eight cases brought to it by Guantanamo detainees’ lawyers. One factor that seemed to be at work then was that Justice Elena Kagan, a former U.S. Solicitor General who previously had some role in detainee matters in the Obama Administration, took no part

in most of those cases. With eight new cases now on file, Kagan so far has not disqualified herself from any, although the occasion for doing so has not yet arisen in several of them. She did recuse in a preliminary vote in a potential ninth new case, but that one has not developed fully yet. There is another pending case, but it was filed for former detainees, no longer held by the U.S.

The government—in both the Bush and Obama Administrations—has taken the view that the *Boumediene* decision entitles Guantanamo detainees to a single court test of their detention, but that, if they win that case, actual release or transfer is a matter for the Executive Branch, either under its control of immigration and deportation matters or its diplomatic authority. The Circuit Court has embraced that claim, but also has gone far to make it harder for any detainee to win such a case in the first place. In one of the more recent Circuit Court rulings, the dissenting judge argued that it was “hard to see what is left of the Supreme Court’s command in *Boumediene* that habeas review be ‘meaningful.’” The majority of the Circuit Court, that judge added, has “called the game in the government’s favor.”

Among the lengthy list of cases in which District Court judges have ruled against further detention, a number have involved a judge’s sharp criticism of the quality of proof in intelligence reports offered by the government. But, when the Circuit Court has decided appeals, it has regularly found the evidence sufficient to support further confinement on the theory that official

evidence is entitled to judicial deference. It has sent a few cases back to District Court for further review, but has yet to clear any detainee for release. Releases that have occurred have been at the discretion of the Executive Branch.

Although the government has regularly won in the Circuit Court with an argument that only the lowest accepted standard of proof need be satisfied to justify continued detention, a senior judge on the Circuit Court, Laurence H. Silberman, has criticized the Justice Department for not pressing for an even more permissive view of detention authority and has expressed doubt that any of his colleagues would vote to release any detainee without virtually absolute proof that they do not actively support a terrorist group. "Some evidence" should be enough, Silberman has written. Another senior judge, A. Raymond Randolph, has likened the Justices in the majority in *Boumediene* to fictional characters in *The Great Gatsby*, "careless people" making messes for other people to clean up. One of the more junior judges, Janice Rogers Brown, has castigated the *Boumediene* ruling for its "airy suppositions" about the nature of war and for using logic that would lead the Executive Branch to adopt a policy of taking no prisoners. Judge Brown has also argued that international law should put no limits on the President's detention power.

Lawyers in some of the new cases in the Supreme Court have recounted those criticisms, just to be sure the Justices are aware of them. In one of the new petitions, the lawyers argued that the Circuit Court had "demonstrated open disdain" for the *Boumediene* ruling, and had "whittled procedural protections in these habeas hearings down to almost nothing."

The Obama Administration, by contrast, has

filed papers in a few of the new cases, contending—as it did in the previous ones that the system of court review of Guantanamo cases that has unfolded since the *Boumediene* ruling is working as it should, and that the government will do its best diplomatically to find a place to relocate any prisoner who has won a court-ordered release—if the government lost an appeal. It has also said that Judge Silberman's remarks on how hard it should be for any detainee to gain release is not the view that prevails on the Circuit Court, and that the government does not share Judge Brown's view that international law does not limit detention power. The government's basic view on detention authority is that it may hold anyone who was "part of" a terrorist network or organization. When the government has chosen not to respond to some of the new petitions, the Court has sought a response.

It is not clear at this point just how the Court is processing the new cases. None is currently scheduled for a specific Conference of the Justices, although some were set previously and then were postponed without explanation. Two cases, though, are on temporary hold at the lawyers' request while a later case was being prepared; it has since been filed. That is the case of *Latif v. Obama* (11-1027), which is the one in which Judge Brown leveled her harshest criticisms at the *Boumediene* decision.

As usual, it will take the votes of four Justices to grant review of any of the cases. Because the *Boumediene* decision came on a 5-4 vote, and the four Justices who were in dissent remain on the Court, votes to review more recent Circuit Court decisions that went against detainees probably would have to come from among the three Justices who remain from the 2008 majority—Justices Anthony M. Kennedy (the opinion's author),

Stephen G. Breyer, and Ruth Bader Ginsburg—along with at least one vote from one of the two newer Justices, Kagan and Sonia Sotomayor. Two years ago, Justices Breyer, Ginsburg, and Sotomayor indicated a willingness to take on a new case at some point. Kennedy did not join in that comment, and Kagan was not on the Court then. Kagan’s recusals last Term thus lowered the prospect of four votes to grant in earlier cases. As a matter of pride of authorship, though, Kennedy is the Justice whose work in *Boumediene* has drawn the sharpest critique from some of the Circuit Court judges.

Perhaps the most provocative question raised in the new petitions—and it is an issue that seemed clearly designed to get Justice Kennedy’s attention—is this one: “Whether the court of appeals’ manifest unwillingness to allow Guantanamo detainees to prevail in their habeas corpus cases calls for the exercise of this Court’s supervisory power.” The question is based on the premise that the Court, in *Boumediene*, had said that habeas review for Guantanamo detainees had to be “meaningful” and that actual release had to be an option open to District Court judges. That question is raised in the *Latif* case, involving a Yemeni national, Adnan Farhan Abdul Latif. A District judge ruled in his favor, but Judge Brown’s opinion for the Circuit Court majority reversed, and laid down the legal principle that government intelligence reports are entitled to a presumption that they are accurate. That opinion prompted an unusual, though sharply worded, dissent from Circuit Judge David S. Tatel. The same question is also asked in the case of another Yemeni, Hussain Salem Mohammed Almerfedi, who won his case in District Court, then the Circuit Court ruled against him, more broadly than the government had asked.

Without knowing at this point when the eight new cases will be sent to the Justices for initial consideration, and assuming that at some point all will be ready, they can now be grouped by the issues they seek to raise. First, there is a list of issues and the cases raising them, by case title and docket number. Later in the post, the petitions are listed with links to all of the filings so far sent to the Court in each.

### **1. Definition of government power to detain at Guantanamo**

*Al-Bihani v. Obama* (10-1383)—seeks a basic definition of detention power, limited by the laws of war

*Uthman v. Obama* (11-413)—challenges detention for one who did not actually fight against U.S. or allied forces and provided no direct support to terrorists

*Almerfedi v. Obama* (11-683)—challenges detention authority if based on non-incriminating facts

*Al-Madhwani v. Obama* (11-7020)—challenges detention based on “guilt by association” with suspected terrorists, based on visits to guesthouses and training facilities

*Al-Alwi v. Obama* (11-7700)—challenges detention based on ties to the Taliban after hostilities had ended

### **2. Circuit Court refusal to uphold any release order**

*Almerfedi* (11-683) and *Latif* (11-1027)

### **3. Procedural rights of detainees in court**

*Uthman* (11-413)—violation of the habeas Suspension Clause if habeas review is not meaningful

*Almerfed* (11-683)—validity of requiring detainee to rebut government evidence found to be credible

*Latif* (11-1027)—challenges presumption of accuracy of U.S. intelligence reports, and challenges Circuit Court power to find facts on its own

*Kandari v. U.S.* (11-1054)—right to restrict government’s use of hearsay evidence

*Al-Madhwani* (11-7020)—right to constitutional due process protection

*Al-Alwi* (11-7700)—inadequate time for attorney to prepare a defense

#### **4. Government power to transfer out of Guantanamo over objection**

*Abdah v. Obama* (11-421)—right of attorney to advance notice in order to challenge planned transfer to a nation where the detainee fears torture

#### **Here are the eight new cases, listed by docket number:**

10-1383—*Al-Bihani v. Obama*

11-413—*Uthman v. Obama*

11-421—*Abdah v. Obama*

11-683—*Almerfed* *v. Obama*

11-1027—*Latif v. Obama*

11-1054—*Kandari v. U.S.*

11-7020—*Al-Madhwani v. Obama*—**Chief Justice recused**

11-7700—*Al-Alwi v. Obama*

Beyond those eight cases filed for current prisoners at Guantanamo, lawyers for two former detainees there are seeking to revive their claim that they have suffered harmful consequences of having been treated as enemies and held by the U.S. military. The claims of Nazul Gul, an Afghan, and Adel Hassan Hamad, a Sudanese national, both claim innocence of any terrorist acts. The petition is *Gul and Hamad v. Obama* (11-7827). The U.S. government response was filed on Thursday but is not yet available.

Finally, there is another current detainee case, but all of the papers in it are sealed. It is *El Falestey v. Obama*, pending on a motion (11M59) to file a classified petition under seal. Justice Kagan is recused.