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YALE LAW & POLICY REVIEW

Khouzam v. Chertoff: Torture, Removal, and the Rule of Noninquiry

Aaron S.J. Zelinsky*

INTRODUCTION

This Comment argues against extending the rule of noninquiry from extradition to removal cases. In removal cases where potential torture is alleged, courts should review removal determinations under a standard deferential to the executive.

The rule of noninquiry precludes U.S. courts from assessing to any degree the institutions and processes of foreign governments in extradition cases to determine “the possibility that the [deportee] will be mistreated . . . in [the destination] country.”¹ Extradition involves the “official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged [or] the return of a fugitive from justice, regardless of consent, by the authorities where the fugitive is found.”² Removal, formerly called deportation,³ is the process through which the United States forces departure of non-citizens from the country and does not necessarily involve transfer directly to a foreign law enforcement agency.⁴ Until now, courts have applied the rule of noninquiry

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1. Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1198 (1991); see Kent Wellington, Note, *Extradition: A Fair and Effective Weapon in the War on Terrorism*, 51 OHIO ST. L.J. 1447, 1448 (1990). This Comment focuses on removal, and the term “deportee” is used to refer to the person challenging removal for the sake of simplicity.
2. BLACK’S LAW DICTIONARY 623 (8th ed. 2004).
3. Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 STAN. J. C.R. & C.L. 195, 195 (2007).
4. See Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1276-79 (codified as amended in scattered sections of 8 U.S.C.).

in extradition cases but have not extended it to removal cases. From 2001 to 2004, over seven hundred thousand people were formally removed from the United States.⁵ If courts were to extend noninquiry to removal contexts, the United States could be implicated inappropriately in mistreatment by foreign governments of deportees. This issue is particularly timely since diplomatic assurances of nontorture will be employed extensively in the transfer of detainees from Guantánamo Bay to other countries.⁶

The Third Circuit recently addressed the rule of noninquiry in the removal context in *Khouzam v. Chertoff*.⁷ The *Khouzam* panel held that the rule of noninquiry did not apply in removal cases, at least when a potential deportee raises a claim under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). The *Khouzam* court explicitly distinguished its holding from the recent Supreme Court decision in *Munaf v. Geren*,⁸ which *Khouzam* described as “arguably extend[ing]” the rule of noninquiry to some removal cases, but not those cases involving potential deportees’ CAT claims.⁹

This Comment argues that *Khouzam* misconstrued *Munaf* and that the Supreme Court did not extend the rule of noninquiry to removal cases in *Munaf*. Rather, both *Munaf* and *Khouzam* involved judicial review of the likelihood of torture upon transfer. The rule of noninquiry has thus not been extended to removal. This Comment opposes use of the noninquiry rule in removal cases. The rule of noninquiry is founded largely on notions of comity, yet other countries do not employ the rule of noninquiry in removal cases. It is ironic to base a rule on comity when the rule is not followed by other nations.

This Comment is divided into four parts. Part I details the facts of *Khouzam* and the Third Circuit’s contention that *Munaf* extended the rule of noninquiry to non-CAT removal situations. Part II argues that the Third Circuit misread *Munaf* and that *Munaf* did not extend the rule of noninquiry to removal cases. Rather, *Munaf* allowed for examination of executive removal decisions

5. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., 2004 YEARBOOK OF IMMIGRATION STATISTICS 159 (2006).

6. Human Rights Watch, EU Should Help Close Guantanamo by Resettling Detainees (Apr. 29, 2009), <http://www.hrw.org/en/news/2009/04/28/eu-should-help-close-guantanamo-resettling-detainees>. Guantánamo Bay detainees likely will be transferred rather than removed. The construction of the rule of noninquiry in the removal and extradition contexts, however, will inform courts’ decisions in transfer cases. See *Kiyemba v. Obama*, 561 F.3d 509, 514-17 (D.C. Cir. 2009) (examining and dismissing the claims of potential torture brought by Uighurs who were to be transferred from Guantánamo Bay on the ground that the CAT had not been invoked and that such transfers were subject to the rule of noninquiry under *Munaf*).

7. 549 F.3d 235 (3d Cir. 2008).

8. 128 S. Ct. 2207 (2008).

9. *Khouzam*, 549 F.3d at 254.

under a deferential standard. Part III examines foreign precedent and argues that, given the rule of noninquiry's frequent justification on comity grounds, the practices of foreign courts have persuasive weight. The decisions of these courts, combined with the opinions in *Munaf*, support deferential judicial review of executive determinations in removal contexts regarding diplomatic assurances not to torture, rather than a rule of complete judicial noninquiry. The Comment concludes by discussing the critical role the rule of noninquiry will play in the Obama Administration's plan to close Guantánamo Bay.

I. THE FACTS OF *KHOUZAM*

On February 10, 1998, Sami Khouzam boarded a plane in Egypt bound for New York City.¹⁰ Khouzam, a Coptic Christian who worked as an accountant in Egypt, held a multiple-entry visa to the United States.¹¹ While Khouzam's plane was airborne, the Egyptian government informed U.S. authorities that Khouzam was wanted in connection with a murder committed in Cairo.¹² U.S. officials detained Khouzam immediately upon his arrival and initiated removal procedures to return him to Egypt.¹³ Khouzam sought asylum, withholding of removal, and relief under CAT.¹⁴

In *Khouzam v. Ashcroft*, the Second Circuit granted Khouzam's petition for withholding removal.¹⁵ While the court found that there were "serious reasons" to believe Khouzam had committed the homicide for which he was wanted,¹⁶ it nevertheless concluded that Khouzam was entitled to relief under CAT because of "'overwhelming' evidence that [he] would be subjected to torture in Egypt."¹⁷ Khouzam eventually was released into the United States on the condition that he report regularly to the Bureau of Immigration and Customs Enforcement (ICE).¹⁸

10. *Id.* at 239; Neela Banerjee, *Coptic Christian Fights Deportation to Egypt, Fearing Torture*, N.Y. TIMES, June 6, 2007, at A16.

11. Banerjee, *supra* note 10.

12. Michael Matza, *Phila. Court Blocks Deporting Egyptian*, PHILA. INQUIRER, Dec. 6, 2008, at A6. It is unclear on the face of the opinions, pleadings, and related media coverage why Egypt did not move to extradite Khouzam at a later point, presumably after charges would have been filed.

13. *Khouzam*, 549 F.3d at 235.

14. *Id.* For the full text of the CAT, see Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 102 Stat. 382, 1465 U.N.T.S. 85.

15. 361 F.3d 161, 171 (2d Cir. 2004).

16. *Id.* at 166.

17. *Khouzam*, 549 F.3d at 239 (quoting *Khouzam v. Ashcroft*, 361 F.3d at 166).

18. *Id.* at 240.

On May 20, 2008, Khouzam reported to ICE and immediately was taken into custody and told that he was “subject to imminent deportation.”¹⁹ Khouzam’s counsel received a letter from an ICE official declaring that there were “sufficiently reliable diplomatic assurances received by the Department of State from the government of Egypt that . . . Mr. Khouzam, would not be tortured if removed” and that the Secretary of Homeland Security was therefore removing Khouzam to Egypt immediately.²⁰ Khouzam filed both an emergency petition for habeas corpus in the district court and a petition for review with the Third Circuit, alleging that Egypt’s diplomatic assurances were insufficient to prevent him from being tortured upon his return there.²¹

In *Khouzam v. Chertoff*, the government argued that Khouzam’s case was nonjusticiable because of the “rule of noninquiry.” Noninquiry “bars courts from evaluating the fairness and humaneness of another country’s criminal justice system, requiring deference to the Executive Branch on such matters.”²² Writing for a unanimous court, Judge Rendell rejected this argument. She noted that the rule of noninquiry has “traditionally been applied only in the extradition context,” not in the case of removals.²³ However, Judge Rendell noted that the Supreme Court “arguably extended the rule of noninquiry beyond the extradition context . . . without referring to the doctrine by name” in a case decided earlier in 2008, *Munaf v. Geren*.²⁴ Judge Rendell contended that Chief Justice Roberts invoked the rule in substance, if not in name, when she concluded that, “[t]he 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.”²⁵

The Third Circuit then distinguished *Khouzam* from *Munaf* on the grounds that *Munaf* did not “properly raise[] a claim for relief under CAT,”²⁶ while *Khouzam* did. *Khouzam*’s case therefore was justiciable, while *Munaf*’s was

19. *Id.*

20. *Id.*

21. *Id.* at 241.

22. *Id.* at 253 (citing *Hoxha v. Levi*, 465 F.3d 554, 563 (3d Cir. 2006)).

23. *Id.* at 253 (citing *Mironescu v. Costner*, 480 F.3d 664, 668-70 (4th Cir. 2007); *Hoxha*, 465 F.3d at 563; *Prasoprat v. Benov*, 421 F.3d 1009, 1016 (9th Cir. 2005); *United States v. Lui Kin-Hong*, 110 F.3d 103, 111 (1st Cir. 1997); *In re Smyth*, 61 F.3d 711, 714 (9th Cir. 1995); *In re Howard*, 996 F.2d 1320, 1329 & n.6 (1st Cir. 1993); *In re Manzi*, 888 F.2d 204, 206 (1st Cir. 1989)).

24. *Id.* at 254. *Munaf* concerned the habeas petitions brought by two dual American citizens held by multinational forces in Iraq, who were contesting their transfer to Iraqi authorities. The Court held that, while habeas applied to the petitioners, it could afford them no relief. *Munaf v. Geren*, 128 S. Ct. 2207, 2213-14 (2008).

25. *Munaf*, 128 S. Ct. at 2226 (citing THE FEDERALIST No. 42 (James Madison)).

26. *Khouzam*, 549 F.3d at 254.

not.²⁷ The appeals court was unconvinced by the assurances of the Egyptian government that Khouzam would not be tortured if returned to Egypt, and Khouzam's "termination of deferral of removal"²⁸ was therefore vacated.²⁹

II. REREADING *MUNAF*

The Third Circuit misinterpreted *Munaf*. Rather than extend the rule of noninquiry to removal cases, *Munaf* assessed the possibility of torture to the deportee on a standard deferential to the executive. *Munaf* and *Khouzam* both addressed the potential for torture in the removal context, but the actual likelihood of torture in Khouzam's case was much greater than in *Munaf*'s.

Justice Souter's concurrence explicitly preserved inquiry in removal proceedings: "[N]othing in today's opinion should be read as foreclosing relief for a citizen of the United States who resists transfer, say, from the American military to a foreign government . . . [where] the probability of torture is well documented, even if the Executive fails to acknowledge it."³⁰ Justice Souter further stated that the right to be free from torture is so compelling that a remedy other than habeas might be crafted to secure the safety of persons threatened by the possibility of torture on removal.³¹ Thus, Justice Souter, as well as Justices Breyer and Ginsburg who joined his concurrence, explicitly understood *Munaf* not as expanding the rule of noninquiry to removal cases, but rather as a case about proof. The likelihood of torture was not proven in that particular factual circumstance.

Chief Justice Roberts's majority opinion reinforces the interpretation that, as an evidentiary matter, *Munaf* failed to demonstrate the likelihood of his torture upon removal. Chief Justice Roberts declared that: "Petitioners *briefly argue* that their claims of *potential torture* may not be readily dismissed . . ."³² Similarly, Chief Justice Roberts stated: "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."³³ Thus, Chief Justice Roberts left open the possibility that courts could review the removal decisions made by the executive in more egregious situations.

27. *Id.* Judge Rendell also noted that *Munaf* presented a highly unusual factual scenario.

28. *Id.* at 248.

29. *Id.* at 259-60.

30. *Munaf*, 128 S. Ct. at 2228.

31. *Id.* at 2228.

32. *Id.* at 2226 (emphasis added).

33. *Id.* at 2207.

Although Chief Justice Roberts did mention the need for the government to speak with “one voice,”³⁴ he nevertheless did not rule out the potential for judicial review of diplomatic assurances of good treatment upon removal. Indeed, he was careful to note that the Court was not discussing a well-pleaded torture complaint, further emphasizing the relative weakness of *Munaf*'s allegations of potential torture.³⁵

Reading Chief Justice Roberts's opinion as categorically extending the rule of noninquiry to non-CAT removal claims (as the *Khouzam* court does) creates an untenable tension in Chief Justice Roberts's analysis. A court's competence to assess the “practices in foreign countries”³⁶ does not increase when a petitioner invokes CAT. Similarly, a court's competence to “determine national policy”³⁷ does not vary depending upon the plaintiff's assertion of a CAT claim. Whether the plaintiff's claims against removal rest on CAT or the Fifth Amendment, courts assessing the validity of diplomatic assurances of nontorture still must “pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice.”³⁸ Thus, the *Khouzam* court's distinction between CAT and non-CAT claims deprives the *Munaf* majority holding of logical coherence. Moreover, Chief Justice Roberts's discussion of the factually weak case for torture presented by *Munaf*, combined with Justice Souter's concurrence, supports the view that the quality of proof offered by *Munaf*, rather than the nature of his claim, was dispositive. Chief Justice Roberts avoided discussing the potential outcome of a well-pleaded removal case with a high potential for torture, while Justice Souter affirmatively asserted that, in such a case, the Court would review diplomatic assurances that the deportee would be treated properly upon his return.

The holdings in *Khouzam* and *Munaf* are thus reconcilable. In the final analysis, neither case is controlled by the rule of noninquiry, and thus the rule has not been expanded to removal cases. The difference in the two outcomes reflects *Munaf*'s mere allegation of the possibility of torture without providing substantial evidence versus *Khouzam*'s clear and convincing proof regarding the likelihood of torture upon his removal to Egypt.

This reading of *Munaf* and *Khouzam* as rejecting the rule of noninquiry in removal cases is consistent with foreign jurisprudence. The next Part shows strong support in foreign jurisdictions for reading *Munaf* as not extending the rule of noninquiry to removal settings. In particular, foreign courts apply a deferential standard of review to executive acceptances of diplomatic assurances not to torture in removal cases.

34. *Id.* at 2226.

35. *Id.* at 2225.

36. *Id.*

37. *Id.*

38. *Id.* at 2226.

III. FOREIGN PRECEDENTIAL SUPPORT FOR REREADING *MUNAF*

The role that foreign precedent should play in domestic decisions is a matter of heated and ongoing debate.³⁹ For some jurists, references to foreign law are anathema to basic democratic values.⁴⁰ For others, foreign law, while not controlling, can provide compelling arguments for domestic courts.⁴¹ In the case of removal, deference to foreign decisions regarding the rule of noninquiry is particularly justified, because the rule itself is largely animated by principles of international comity, obligations under international treaties, and pragmatic policy foreign concerns. Foreign decisions about removal support this Comment's interpretation of *Munaf* as a fact-based decision, not an expansion of the rule of noninquiry to removal cases.

Supporters of the rule of noninquiry argue that "the interests of international comity are ill served" by judicial inquiry into the procedures and assurances of foreign countries.⁴² At the core of international comity is the "principle of deference to foreign law and foreign courts."⁴³ It would be ironic for the United States to propound a rule of international comity—the rule of noninquiry in removal contexts—that is not shared by the rest of the world.⁴⁴ Indeed, even in the extradition context, the rule of noninquiry virtually is unique to the United States.⁴⁵ In contrast, the norm against torture is *jus cogens*, which is in-

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39. See Timothy K. Kuhner, *The Foreign Source Doctrine: Explaining the Role of Foreign and International Law in Interpreting the Constitution*, 75 U. CIN. L. REV. 1389, 1390 (2007).
40. Antonin Scalia, Assoc. Justice, U.S. Supreme Court & Stephen Breyer, Assoc. Justice, U.S. Supreme Court, Debate on Constitutional Relevance of Foreign Court Decisions at American University, Washington College of Law (Feb. 25, 2005) (transcript available at <http://www.freerepublic.com/focus/news/1352357/posts>).
41. See, e.g., Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES, Apr. 12, 2009, at A14 (quoting Justice Ginsburg as saying: "I frankly don't understand all the brouhaha lately from Congress and even from some of my colleagues about referring to foreign law.").
42. *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990), *stay denied*, 497 U.S. 1054 (1990) (holding that the Secretary of State alone should entertain potential claims of mistreatment upon extradition).
43. Joel R. Paul, *The Transformation of International Comity*, 71 LAW & CONTEMP. PROBS. 19, 20 (2008) (citing *Hilton v. Guyot*, 159 U.S. 113, 163-66 (1895)).
44. John Quigley, *The Rule of Non-Inquiry and Human Rights Treaties*, 45 CATH. U. L. REV. 1213, 1248 (1996) ("The federal rule of non-inquiry was consistent with international practice at the time it was developed. Today, however, it is at odds with international practice and as such has been repudiated by the international community.").
45. *Id.*

cumbent on all societies.⁴⁶ It is illogical for the United States to extend a rule on foreign comity grounds when foreign courts do not have such a rule.

The second justification for the rule of noninquiry is treaty obligation.⁴⁷ The Supreme Court has held that, when interpreting treaties, “the opinions of our sister signatories [are] entitled to considerable weight.”⁴⁸ From this premise, U.S. courts should look to foreign opinions when the rule of noninquiry arises in a treaty context. No CAT signatory permits removal without affording the transferee the ability to challenge the validity of diplomatic assurances that he will not be tortured upon return to his home country.⁴⁹

Finally, supporters of the rule of noninquiry argue that the nation should “speak with one voice” in foreign affairs.⁵⁰ Contradictory pronouncements from different branches of government will produce conflicting messages to diplomatic partners that may undermine the future credibility of U.S. negotiators. Foreign precedent is useful in evaluating this prudential argument empirically. If, in relevant contexts, other nations can conduct foreign relations adequately without the rule of noninquiry, then the United States likely can do so as well.⁵¹

Two high courts in jurisdictions with similar legal structures to the United States—Canada and the European Court of Human Rights—have addressed cases with nearly identical facts to *Khouzam*. Their decisions further support interpreting *Munaf* as permitting inquiry into the potential for torture in all removal cases, even when CAT claims are not raised. In 2006, a Canadian court

46. See, e.g., *Khouzam v. Hogan*, 529 F. Supp. 2d 543, 564 (M.D. Pa. 2008) (“[T]he right to be free from torture is *jus cogens*.”).

47. Semmelman, *supra* note 1, at 1221-22.

48. *Air Fr. v. Saks*, 470 U.S. 392, 404 (1985) (quoting *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978)).

49. Declaration of Julia Hall at 2, *Khouzam v. Hogan*, 529 F. Supp. 2d 543 (M.D. Pa. 2008) (No. 3:CV-07-0992), available at http://www.hrw.org/sites/default/files/related_material/khouzamo807.pdf (“To the best of my knowledge, no other country that has absolute nonrefoulement obligations under the Convention Against Torture or a similar treaty instrument . . . transfers a person at risk of torture without permitting him to challenge that transfer before and independent, impartial body.”). For a further breakdown of the jurisprudence of foreign nations, see HUMAN RIGHTS WATCH, *STILL AT RISK: DIPLOMATIC ASSURANCES NO SAFEGUARD AGAINST TORTURE* (2005), <http://www.hrw.org/en/node/11783/section/1>.

50. *Munaf v. Geren*, 128 S. Ct. 2207, 2226 (2008) (citing *THE FEDERALIST* NO. 42 (James Madison)).

51. It is difficult to appraise the impact of the lack of the rule on a foreign country’s ability to speak with one voice, but there does not appear to be a country that has been adversely impacted by the lack of the rule. Indeed, the U.S. government does not cite any examples in its brief in *Khouzam*. See Brief for the Respondents, *Khouzam v. Chertoff*, 549 F.3d 235 (3d Cir. 2008) (No. 08-1094).

held in *Mahjoub v. Minister of Citizenship and Immigration*⁵² that Egypt's diplomatic assurances of good treatment were insufficient to support transferring the plaintiff back to that nation. In 2008, the European Court of Human Rights (ECHR) in *Ismoilov v. Russia*⁵³ similarly ruled that diplomatic assurances of nontorture given by Uzbekistan were insufficient to support removal. These rulings display willingness by courts of American allies in the international system to examine the affairs of other nations when the jus cogens violation of torture is alleged.

These foreign decisions help resolve a question left open in both *Munaf* and *Khouzam*: What is the appropriate level of review of executive diplomatic assurances in the removal context? Justice Souter's *Munaf* concurrence, combined with foreign precedent, supports deferential review of executive acceptances of diplomatic assurances not to torture. Justice Souter indicated that the *Munaf* plaintiff did not prove a sufficiently high "probability of torture"⁵⁴ to counteract the executive's determination that he would not be mistreated upon removal. Similarly, the Canadian Supreme Court declared that it would take a "deferential approach" to these questions regarding assurances not to torture and intervene to "set aside [the Executive's decision] only if it is patently unreasonable."⁵⁵ In *Ismoilov*, the ECHR found that there were "substantial grounds for believing that [the extraditee] would be in danger of being subjected to torture"⁵⁶ and therefore was "not persuaded that the assurances from the Uzbek authorities offered a reliable guarantee against the risk of ill-treatment."⁵⁷

While these cases do not employ precisely the same standard, they point to a deferential review of the executive's determination that it has received reliable assurances that a deportee would not be mistreated. The Canadian Court explicitly takes a "deferential approach" to such determinations, while the ECHR looked to a "substantial ground" framework. Taking a similar approach, United States courts should respect the executive's leading role in foreign affairs while allowing for a deferential review to preserve deportees' fundamental rights and comply with notions of international comity. Such deference would allay Chief Justice Robert's concern that the Court would interfere in the realm of foreign affairs traditionally left to the executive by examining the possible torture of deportees.

52. [2006] 4 F.C.R. 247 (Can.).

53. App. No. 2947/06, 49 Eur. H.R. Rep. 42 (2008), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=834420&portal=hbkms&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

54. *Munaf*, 128 S. Ct. at 2228.

55. *Mahjoub*, 4 F.C.R. at 248.

56. *Ismoilov*, ¶ 68.

57. *Id.* ¶ 127.

In sum, these recent decisions, coupled with the practices of all CAT signatories and the opinions of Justice Souter and Chief Justice Roberts, support reading *Munaf* to allow for deferential inquiry into executive branch determinations regarding torture in the removal cases, rather than no inquiry at all.

CONCLUSION

As the Obama White House seeks to close Guantánamo Bay, “persuading other countries to accept detainees” has become a critical element of the Administration’s plan.⁵⁸ Approximately fifty to sixty of these detainees face no criminal charges and “have told their lawyers that they fear torture in their home countries and do not want to be returned there.”⁵⁹ The United States “has acknowledged that it relies on [diplomatic assurances] for *all* transfers from Guantánamo.”⁶⁰ The content of these assurances almost always is kept secret, even from the person to whom they refer.⁶¹

Fears of torture hardly are idle. In 2004, the United States secured diplomatic assurance from Syria that a detainee, Maher Arar, would not be tortured upon his return to the Middle East.⁶² Arar contends that he nevertheless was severely tortured upon return to Syria, and he currently is pursuing a civil remedy.⁶³ There is increasing pressure on the Obama Administration to honor its pledge to close Guantánamo by January 2010. Thus, the Administration likely will obtain guarantees of nontorture like those at issue in *Arar v. Ashcroft*⁶⁴ and find itself facing similar allegations to those raised in *Khouzam*. Moreover, as *Khouzam* shows, the risk of torture is not limited to Guantánamo detainees.

Some might argue that the impact of deferential review for all noninquiry claims would be limited since *Khouzam* allows for review of CAT claims in removal cases. Under that theory, the Third Circuit’s interpretation of *Munaf* is of

58. William Glaberson & Mark Landler, *Top Diplomat To Be Named Special Envoy on Guantanamo*, N.Y. TIMES, Mar. 12, 2009, at A18.

59. Human Rights Watch, *EU Should Help Close Guantanamo by Resettling Detainees* (Apr. 29, 2009), <http://www.hrw.org/en/news/2009/04/28/eu-should-help-close-guantanamo-resettling-detainees>.

60. Press Release, ACLU, *Documents Reveal U.S. Knowingly Transfers Detainees to Countries That Torture* (Nov. 18, 2008), <http://www.aclu.org/safefree/torture/37805prs20081118.html> (emphasis added).

61. *Id.*

62. Human Rights Watch, *Terrorism Suspects Sent Back to Countries Which Torture* (Apr. 14, 2004), <http://www.hrw.org/en/news/2004/04/14/terrorism-suspects-sent-back-countries-torture>.

63. Owen Fiss, *The Example of America*, 119 YALE L.J. POCKET PART 1 (2009), <http://yalelawjournal.org/content/view/764/1/>.

64. *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008).

little practical significance, since potential deportees need only frame their claims properly by invoking CAT. This argument is incorrect for two reasons. First, *Khouzam* is only the law of the Third Circuit, while *Munaf* binds the country. Second, there is an underlying tension in *Khouzam* that is unresolved by the Third Circuit's reading of *Munaf*. *Khouzam* provides no convincing basis for distinguishing between CAT and non-CAT removal claims. As a logical matter, concerns of competence and judicial interference apply regardless of whether or not a plaintiff invokes CAT in his effort to remain in the United States. Thus, the review standard in *Khouzam* stands on weak ground and may not be sustained by the Supreme Court or in the other circuits.

Diplomatic assurances against torture in removal cases likely will play a continuing and important role in the future of American policy. If these assurances are challenged judicially, courts should review them using a standard deferential to the executive rather than undertaking no inquiry at all. Such deferential review is consistent with *Munaf*, *Khouzam*, and foreign precedent. *Munaf* should be read to support judicial inquiry into the potential for torture, under a standard deferential to the executive trying to remove the potential deportee.

