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The Politicization of the Convention Against Torture: The Immigration Hearing of Luis Posada-Carriles and its Inconsistency with the "War on Terror"

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CASENOTE

The Politicization of the Convention Against Torture: The Immigration Hearing of Luis Posada-Carriles and its Inconsistency with the "War on Terror"

Sunjay Trehan*

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* J.D. Candidate, University of Miami, 2007. I would like to thank my wife Ashley, my family, the staff of the Inter-American Law Review, and Professor David Abraham for all of their support.
I. INTRODUCTION

On September 26, 2005, in a decision that received very little attention from the American media, Immigration Judge William Abbott ruled that Luis Posada-Carriles could not be extradited to Venezuela, where he faced charges in connection with the 1976 bombing of a Cuban airliner that killed seventy-three people. Judge Abbott relied on the United Nations Convention Against Torture (CAT) and held that there was sufficient grounds Posada would face torture and possible extradition to Cuba if he were deported to Venezuela. Under CAT, the "burden of proof is on the applicant...to establish that it is more likely than not the he or she would be tortured if removed to the proposed country of removal." The United States government, the party "seeking" extradition, did not present any witnesses and did not offer any evidence that Posada would not be tortured if extradited to Venezuela. Thus, it was not very difficult for Posada to meet his burden under CAT.

As indicated by the Posada decision, if the government seeking extradition decides that it does, or does not, want an alien extradited, it has enormous influence over the decision. The standard for CAT relief is extremely malleable and allows for political ideology to influence its results, particularly when involving suspected terrorists in the United States. This article will first offer a background of the history and purpose of CAT. It will then examine the standards necessary for relief under CAT and how these standards are applied to suspected terrorists. From there, the article will analyze the Posada decision in great detail. Finally, this article will assess the political implications of the Posada decision and offer possible solutions to avoid such grossly politicized and unjust results in the future.

2. In re Posada-Carriles, No. A-12 419 708, at 1 (Dept. of Justice, Exec. Office for Immigr. Review Sept. 26, 2005) [hereinafter Posada Immigration Decision], available at http://lawprofessors.typepad.com/immigration/files/POSADA_DECISION3_9-26-05.pdf (last visited April 17, 2006). This decision is unpublished. My attempts to obtain a written copy of the decision from Eduardo Soto, P.A. (the firm that represented Posada) and the Immigration Court in El Paso, Texas were unsuccessful. Perhaps even the court itself was embarrassed by the decision. Fortunately, I was able to find a copy of the decision at the above listed website.
3. 8 C.F.R. § 208.16(c)(2) (2006).
II. THE UNITED NATIONS CONVENTION AGAINST TORTURE (CAT)

A. History and Purpose

The United Nations Convention Against Torture (CAT) was adopted by the United Nations General Assembly on December 10, 1984, out of a desire "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world." The primary provision of CAT is within Article 3, which states that "[n]o State Party shall expel, return . . . 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." In determining whether there are such grounds, "all relevant considerations" shall be taken into account including "the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

Article 3 of CAT was incorporated into United States law in October of 1998 with the passage of the Foreign Affairs Reform and Restructuring Act (FARRA). § 2242(a) of FARRA provides:

> 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.

Implementing regulations were issued in February of 1999, which created new procedures for applying relief under CAT. Immigration judges usually have jurisdiction in the first instance.

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7. Id art 3.
8. Id.
10. Id. (citing Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) § 2242(a), 22 U.S.C. § 6501 (2006)).
to decide CAT claims.\textsuperscript{12} Judicial review of CAT claims are permitted, but only as a part of a "review of a final order of removal pursuant to [§] 242 of the INA."\textsuperscript{13}

**B. Standard of Relief Under CAT**

To gain protection under CAT, an applicant must "establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal."\textsuperscript{14} There must be persuasive evidence of the likelihood of torture in order to get CAT protection.\textsuperscript{15} CAT specifically defines torture as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.\textsuperscript{16}

As interpreted by courts in the United States, for an act to constitute torture it must be: "(1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for a prescribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official\textsuperscript{17} who has custody or physical control of the victim; and (5) not arising from lawful sanctions."\textsuperscript{18}

The denial of CAT protection by an Immigration Judge is reviewed under the "highly deferential"\textsuperscript{19} substantial evidence test, which requires the court to affirm the Immigration Judge's order if it is "supported by reasonable, substantial, and probative evidence on the record considered as a whole."\textsuperscript{20} An Immigration

\begin{itemize}
\item \textsuperscript{12} Id.
\item \textsuperscript{13} Id. at 332-33.
\item \textsuperscript{14} 8 C.F.R. § 208.16(c)(2) (emphasis added). See also Zheng v. Ashcroft, 332 F.3d 1186, 1194 (9th Cir. 2003).
\item \textsuperscript{15} 8 C.F.R. § 208.16(c)(2).
\item \textsuperscript{16} CAT, supra note 6, art 1.
\item \textsuperscript{17} Acquiescence of a public official includes both "awareness and willful blindness and does not require actual knowledge or 'willful[ ] accept[ance]'." Zheng, 332 F3d at 1197 (citing INS v. Ventura, 123 S.Ct. 353, 355).
\item \textsuperscript{18} Elien v. Ashcroft, 364 F.3d 392, 398 (1st Cir. 2004) (quoting In re J-E-, 23 I. & N. Dec. 291, 297 (citing 8 C.F.R. § 208.18(a))).
\item \textsuperscript{19} Liu v. Ashcroft, 380 F.3d 307, 312 (7th Cir. 2004).
\item \textsuperscript{20} Id (quoting Karapetian v. INS, 162 F.3d 933, 936 (7th Cir. 1998)).
\end{itemize}
Judge's legal analysis is reviewed de novo.\textsuperscript{21} 

"Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment."\textsuperscript{22} In addition, "mental pain and suffering will only constitute torture when 'prolonged mental harm' results from the occurrence or threat, to oneself or another, of 'severe physical pain or suffering,' the administration of 'mind altering substances,' or 'imminent death.'"\textsuperscript{23} 

"[A]ll evidence relevant to the possibility of future torture shall be considered" in determining whether it is more likely than not that an applicant will be tortured.\textsuperscript{24} Specifically, there are four types of relevant evidence a court should consider:

(1) Evidence of past torture inflicted upon the applicant; (2) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured; (3) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and (4) Other relevant information regarding conditions in the country of removal.\textsuperscript{25} 

What constitutes "torture" is essential in determining whether an applicant will receive CAT protection. For example, under CAT, "substandard prison conditions are not a basis for relief . . . unless they are intentionally and deliberately created and maintained in order to inflict torture."\textsuperscript{26} In addition, isolated reports of physical beatings by prison guards do not necessarily establish that such beatings are so pervasive that they indicate a likelihood of torture.\textsuperscript{27} Thus, in order to establish a likelihood of

\begin{itemize}
\item 21. Singh v. Gonzalez, 413 F.3d 156, 160 (1st Cir. 2005).
\item 22. Rashiah v. Ashcroft, 388 F.3d 1126, 1131(7th Cir. 2004) (quoting 8 C.F.R. § 208.18(a)(2) (2004)).
\item 23. Id. (quoting 8 C.F.R. § 208.18(a)(4) (2004)).
\item 24. Id. (quoting 8 C.F.R. § 208.16(c)(3) (2004)).
\item 25. Id. (quoting § 208.16(c)(3) (2004)).
\item 26. Shafer, supra note 5, at *4 (citing 8 C.F.R. § 208.16(c)(2) (2005); 8 C.F.R. § 208.18(a)(1) (2005); Alemu v. Gonzales, 403 F.3d 572 (8th Cir. 2005)).
\item 27. "While isolated reports of physical beatings of prisoners by Haitian guards might constitute evidence of torture, Haitian national failed to establish that such beatings were so pervasive within prisons in Haiti that it was more likely than not that he would be subjected to such beatings if returned to Haiti and imprisoned pursuant to Haiti's policy of detaining criminal deportees; alien did not claim that he had been tortured in past and failed to make requisite showing for grant of relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) as enacted into domestic law by the Foreign Affairs Reform and Restructuring Act (FARRA)." Id., at 21b (citing Auguste v. Ridge, 395 F.3d 123 (3d Cir. 2005)).
\end{itemize}
torture, an applicant needs to meet a high threshold.

The burden on the applicant to establish that it is more likely than not that he or she will be tortured if removed shifts to the government only after the applicant has "established that he has suffered persecution in the past or that his persecutor is a government or is government sponsored." Therefore, unless the applicant presents evidence to establish at least one of these two conditions, the burden remains with the applicant throughout the immigration proceedings.

C. CAT as Applied to Suspected Terrorists

Federal regulations provide that:

an alien whose removal has been ordered by the Alien Terrorist Removal Court under the special procedures set forth in Title V of the Act shall not be removed to a particular country if the Attorney General determines, in consultation with the Secretary of State, that removal to that country would violate Article 3.

Rights under CAT are "non-derogable, meaning that they cannot be suspended, not even in times of emergency." Article 2 of CAT states that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." 3

1. Withholding of Removal

Applicants for withholding under CAT are subject to the

28. Rashiah v. Ashcroft, 388 F.3d 1126, 1132 (7th Cir. 2004) (citing Bace v. Ashcroft, 352 F.3d 1133, 1138 n.3, 1140 (7th Cir.2003); 8 C.F.R. 208.13(b)(3)(ii) (2004)).
31. CAT, supra note 6, art 2. There is still debate as to whether the United States Senate fully adopted Article 2 when CAT was ratified in 1994. However, "[a]lthough its 1994 ratification was accompanied by a reservation adopting 'a more restrictive definition of torture' than that set out in the Convention, the Senate stated no 'reservations' to—and, therefore, fully accepted—Article 2(2)'s provision . . . ." Sanford Levinson, "Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11, 81 TEX. L. REV. 2013, 2014-15 (2003) (quoting John T. Parry & Welsh S. White, Interrogating Suspected Terrorists: Should Torture Be an Option?, 63 U. Pitt. L. Rev. 743, 746 (2002)).
nearly identical mandatory bars of removal contained in § 241(b)(3)(B) of the Act. The mandatory denials to withholding apply if the Attorney General decides that:

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;
(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;
(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or
(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

Thus, the Attorney General plays an important role in immigration proceedings. The fourth exception, which calls for a mandatory denial of withholding if the Attorney General decides that "there are reasonable grounds to believe that the alien is a danger to the security of the United States," is the most relevant to cases involving suspected terrorists. "Reasonable grounds exist to believe that an alien is a danger to the security of the United States if the alien 'has engaged, is engaged, or at any time after admission engages in any terrorist activity (as defined in section 1182(a)(3)(B)(iv) . . . ).' Under § 1182(a)(3)(B)(iii), "terrorist activity" is defined as:

[any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:
(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit

condition for the release of the individual seized or detained.
(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of Title 18) or upon the liberty of such a person.
(IV) An assassination.
(V) The use of any –
(a) biological agent, chemical agent, or nuclear weapon or device, or
(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
(VI) A threat, attempt, or conspiracy to do any of the foregoing.\(^\text{36}\)

Under § 1182(a)(3)(B)(iv), the term “engage in terrorist activity” means “in an individual capacity or as a member of an organization”:

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;
(II) to prepare or plan a terrorist activity;
(III) to gather information on potential targets for terrorist activity;
(IV) to solicit funds or other things of value for—
(aa) a terrorist activity;
(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or
(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;
(V) to solicit any individual—
(aa) to engage in conduct otherwise described in this subsection;
(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or
(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.\(^37\)

Because terrorist activity is defined very broadly, CAT relief can be withheld for a number of reasons. Courts have struggled to apply the doctrine consistently. In *Bellout v. Ashcroft* the Ninth Circuit found that there was substantial evidence which supported the Immigration Judge's conclusion that the applicant was "engaged in or was likely to engage in terrorist activity.\(^38\) The decision was based on the applicant's own testimony that he was a member of the Armed Islamic Group, a "State Department-designated terrorist organization," for three years in Algeria.\(^39\) Because the applicant was engaged in terrorist activity, the court found that there were reasonable grounds to believe he was "a danger to the security of the United States."\(^40\) Thus, the applicant was not eligible for statutory removal and withholding under CAT, despite the threat of torture he may have faced in Algeria.\(^41\)

*Arias v. Gonzales* is another recent case that illustrates the broad application of the term "engages in terrorist activity" and the difficulty faced by a suspected terrorist seeking withholding of removal under CAT.\(^42\) In this case a Colombian citizen, Arias, ille-

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38. *Bellout*, 363 F3d at 978.
39. *Id.* at 977-78.
40. *Id.* at 978 (quoting 8 U.S.C. § 1231(b)(3)(B)(iv) (2003); 8 C.F.R. § 1208.16(d)(2) (2003)).
41. *Id.*
42. *Arias v. Gonzales*, 143 Fed. App'x. 464 (3d Cir. 2005). This case was not selected for publication in the Federal Reporter and is not precedential.
gally entered the United States with the use of a fraudulent visa.\textsuperscript{43} A designated terrorist organization, the Revolutionary Armed Forces of Colombia ("FARC") was, according to the court "known to extort so-called 'war taxes' from civilians in order to finance its operations."\textsuperscript{44} Arias joined the Colombian police force in 1991.\textsuperscript{45} His duties there included fighting guerrillas who were members of FARC.\textsuperscript{46} After working a few years, Arias quit his position with the police force and began working in an area which he knew to be controlled by FARC.\textsuperscript{47} In 1997 a man approached Arias and gave him an envelope marked "Armed Revolutionary Forces of Colombia" and told him to give it to another individual (Guiterrez).\textsuperscript{48} Arias was not threatened, but was later told by Guiterrez that the letter demanded payment to FARC of a monthly "tax."\textsuperscript{49} Guiterrez then directed Arias to "pay the tax on his behalf with funds provided by Guiterrez" and Arias agreed.\textsuperscript{50} According to the facts, each month approximately fifty armed FARC guerrillas would come to receive the payments.\textsuperscript{51} Although Arias was never threatened, he "was constantly afraid of them and believed they would kill him if he did not pay them."\textsuperscript{52} Arias also testified that "he never supported or agreed with FARC's political agenda."\textsuperscript{53}

The Immigration Judge denied Arias' applications for asylum, withholding of removal, and protection under CAT, on the grounds that the payments Arias made to FARC on Guiterrez's behalf "rendered him inadmissible under § 1182(a)(3)(B) . . . [which] provides that an alien is inadmissible to the United States where he is found to have 'engaged in a terrorist activity.'"\textsuperscript{54} The payments fell under the category of a "commi[ssion of] an act that the actor knows, or reasonably should know, affords material support, including . . . transfer of funds or other material financial benefit . . . to a terrorist organization . . . ."\textsuperscript{55}

The issue of whether it is necessary for the conduct to be vol-

\begin{itemize}
  \item \textsuperscript{43} Id. at 465.
  \item \textsuperscript{44} Id.
  \item \textsuperscript{45} Id.
  \item \textsuperscript{46} Id. at 465-66.
  \item \textsuperscript{47} Id. at 466.
  \item \textsuperscript{48} Id.
  \item \textsuperscript{49} Id.
  \item \textsuperscript{50} Id.
  \item \textsuperscript{51} Id.
  \item \textsuperscript{52} Id.
  \item \textsuperscript{53} Id.
  \item \textsuperscript{54} Id. (quoting 8 U.S.C. § 1182(a)(3)(B)(i) (2005)).
  \item \textsuperscript{55} Id. (alteration in original) (quoting 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(cc) (2005)).
\end{itemize}
untary, as opposed to involuntary, was not addressed in the Third Circuit's review. The Immigration Judge found that the provision "applied regardless of whether the conduct at issue was voluntary" and the Board of Immigration Appeals agreed with this statutory construction. Still, the Third Circuit concluded that "substantial evidence" supported the Board's finding that "Arias acted voluntarily when he made payments to the FARC" and denied Arias's petition for asylum and withholding of removal on this basis. This is a very broad reading of § 1182, especially in light of the fact that FARC was known to kill individuals who did not pay the monthly "tax."

_Cheema v. Ashcroft_ also dealt with the issue of whether an alien was "engaging in terrorist activity." In that case, the Ninth Circuit deferred to the Board's holding that the alien engaged in terrorist activity "by soliciting funds for individuals and groups. . .that he knew or reasonably should have known or at least had reason to believe had committed terrorist activity; and [by giving] material support to [the groups] by connecting calls to them from Sikh militants." Thus, it does not take much for an applicant to fall within the "engaging in terrorist activity" bar to withholding of removal.

2. Deferral of Removal

If an alien is denied withholding of removal under CAT or under § 241(b)(3), he or she still has the option of deferral of removal. Deferral of removal has been described as a "limited form of protection." Before determining whether the mandatory bars of § 241(b)(3)(B) apply, the Immigration Judge is required to find whether or not the alien is more likely than not to be tortured if removed. If the bars to withholding of removal of § 241(b)(3)(B) do not apply, the judge will grant withholding of removal. However, if the bars to withholding of removal do

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56. Id.
57. Id.
58. Id. at 468.
59. Id. at 465.
60. Cheema v. Ashcroft, 383 F.3d 848 (9th Cir. 2004).
61. Id. at 853 (internal citations omitted).
64. See Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8481 (Feb. 19, 1999) (codified at 8 C.F.R. § 208.17 (2006)).
65. See id.
66. See id.
apply and the Immigration Judge finds that the alien is more likely than not to be tortured in the proposed country of removal, 8 C.F.R. 208.17 requires the Immigration judge to defer removal. According to the regulations, an alien is not required to apply separately for deferral of removal. The alien will not be returned to the proposed country of removal while the order of deferral is in effect.

Thus, under CAT, an applicant can receive withholding of removal if the applicant can establish that it is more likely than not he or she would be tortured if removed. However, if the applicant establishes that it is more likely than not he or she would be tortured, and one or more of the mandatory bars of § 241(b)(3)(B) apply, the applicant can only receive a deferral of removal under CAT.

The regulations note that the order of deferral “provides a much more limited form of protection than does a grant of withholding of removal.” An order of deferral does “not confer upon the alien any lawful or permanent immigration status in the United States . . . .” The order is subject to “streamlined and expeditious review and termination if it is determined that it is no longer likely that the alien would be tortured” in the proposed country of removal. In addition, the order of deferral, like withholding, does not prevent the government from removing the alien to another country where the alien would not be tortured. The Immigration Judge is required to inform the alien of the “limited nature of the deferral order at the time such order is entered.” For example, in the Posada hearing, the fact that Posada was granted a deferral of removal does not prevent the United States from removing him to a country other than Venezuela or Cuba. In principle, it also does not prevent removal to Venezuela or Cuba at a later date if it is determined that those countries no longer engage in the practice of torture.

In Bellout v. Ashcroft, although engaging in terrorist activity barred the alien from withholding of removal under CAT, he was still eligible for “deferral of removal” under CAT if he could estab-

67. See id.
68. See id.
69. See id.
70. Id.
71. Id.
72. Id.
73. See id.
74. Id.
lish that it was "more likely than not" that he would be tortured if removed to the proposed country of removal.\textsuperscript{75} However, in \textit{Bellout} the alien testified to only one incident of abuse by the police before he joined the "State Department-designated terrorist organization\textsuperscript{76} and there was "no evidence in the record that the Algerian government [was] aware that Bellout joined the [designated terrorist organization] or [was] interested in him."	extsuperscript{77} In addition, the Immigration Judge found that there was "no evidence that members of militant groups who leave Algeria [would] be persecuted or tortured upon return."\textsuperscript{78} Because of a lack of evidence, the court held that the alien "did not meet his burden of establishing it is more likely than not that he will face torture if returned to Algeria."\textsuperscript{79} Therefore, Bellout was unable to defer removal under CAT.

Similarly for the husband in \textit{Cheema}, the Court affirmed the Board's determination that full relief under CAT was barred.\textsuperscript{80} However, the court also deferred to the Board's holding that the alien "may not be deported to the country where he is likely to be tortured."\textsuperscript{81} This is another example of how "engaging in terrorist activity" can bar withholding, but cannot completely bar deferral of removal under CAT.

\textit{Bellout} and \textit{Cheema} demonstrate that it can sometimes be very difficult for an alien to establish that it is more likely than not he or she will be tortured if removed. However, it is relatively easy for the country "seeking removal" to take steps in order to ensure CAT relief will be granted. For example, in the \textit{Posada} hearing, the United States government presented no witnesses to rebut the testimony of Posada's witnesses, who testified that he would be tortured if sent to Venezuela or Cuba.\textsuperscript{82} Jose Pertierra, a lawyer who represents Venezuela on the Posada case, said after the decision that, the "[Department of Homeland Security] gave

\textsuperscript{75} "Although barred from 'withholding of removal' under CAT, Bellout remains eligible for 'deferral of removal' under CAT. To be eligible for deferral of removal under CAT, Bellout must establish that he 'is more likely than not to be tortured' if he returns to Algeria." Bellout v Ashcroft, 363 F.3d 975, 979 (9th Cir. 2004) (citing 8 C.F.R. § 1208.17(a)(2003)); \textit{See also} Zheng v. Ashcroft, 332 F.3d 1186, 1194 (9th Cir. 2003).
\textsuperscript{76} \textit{Bellout}, 363 F.3d at 977.
\textsuperscript{77} \textit{Id.} at 979.
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{See} \textit{Cheema v. Ashcroft}, 383 F.3d 848, 859 (9th Cir. 2004).
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Posada Immigration Decision, supra} note 2, at 3.
this decision to the judge on a silver platter." Perttierra also stated that he felt "deceived with the conduct of the prosecutors and DHS, which didn't litigate this case in good faith." The *Posada* decision will be discussed at great lengths *infra* Part III.

III. IN THE MATTER OF LOUIS POSADA-CARRILES

A. Events Leading Up to the Decision

In 1976 a bomb was detonated aboard a Cuban airliner en route from Caracas, Venezuela to Havana, Cuba. Seventy-three people were killed. Posada was charged in Venezuela in connection with the bombing and was acquitted. In 1985, while awaiting a prosecutor's appeal of the decision, Posada escaped from a Venezuelan prison.

In 1997 Posada was implicated in a series of bombings at Havana hotels and restaurants that injured 11 people and killed an Italian tourist. Posada was wanted in Cuba in connection with the bombings. In 2000 Posada was arrested for plotting to kill Cuban President Fidel Castro while the president was attending a summit in Panama. A Panamanian court dropped the most serious charges. However, in April of 2004 Posada and three others were convicted on lesser charges and Posada was sentenced to up to 8 years in prison. Five months later, then Panamanian President Mireya Moscoso pardoned Posada.

Posada secretly lived in the Caribbean and Central America until March of 2005, when he traveled from Guatemala to the United States-Mexico border and was smuggled into the United States. He then took a bus to South Florida, where he remained for several months until he was detained. On May 10, 2005 declassified CIA and FBI documents suggested that Posada was

84. *Id.*
86. *See id.*
87. *See id.*
88. *See id.*
89. *See id.*
90. *See id.*
91. *See id.*
92. *See id.*
93. *See id.*
94. *See id.*
95. *See id.*
96. *See id.*
involved in the 1976 bombing of the Cuban airliner. Venezuela submitted an extradition request to the United States. The United States government then brought proceedings against Posada in an immigration court in El Paso, Texas, charging Posada with entering the country illegally.

B. The Decision

On September 26, 2005, Immigration Judge William Abbott ruled that Posada could not be extradited to Venezuela. The Posada decision is an example of a case in which a suspected terrorist was granted deferral of removal under CAT. Granting of deferral of removal under CAT is not supposed to be influenced by the status of the applicant. As Judge William Abbott correctly asserted in his decision, there are no statutory bars to deferral of removal, and even "the most heinous terrorist or mass murderer would qualify for deferral of removal if he or she could establish the necessary burden of proof regarding the probability of torture in the future." However, in practice, as evidenced by Bellout and Cheema in the discussion above, deferral of removal tends to be denied or limited in cases involving suspected terrorists.

In the Posada decision, the applicant, Posada, conceded that he was deportable for being inadmissible and entering the United States without a proper entry visa. Instead, Posada applied for withholding of removal under Article III of CAT. After the Department of Homeland Security (DHS) submitted a motion to pretermi Posada's application for withholding of removal, Posada conceded ineligibility for withholding under § 241(b)(3)(B)(iii) for a "serious nonpolitical crime outside the United States before arrival." The DHS stipulated a grant of deferral of removal in relation to Posada's potential deportation to Cuba. However, DHS did not stipulate as to Posada's request for deferral of removal to Venezuela.

97. See id.
98. See Alicia Caldwell, Posada Proceedings Won't Be in Florida MIAMI HERALD, June 21, 2005, at B3.
99. See id.
100. Corral, supra note 1, at A1.
101. Posada Immigration Decision, supra note 2, at 5.
102. Id. at 2.
103. Id.
104. Id.
105. Id.
106. Id.
Posada testified that because of his anti-Castro activities he would be tortured and killed if returned to either Venezuela or Cuba.\textsuperscript{107} In his testimony, Posada said he was particularly worried that, because of the ties between Castro and Hugo Chavez, the President of Venezuela, if extradited to Venezuela, he could be sent to Cuba.\textsuperscript{108} Posada also submitted numerous articles and papers “regarding current affairs in Venezuela and Cuba.”\textsuperscript{109} Only one witness was presented by Posada: attorney Joaquin Fernando Chaffardet Ramos, an attorney from Venezuela.\textsuperscript{110} Chaffardet testified that due to Chavez’s extraordinary interest in the Posada case, Posada could not receive a fair trial in Venezuela.\textsuperscript{111} Chaffardet also testified that he personally observed victims of torture at the hands of Venezuelan security personnel.\textsuperscript{112} No details of torture were provided in Judge Abbott’s written decision.

In response to Posada’s testimony, DHS did not submit any rebuttal evidence relating to Posada’s application for deferral of removal.\textsuperscript{113} At closing argument, DHS stated that the Venezuelan Constitution prohibits the extradition of its citizens to other countries.\textsuperscript{114} DHS had “no specific information indicating” that Venezuela would extradite Posada to Cuba.\textsuperscript{115} However, the United States Government was “concerned that the growing economic and political ties between Cuba and Venezuela might persuade President Chavez to allow Cuban agents to come to Venezuela where [Posada] could possibly suffer torture at the hands of these Cuban agents.”\textsuperscript{116} Again, DHS presented no specific information that this would happen.\textsuperscript{117}

Despite the speculative nature of the little evidence presented at the hearing, Judge Abbott held that, under CAT, it was “more likely than not” Posada would be tortured if sent to Venezuela.\textsuperscript{118} Specifically, the Court found that in the absence of evidence to the contrary:

“that torture exists in Venezuela, although not on a wide-
spread scale; that the notoriety of a case does not immunize the detainee from possible torture; that Cuban authorities, as a matter of official policy, engage in the systematic torture of detainees for the purposes of extracting information, intelligence, and confessions; that existing cultural, political, and economic ties between Cuba and Venezuela make the case of the respondent problematic in that it appears plausible that Cuban agents may be allowed to interrogate the respondent while in the custody of Venezuelan authorities; that it is more likely than not that the Cuban agents would subject the respondent to torture as this is part of their interrogation technique; that there is nothing in the record to suggest that the Venezuelan authorities would prohibit this practice, and thus, would acquiesce in the torture of the respondent by Cuban agents."

C. Errors and Inconsistencies in the Posada Decision

1. Posada Did Not Meet His Burden of Proof Under CAT

There are many errors in the Posada decision. First, Posada did not appear to meet his burden of proof under CAT. Judge Abbott stated that "there is nothing in the record to suggest that the Venezuelan authorities would prohibit this practice [of torture]." However, under CAT, the burden is on the alien to establish that it is "more likely than not" that he would be tortured, not on the authorities of the proposed country of removal. The burden should have been on Posada to present evidence establishing that it is more likely than not he would be tortured in Venezuela. Instead, there was a presumption that Posada would be tortured if sent to Venezuela, and Judge Abbott concluded that there was nothing in the record that indicated otherwise.

Judge Abbott also stated that because of the existing "cultural, political and economic ties between Venezuela and Cuba" that it "appears plausible" that Cuban agents "may be allowed" to interrogate Posada "while in the custody of Venezuela." Judge Abbott then found that "it is more likely than not that the Cuban agents would subject the respondent to torture as this is part of

119. Id. at 6.
120. Id.
121. "The burden of proof is on the applicant for withholding of removal ... to establish that it is more likely than not the he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2) (2006).
122. Posada Immigration Decision, supra note 2, at 6.
123. Id.
their interrogation technique.”

Thus, Judge Abbott's reasoning is that since it “appears plausible” that Cuban agents “may be allowed” to enter Venezuela to interrogate Posada, and because Cuban agents are “more likely than not” to torture Posada if allowed in Venezuela, it is “more likely than not” that Posada would be tortured if removed to Venezuela. The conclusion does not logically follow from the speculative nature of the presumptions. “Appears plausible” and “may be allowed” do not rise to the level of “more likely than not.” Since these two conditions are necessary for Cuban agents to even enter Venezuela, the conclusion that it is “more likely than not” that Posada would be tortured at the hands of the Cuban agents is illogical. Therefore Judge Abbott erred as a matter of both logic and law when he held that it was “more likely than not” that Posada would be tortured if removed to Venezuela.

The arguments presented by the United States Government and DHS were also equally speculative. For example, the United States Government was “concerned” that because of the growing economic ties President Chavez “might” be persuaded to allow Cuban agents to come to Venezuela. In addition, the Government evidence stated that if the Cuban agents were to arrive, Posada “could possibly” be tortured by these Cuban agents. Thus, there was a “concern” that something “might” happen that could lead to the “possibility” of something else happening. This combination should not lead to a conclusion that the “something else” is “more likely than not” to happen, as required to gain a deferral of removal under CAT. Yet, this evidence, in combination with the testimony of Posada, the applicant seeking relief, and a Venezuelan lawyer, who happened to be an “old friend” of Posada’s, was enough to satisfy the “more likely than not” standard required to gain deferral of removal under CAT.

124. Id. While, this finding was based upon “all country reports, both Department of State and other Non-governmental organizations,” details of the reports and details of the interrogation techniques in question were not provided in Judge Abbott's decision. See id.

125. Id. at 3.

126. Id.

2. The Posada Decision is Inconsistent with Other CAT Decisions Involving Venezuelan Citizens

Two recent cases have denied withholding of removal under CAT for Venezuelan applicants. In Rosal-Olavarrieta v. Gonzales, petitioner Rosal, a citizen of Venezuela, requested deferral of removal to Venezuela under CAT claiming a well-founded fear of persecution and/or torture because he was an HIV-positive homosexual man. Rosal testified to past accounts of sexual orientation harassment and discrimination in Venezuela as well as extortion by the Venezuelan police. In particular, Rosal testified that he had been "stopped by the police many times and forced to pay a bribe or the police would put him in detention with other prisoners." Rosal also claimed he would receive inadequate medical treatment in Venezuela. The Immigration Judge found that Rosal "exaggerated" the incidents of past persecution and torture by the Venezuelan police and denied CAT relief. On appeal, Rosal sought to introduce supplemental evidence of past persecution and torture, on account of difficulties communicating with his counsel. The Board of Immigration Appeals refused, concluding that Rosal "had an adequate opportunity to develop his allegations of persecution but had failed to do so." The Third Circuit affirmed the decision, finding that Rosal failed to provide credible testimony of past persecution.

In Ortega v. U.S. Attorney General, applicant Ortega, a Venezuelan citizen originally admitted into the United States on a non-immigrant visitor visa, sought withholding of removal to Venezuela under CAT. Ortega alleged that he had received threatening phone calls and had been physically attacked because of his political opinion. He also stated that he feared he would be killed if returned to Venezuela. Ortega testified that he had participated in several marches and protests in opposition to Venezuelan President Hugo Chavez and that he acted as armed secur-

129. Id. at 594.
130. Id. at 595.
131. Id. at 594.
132. Id.
133. Id.
134. Id. at 595.
135. Id.
137. Id. at 831.
138. Id.
ity for a regional governor opposing Chavez. Ortega visited the United States after beginning his political involvement, but returned to Venezuela without requesting asylum. Upon returning to Venezuela, Ortega received at least five calls from an unidentified man who Ortega believed to be affiliated with the Bolivarian Circle, a pro-Chavez group. The unidentified man used "filthy language," called Ortega a traitor, and told Ortega to stop participating in demonstrations opposing Chavez. These calls were not reported to the police because Ortega feared the police were controlled by Chavez. One morning, Ortega was attacked and beaten while on his way to work. Following the attack, Ortega received another call reiterating warnings. Ortega then decided to leave Venezuela.

The Eleventh Circuit upheld the Immigration Judge's denial of asylum. The court found that there was substantial evidence to support the Immigration Judge's conclusion that Ortega failed to establish past persecution. It reasoned that, "although the phone calls and attack may support a finding of persecution, they do not necessarily compel such a conclusion." In addition, the court stated that "a single attack and a few phone calls does not rise to the level of persecution." The court also found that the Immigration Judge "properly determined that Ortega failed to show an objectively reasonable fear of future persecution." The court stated that Ortega did not offer any specific evidence showing a causal connection between the attack and Ortega's political expression, despite the fact that Ortega received threatening calls telling him to stop his demonstrations prior to and directly after the attack. Because Ortega's asylum claim failed, the court stated that his CAT claim was without merit.

139. Id.
140. Id.
141. Id.
142. Id.
143. Id. at 832.
144. Id. at 831.
145. Id.
146. Id.
147. Id. at 834.
148. Id. at 833.
149. Id. (citing Sepulveda v. U.S. Att'y Gen., 401 F.3d 1226, 1231 (11th Cir. 2005)).
150. Id. (citing Sepulveda, 401 F.3d at 1231).
151. Id.
152. Id.
153. Id. at 831.
154. "Where an applicant fails to establish a claim of asylum on the merits, the
Unlike Posada, the applicants in Rosal and Ortega presented specific instances in which they were threatened. Ortega also provided an instance in which he was physically attacked. Despite these specific instances of conduct, both Rosal's and Ortega's claims failed, while Posada's succeeded. Consistency amongst applicants seeking withholding of removal under CAT is, of course, unlikely if not impossible. Here, however, the inconsistency between applicants all seeking withholding of removal to Venezuela is beyond glaring.

3. The Posada Decision is Inconsistent with United States' Practices and Policies

The granting of deferral of removal to Posada is also inconsistent with the current position of the United States on the "harboring" of terrorists. In a public response before Congress and the nation to the September 11th terrorist attacks on the United States, President Bush stated: "Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime." In his State of the Union Address in 2002, President Bush stated that "...so long as nations harbor terrorists, freedom is at risk. And America and our allies must not and will not allow it." In a speech to the nation attempting to justify the impending war in Iraq, President Bush reiterated his statement from his 2002 State of the Union Address, stating: "When I spoke to Congress more than a year ago, I said that those who harbor terrorists are as guilty as the terrorists themselves."

Despite these statements of policy from the President, the United States is currently "harboring" Posada, a suspected terrorist. Not only is the United States currently holding Posada, the government did not even attempt to present a case against Posada which would have extradited him to a country where he was awaiting trial for his terrorist activity. As a result of the decision, it is unlikely that Posada will ever be brought to justice. This other claims for withholding of removal under the INA or under CAT generally fail." Id. (citing Forgue v. U.S. Att'y Gen., 401 F.3d 1282, 1288 n.4 (11th Cir. 2005)).


156. President's Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 129, 131 (Jan. 29, 2002).

157. Address to the Nation on Iraq From Cincinnati, Ohio, 38 WEEKLY COMP. PRES. DOC. 1716, 1717 (Oct. 7, 2002).
severely undermines the credibility of the United States in its "War on Terror."

The *Posada* decision has exposed the United States to well-founded cries of hypocrisy regarding the United States' position on torture. During the "War on Terror", the CIA has allegedly helped move "dozens of detainees" to Jordan, Egypt, Morocco and Syria.\(^{158}\) This process, known as "extraordinary rendition" involves capturing suspected terrorists and sending them to their home countries or to third countries, some of which have records of torturing their prisoners.\(^{159}\) Syria, for example, has a strong record of torturing its prisoners. According to a 2004 State Department Report, "there was credible evidence that security forces continued to use torture frequently."\(^{160}\) In addition, there were "reports of death in prison due to torture" and the "torture of political detainees was a common occurrence."\(^{161}\) The report describes the torture methods in great detail, which includes,

administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim was suspended from the ceiling; hyperextending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a backward-bending chair to asphyxiate the victim or fracture the victim's spine.\(^{162}\)

In 2002, the United States Government arrested Canadian Maher Arar at New York's JFK Airport on a suspicion he was engaging in terrorism.\(^{163}\) Maher Arar was then sent to Syria where he was tortured and his hands "repeatedly whipped with cables."\(^{164}\) He was released after one year and it was announced that there were no findings of any terrorist links.\(^{165}\) He is currently suing the United States Government.\(^{166}\) Recently, Robert Tuttle, the United States ambassador to London was "forced to retract his categorical denial that the US had sent any terrorism


\(^{161}\) *Id.*

\(^{162}\) *Id.*


\(^{164}\) *Id.*

\(^{165}\) *Id.*

\(^{166}\) *Id.*
suspects to Syria, a country that routinely practises torture.\textsuperscript{167}
Also, a formal investigation by a 46-member committee of the European Parliament was initiated in January 2006 after it was reported that CIA aircraft have transported terrorist suspects across Europe to countries such as Egypt, Syria, and Saudi Arabia.\textsuperscript{168}

In addition to transferring detainees to countries that engage in torture, the United States may be engaging in many of the same interrogation techniques that Judge Abbot condemned in the \textit{Posada} decision. There are many reports of torture at the Guantanamo detention camps where hundreds of prisoners, only some suspected of terrorism, are being held. A recent United Nations report documented some of the "authorized" techniques, including the use of dogs, exposure to extreme temperatures, sleep deprivation for several consecutive days, and prolonged isolation.\textsuperscript{169} While individual use of these techniques is "perceived as causing severe suffering," the simultaneous use of the techniques probably amounts to torture.\textsuperscript{170} In addition, there are reports of torture at secret prisons in Afghanistan.\textsuperscript{171} There is also photographic evidence of the treatment of prisoners at Iraq's Abu Ghraib prison that provides tangible examples of the United States military torturing Iraqi prisoners.\textsuperscript{172} The evidence that the United States engages in the practice of torture seems far more convincing than the testimony of a single paid lawyer on which Judge Abbott based his decision in the Posada case.

\begin{thebibliography}{9}
\bibitem{167} Anton La Guardia, \textit{US Ambassador Corrects Slip-up over Sending Suspects to Syria}, \textit{Daily Telegraph} (London), Dec. 27, 2005 at 16.
\bibitem{170} See id.
\bibitem{171} "Eight men at the American detention camp in Guantánamo Bay have separately given their lawyers 'consistent accounts' of being tortured at a secret prison in Afghanistan at various periods from 2002 to 2004 . . . . [T]hey say they were chained to walls, deprived of food and drinking water, and kept in total darkness with loud rap or heavy metal music blaring for weeks at a time." Carlotta Gall, \textit{The Reach of War: Detainees; Rights Group Reports Afghanistan Torture}, \textit{NY Times}, Dec. 19, 2005, at A14.
\bibitem{172} The photographs, originally obtained by CBS for \textit{60 Minutes II}, included a photo of naked Iraqi prisoners stacked in a human pyramid (one with a slur written on his skin in English), a photo of a prisoner standing on a box with his head covered and wires attached to his body, and a photo of male prisoners positioned to simulate sex with each other. James Risen, \textit{Treatment of Prisoners: G.I.'s Are Accused of Abusing Iraqi Captives}, \textit{NY Times}, Apr. 29, 2004, at A15.
\end{thebibliography}
The Bush Administration has fought efforts from Congress to ban United States forces from "cruel, inhuman or degrading" treatment of its detainees.\(^{173}\) In addition, the Bush Administration attempted "to limit the definition of torture to that which inflicts agony just short of the pain of organ failure or death."\(^{174}\) Since the Posada decision, and as a result of worldwide scrutiny over Abu Ghraib and the treatment of Guantanamo detainees, the United States has had to reconsider its position on torture. The Bush Administration faced heavy pressure from Congress to support a ban on the torture of detainees. In December of 2005, the Bush Administration finally agreed to a ban on torture.\(^{175}\) Amendments set out in the Detainee Treatment Act of 2005 place a prohibition on "cruel, inhuman, or degrading treatment or punishment" of persons under control of the United States Government.\(^{176}\)

However, the potential deterrent effect of the amendment was lessened by a last-minute change that added protection against litigation for those conducting such interrogations.\(^{177}\) This provision allows United States personnel a defense when dealing with suspected terrorists that such personnel "did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful."\(^{178}\) It also states that "good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful."\(^{179}\)

In addition, when signing the bill, President Bush issued a "'signing statement,' saying he would interpret the restrictions in the context of his broader constitutional powers as commander in chief."\(^{180}\) According to the Boston Globe, "[a] senior administration official later confirmed that the president believes the Constitution gives him the power to authorize interrogation techniques that go beyond the law to protect national security."\(^{181}\)

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174. Id.
175. See id.
177. See Cullen, supra note 173.
179. Id.
181. Id.
set off an intense battle between Congress and the Executive Branch over the authority of the President to act beyond the law. It also fuels claims of hypocrisy from those nations whose extradition requests the United States has denied on account of the practice of torture.

**D. The Posada Decision Appears to be the Result of Politics**

There are strong indications that the *Posada* decision was politically-based. The attorneys for the Department of Homeland Security did not present its best case against Posada to prevent a deferral of removal. Indeed, they barely presented any case at all. Rather, DHS attorneys expressed concern that Venezuela might let Cuban agents into Venezuela where Posada “could possibly suffer torture” at the hands of these agents.182 Because the DHS attorneys did not even perform their most minimum duty as prosecutors, there is an appearance that their actions were influenced by a higher authority.

There are several possible reasons why the United States did not want Posada extradited to Venezuela. One possible reason is that the government wanted to appease Cuban American organizations, particularly in the critical election state of Florida. The Cuban American vote represents a strong and important base for the current Administration and many elected representatives. Right wing exile organizations have a strong influence over the vote, and these organizations are as active, relentless, and uncompromising as any in the United States. Many Cuban Americans have been told and believe that Posada is a “freedom fighter” or a “patriot,” notwithstanding Posada’s suspected terrorist activity.183 In a recent poll conducted by Coral Gables-based Bendixen & Associates, over 65% of Cuban exiles living in South Florida have a “positive opinion” of Posada.184 In addition, 61% of exiles feel that he is a patriot rather than a terrorist.185 Sergio Bendixen, who funded the poll, said “Cuban exiles feel that when Posada was committing all of these acts of violence, that was the strategy then and he was following orders from the CIA . . . . And they don’t think it’s fair to punish him now because the strategy has

182. *Posada Immigration Decision*, supra note 2, at 3.
184. Id.
185. Id.
changed."186 Knowing that much of the Cuban American support for the Administration could be lost if Posada were brought to trial in Venezuela, perhaps those government officials sensitive to the desires of Cuban exile groups had an influence over the DHS's trial strategy.

Another reason why the United States did not want Posada removed to Venezuela may have to do with Posada's history with the United States Government. The CIA trained Posada to take part in the 1961 Bay of Pigs invasion.187 Posada also worked for the CIA in Miami and later helped the United States arm Contras in Nicaragua.188 Judge Abbott in his opinion acknowledged that Posada was a "cold war warrior, working on behalf of the United States in the early days of the Cuban problem."189 It is entirely possible that not removing Posada to Venezuela is a reward for his service to the United States government during the Cold War. It is also possible that, if there were a public trial in Venezuela, this information would likely be brought to the forefront of mainstream media. Not only does this information have the potential to embarrass the United States, it is possible that there is other information even more embarrassing that could surface during the course of a trial.

E. Implications of the Posada Decision and Other Decisions Under CAT

A denial of the extradition of a suspected terrorist on the basis of CAT can have far-reaching political repercussions. In some cases such a denial is tantamount to saying that another country condones or endorses torture. The decision not to extradite Posada to Venezuela has already strained the fragile relations between Venezuela and the United States. Before the Posada decision, Venezuelan President Hugo Chavez stated "if the United States does not extradite Luis Posada Carriles, we will be forced to reconsider our diplomatic ties . . . . We will have to consider whether it's worth having an embassy there, and whether it's worth the United States having an embassy here."190

186. Id.
188. Id.
189. Posada Immigration Decision, supra note 2, at 5.
Since the decision, top Venezuelan diplomat for North America, María del Pilar Hernández, stated, “I would like for them to present just one piece of evidence that Venezuela tortures people when our constitution clearly establishes the prohibition of torture.”191 Two days after the Posada decision, President Chavez pointed out the hypocrisy, “In Guantánamo [the United States] torture[s] people. They’re the ones who torture. They murder, they bomb, they kill children — and now a judge over there says he [Posada] can’t go to Venezuela because he runs the risk of being tortured here.”192 The Venezuelan Ambassador to the United States, Bernardo Alvarez, also challenged the decision not to extradite Posada to Venezuela.193

Given the reaction of Venezuelan officials to the Posada decision, if an act of terrorism were committed in the United States and the terrorist fled to Venezuela, it is highly unlikely that the terrorist would be returned to the United States to stand trial. One can only imagine the outrage of the American public if an associate of Osama Bin Laden were found in Venezuela, and the Venezuelan government refused to extradite him to the United States, finding it more likely than not that he would be tortured if removed.

In a recent ruling in London, cleric Abu Hamza was convicted of inciting his supporters to kill Jews and non-Muslims.194 Abu Hamza is also wanted in the United States on charges of “trying to establish a terrorist training camp in Oregon, conspiring to take hostages in Yemen, and facilitating terror training in Afghanistan.”195 The United States is seeking extradition after Abu Hamza serves his seven year sentence. Justice Department spokesman Bryan Sierra said that the United States “stands ready to resume the extradition proceedings against Abu Hamza when British law allows.”196 What would happen if Great Britain deferred removal under CAT, finding that it is more likely than not that he would be tortured if removed to the United States? Unfortunately, it would not be unreasonable for a Judge in Great Britain to make such a finding, given the treatment of terrorist

191. Ian James, Venezuela Criticizes Court Ruling on Posada, MIAMI HERALD, Sept. 29, 2005, at A12.
192. Id.
194. See Tariq Panja, Cleric in Britain Gets 7 Years for Inciting, PHILA. INQUIRER, Feb. 8, 2006, at A3.
195. Id.
196. Id.
suspects at Guantanamo. The political and foreign relations fall-out would be tremendous. However, it is unlikely that such a ruling would be issued given current relations between the United States and Great Britain.

F. Note on the Aftermath of the Posada Decision

Since gaining a deferral of removal, Posada pushed for full release from the El Paso immigration detention facility. However, his release was dependent on “demonstrating to the satisfaction of the Attorney General and Secretary of Homeland Security that [he] will not pose a danger to the community and [he] will not pose a flight risk.” On March 22, 2006, the United States government decided that it would not free Posada. A letter to Posada from the U.S. Immigration and Customs Enforcement (ICE) designated Posada as a “flight risk” and as someone having a “history of engaging in criminal activity, associating with individuals involved in criminal activity, and participating in violent acts that indicate a disregard for the safety of the general public.”

Posada has filed for a writ of habeas corpus in federal court in El Paso, arguing that he “has been detained longer than six months and that ICE has ‘failed to provide’ evidence that he poses a danger to the community or national security.” Posada also contends that he was “a loyal servant of the United States who advanced the national interest.” If his petition is successful, it is possible that Posada will avoid a criminal trial altogether for his alleged involvement in the bombing of a Cuban airliner that killed seventy-three people and the bombing of a Cuban hotel that killed an Italian tourist.

IV. IDEAS FOR MODIFYING CAT

One way to avoid the gross miscarriage of justice in cases like

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198. Id.
200. Id.
202. Id.
203. As of May 11, 2006, a ruling on Posada’s petition for a writ of habeas corpus has yet to be made.
Posada would be to modify CAT to require the government seeking extradition to present its case against the alien in "good faith." This would discourage governments from presenting weak cases in an attempt to withhold or defer the extradition of an alien.\textsuperscript{204} In the Posada case, the government did not present any witnesses to rebut the testimony of Posada that he would be tortured if removed to Venezuela.\textsuperscript{205} If there were a "good faith" requirement, perhaps a stronger case would have been presented against Posada and the political fallout could have been reduced. A "good faith" provision would also reduce or prevent the appearance of Presidential and other Executive influence in the decision. In addition, such a provision would help fulfill the professional ethical requirements likely breached by the government attorneys in Posada.

The law of CAT in the United States is also still largely undeveloped. There has yet to be a Supreme Court case deciding a CAT claim. Clearer standards need to be delineated by the Supreme Court to resolve the struggle to define "engaging in terrorist activity" under CAT. In addition, there is still ambiguity over what constitutes torture for the purposes of deferral of removal. A clearer definition of torture, either set out by the Supreme Court or by Congress, would help make decisions under CAT more consistent. What constitutes a "likelihood" of torture also needs to be more clearly defined. The Supreme Court in Cardoza-Fonseca and numerous other cases have squarely faced a range of "likelihood" issues.\textsuperscript{206} It could do so here as well. These steps would help to reduce the perception of American political and ideological bias towards one country over another when removing aliens.

V. Conclusion

Decisions under CAT can have political implications beyond the scope of the individual applicant seeking relief. A major short-
coming of CAT is the inevitable political and foreign policy problems it presents and indeed encourages. Although CAT is designed to be a humanitarian project, it cannot escape sovereign politics. Because of this, it is necessary that decisions under CAT be carefully made. It would also be helpful if the standards for relief under CAT were clearer so as to prevent the appearance of political influence or bias towards any particular country.

The Posada decision represents the malleability of CAT and how a government can take political advantage of its malleability at the expense of justice. The government in the Posada decision did not present its best case against Posada. As a result, it is possible that there will never be justice for the family members of the seventy-three people who died in the bombing of the Cuban airline in 1976 or the family of the Italian tourist who was killed in 1997. In addition, the Posada decision has the potential to severely undermine the credibility of the United States in its “War on Terror.” Modifications of CAT are necessary so as to avoid decisions such as Posada in the future. However, in the absence of such modifications, those nations that are members of CAT must act more responsibly, especially when dealing with suspected terrorists, to avoid such political, inconsistent, and unjust decisions.