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The Tension between Policy Objectives and Individual Rights: Rethinking Extradition and Extraterritorial Abduction Jurisprudence

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COMMENTS

The Tension Between Policy Objectives and Individual Rights: Rethinking Extradition and Extraterritorial Abduction Jurisprudence

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I. INTRODUCTION

The United States' "War on Drugs"[1] has become increasingly

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1. The United States has been waging a "war" on drugs since the early 1970s. In 1973, President Nixon declared war on international drug trafficking, calling it the na-

international in scope.[2] One consequence of this "internationalization" has been the removal of barriers to anti-narcotics enforcement efforts.[3] Legally, the Drug War's growing enforcement emphasis has prompted revisions in the wording and application of extradition

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tion's number one problem. JERALD W. CLOYD, DRUGS AND INFORMATION CONTROL: THE ROLE OF MEN AND MANIPULATION IN THE CONTROL OF DRUG TRAFFICKING 88 (1982).

2. The preferred strategy of the United States in combatting the international drug problem has been interdiction. *See infra* part II. "Interdiction involves efforts to intercept or deter foreign shipment of illegal narcotics into the United States." Mary E. Welch, *The Extraterritorial War on Cocaine: Perspectives From Bolivia and Colombia*, 12 SUFFOLK TRANSNAT'L L.J. 39, 42 (1988). However, due to the inadequacy of interdiction efforts, the United States developed new strategies which focused on the origins of illegal narcotics. In addition to extradition, discussed *infra* in part III, these strategies have included the increased participation by the military in assisting drug law enforcement, both domestically and internationally; and linking foreign economic assistance in recognized drug producing and drug transmitting nations with drug control efforts. *Id.* at 45. For other examples of the United States offering incentives to foreign countries to gain compliance with United States foreign policy goals, see *infra* part II.

3. *See generally* Ethan A. Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT'L L.J. 37 (1990). Internationalization is an identifiable policy direction in other areas as well. In 1984 and 1986, for example, Congress passed legislation giving the United States extraterritorial jurisdiction over certain terrorist crimes committed anywhere in the world. *See* Aircraft Sabotage Act, Pub. L. No. 98-473, 98 Stat. 2187 (1984) (codified as amended at 18 U.S.C. §§ 31, 32 (1988)); Act for the Prevention and Punishment of the Crime of Hostage Taking, Pub. L. No. 98-473, 98 Stat. 2186 (1984) (codified as amended at 18 U.S.C. § 1203 (1988)); Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 896 (1986) (codified as amended at 18 U.S.C. § 2331 (1987)).

The Drug War has also effected the scope of individual rights within the United States. One area in which individual rights have been narrowed is in the Supreme Court's Fourth Amendment jurisprudence. *See* Florida v. Bostick, 111 S.Ct. 2382, 2386-88 (1991) (holding the actions of sheriff officers in boarding a bus, questioning defendant, and conducting a consensual search of defendant's luggage did not constitute a "seizure" under the Fourth Amendment); Alabama v. White 496 U.S. 325, 328-32 (1990) (holding that an anonymous telephone tip, corroborated by independent police investigator, exhibited sufficient indicia of reliability to provide suspicion to make an investigatory stop of defendant's vehicle); United States v. Sokolow, 490 U.S. 1, 11 (1989) (holding that DA's stop of a person fitting a drug courier profile was reasonable); National Treasury Employees Union v. Von Raub, 489 U.S. 656, 668 (1989) (extending the "special needs" exception to the warrant and probable cause requirements to include suspicionless drug testing of employees); United States v. Leon, 468 U.S. 897, 922-25 (1984) (adopting a "good faith" exception to the exclusionary rule); Illinois v. Gates, 462 U.S. 213, 230 (1983) (adopting a "totality of the circumstances" approach to probable cause).

Another example of judicial narrowing of Fourth Amendment protections has involved the granting of "anticipatory" search warrants. *See* United States v. Garcia, 882 F.2d 699 (2d. Cir.) *cert. denied*, 493 U.S. 943 (1989); State v. Gutman, 670 P.2d 1166 (Alaska Ct. App. 1983); State v. Wright, 772 P.2d 250 (Idaho Ct. App. 1989). *See Abridged Too Far: Anticipatory Search Warrants and the Fourth Amendment*, 32 WM. & MARY L. REV. 781 (1991).

For a scholarly analysis of the retraction of Fourth Amendment protections of individual rights, see Christopher J. Sullivan, *First Circuit Extends Fourth Amendment Warrant Exception*, 7 SUFFOLK TRANSNAT'L L.J. 173 (1983).

treaties.[4] Extralegally, it has created a window of opportunity for the United States government to circumvent diplomatic and legal obstacles in order to facilitate policy and prosecutorial objectives.[5]

The policy practice of this brave new world raises important, but heretofore largely unaddressed, legal and political questions.[6] While new enforcement strategies have yielded many positive developments, such as encouraging international cooperation in criminal matters, they have evolved in disregard for their effects on individual rights.[7] The global Drug War, as a balance between policy objec-

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4. *See infra* note 285 and accompanying text.

5. See, for example, the letter from the Justice Department to the FBI, advising the FBI that the United States' abduction of foreign nationals from abroad without the permission of the host state was legal. Ronald Ostrow, *Baker Vows Full Talks Before FBI Uses Foreign Arrest Powers*, L.A. TIMES, Oct. 14, 1989, at A16.

United States officials have utilized other quasi-legal methods to gain acquisition over individuals. Two such methods have been to persuade foreign officials to expel fugitives to the United States and to trick fugitives to fall into United States custody. Because such methods are less cumbersome than extradition proceedings, United States officials have resorted to these methods even when extradition is available. *See Proceedings of the Harvard Law School Conference on International Cooperation in Criminal Matters*, 31 HARV. INT'L L.J. 1, 72 (1990) [Hereinafter *Harvard Conference*]. For example, during the 1970's, United States drug enforcement agents involved in "Operation Springboard" worked closely with specially created Latin American police groups to apprehend and expel about five dozen major drug traffickers without resort to formal extradition procedures. *Id.* at 73.

Describing some of the more creative ways to "extradite" foreign nationals, M. Cherif Bassiouni notes that the practice of disguised extradition:

> is a method by which a state uses or relies upon its immigration laws to deny an alien the privilege of remaining in that state and then, in carrying out the exclusion, expulsion or deportation provisions of such laws against the individual, it places him directly or indirectly in the control of the agents of another state who seek him.

M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 133-34 (1974). Irregular methods of rendition were used to expel Nazi war criminals from the United States. *See* BARBARA M. YARNOLD, INTERNATIONAL FUGITIVES: A NEW ROLE FOR THE INTERNATIONAL COURT OF JUSTICE 67 (1991).

6. Extradition is a part of a wider network of cooperative law enforcement methods. This network includes Mutual Legal Assistance Treaties, which provide for a wide variety of cooperative law enforcement assistance, including: "providing records, locating persons, taking the testimony or statements of persons, producing documents, executing requests for search and seizure, forfeiting criminally-obtained assets, and transferring persons in custody for testimonial purposes." Bruce Zagaris, *Developments in International Judicial Assistance and Related Matters*, 18 DENV. J. INT'L L. & POL'Y 339, 352 (1990). As of 1990 the United States has Mutual Legal Assistance Treaties with Switzerland, the Netherlands, Turkey and Italy. *Id.* Additionally, there were six proposed Treaties Relating to Mutual Legal Assistance in Criminal Matters pending with the Cayman Islands, Mexico, Canada, Belgium, the Bahamas and Thailand. *Id.* at 351.

7. Doctrines which constrain individual rights cannot be confined to the often narrow factual context which gives rise to their use. Stephen Saltzburg notes that

> Few constitutional doctrines can be confined to drug cases, and judicial toleration of improper practices thus cannot be reserved for these cases. Once created,

tives and individual rights, has increasingly become one-sided.[8] Under the comforting auspices of cooperation and the claimed common interest in ending illicit narcotics activities, anti-drug efforts have swung the balance in favor of policy and enforcement objectives at the expense of individual rights and liberties.

This subordination of individual rights to policy interests is reflected in United States' extradition and abduction jurisprudence.[9] Because extradition proceedings are not classified as criminal trials, extradition defendants are afforded few procedural and substantive protections.[10] Although extradition defendants can challenge extradition on jurisdictional grounds, these challenges have been repeatedly rejected.[11] Courts have uniformly interpreted extradition as a process which protects state, not individual rights.[12] Courts have also rejected the constitutional claims of extradition defendants, finding some constitutional protections inapplicable to extradition proceedings, and construed others as a function of United States' diplomatic and policy efforts rather than as an independent set of protections guaranteed to all persons.

The policy objective/individual rights imbalance is also reflected in the United States' acquisition of foreign defendants. For over a century, since the Supreme Court decided *Ker v. Illinois*,[13] the way in which we bring foreign nationals to trial has no bearing on our ability to try them.[14] The exception to this rule, *United States v.*

> doctrines have a life of their own, so that decisions giving the government an edge against drug dealers may permit the government to deal with individuals who have no connection with drugs in ways that would not otherwise be tolerated. Thus liberty denied to those suspected of dealing in drugs is liberty denied to all.

Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1,3 (1986).

8. This theme is currently receiving a lot of scholarly and public attention, see e.g., Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737 (1991); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278 (1990).

9. The phrase "abduction jurisprudence" will be used throughout this Comment to describe how the courts have dealt with the abduction of foreigners by the United States. This term is used because challenges to abduction can involve three types of claims: (1) a claim that an individual's due process rights have been violated; (2) a claim that the abducting country violated a treaty obligation; or (3) the claim that the abduction violated a nation's sovereignty.

10. *See infra* part III.A.

11. *See infra* part III.A.2.

12. *See infra* part III.A.2.

13. 119 U.S. 436 (1886).

14. *Id.* at 441.

Toscanino,[15] has been sharply narrowed.[16] In addition to *Ker*, our extradition jurisprudence assumes that foreign nations will interpose themselves politically between abusive governmental practices and an individual whose rights have been violated.[17] This assumption ignores current international realities. First, the United States is increasingly removing potential individual protections from extradition treaties, thus decreasing the potential bases from which claims against United States misconduct could be made.[18] Second, the United States is using other measures, such as threats to cut off aid, to pressure countries into compliance with its foreign policy goals.[19]

Several recent decisions may affect the policy interest/individual rights balance. In *United States v. Verdugo-Urquidez I*,[20] the Supreme Court overturned a Ninth Circuit decision which held that a Mexican national's Fourth Amendment rights were violated when his residence was illegally searched by United States authorities.[21] While this decision continues the long-standing judicial trend of deferring to the government's foreign policy initiatives[22] and narrowing the reach and protections of the Fourth Amendment,[23] it also takes a further step toward narrowing the extraterritorial reach of the Constitution.

Next, in *United States v. Alvarez-Machain*,[24] the Supreme Court ruled that the United States' abduction of a Mexican national did not violate the extradition treaty between the United States and Mexico. The Court found that there was nothing in either the Treaty or general principles of international law which suggested that abduction was not a legitimate means for bringing a person to the requesting state.[25]

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15. 500 F.2d 267 (2d Cir. 1974).

16. Restrictions have occurred even in the Circuit that decided *Toscanino*. *See* United States *ex rel* Lujan v. Gengler, 510 F.2d 62 (2d. Cir.), *cert. denied*, 421 U.S. 1001 (1975).

17. One underpinning of this assumption is the "state protest" requirement, a prerequisite to individual challenges of state conduct under a treaty. *See* Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir. 1990) (noting that individual rights are protected by the deterrent effect of State protest). *See infra* part III.B.

18. *See infra* part III.B.

19. *See infra* part IV.B.

20. 494 U.S. 259 (1990). For a general discussion of *Verdugo-Urquidez I*, see Jon A. Dobson, Note, Verdugo-Urquidez: *A Movement Away From Belief in the Universal Pre-Existing Rights of All People*, 36 S.D. L. REV. 120 (1991).

21. United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir. 1988), *rev'd*, 494 U.S. 259 (1990).

22. *See infra* part IV.A.

23. *See supra* note 3.

24. 112 S.Ct. 2188 (1992).

25. *See infra* part IV.C.

Later the Court vacated the Ninth Circuit decision in *United States v. Verdugo-Urquidez II*,[26] remanding it for reconsideration under *Alvarez-Machain*. In *Verdugo-Urquidez II* the Ninth Circuit ruled that the United States' collusion with Mexican police in bringing Verdugo-Urquidez to the United States violated the United States-Mexico extradition treaty, and was grounds for divesting the United States of jurisdiction to try him.[27] With this ruling, the Ninth Circuit had broken from a clear pattern of rejecting the claims of irregularly apprehended individuals. Specifically holding that treaty obligations were binding, the Ninth Circuit departed from most precedent by putting teeth into its role as monitor of governmental extraterritorial conduct.[28]

This Comment will analyze two elements of the international Drug War, extradition and abduction, and analyze the impact of these practices on individual rights. Part II of the Comment briefly summarizes the internationalization of the Drug War. Part III describes United States' extradition and "irregular rendition"[29] practices. It illustrates the few protections available to individuals in extradition proceedings, and describes how these protections are waning in light of the changing extradition landscape. From this starting point, it then shows how the United States has tried to circumvent obstacles in order to further prosecutorial objectives abroad. Part IV summarizes the *Verdugo-Urquidez* and *Alvarez-Machain* decisions. Part V analyzes the impact of these decisions on extradition and abduction jurisprudence and on the individual rights/policy objective balance. It then suggests that the reasoning employed in *Verdugo-Urquidez II* should be used as the beginnings of a model for sorting out extradition and abduction issues more rationally. Finally, Part VI considers the significance of the elevation of policy interests over individual rights, both for other states and individuals.

II. THE INTERNATIONALIZATION OF THE WAR ON DRUGS

International anti-drug efforts can be traced to the beginning of the twentieth century.[30] The first recorded initiatives involved bilat-

26. 939 F.2d 1341 (9th Cir. 1991), *vacated*, 112 S.Ct. 2986 (1992).

27. 939 F.2d at 1345-49.

28. *See infra* part IV.B.

29. For the purposes of this Comment, "irregular rendition" practices are any procedures, outside of the formal extradition process, which are utilized to acquire the body of a person outside of the United States. For another definition of "irregular rendition", see *infra* note 63.

30. *See generally* UNITED NATIONS OFFICE OF PUBLIC INFORMATION, INTERNATIONAL CONTROL OF NARCOTIC DRUGS (1965) (discussing the historical background and the existing system of international narcotics control) [hereinafter UNITED NATIONS].

eral and multilateral conventions which evidenced a shared commitment to end the drug problem. The earliest form of this commitment involved the regulation of international narcotics traffic.[31]

This early anti-drug commitment has continued unabated; the Drug War is at the forefront of current cooperative international efforts.[32] Several reasons for this exist: first, the size and impact of the illegal narcotics industry;[33] second, the perception that single nations cannot respond to the drug trade effectively;[34] and third, the

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31. Several important anti-drug conventions have been: Convention at the Hague in 1912 (controlling the production and distribution of opium, limiting use of narcotic drugs to "legitimate" uses, and subjecting drug manufacturers and traders to a permit and recording system); the Geneva Convention of 1925 (required governments to submit drug statistics to Permanent Control Opium board; established system of governmental monitoring of imports and exports); Convention for the Suppression of the Illicit Traffic in Dangerous Drugs (called for commitment to preventing drug offenders from escaping for "technical reasons" and facilitated extradition for drug offenses); The Protocol of 1946 (transferred to the United Nations the functions previously exercised by the League under the various narcotics treaties concluded before World War II); The Paris Protocol of 1948 (authorized the World Health Organization to place under full international control any new drug which could not be placed under such control by application of the relevant provisions of the 1932 Convention and which it finds either to be addiction-producing or convertible into an addiction-producing drug); The Opium Protocol of 1953 (limited the use of opium and the international trade in it to medical and scientific needs and eliminates legal overproduction of opium through the indirect method of limiting the stock of the drug maintained by the individual states; empowers the Permanent Central Opium Board to employ certain supervisory and enforcement measures); The Single Convention of 1961 (replaced the existing nine treaties; extended control to the cultivation of plants from which the "natural" narcotics drugs are obtained; and simplified the international control machinery); 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. UNITED NATIONS, *supra* note 30, at 10.

Currently, the four main United Nations bodies responsible for controlling drugs are: The UN Commission on Narcotic Drugs, the UN Division of Narcotic Drugs, the International Narcotics Control Board; and the UN Fund for Drug Abuse Control. *See* M. Cherif Bassiouni, *Critical Reflections on International and National Control of Drugs*, 18 DENV. J. INT'L. & POL. 311, 317-18 (1990).

32. *See* Bassiouni, *supra* note 31, at 311-16; Faiza Patel, *Crime Without Frontiers: A Proposal for an International Narcotics Court*, 22 N.Y.U. J. INT'L L. & POL. 709, 715 (1990) ("The international community's recognition of the dangers of narcotics abuse and the necessity of controlling the narcotics supply is evidenced by the thirteen multilateral treaties that have been concluded on the subject of international control of narcotics since 1912.").

33. The international narcotics trade, worth an estimated 500 billion dollars a year, is second only to the international arms trade in value. *Id.* at 709. Narcotics trafficking continues to transcend national borders and concerns. Narcotics are produced and processed mainly in South Asia and Latin America and are subsequently distributed throughout the world for resale and individual consumption. *Id.* at 716.

34. Bruce Zagaris has commented that "[m]any countries that lack essential institutional capabilities, [such as an operative or effective judiciary,] financial resources, and skilled personnel are not capable of designing and implementing . . . strategies for dealing with narco-terrorism." Bruce Zagaris, *Protecting the Rule of Law From Assault in the War Against Drugs and Narco-Terrorism*, 15 NOVA L. REV. 703, 707 (1991); *see gener-*

perceived fusion of the narcotics industry with legitimate foreign governmental operations, especially in Latin American countries.[35] The United States plays a leading role in the ongoing conflict, conducting an anti-narcotics war on political and legal fronts that utilizes an array of different methods, ranging from economic incentives and disincentives to interdiction efforts to military action.[36]

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ally INTERNATIONAL DRUG TRAFFICKING (D. Rose ed., 1988); Bassiouni, *supra* note 31, at 318.

Some of the difficulties in mounting an institutional attack on the drug war lie in the indeterminate nature of illicit narcotics activities. The sources of narco-terrorism and narco-trafficking are difficult to reduce to a single typology. Illicit drug activities are the product of a wide range of relationships between situations and groups. A common denominator between these relationships, however, is the use of terrorism to intimidate the government, judiciary, police, and military to prevent apprehension, prosecution and incarceration. Zagaris, *supra* at 710.

35. *See* STEPHEN WISOTSKY, BEYOND THE WAR ON DRUGS 155 (1990). Bolivia, for instance, was taken over by a group of military officers who also dominated the drug trade in the early 1980s under the Luis Garcia Meza government. *See* Zagaris, *supra* note 34, at 708. A similar situation is alleged to have occurred in Panama under deposed President Manuel Noriega's administration. *Id.*

36. For example, the United States succeeded in curtailing importation of heroin by agreeing to provide $35 million in aid to Turkey for that Nation's outright ban on opium production. Nikolaos Stavrou, *The Politics of Opium in Turkey, in* DRUGS, POLITICS, AND DIPLOMACY 220 (R. S. Simons & Abdul A. Said, eds., 1974). For other examples of similar incentives and disincentives, see *infra* notes 44, 50, 56 and accompanying text. For a general account of the ascension of the military in the Drug War see *infra* notes 40-45 and accompanying text.

An interesting statutory development regarding the control of drugs is the evolution of the Mansfield Amendments to the Foreign Assistance Act. The original amendment provided that "[n]otwithstanding any other provision of law, no officer or employee of the United States may engage or participate in any direct police arrest action in any foreign country with respect to narcotics control efforts." International Security Assistance and Arms Export Control Act of 1976, Pub. L. 94-329, § 504, 90 Stat. 764 (current version at 22 U.S.C. § 2291(c) (Supp. I 1989)).

Two years later the Mansfield Amendment's limits on involvement in "police action" were slightly relaxed with the provision that: "[n]o such officer or employee may interrogate or be present during the interrogation of any United States person in any foreign country with respect to narcotics control efforts *without the written consent of such person.*" International Security Assistance Act of 1978, Pub.L.No. 95-384, § 3, 92 Stat. 730 (1978) (emphasis added). In 1986 it was again modified to authorize the Secretary of State to waive the prohibition on participation by United States officers in a direct police arrest if he determined that the application of the provision "would be harmful to the national interests of the United States." International Narcotics Control Act of 1986, Pub. L. No. 99-570, § 2009, 100 Stat 3207-64, (codified at 22 U.S.C. § 2291(c)(2) (1988)).

Finally, in 1989 the Mansfield Amendment was revised to permit American officers, with the approval of the United States chief of mission, to assist or observe foreign officers in effecting an arrest. International Narcotics Control Act of 1989, Pub. L. No. 101-232, § 15, 103 Stat 1954, 1963-64 (codified at 22 U.S.C. § 2291 (c)(2) (Supp. I. 1989). *See* Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J.INT'L. L. 444, 479-80 (1990) (noting that many efforts to repeal the Mansfield Amendment or deprive it of its force were not successful).

Major United States involvement in the Drug War began under the Nixon administration.[37] Calling drug abuse a "national emergency," President Nixon doubled the manpower of the Bureau of Narcotics and Dangerous Drugs and later consolidated enforcement power in the Drug Enforcement Administration (DEA).[38] These efforts were greatly expanded during the Reagan Administration, most significantly by unifying the executive and legislative branches and using this broad-based political support to enact many sweeping anti-drug initiatives.[39] Under President Reagan the use of the military in counter-narcotics efforts greatly expanded.[40] For example, the Department of Defense Authorization Act of 1982[41] authorized the Department to provide civilian officials with information, equipment, training and advice.[42]

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37. CLOYD, *supra* note 1, at 88.

38. WISOTSKY, *supra* note 35, at 3.

39. President Reagan was quick to lay out his anti-drug campaign. An early Reagan speech called for (1) more personnel; (2) more aggressive law enforcement - creating 13 regional prosecutorial task forces across the nation; (3) $127.5 million in additional funding, and a substantial re-allocation of the existing $702.8 million budget away from prevention, treatment, and research programs to law enforcement programs; (4) the addition of 1,260 beds at eleven federal prisons to accommodate the increase in drug offenders to be incarcerated; (5) more stringent laws; (6) better inter-agency coordination; and (7) improved federal-state coordination. *Id.* at 4-5.

40. *Id.* at 4-5.

41. Pub. L. No. 97-86, title IX, § 905(a)(1), 95 Stat. 1115 (1981) (codified as amended at 10 U.S.C. §§ 371-373 (1982)).

42. *Id.* §§ 371-373. Additionally, Wisotsky writes that

> Reagan also succeeded in literally militarizing what had previously been a rhetorical war by deploying the military forces of the United States in drug enforcement operations. The Department of Defense (DOD)provided pursuit planes, helicopters, and other equipment to civilian enforcement agencies, while Navy "hawkeye" radar planes patrolled the coastal skies in search of smuggling aircraft and ships. The Coast Guard intensified its customary task of interdicting drug-carrying vessels at sea; and for the first time in American history Navy ships, including a nuclear-powered anti-aircraft carrier, interdicted-and in one case fired upon drug-smuggling ships in international waters.

WISOTSKY, *supra* note 35, at 5-6.

Other legal initiatives gave the branches of the military a greater role in the Drug War. The 1981 Amendments to the Posse Comitatus Act, for example, authorized a greater role for both the Army and Air Force. *Id.* at 92. The Department of Defense also waived administrative regulations which cramped the enforcement role of the Navy. *Id.* at 93.

> The Navy then began providing air and surface surveillance of 'suspected drug trafficking vessels.' It also began carrying Coast Guard detachments on vessels for 'law enforcement boardings of United States flag and stateless vessels.' To maintain the fiction of an 'indirect' law enforcement role, the Secretary's directive stipulated that '[t]actical control of Navy vessels will shift to the Coast Guard prior to any interdiction.' In other words, the Navy ship 'becomes' a Coast Guard ship during the interdiction.

Id. at 94.

The International Narcotics Control Act of 1986,[43] another broad Reagan Administration anti-narcotics measure, was clearly geared toward stepping up the Drug War abroad. It authorized withholding assistance to drug producing and transit nations,[44] further recognized the increased role for the military in domestic and overseas enforcement of American drug laws,[45] and sanctioned and encouraged the negotiation of effective extradition treaties.[46]

A third Reagan Administration anti-drug initiative was the Anti-Drug Abuse Act of 1988.[47] This Act: (1) strengthened the reporting and monitoring requirements by financial institutions;[48] (2) ordered the Department of the Treasury to attempt to create an international currency control agency, to assist enacting uniform money laundering laws, and to collect and analyze the currency transaction reports;[49] (3) expanded information sharing practices with other countries and called for sanctions of countries not complying with such practices;[50] (4) agreed to create a model extradition statute and a model mutual legal assistance treaty;[51] and (5) called for the creation of an international drug force.[52]

Like the Nixon and Reagan Administrations, the Bush Administration also favored law enforcement over individual treatment.[53] This enforcement preference was reflected in the Bush

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43. Pub. L. No. 99-570, § 2005, 100 Stat. 3207, 3261-63 (1986) (codified as amended at 22 U.S.C. § 2291 (Supp. V 1987)).

44. Id § 2008, 100 Stat. at 3264 (codified as amended at 22 U.S.C. § 2291(e)(3)), which provides that a determination of a nation's eligibility for foreign assistance shall include:

> [a] discussion of the extent to which such country has cooperated with the United States narcotics control efforts through the extradition or prosecution of drug traffickers, and, where appropriate, a description of the status of negotiations with such country to negotiate a new or updated treaty relating to narcotics offenses.

45. National Drug Interdiction Improvement Act of 1986, Pub. L. No. 99-570, § 3002, 100 Stat at 3207, 73 (1986) (codified as amended at 21 U.S.C. § 801 (Supp. V 1987)).

46. *Id.* § 2008, 100 Stat. at 3264.

47. Anti-Drug Abuse Act of 1988, 31 U.S.C. § 5311 (1988).

48. Bruce Zagaris, *Developments in International Judicial Assistance and Related Matters*, 17 DENV. J. INT'L L. 339, 400 (1990).

49. *Id.* at 340.

50. *Id.*

51. *Id.*

52. The Reagan Administration's anti-narcotics initiative included some use of multinational forces, such as "Operation Blast Furnace," the United States and Bolivia's attempt to cocaine laboratories hidden in Bolivia. Jaime Malamud-Goti, *Soldiers, Peasants, Politicians and the War on Drugs in Bolivia*, 6 AM. U. J. INT'L L. & POL'Y 35, 41 (1991).

53. *See American Interests: "A Drug War Scorecard with Robert Martinez,"* Federal News Serv., Sep. 6, 1991, *available in* LEXIS, Nexis Library, Omni File [hereinafter *American Interests*]. President Bush's anti-drug strategy had three components. First was demand reduction, which involves education programs and related efforts, such as drug

Administration's "Andean" initiative, an agreement between the United States and Latin American countries to move the Drug War into the back yards of the drug traffickers themselves.[54]

The changing character of the Drug War did not alter the Bush Administration's enforcement commitment. As the war has physically expanded, drug traffickers have relocated to different parts of Latin America, such as Peru.[55] President Bush responded to this change in the drug-trafficking topography by vigorously funding Peruvian anti-drug efforts.[56] A second change in the drug trafficking climate was Colombia's decision to amend its Constitution to prevent extradition.[57] The political mileage Columbia gleaned from this decision, in its bargaining with drug kingpins, has led other countries to consider similar policy measures.[58] The response to this has been predictable: more flexibility, more funds, and more enforcement.[59]

From Presidents Nixon to Bush the global Drug War increasingly focused on enforcement to cut the supply of narcotics off at its source. Politically, this emphasis lead to an increased use of the military in anti-narcotics efforts, increased involvement with the anti-narcotics policies of foreign nations, and the physical expansion

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treatment and workplace, with an estimated cost of $3 billion. *Id.* The second component was domestic law enforcement, which involves finding, arresting and punishing users, at a cost of $5 billion. *Id.* The third component involved border control and international initiatives, at a cost of $3 billion. *Id.*

At this writing it is too soon to tell what the drug control policy of the Clinton Administration will be.

54. At the 1990 anti-narcotics summit, President Bush outlined his Andean strategy, a five-year, $2.2 billion strategy aimed at destroying the growing, processing and transportation of coca and coca products in Bolivia, Colombia and Peru. The measure also provided about $800 million over 5 years in military aid to these countries. Elizabeth Neuffer, *In Drug Fight, a Battle Over Bush Strategy*, BOSTON GLOBE, Feb. 27, 1992, National/Foreign, at 1.

55. *American Interests*, *supra* note 53.

56. This money was transferred despite Peru's questionable human rights record. Although there was evidence of "serious human rights abuses," the State Department certified that there was "no consistent pattern" of human rights violations which would have made Peru ineligible to receive foreign aid. *Id.* Thirty-five million dollars was transferred to Peru, accompanied by United States Green Berets, for the training of Peruvian military anti-drug teams. *Id.* This development is troubling because American extradition jurisprudence assumes that the United States will not make treaties with countries which have questionable human rights records. *See* Ahmad v. Wigen, discussed *infra* at note 129 and accompanying text.

57. *American Interests*, *supra* note 53.

58. *Id.*

59. *See American Interests*, *supra* note 53. *See also Drug-War Cooperation*, CHRISTIAN SCI. MONITOR, Aug. 5, 1991, at 20 (discussing increase in U.S. funding of Columbian justice system following decision to try drug traffickers in Columbia rather than extradite them to the U.S.).

of the war into Latin America itself. Legally, this emphasis shifted the focus to what has been perceived as one of the largest obstacles to the enforcement front in the Drug War—the difficulty in bringing suspected narcotics felons to trial.[60]

III. UNITED STATES EXTRADITION AND ABDUCTION PRACTICE

A. *Surrendering Fugitives to Foreign Countries*

Efforts to bring drug offenders to trial range from extradition to forms of irregular rendition to abduction.[61] Extradition,[62] traditionally the most typical of these methods, is the "surrender by one state or country to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which, being competent to review and punish him, demands his surrender."[63]

The procedural and substantive elements of the extradition process are outlined in treaties[64] and statutes.[65] The right to request

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60. *See infra* note 87 and accompanying text.

61. *See infra* part III.B.

62. According to Bassiouni

> [t]he history of extradition can be divided into four periods: (1) ancient times to the seventeenth century—a period revealing almost exclusive concern for political and religious offenders; (2) the eighteenth century and half of the nineteenth century—a period of treaty-making chiefly concerned with military offenders characterizing the condition of Europe during that period; (3) from 1833 to present—a period of collective concern in suppressing common criminality, and (4) post 1948 developments which ushered a greater concern for protecting the human rights of persons and reveals an awareness of the need to have international due process of law to regulate international relations.

BASSIOUNI, *supra* note 5, at 4-5 (footnote omitted).

63. BLACK'S LAW DICTIONARY 526 (5th ed. 1979). *See* Barbara Sicaledes, Comment, *RICO, CCE, and International Extradition*, 62 TEMP. L. REV. 1281, 1290 (1989). In addition to the ways listed in note 6, *supra*, there are other ways to obtain the body of a person besides extradition. Quasi-extradition, for example, is "any procedure that allows an individual to be punished in one jurisdiction for an offense committed in another or that facilitates a criminal investigation by giving a court access to evidence within the territorial jurisdiction of another State." William V. Dunlap, *Dual Criminality in Penal Transfer Treaties*, 29 VA. J. INT'L L. 813, 837 (1989). Quasi-extradition, as opposed to routine extradition, "does not entail the physical surrender of the defendant to the jurisdiction of the State of offense." *Id.* Irregular rendition, another way of obtaining the body of a person without extradition, involves informal, ad hoc agreements between apprehending and holding states to secure the rendition of the alleged offender with the assistance or acquiescence of the holding state. *See* J. Richard Barnett, Note, *Extradition Treaty Improvements to Combat Drug Trafficking*, 15 GA. J. INT'L. & COMP. L. 285, 301-04 (1985). Finally, a nation can resort to abduction, or kidnapping of foreign nationals, to acquire the body of a person without extradition. Abduction occurs when "agents of the apprehending nation [unilaterally seize a fugitive] without the cooperation of the government in which the fugitive is located." *Id.* at 301.

64. Bilateral treaties constitute the main basis of international practice. BASSIOUNI,

an individual's extradition is created by treaty.[66] There is no obligation to extradite an individual under international law without a treaty between the requested and the requesting state,[67] a notion which American courts follow today.[68]

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supra note 5, at 14. In addition, some countries are parties to multilateral treaties. These take the form of either a convention on extradition which replaces, supplements, or complements bilateral treaties, like the European Extradition Convention, or a convention in which states agree to adopt reciprocal national legislation modelled on an agreed pattern, such as among the member states of the British Commonwealth. *Id.* at 19.

65. 18 U.S.C. §§ 3181-3195 (1988). The primary international extradition provision is § 3184, which provides:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty of convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. . . . If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

66. Quinn v. Robinson, 783 F.2d 776 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986).

67. David Bernstein, *International Court of Justice—Case concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States), 28 HARV. INT'L L. J. 146 (1987). *See also Quinn*, 783 F.2d at 782. A treaty is an "agreement, league, or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the several sovereigns or the supreme power of each state." BLACK'S LAW DICTIONARY 1502 (6th ed. 1990). As Geoff Gilbert notes, however, some "civil law states, such as France and Switzerland, statutorily provide for extradition when no treaty exists." GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 26 (1991).

International extradition is exclusively a power of the Federal Government. This power is justified under the argument that, as an exclusively treaty-founded process, extradition is a matter of foreign affairs which is within the enumerated powers of the federal government and specifically vested in the president. In the absence of a treaty there is no duty to extradite. Factor v. Laubenheimer, 290 U.S. 276, 287 (1933). Yet nations can, if they wish, extradite an individual without a treaty. *See* James Brooke, *War Report From Columbia: Fight Will be Long*, N.Y. TIMES, Sept. 18, 1989, at A12 (describing the extradition of accused traffickers from Columbia without a treaty). For a discussion challenging the authority of the President in treaty matters see DAVID GRAY ADLER, THE CONSTITUTION AND THE TERMINATION OF TREATIES (Harold Hyman & Stuart Bruchey eds., 1986).

68. Some changes regarding extradition and international anti-narcotics initiatives were incorporated in the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, U.N. Doc. E/CONF. 82/15, U.N. Sales

The United States has over 100 extradition treaties in force.[69] Extradition treaties are customarily composed of several elements, which define their scope and procedural requirements.[70] To extradite an individual from the United States, a requesting nation must file a verified complaint with the United States government.[71] An extradition judge or magistrate then issues a warrant for the accused's arrest, after which a hearing is held to determine whether the requesting nation has established probable cause for extradition.[72] The extradition hearing has two major functions. First, the reviewing court determines whether the extradition request is in compliance with the applicable extradition treaty.[73] Second, the court decides whether there is sufficient evidence to surrender the accused to the requesting nation.[74] If the accused is declared extraditable, the judge or magistrate orders his detention and certifies the evidence to the Secretary of State, who makes the final decision to extradite; if not surrendered to the requesting country within two months of the

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No. E.91.XI.6 (1991), *reprinted in* 28 I.L.M. 493 (1989). The Convention (1) provides that certain offenses shall be extraditable regardless of whether or not they are included in an extradition treaty; (2) explicitly recognizes that narcotics-related money laundering, a new category of offenses for many states, is an extraditable offense; (3) provides that requested states may refuse to comply with extradition requests when there are substantial grounds to believe that compliance would facilitate prosecution of a person on account of his race, religion, nationality or political opinions. However, extradition requests may not be refused under the Convention on the grounds that they involve 'fiscal', 'political', or 'politically motivated' offenses. *See* David P. Stewart, *Internationalizing the War on Drugs: The UN Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances*, 18 DENV. J. INT'L L. & POL'Y 387, 397-98 (1990). This constitutes an attack on the political offense exception. For a discussion of exceptions to extradition treaties and criticisms of those exceptions, see *infra* note 287 and accompanying text.

69. For a listing of bi-lateral and multilateral extradition treaties to which the United States is a party, see 18 U.S.C. § 3181 (1988).

70. Typically, extradition treaties include (1) a list of extraditable offenses; (2) a list of circumstances in which extradition is to be prohibited; (3) general procedural guidelines, including required supporting documentation (e.g., description of the accused, statement of facts, text of applicable laws, warrant for arrest issued by judicial officer of the requesting state, evidence justifying arrest and committal); (4) a provision for "provisional" arrest, which allows for arrest of the accused, prior to receipt by the requested state of supporting documentation, if there is a high risk that the accused will soon flee. *See, e.g.*, Treaty on Extradition, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 983; *see generally* M. Cherif Bassiouni, *International Extradition: A Summary of the Contemporary American Practice and a Proposed Formula*, 15 WAYNE L. REV. 733, 739-50 (1969). Treaties are, however, "generally silent as to the designation of organs competent to handle extradition proceedings." BASSIOUNI, *supra* note 5, at 504.

71. 18 U.S.C. § 3184 (1988).

72. *Id.*

73. *Id.*

74. The latter requirement is satisfied when the requesting governments demonstrates that there is probable cause to believe that the accused committed the alleged offense or that the accused has been convicted of the offense in the requesting nation. *Id.*

commitment order, the accused may be released.[75]

1. *The Absence of Procedural Protections.* Individuals facing extradition proceedings have few rights. Although a defendant can appeal an extradition order, the scope of appellate review is narrow. The only way to review an extradition order is by a writ of habeas corpus proceeding; there is no statutory provision for direct appeal.[76]

The scope of habeas corpus review is also limited. In *Fernandez v. Phillips*,[77] Justice Holmes wrote:

> [habeas corpus review] is not a means for rehearing what the magistrate has already decided. The alleged fugitive from justice has had his hearing and *habeas corpus* is available only to inquire whether the magistrate had jurisdiction, whether the offence charged is within the treaty[78] and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.[79]

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75. 18 U.S.C. §§ 3184, 3186, 3188.

76. Collins v. Miller, 252 U.S. 364, 369 (1920) ("proceeding before a committing magistrate in international extradition is not subject to correction by appeal"). For an argument for direct appellate review in extradition proceedings, see Kevin S. Rosen, *Toward Direct Appellate Review in United States Extradition Procedures*, 25 COLUM. J. TRANSNAT'L L. 433 (1987).

77. 268 U.S. 311 (1925).

78. Language of treaties, both at the extradition hearing and in habeas corpus review are given "liberal" construction. The Supreme Court, for example, in Factor v. Laubenheimer, 290 U.S. 276, 293 (1933), held that

> [i]n choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them.

79. *Fernandez*, 268 U.S. 311, 312. In Ornelas v. Ruiz, 161 U.S. 502, 509 (1896), the Court wrote:

> Whether an extraditable crime has been committed is a question of mixed law and fact, but chiefly of fact, and the judgment of the magistrate rendered in good faith on legal evidence that the accused is guilty of the act charged, and that it constitutes an extraditable crime, cannot be reviewed on the weight of the evidence, and is final for the purposes o the preliminary examination unless palpably erroneous in law.

But Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y. 1989) noted that "[i]n practice, however, habeas review in extradition cases has been somewhat broader than Justice Holmes suggested should be the case." *Id.* at 396. *See also* Hooker v. Klein, 573 F.2d 1360, 1369 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978) ("[T]he 'victim' of an extradition generally gets a pretty broad review under habeas corpus, notwithstanding preachments that it is extremely limited."). For example, habeas corpus review has also been expanded to include examination of procedural defects in the extradition process that are of constitutional magnitude, and of the constitutionality of the executive branch's conduct in

The characterization of extradition hearings further insulates them from searching appellate review. Courts repeatedly have emphasized that extradition hearings are not criminal trials and that rules of criminal procedure are inapplicable.[80] The Federal Rules of Evidence also do not apply to extradition proceedings.[81] Because extradition is not classified as a criminal trial, the defendant's possible defenses in extradition proceedings are limited. A defendant cannot contradict the requesting country's proof or pose questions of credibility; he can only offer evidence which explains or clarifies the proof levied against him.[82] The defendant may not introduce evidence to establish an alibi or raise insanity as a defense to charges levied against him.[83]

Although there is no explicit statutory right to discovery, the extraditing court has the power to order discovery procedures as

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deciding to extradite the accused. *See In re* Extradition of Burt, 737 F.2d. 1477, 1484 (7th Cir. 1984); Plaster v. United States, 720 F.2d 340, 347-49 (4th Cir. 1983).

80. Courts have made it clear that an extradition hearing is "not the occasion for an adjudication of guilt or innocence." Melia v. United States, 667 F.2d 300, 302 (2d Cir. 1981). The evidentiary rules of criminal litigation are not applicable. *Id.*; Simmons v. Bran, 627 F.2d 635, 636 (2d Cir. 1980); FED. R. CRIM. P. 54(b)(5); FED. R. EVID. 1101(d)(3). It is widely accepted today, for the simple reason that the extradition proceeding is not a trial of guilt or innocence, that extradition and criminal proceedings are inherently different. *See* Jiminez v. Aristequieta, 311 F.2d 547, 556 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963); Shapiro v. Ferrandina, 478 F.2d 894, 900 (2d Cir. 1973). In enforcing an extradition treaty, "the ordinary technicalities of criminal proceedings are applicable only to a limited extent," Grin v. Shine, 187 U.S. 181, 184 (1902), and "form is not to be insisted upon beyond the requirement of safety and justice," *Fernandez*, 268 U.S. at 312. Consequently, the requesting nation is given an advantage over the party seeking to block extradition, an advantage "most uncommon to ordinary civil and criminal litigation." First Nat'l City Bank of N.Y. v. Aristeguieta, 287 F.2d 219, 226 (2d Cir. 1960), *vacated as moot*, 375 U.S. 49 (1963).

81. *In re* Sindona, 584 F. Supp 1437, 1446 (E.D.N.Y. 1984). Additionally, a review by a magistrate is all that is required in an extradition hearing. Ward v. Rutherford, 921 F.2d 286, 288 (D.C. Cir. 1990).

Judge or magistrates also do not normally need to recuse themselves from habeas corpus proceedings. Oen Yin-Choy v. Robinson, 858 F.2d 1400, 1408 (9th Cir. 1988) ("judge who presides over an extradition hearing need not recuse and may hear a habeas corpus action"), *cert. denied*, 490 U.S. 1106 (1989). *See* Demjanjuk v. Petrovsky, 776 F.2d 571, 577 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); David v. Attorney General, 699 F.2d 411, 416-17 (7th Cir.), *cert. denied*, 464 U.S. 832 (1983). A judge's alleged bias, in order to be disqualifying, must emanate from some extrajudicial source rather than from participation in judicial proceedings. United States v. Grinnel Corp., 384 U.S. 563, 583 (1966).

82. Shapiro v. Ferrandina, 478 F.2d 894, 905 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973).

83. First Nat'l City Bank of N.Y. v. Aristeguieta, 287 F.2d 219, 226-27 (2d Cir. 1960), *vacated as moot*, 375 U.S. 49 (1963); United States *ex rel* Petrushansky v. Marasco, 325 F.2d 562, 567 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1964); Romeo v. Roache, 820 F.2d 540 (1st Cir. 1987).

"law and justice require."[84] This power, however, is limited, and has been sparingly exercised by the courts.[85] In *Emami v. U.S. Dist. Court for Northern Dist. of California*,[86] the court stated that "[i]n exercising its discretion to grant or deny discovery, an extraditing court should consider that 'extradition proceedings should not be converted into a dress rehearsal for trial' and 'whether the resolution of the contested issue would be appreciably advanced by the requested discovery.'"[87]

These procedural limitations are amplified by statutory disadvantages. Extradition law[88] permits the requesting country to introduce evidence *ex parte* in the requesting country, while those same *ex parte* opportunities are unavailable to the accused.[89] Additionally, the requesting country need not set forth the crime for which the fugitive was indicted with any particularity or produce an authentic copy of the arrest warrant.[90] Further, courts have found that the "wrongful exclusion of specific pieces of evidence does not render the detention illegal."[91] Finally, some countries, including the United States, may refuse to stay extradition, even in the event of otherwise impermissible procedural deficiencies, if the requesting nation has "sufficient safeguards" in place.[92]

Extradition orders can also be challenged on the grounds that

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84. *See* Quinn v. Robinson, 783 F.2d 776, 817 n.41. (9th Cir.), *cert. denied*, 479 U.S. 882 (1986).

85. Jhirad v. Ferrandina, 377 F.Supp. 34, 37 (S.D.N.Y 1974), *aff'd*, 536 F.2d 478, 484 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976).

86. 834 F.2d 1444 (9th Cir. 1987).

87. *Emami*, 834 F.2d at 1452 (quoting Quinn v. Robinson, 783 F.2d 776, 817 n.41 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986)). Other discovery requests have also been denied. In *In re* Extradition of Singh, 123 F.R.D. 108 (D.N.J. 1987), the court denied the defendant's deposition request for three reasons. First, Singh's request was no more than a blanket discovery request, inconsistent with the limited purpose of an extradition proceeding. Second, the Singh's request would impermissibly convert the hearing into a full trial. Finally, there was nothing to suggest that granting Singh's deposition request "would produce explanatory evidence." *Id.* at 117.

In part, courts have justified the unwillingness to grant discovery motions under the rationale that Congress, through 18 U.S.C. § 3191 (1992), has "provided a means by which defendants in extradition proceedings may secure evidence." *Singh* at 115. The Supreme Court has held that the purpose of this section is "to afford the defendant the means for obtaining the testimony of witnesses and to provide for their fees." Charlton v. Kelly, 229 U.S. 447, 458 (1913).

Courts have also denied requests for cross examination. *See* Oen Yin-Choy v. Robinson, 858 F.2d 1400 (9th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

88. 18 U.S.C. § 3190 (1988).

89. *Id.*

90. Grin v. Shine, 187 U.S. 181, 188-91 (1902).

91. Collins v. Loisel, 259 U.S. 309, 316 (1922); *see* United States *ex rel* Hughes v. Gault, 271 U.S. 142, 151 (1926).

92. *See, e.g.*, Magisano v. Locke, 545 F.2d 1228, 1230 (9th Cir. 1976).

probable cause that the accused committed the crime in question was not shown.[93] This challenge is also narrow; the reviewing court only examines "whether there was any evidence warranting the finding that there was a reasonable ground to believe the accused guilty."[94] The scope of review is limited to determining whether there was persuasive evidence of guilt:[95]

> To establish the level of probable cause necessary to certify one for extradition, evidence must be produced that is 'sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt.' The primary source of evidence of the probable cause determination is the extradition request and any evidence is deemed truthful for purposes of this determination.[96]

Although pre-hearing liberty is constitutionally recognized as an important individual right,[97] an arrestee in an extradition proceeding has no statutory right to pre-hearing release.[98] Bail is ordinarily not granted in cases of foreign extradition;[99] the Supreme

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93. *See* Theron v. United States Marshal, 832 F.2d 492, 495 (9th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988).

94. *Id.* at 495.

95. *See* Fernandez v. Phillips, 268 U.S. 311, 312 (1925); Shapiro v. Ferrandina, 478 F.2d 894, 901 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973); *see also* Eain v. Wilkes, 641 F.2d 504, 509 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981); Koskotas v. Roche, 740 F. Supp. 904, 913 (D. Mass. 1990) ("review of the evidence before a magistrate has been limited to a determination that there was competent evidence supporting the finding of extraditability."). Additionally some courts have held that the magistrate's probable cause finding must be upheld if there is *any* competent evidence . . . to support it." Quinn v. Robinson, 783 F.2d 776, 791 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986) (emphasis added). The "probable cause" standard is interpreted to mean that probable cause determinations must fail if there is "any evidence of probable cause." Artukovic v. Rison, 784 F.2d 1354, 1355-56 (9th Cir. 1986).

Other evidentiary procedures favor the prosecution. Accomplice testimony, for example, is sufficient even without corroboration to demonstrate probable cause to certify the accused for extradition. *Eain*, 641 F.2d. at 510 & n.5. Where accomplice testimony is corroborated by other reliable evidence, it will *a fortiori*, support a finding of probable cause. *Id.* at 510.

96. Ahmad v. Wigen, 726 F. Supp 389, 399 (E.D.N.Y. 1989) (quoting Coleman v. Burnett, 477 F.2d 1187, 1202 (D.C. Cir. 1973).

97. United States *ex rel* Goodman v. Kohl, 456 F.2d 863 (2d Cir. 1972). Additionally, the Eight Amendment to the United States Constitution reads: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

98. There have been several unsuccessful Congressional attempts to codify a bail standard for international extradition cases. *See* H.R. REP. NO. 998, 98th Cong., 2d Sess. 7 (1984).

99. Wright v. Henkel, 190 U.S. 40, 63 (1903). "In extradition proceedings the presumption is against bail because of the nation's foreign relations interest in successfully producing extradited persons." United States v. Messina, 566 F. Supp. 740, 742 (E.D.N.Y. 1983). *But see* Beaulieu v. Hartigan, 430 F. Supp. 915, 916 & n.2 (D. Mass. 1977) (noting that the "granting of bail pending completion of the extradition proceeding has been the

Court has said that release may be granted only when the accused can show the presence of "special circumstances."[100]

2. *Challenges To Jurisdiction: Double Criminality and Specialty.* Extradition proceedings can be challenged by defendants on jurisdictional grounds. These challenges, consistent with the narrow procedural protections extradition defendants are accorded, have been limited by the courts. Theoretically, while procedural protections have been denied to extradition defendants because of extradition's non-criminal classification, jurisdictional challenges to extradition orders have been denied because the basis of these claims are construed as protecting international relations, not individual rights.

The double, or dual, criminality requirement, for example, demands that in order for an individual to be extradited for an offense, both countries in an extradition proceeding must recognize the offense as criminal.[101] The Supreme Court has not interpreted the doctrine of "double criminality" to require exact offense congruity; this broad interpretation favors extradition:

> The law does not require that the name by which the crime is described in the two countries be the same; nor that the scope of liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the act charged is criminal in both jurisdictions.[102]

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rule rather than the exception").

100. "Special circumstances" have been limited to situations where

> the justification is pressing as well as plain, . . . or in the most pressing circumstances, and when the requirements of justice are absolutely peremptory. . . . Such circumstances may include a delayed extradition hearing, . . . and the need of the defendant to consult with his attorney in a civil action upon which his 'whole fortune' depends. . . . In contrast, the discomfiture of jail, . . . and even applicant's arguable acceptance of a tolerable bail risk . . . are not special circumstances.

United States v. Williams, 611 F. 2d 914, 915 (1st Cir. 1979) (citations omitted).

The same standard is applied to pre and post-extradition bail requests. In Wright v. Henkel, 190 U.S. 40, 62 (1903), the Supreme Court decided a pre-hearing bail request by analyzing factors relevant to a post-hearing request and concluded that "the same reasons which induced the language used in the statute [arguing against bail after the extradition hearing] would seem generally applicable to release pending examination."

101. *See generally* Sharon A. Williams, *The Double Criminality Rule and Extradition*, 15 NOVA L. REV. 581 (1991); David Levy, Note, *Double Criminality and the U.S.-U.K. Extradition Treaty: Hu Yau-Leung v. Soscia*, 8 BROOK. J. INT'L L. 475 (1982).

102. Collins v. Loisel, 259 U.S. 309, 312 (1922). *See also* United States v. Stockinger, 269 F.2d 681, 687 (2d Cir.), *cert. denied*, 361 U.S. 913 (1959) (finding that it is "immaterial that the acts in question constitute the crime of theft and fraud in Canada and the crime of larceny in New York State. It is enough if the particular acts charged are criminal in both jurisdictions.").

In United States v. Sensi, 879 F.2d 888, 893 (D.C. Cir. 1979), the court held that dou-

Double criminality, despite its ability to proscribe general state practices which one party to an extradition proceeding does not approve, has been restricted to analyzing only the criminal posture of two states regarding a certain offense. Double criminality cannot prevent extradition if a defense is not "available in the requested state that would not be available in the requesting state, or [if] different requirements of proof are applicable in the two states."[103]

Because of their nature, extradition cannot be barred for some crimes by the double criminality doctrine regardless of the criminal perspectives of the involved states. In *Demjanjuk v. Petrovsky*,[104] addressing the extradition of an alleged war criminal, the court explained that "some crimes are so universally condemned that the perpetrators are the enemies of all people . . . any nation which has custody of the perpetrators may punish them according to its law applicable to such offenses."[105]

Another potential defense in extradition proceedings is the specialty doctrine, which prohibits a requesting country from prosecuting an individual for crimes beyond those for which extradition is granted.[106] Like double criminality, judicial interpretations of specialty have safeguarded international relations rather than individual rights.[107] *United States v. Jetter*[108] held that in determining whether the specialty principle has been abrogated in a given instance, courts only inquire "whether the surrendering state would regard the prosecution of the issue as a breach," not whether or not

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ble criminality does not require the criminal laws of the requested and requesting state to be "perfectly congru[ous]." *See* Oen Yin-Choy v. Robinson, 858 F.2d 1400 (9th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); United States v. Thirion, 813 F.2d 146 (8th Cir. 1987); *In re* Extradition of Russell, 789 F.2d 801 (9th Cir. 1986); *In re* Suarez-Meson, 694 F.Supp. 676 (N.D. Cal. 1988).

103. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 476, cmt. d (1986).

104. 776 F.2d 571 (6th Cir.), *cert. denied*, 475 U.S. 1016 (1985).

105. *Id.* at 582. Additionally, an asylum country may consent to extradite a defendant for offenses other than those enumerated in an extradition treaty. United States v. Thirion, 813 F.2d 146 (8th Cir. 1987).

For a general discussion of the Demjanjuk case, see Rena Hozore Reiss, *The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and the Political Offense Doctrine*, 20 CORNELL INT'L L.J. 281 (1987).

106. Shapiro v. Ferrandina, 478 F.2d 894, 905 (2d. Cir.), *cert. dismissed*, 414 U.S. 884 (1973).

For general discussions of the specialty doctrine, see Christopher J. Morvillo, *Individual Rights and the Doctrine of Specialty: The Deterioration of United States v. Rauscher*, 14 FORDHAM INT'L L.J. 987 (1991); David Runtz, *The Principle of Specialty: A Bifurcated Analysis of the Rights of the Accused*, 29 COLUM. J. TRANSNAT'L L. 407 (1991).

107. United States v. Molina-Chacon, 627 F. Supp. 1253 (E.D.N.Y.), *aff'd in part sub nom.* United States v. DiTommasso, 817 F.2d 201 (2d Cir. 1986); United States v. Riviere, 924 F.2d 1289 (3d Cir. 1991).

108. 722 F.2d 371 (8th Cir. 1983).

the charge fell outside the letter of the extradition treaty.[109]

The potential reach of the specialty doctrine has been restricted in other ways. In *Demjanjuk*,[110] for example, the court noted that "[t]he principle of specialty does not impose any limitation on the particulars of the charge so long as it encompasses only the offense for which extradition was granted."[111] The court determined that Demjanjuk's murder charge was, under the Treaty, inclusive of crimes against Jewish persons and war crimes.[112]

3. *The Absence of Constitutional Protections.* In addition to narrowing procedural protections, and sharply limiting doctrinal challenges, courts have also been unreceptive to constitutional challenges in extradition proceedings. In *In re Extradition of Burt*,[113] Burt argued that his due process rights were violated by the United States when it attempted to extradite him to West Germany fifteen years after first deciding not to prosecute or extradite him.[114] Burt also asserted that the extradition deprived him of his rights under both Sixth Amendment of the Constitution and Article VII of the NATO-SOFA Treaty.[115]

The court first acknowledged that aliens are entitled to some procedural due process rights in extradition hearings, and that habeas corpus petitions were the appropriate means of enforcing those rights.[116] Next, the court noted that *Fernandez*'s narrow scope of review applied to challenges to the magistrate's findings, but not "on constitutional grounds, [to] the conduct of the executive branch in deciding to extradite the accused."[117] The United States government must "conform its conduct to the requirements of the Constitution,"[118] and although a treaty is the "supreme law of the land, ...

109. *Id.* at 373.

110. 776 F.2d 571 (6th Cir.), *cert. denied*, 475 U.S. 1016 (1986).

111. *Id.* at 583.

112. Also, the protections provided by the specialty doctrine do not extend to crimes committed subsequent to the accused's extradition. *See* Collins v. Johnston, 237 U.S. 502 (1915); Collins v. O'Neil, 214 U.S. 113 (1909).

113. 737 F.2d 1477 (7th Cir. 1984).

114. *Id.* at 1482.

115. *Id.* Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, art. 7, 4 U.S.T. 1792, (entered into force Aug. 23, 1953).

116. *Burt*, 737 F.2d at 1485. The First Circuit has recognized "that serious due process concerns may merit review beyond the narrow scope of inquiry in extradition proceedings." *In re* Extradition of Manzi, 888 F.2d 204, 206 (1st Cir. 1989). However, to warrant review, the petitioner must raise "fundamental issues of substantive or procedural due process." *Id.* at 206.

117. *Burt*, 737 F.2d at 1483.

118. *Id.* at 1484. *See also* Reid v. Covert, 354 U.S. 1, 5-6 (1957) (plurality opinion) (noting that the United States government is "entirely a creature of the Constitution. Its

when in direct conflict, [it] must yield to the Constitution."[119]

Despite recognizing its obligation to conduct a searching inquiry into its constitutional appropriateness, the court granted the extradition, holding that

> while it may be fundamentally unfair for the government as enforcer of its criminal statutes to compel an accused to respond to and stand trial for charges when the government's delay in bringing the charges has resulted in actual prejudice to the accused, we do not believe that the government necessarily acts unfairly when as extraditer it makes decisions responsive to diplomatic concerns that may secondarily affect the accused's ability to respond to criminal charges brought by a foreign state.[120]

The court held that requiring the government to consider actual prejudice would "distort the aims of the diplomatic effort."[121] It concluded:

> so long as the United States has not breached a specific promise to an accused regarding his or her extradition, and bases its extradition decisions on diplomatic considerations without regard to such constitutionally impermissible factors as race, color, sex, national origin, religion or political beliefs, and in accordance with such other exceptional constitutional limitations as may exist because of particularly atrocious procedures or punishments employed by the foreign jurisdiction, those decisions will not be disturbed.[122]

One of the clearest doctrinal examples of the judiciary's deference to nations in the extradition process is found in the non-inquiry rule, which bars courts from considering a person's post-extradition safety.[123] Pursuant to this rule, even a defendant's legitimate fears of

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power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."); Holmes v. Laird, 459 F.2d 1211, 1217 (D.C. Cir.) (specifically holding that the United States Constitution overrides the SOFA Treaty and the USA-FRG Supplementary Agreement), *cert. denied*, 409 U.S. 869 (1972); Bell v. Clark, 437 F.2d 200, 203 (4th Cir. 1971) (testing treaty against Constitution).

119. *Id.*; *see also Reid*, 354 U.S. at 16 ("no agreement with a foreign nation can confer power on the Congress, or on any other branch of the government, which is free from the restraints of the Constitution.").

120. *Burt*, 737 F.2d at 1486 (citation omitted).

121. *Id.* at 1487.

122. *Id.* at 1487 (citations omitted).

123. *See* Quinn v. Robinson, 783 F.2d 776, 789-90 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986); Eain v. Wilkes, 641 F.2d 504, 516 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981); Escobedo v. United States, 623 F.2d 1098, 1105 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980); Sindona v. Grant, 619 F.2d 167, 174-75 (2d Cir. 1980); Peroff v. Hylton, 563 F.2d 1099, 1102 (4th Cir. 1977) (per curiam); Garcia-Guillern v. United States, 450 F.2d 1189, 1192-93 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); *In re* Pazienza, 619 F. Supp. 611, 621 (S.D.N.Y. 1985); *In re* Singh, 123 F.R.D. 127, 129-40 (D.N.J. 1987).

Traditionally, federal courts have refused to consider questions relating to the procedures or treatment that might await an individual on extradition. For example in

being subjected to future due process deprivations are deflected by the courts and relegated to the exclusive purview of the executive branch.[124]

The narrow grounds for challenging the non-inquiry rule were articulated in *Gallina v. Fraser*.[125] There, an Italian national challenged his extradition on the grounds that Italy had impermissibly tried him in absentia.[126] While finding dispositive the fact that no case had "allowed the court to inquire into the procedures which await the relator upon extradition,"[127] the court noted that it could "imagine situations where [a] relator, upon extradition, would be subject to procedures or punishments so antipathetic to a federal court's sense of decency [that they would] require reexamination of the [non-inquiry] principle."[128]

Despite this encouraging dictum, the *Gallina* exception to the non-inquiry rule has not expanded individual rights in extradition proceedings. Illustrative of this point is the recent review of *Gallina* in *Ahmad v. Wigen*.[129] Ahmad sought a writ of habeas corpus to prevent his extradition to Israel for charges related to his attack on

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Prushinowski v. Samples, 734 F.2d 1016 (4th Cir. 1984), the court refused to prevent extradition despite petitioner's claim that his constitutional right to religious expression would be violated by incarceration in a British prison which refused to cater to strict religious diets.

For a general discussion of the non-inquiry rule, see Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198 (1991).

124. Ahmad v. Wigen, 726 F. Supp. 389, 412 (E.D.N.Y. 1989); *see also* Glucksman v. Henkel, 221 U.S. 508 (1910) ("courts are bound by the existence of an extradition treaty to assume that the trial . . . will be fair."); Jhirad v. Ferrandina, 536 F.2d 478, 484 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976) (noting that it is not "the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another foreign nation.").

In re Assarsson, 635 F.2d 1237, 1244 (7th Cir. 1980), the court noted: "[W]e often have difficulty discerning the law of neighboring States, which operate in the same legal system that we do; the chance of error is much greater when we try to construe the law of a country whose legal system is much different from our own. The possibility of error warns us to be even more cautious of expanding judicial power over extradition matters."

125. 278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960).

126. *Id.* at 77.

127. *Id.* at 78.

128. *Id.* at 79. *Accord* United States *ex rel.* Bloomfield v. Gengler, 507 F.2d 925, 928 (2d Cir. 1974); Rosado v. Civiletti, 621 F.2d 1179, 1195 (2d. Cir.), *cert. denied*, 449 U.S. 856 (1980); *see also* Demjanjuk v. Petrovsky, 776 F.2d 571, 583 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) (holding that the court would not inquire into the procedures of the extraditing nation unless they are found to be "antipathetic to a federal courts sense of decency"); Arnbjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983) (holding that extraditing courts generally do not inquire into the procedures or treatment awaiting a surrendered fugitive and noting that the *Gallina* exception has yet to be employed in an extradition case).

129. 726 F. Supp. 389 (E.D.N.Y. 1989).

a passenger bus.[130] On his habeas corpus writ, Ahmad argued that Israel's extradition request should be denied, because if he were extradited, he would "face procedures and treatment antipathetic to a court's sense of decency."[131]

The District Court listed protections which safeguarded extradited individuals. The United States does not enter into extradition treaties with countries that it does not trust.[132] Also, the executive branch retains the unilateral right to stay extradition,[133] and courts can, "as an independent branch of government," block an individual's extradition if the executive branch does not intervene on behalf of an individual whose safety is in jeopardy.[134] *Ahmad* further noted that "courts may not be parties to abusive judicial practices, even where sensitive foreign relations matters are concerned."[135]

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130. *Id.* at 394. After fleeing Israel, Ahmad was located in Venezuela, expelled to the United States, and charged with a number of crimes listed in the United States-Israel extradition treaty. *Id.*

131. *Id.* at 395.

132. *Id.* at 411. But the United States has been willing to enter into relations with countries it does not trust when it is in its interest to do so. *See supra* note 56.

133. *Id.* at 411. *See also In re* Tang Yee-Chun, 674 F. Supp. 1058 (S.D.N.Y. 1987) (finding that it is the function of the Secretary of State, not the courts, to determine whether or not extradition can be avoided on humanitarian grounds).

134. *Ahmad*, 726 F.Supp at 411-12.

135. *Id.* at 412. The court wrote:

> Despite the fact that the executive branch has a constitutional duty and right to conduct foreign policy, and the legislative and executive branches together have the duty and right to enter into treaties for extradition, the courts are not, and cannot be, a rubber stamp for the other branches of government in the exercise of extradition jurisdiction. They must, under article III of the Constitution, exercise their independent judgment in a case or controversy to determine the propriety of an individual's extradition. The executive may not foreclose the courts from exercising their responsibility to protect the integrity of the judicial process. A court must ensure that it is not used for purposes which do not comport with our Constitution or principles of fundamental fairness.

Id.

The *Ahmad* court also reviewed The Soering Case, European Court of Human Rights of the Council in Stasbourg on July 7, 1989. Slip sheet 1/1989/161/217, where the European Court intervened to prevent Soering's extradition from Great Britain to the United States. *Ahmad*, 726 F. Supp. at 413. Soering claimed if extradited for murder he would be placed on death row, which would violate article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Id.* The relevant language in that covenant provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221, 224.

The European Court first reasoned that extradition could be prevented "where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country." 161 Eur. Ct. H.R. (ser. A) at 35. These "substantial grounds" required proof of first, a "substantial probability that he or she can rebut the presumption of State Department propriety in assuming the fairness of

Despite its authority and admitted obligation to intervene on an individual's behalf, the court noted that the judiciary does not ordinarily inquire into the condition awaiting an extradited individual because of the absence of post-extradition protections.[136] *Ahmad* explained that the State Department monitors the treatment of an

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the judicial process by the requesting country." *Ahmad*, 726 F. Supp. at 415. Second, the petitioner was required to demonstrate by "clear and convincing evidence that upon extradition he or she will face a lack of due process, or torture or other cruel and inhuman treatment in the requesting country." *Id.* at 416. The petitioner's burden of proof is also met by a showing it is "more probable than not" that the foreign country will treat him unfairly. *Id.* The court concluded that the "extreme conditions" of death row," with the ever present and mounting anguish of awaiting execution of the death penalty" went beyond Article III's threshold." *Id.* at 413. For a general review of the Soering Case, see Stephan Breitenmuser and Gunter E. Wilms, *Human Rights v. Extradition: The Soering Case*, 3 MICH. J. INT'L L. 845 (1990).

There are other international documents which theoretically provide the basis for individual human rights protection. For example, there are portions of the International Covenant on Civil and Political Rights G.A. Res 2200a, 21 U.N. GAOR Supp (No. 16) at 52, art. 9 U.N. doc A/6316 (1966) which, on their face might protect individuals. Part II, Article 5 of the Covenant provides, in relevant part, that:

> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform *any act* aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant (emphasis added).

Article 9 provides that:

> 1. *Everyone has the right to liberty and security of person.* No one shall be subjected to arbitrary arrest of detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law (emphasis added).

Article 10 provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

See also European Convention on Human Rights 213 U.N.T.S 221; European Commission of Human Rights; European Court of Human Rights; Standard Minimum Rules for the Treatment of Prisoners, First U.N. Congress in Prevention of Crime and the Treatment of Offenders Annex I.A. at 67, U.N. Doc. a/CONF /6/1 (1956), adopted July 31, 1957 by the U.N. Economic and Social Council, E.S.C. Res 663C (XXIV), 24 U.N. ESCOR Supp (No. 1), at 11, U.N. DOC. E /13048 (1947).

The United States government consistently had defended its refusal to ratify important international human rights treaties by asserting that domestic law provides more protection than its international law counterparts. *See* Dean Rusk, *A Personal Reflection on International Conventions on Human Rights*, 9 HOFSTRA L. REV. 515,520 (1981). Note that several countries will not extradite an individual if the procedures in the requesting State are contrary to the European Convention on Human Rights: Switzerland, Austria and the German Federal Republic. Christine Van Den Wyngaert, *Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?*, 39 INT'L & COMP. L.Q. 757, 759 (1990).

See generally John H. Wakefield, *How the Working Organs of the European Convention Have Elevated the Individual to the Level of Subject of International Law*, 12 I.L.S.A. J. INT'L L. 27 (1988).

136. *Ahmad*, 726 F.Supp. at 410, 419.

extraditee after he leaves the United Sates to insure that conditions consistent with principles of fundamental fairness are fulfilled.[137]

The court concluded by listing three reasons why Ahmad was not likely to be subject to abusive practices. First, there was no evidence that persons extradited to Israel from the United States in the past had been denied due process.[138] Second, Ahmad did not "fit the profile" of a person against whom Israeli authorities were likely to "exert pressure."[139] Third, Israel assured the United States government that Ahmad would be treated fairly.[140]

Courts have been reluctant to accord extradition defendants other constitutional protections. *Romeo v. Roache*[141] rejected alleged violations of Fourth, Fifth and Sixth Amendment rights where Romeo claimed that he had not been given his *Miranda* warnings, that his mental incompetency rendered him incapable of knowingly consenting to his post-arrest interview, and that under the pretext of a search warrant for a year and a half old murder charge, a search in excess of the scope authorized by the warrant had been conducted.[142]

In dismissing Romeo's constitutional claims, the court pointed out that state, rather than federal, officials conducted the challenged interview and search, and that dismissing the extradition proceedings would not deter states from similar conduct in the future.[143] The court concluded that "more egregious conduct than that alleged here would be required before a court should interfere in international affairs by denying foreign states their rights under extradition trea-

137. *Id.* at 419. The court also noted that it "was informed that the State Department will observe the trial abroad to insure that its conditions are fulfilled." *Id.* at 410. Research has uncovered no instances where these post-extradition protections have been invoked to protect an individual after extradition.

138. *Id.* at 417.

139. *Id.*

140. *Id.*

141. 820 F.2d 540 (1st Cir. 1987).

142. *Id.* at 542-43. Romeo's mental competency claim was actually a form of constitutional claim, based on *In re Extradition of Artukovic*, 628 F. Supp. 1370, 1375 (C.D. Cal. 1986). There the government's contention that competence was not a proper subject of inquiry in extradition proceedings was rejected because of the Sixth Amendment guarantee of effective assistance counsel to all persons before the court in matters affecting life and liberty, and that the Fifth Amendment fair hearing right requires that a defendant have minimum competence. *Artukovic*, 628 F. Supp. at 1375. However, the *Romeo* court relied upon *Charlton v. Kelly*, 229 U.S. 447, 462 (1913), which *Artukovic* did not consider, holding that incompetence claims were appropriately heard at trial, not before extradition. The court added that the incompetency standard used in *Artukovic* was from criminal cases, and that extradition proceedings were not criminal prosecutions. *Romeo*, 820 F.2d at 543-44.

143. *Id.* at 545.

ties."[144]

Extradition defendants also cannot use the Constitution as a defense to otherwise unconstitutional procedural practices. In *Hooker v. Klein*,[145] Hooker was charged with theft of corporate assets after the dissolution of a Canadian company.[146] After a court found that "no crime had been committed in Canada for which appellant could be extradited," an extradition request was submitted to a second court, on the same facts, on the grounds that previously Hooker had erroneously been allowed to rebut evidence.[147] Hooker claimed that the reinstitution of extradition proceedings violated his constitutional right to be free from double jeopardy.[148] In granting the extradition, the court wrote that "relief for abuse of multiple attempts to extradite lies not in judicial limitation but rather in the fair mindedness of the government in fulfilling its obligations under the extradition treaty."[149]

Finally, extradition defendants have been denied protection under the "remedies and recourses" provisions of some extradition treaties, which allow individuals to avail themselves of the constitu-

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144. *Id.* This reasoning has been echoed in other contexts. Courts have also held that the Fifth and Sixth Amendment right to a speedy trial is not an "appropriate consideration" for extradition proceedings, Freedman v. United States, 437 F. Supp. 1252, 1265 (N.D. Ga. 1977), and such right should be "limited by its terms to criminal proceedings," Jhirad v. Ferradina, 536 F.2d 478, 485 n.9 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976).

145. 573 F.2d 1360 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978). *See* Shelley M. Goldstein, Comment, *Extradition and Double Jeopardy: Will the "Same Transaction" Test Succeed in an International Context?*, 6 N.C. J. INT'L L. & COM. REG. 141 (1980).

146. 573 F.2d at 1363.

147. *Id.* at 1364.

148. *Id.* at 1365.

149. *Id.* Not surprisingly, double jeopardy provisions do not apply to separate sovereigns in extradition proceedings. United States v. Wheeler, 435 U.S. 313 (1978) (Indian tribes are separate sovereigns such that a defendant may be prosecuted by both federal government and Navaho tribe for crimes arising out of one act); contrast this position with the language in Arizona v. Washington, 434 U.S. 497 (1978) where the court wrote:

> Because jeopardy attaches before the judgment becomes final, the constitutional protection [of double jeopardy] also embraces the defendant's "valued right to have his trial completed by a particular tribunal." The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

434 U.S. 497, 503-05 (citations omitted); *see also* Bartkus v. Illinois, 359 U.S. 121 (1959) (state's prosecution of a defendant after acquittal on a federal indictment for substantially identical facts does not violate due process clause).

tional protections of the extraditing forum. In *Kamrin v. United States*,[150] Kamrin sought "to prevent his extradition to Australia on the ground that the United States statute of limitations would bar" his prosecution in Australia.[151] The Treaty provided that "the person whose extradition is sought shall have the right to use such remedies and recourses as are provided by the [law of the requested state.]"[152]

The court wrote that when the United States is the requested country, while delay in seeking extradition is relevant to the Secretary of State's final extradition determination, "the delay may not . . . serve as a defense to . . . extradition proceedings."[153] Adopting *Charlton*'s reasoning, the court held that in the absence of an express treaty provision, a statute of limitations could only be advanced as a defense to criminal proceedings upon return to the requesting state.[154]

Turning to the Treaty, the court found that Kamrin could not avail himself of its "remedies and recourses" provision. The court began by noting that bail may only be granted in special circumstances.[155] This special circumstance requirement undermined Kamrin's claim that "bail is one of the remedies and recourses of United States law to which an extraditee is entitled."[156] Kamrin was thus denied the rights of the requested country under the rationale that due process rights cannot be extended extraterritorially, even though he had claimed them in the requested country.[157]

Extradition jurisprudence and practice are implicit and explicit statements about the boundaries of individual rights. These statements have been clear and telling: The legacy of Justice Holmes' language in *Fernandez*[158] has been to define individual rights as a function of the form of the extradition process, regardless of its substance, perception by the extradited individual, or its use by the involved parties. Despite the occasional pro forma extension of the confines of *Fernandez*, such as in the *Gallina* exception to the non-inquiry rule or the dictum in *Ahmad* or *Burt*,[159] the judiciary's

150. 725 F.2d 1225 (9th Cir. 1984).

151. *Id.* at 1226.

152. *Id.* at 1227, *quoting* Extradition Treaty, May 8, 1976, U.S.-Australia, 27 U.S.T. 957.

153. *Id.*

154. *Id.*

155. *Kamrin*, 725 F.2d at 1227. Kamrin had relied upon the District Court's opinion in *United States v. Williams*,480 F. Supp. 482 (D. Mass 1979), *rev'd*, 611 F.2d 914 (1st Cir. 1979), which permitted the grant of bail in extradition proceedings.

156. *Kamrin*, 725 F.2d at 1228.

157. *Id.*

158. 268 U.S. 311 (1925).

159. Ironically, in each of these cases the promised exception to the non-inquiry rule did not bear fruit, as each extradition request was approved.

reluctance to think systematically about extradition as a complex of political, legal and international processes which require scrutiny has not changed. The implications of the judiciary's refusal to think beyond the form of extradition proceedings in construing the rights of extradition defendants are amplified by its treatment of the specialty and double criminality doctrines. Notwithstanding minor rhetorical variations, courts have interpreted the doctrines as protecting individual nations, not individual rights. Finally, courts have been reluctant to grant constitutional protections to defendants, ruling that some constitutional considerations are "inapplicable in extradition proceedings,"[160] and subjugating others to diplomatic interests.

The previous cases demonstrate that extradition defendants are denied many fundamental procedural and substantive protections, such as the right to contradict evidence brought against them, and that those protections within the discretionary power of the court, such as bail, cross-examination and discovery, are rarely extended.[161] The fundamental rationale for denying individuals protection in extradition proceedings is that extradition is not a criminal trial and, accordingly, rules of criminal trials are inapplicable.[162]

Underlying extradition law is the assumption that extradition proceedings are distinct from criminal trials in their ends: courts view extradition as a process which transports a person *to* trial, not as the process which tries them.[163] Accordingly, courts transfer the obligation to provide protections, with the extraditee, to the requesting state. Yet the jurisprudential premise that extradition is merely a procedural incident to a subsequent trial should be questioned. The rights accorded to individuals in criminal trials—and the constitutional source from which those protections emanate[164]—indicate that subjection to the institutional and coercive processes of the state can be dangerous.[165] Subjection to state scrutiny, of any sort, is

160. Jhirad v. Ferrandina, 536 F.2d 478, 485 n.9 (2d. Cir.), *cert. denied*, 429 U.S. 833 (1976).

161. For instances in which courts have chosen not to exercise their discretion to grant discovery, see Emami v. U.S. Dist. Court for Northern Dist. of California, 834 F.2d 1444 (1987); *In re* Extradition of Singh, 123 F.R.D. 108 (D.N.J. 1987). For instances in which courts have chosen not to exercise their discretionary power to grant bail, see Wright v. Henkel, 190 U.S. 40 (1903); United States v. Messina, 566 F. Supp. 740 (E.D.N.Y 1983).

162. Moreover, courts have held that the discretionary powers of the court to intervene and grant procedural protections to extradition defendants have also been subjected to policy interests. *See supra* note 99.

163. *See, e.g.*, Melia v. United States, 667 F.2d 300, 302 (2d Cir. 1981) ("An extradition hearing is not the occasion for an adjudication of guilt or innocence.").

164. *See* U.S. CONST. amend. V, VII, VIII, XIV.

165. For an example within extradition jurisprudence of distinction between differ-

a potentially abusive practice which American jurisprudence, since its inception, has wisely offset through procedural protections.[166] Extradition law should benefit from this lesson as well. Accordingly, extradition should be considered as a procedure which, as falling within the purview of the executive branch, might be abused, or which might be inherently abusive. It should be considered as a process which implicates rights concerns that many people feel, and that our Constitution states, are important. Extradition law should simply be a function of the substance, not the form, of extradition proceedings.

Further, the substantive and procedural protections afforded defendants in extradition proceedings, aside from serving as formal statements about the value of individual liberty, send messages to governments about the permissible use of their institutional processes. Statements like these are especially important in our constitutional democracy, because the separate governmental branches are expected to monitor each other.[167] Yet present extradition law, as a social and philosophical guide to the executive branch, is unreflective of both the checks and balances on which our governmental system rests, as well as many historically and presently shared feelings about proper governmental behavior. One example involves the notion that individuals should not, civilly or criminally, be brought to trial more than once for the same offense.[168] Courts have permit-

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ent types of processes, see Van Cauwenburghe v. Baird, 486 U.S. 517 (1988), discussed *infra* note 217 and accompanying text.

166. Many areas of our jurisprudence have built protections around the context and the potential deprivations of individual liberty. However, the trend has been towards narrowing these protections. *See* Rafeedie v. Immigration and Naturalization Service: *Summary Exclusion and the Procedural Due Process Rights of Permanent Resident Aliens*, 13 LOY. L.A. INT'L & COMP. L.J. 179 (1990); M. Shane Craighead, Note, Paillot v. Wooton: *Determining the Complexity of Predeprivation Hearings Required by Procedural Due Process, 51* LA. L. REV. *923 (1991); Ideologically Excluded Aliens and their Entitlement to Fundamental Procedural Rights*, 13 SUFFOLK TRANSNAT'L L.J. 229 (1989); Amy J. Borman, Note, *Procedural Due Process and "The Mere Right of Reply"*-Ducheine v. Williams, 20 U. TOL. L. REV. 765 (1989); George F. Driscoll, Jr., Case Comment, 22 SUFFOLK U. L. REV. 201 (1988). *See also* Mathews v. Eldridge 424 U.S. 319 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970).

167. Note that the reality of modern day American government is otherwise. David Broyles notes

> [t]hese days a discussion of the Constitution's separated powers must be prefaced by a rueful acknowledgment that these separated powers have disappeared. Separated powers, that is to say, is absent from the place our Founders assigned to it in our political science. It is no longer considered our chief means for realizing freedom and good government.

David Broyles, *Separated Power and its Opponents*, in PRINCIPLES OF THE CONSTITUTIONAL ORDER 111 (Robert L. Utley, Jr. ed., 1989).

168. The emphasis in double jeopardy theory is that the system itself should not be employed against individuals. One scholar has commented:

ted circumvention of this value by allowing the reinstitution of extradition proceedings if the first extradition effort fails.[169]

Ironically, the presumed remedy for the government's abuse of power in the extradition process lies with the feared abuser, the government itself. Decisions to reinstitute extradition proceedings are currently bound only by governmental fair-mindedness.[170] This standard stems from the judiciary's great deference to the executive branch in extradition proceedings. However, the fair-mindedness standard has not been a sufficient bar to otherwise objectionable governmental conduct for two reasons.[171] First, courts have constituted fair-mindedness not as a objective product of shared legal or social norms, but as a function of prevailing (governmental) political wants. Second, governmental fair-mindedness is an especially suspect means for securing governmental compliance with legal values given past governmental conduct; as *Burt* demonstrated, the government can sidestep otherwise confining legal imperatives and values before it is forced to comply with them.[172]

Judicial occupation with the form of extradition proceedings also neglects the perception of the extradited individual. Refusing to classify extradition as a criminal trial, or at least as a process with many similarities to a criminal trial, disregards that from a defendant's perspective, extradition bears a striking functional resemblance to a trial. It is a trial over whether or not an individual will be compelled to leave the location of his choice and be sent to a foreign country against his wishes. It is a trial over whether or not an

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> We should, therefore, pause to ask why double jeopardy is intrinsic to Western legal thought. The answer lies in the type of governmental conduct that gives rise to its protections. Other Bill of Rights guarantees affect different parts of the criminal process. The privilege against self-incrimination of the fourth amendment, for example, limits the government's evidence gathering capability. The right to counsel and to a jury prescribe a procedure to be followed in seeking a conviction. The double jeopardy clause, however, protects against using the criminal process itself to oppress individuals.

George C. Thomas III, *An Elegant Theory of Double Jeopardy,* 1988 U. ILL. REV. 827, 837 (1988).

169. *See supra* notes 145 to 149 and accompanying text.

170. *See* Hooker v. Klein, 573 F.2d 1360, 1365 (9th Cir.), *cert. denied,* 439 U.S. 932 (1978).

171. *See* United States v. Lovasco 431 U.S. 783, 790 (1977), writing that "while it may be fundamentally unfair for the government as enforcer of its criminal statutes to compel an accused to respond to and stand trial for charges when the government's delay in bringing the charges has resulted in actual prejudice to the accused . . . ."

172. *In re* Extradition of Burt, 737 F.2d 1477 (7th Cir. 1984). One possible test the courts could fashion would involve: (1) a list of the protections which are available in extradition proceedings and what those protections mean; and (2) the requirement that the government would have demonstrate a compelling interest in circumventing these protections.

individual will stand to face charges in a jurisdiction which does not share his political or legal views. In one way, extradition proceedings are even more threatening than a trial. Trials have a beginning and an end, but extradition procedures have no judicially imposed start or finish. In short, the organization of extradition law around the form of extradition proceedings ignores the nature of the extradition process and its use by and impact upon the parties to that process.

The judiciary's repeated rejection of jurisdictional challenges to extradition proceedings should also be challenged. While extradition is defined by statutes, the specialty and double criminality doctrines and the non-inquiry rule have been interpreted by resorting *only* to broad, indeterminate theories of international comity and reciprocity. Courts have repeatedly rejected attacks on extradition orders utilizing the specialty and double criminality doctrines under the rationale that they protect international relations, not individual rights.[173]

Yet these affirmative defenses to extradition do not merely govern and serve to strengthen international relations; they arguably imply independent individual rights. These rights inhere in the letter of the defenses themselves. Specialty requires that no state try an individual for crimes other than those for which he was extradited. Double criminality requires that no state try an individual for a crime that one party to the extradition process deems as not criminal. Despite this doctrinal clarity, case law has interpreted the "shall not" imperative in these doctrines as relative, subject to the manifest political preferences of one state and the perceived political preferences of another. In sum, the redefinition of specialty and double criminality as protective of only states' rights results from practical failures to enforce each doctrine's letter, not from a reasoned understanding of the relationship between the state and the individual. This understanding, as with the recognition of procedural protections within extradition proceedings, should come from considering, in addition to political limits on state conduct, the inherent boundaries treaty language imposes on that conduct.

The use of the specialty and double criminality doctrines as guarantors of state, as opposed to individual, liberty raises broader political questions of individual-state relations. It assumes that the individual, as a political entity, is subordinate to the state. But the state is created by the people: it is not an independent, autonomous entity severable from the citizens which constitute it.[174] In other

173. *See* United States v. Najohn, 785 F.2d 1420 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986).

174. Professor Allott notes:

words, while the state is granted rights and authority from individuals, the *source* of those rights and authority are strictly individual preferences, not the interests of the state apart from those preferences.[175] Due to the complex nature of modern life, the nature of the citizen-state relationship is admittedly blurred. But social realities which make power relationships less visible to traditional overseers of political relations, such as other branches of government or the electorate, should not be excuses to redefine these relationships. Extradition law should—via the Constitution—insure that citizen preferences are examined, continually expressed, and defended. This scrutiny is especially important given that extradition is a process generally removed from public debate and comment. Yet despite this strong case for linking political accountability with doctrinal clarity, courts have summarily reasoned that individual preferences—expressed as defendants' individual rights claims in extradition hearings—are utterly subject to the will and practice of the state. More precisely, and more troubling, the claims are subject to the will and preferences of persons that are acting in the name of the state.[176]

Finally, the courts' reluctance to grant extradition defendants constitutional protections should also be questioned. As with the issues of procedural protections and jurisdictional challenges, the scope of constitutional protections has proceeded from the judiciary's formalistic analysis of the extradition process.[177] Yet, as with proce-

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> The subjects of international law are states but only in the sense that the present conceptual structure of international law attaches legal rights . . . to the category "states". . . . The subjects of international law, in the sense of those for whose benefit the law assigns all rights and duties, are the peoples of the world.

Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT'L L.J. 1, 14 (1988).

The Supreme Court has recognized that even the comity doctrine, which concerns the deference states afford each other, is protective of individual rights:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nations allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, *and to the rights of its own citizens or of other persons who are under the protection of its laws.*

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (emphasis added).

175. Yet the state often does not behave this way. *See* Allott, *supra* note 174, at 14. For an inquiry into why states voluntarily follow their own moral directives, see Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988).

176. To what degree is extradition, which is supposedly done in the name of the state, actually a process which reflects only the institutional needs of a single agency within the state? This possibility makes scrutinizing the means and ends of extradition more important. *See infra* part VI.

177. For example, *Jhirad* held that the Fifth and Sixth Amendment right to a speedy trial is not an "appropriate consideration" for extradition proceedings. Jhirad v. Ferrandina, 536 F.2d 478 (2d. Cir.), *cert. denied*, 429 U.S. 833 (1976).

dural protections, constitutional protections should arise from the substance of the extradition proceedings, not their form. "Substance" involves nothing less than an examination of what rights are implicated in the extradition process and how those rights are affected by the process. Extradition law is currently wasting a tremendous opportunity to square our constitutional jurisprudence with difficult political and international issues. Instead of addressing these issues, the law ignores them.

The same criticism can be particularly directed at the non-inquiry rule. Our obligations to safeguard individual rights should not end at our borders, especially in an age when democratic and humanitarian values and ideology are used as weapons to wage America's wars. If the United States and other countries increasingly expect each other to follow shared norms, these norms should simultaneously be enforced domestically. With regard to the non-inquiry rule, this could make non-inquiry determinations rest on a balance between the political reasons for non-inquiry with the applicability of those reasons to a particular state which petitions the United States to extradite an individual. Further, political realities could alter the presently all-or-nothing character of the non-inquiry rule, by establishing intermediate procedures to protects the rights of an individual who may be in jeopardy.[178]

Extradition jurisprudence assumes that some constitutional protections are subject to diplomacy.[179] This assumption makes poor theoretical sense. Diplomacy is neither constitutional law nor a valid principle of constitutional interpretation. The right to engage in diplomacy is accorded deference because it is a valid expression of the foreign relations authority vested in the executive branch; but that does not mean that every individual act of diplomacy is equally entitled to constitutional approval.

Moreover, constitutional protections do not merely shield individuals, they constrain government from abuses of authority.[180] Courts have been reluctant to consider extradition law as a normative statement concerning governmental conduct.[181] *Romeo*[182] found

178. This exists already, to some degree. Individuals are allegedly assigned to foreign countries at times to protect an individual's rights. *See* Ahmad v. Wigen, F. Supp. (E.D.N.Y. 1975). This type of protection could be expanded to, perhaps, insuring that the individual is tried by a third party before transferred. Or perhaps that an individual's sentence is carried out in the requested state.

179. *See e.g., In re* Extradition of Burt, 737 F.2d 1477 (7th Cir. 1984).

180. United States v. Verdugo-Urquidez I, 856 F.2d 1214 (9th Cir. 1988).

181. Yet such an inquiry is arguably implied by constitutional law. *See* Ziyad Motala, *The Jurisprudence of Constitutional Law: The Philosophical Origins and Differences Between the Western Liberal and Soviet Communist State Law*, 8 DICK. J. INT'L L. 225, 227 (1990) ("Constitutionalism is clearly linked to a set of political ideals.").

182. Romeo v. Roache, 820 F.2d 540 (1st Cir. 1987).

that the "[d]ismissal of extradition proceedings would not seem to serve much of a deterrent effect to such state conduct." While the deterrent value for governments, or individuals in their service, of dismissing extradition proceedings is debatable, it would nevertheless send a signal to society, generally, about the value of protecting individuals from wrongful governmental practice. This might influence our political culture, which in turn might affect the type of policy and legal intrusions the citizenry is willing to tolerate.

In addition to the fundamental absence of individual protections in extradition proceedings, courts have also removed potential constitutional protections, even when they are specifically guaranteed by treaty. In *Kamrin*,[183] the court denied the petitioner's constitutional claims, even though the applicable treaty guaranteed him whatever rights the requested country had. The court denied his claims on the grounds that the Constitution cannot be asserted extraterritorially and that bail was only to be granted in special circumstances.[184] Yet Kamrin was not trying to assert an extraterritorial constitutional claim, he was simply trying to avail himself of an applicable territorial constitutional protection, in accordance with the Treaty. The Treaty gave individuals the rights to assert the requested countries' constitutional protections; it did not make those rights subject to one country's unilateral decision to water down its constitutional protections in extradition proceedings.

In summary, current extradition jurisprudence constitutes a narrow statement about individual rights. This statement, moreover, rests on three static and questionable assumptions. The first is that extradition is not a criminal trial, and that extradition law is a function of the form, not the substance of extradition practice. This simply does not reflect current use of the extradition process. The second assumption is that individual rights, to the extent that they exist at all, are only derivative of states' rights. This ignores both the relationship between the state and the individual our political culture envisions, and the values our laws, governmental structure and history ensure. Finally, extradition jurisprudence dictates that behavior otherwise violative of the Constitution is transformed into constitutionally permissible conduct when it is directed against individuals the courts do not feel compelled to protect. This does more than elevate diplomacy above the Constitution; it subordinates constitutional principles to simple political expediency. It is against the backdrop of extradition jurisprudence as a procedural, substantive and normative statement about individuals that this Comment turns to consider the United States' acquisition of foreign defendants.

183. Kamrin v. United States, 725 F.2d 1225, 1228 (9th Cir. 1984).
184. *Id.* at 1227.

B. *The United States' Acquisition of Foreign Defendants*

Just as the extradition of defendants from the United States protects international relations more than individual rights, the United States' acquisition of foreign defendants also restricts individual due process rights. Due process jurisprudence regarding the United States' acquisition of foreign defendants began with *Ker v. Illinois*.[185] Ker, who was abducted from Peru by a private party to answer larceny charges in the United States, asserted that the abduction violated the Fourteenth Amendment's Due Process Clause and the extradition treaty between the United States and Peru.[186] The Court held that due process is "complied with when the party is regularly indicted by the proper grand jury in the State court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled."[187]

While conceding instances in which acquisition of a defendant might give rise to constitutional claims, the Court concluded that "for mere irregularities in the manner in which [a defendant] may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all. . . ."[188] *Ker* thus effectively held that the means by which a person is brought within a state's control is irrelevant to the state's authority to try him.

The Court also dismissed Ker's claim that the United States violated its obligations under the extradition treaty with Peru. The treaty granted Ker no right to claim asylum in Peru and the abduction, moreover, was carried out "without any pretense of authority under the treaty or from the government of the United States."[189]

Ker is generally cited with a case decided over 60 years later, *Frisbie v. Collins*.[190] Frisbie, who was seized and forcibly brought to Michigan to stand trial, claimed that his murder conviction should be quashed as his abduction violated the Due Process Clause and the Federal Kidnapping Act.[191] Following *Ker*, the Court concluded that "due process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards."[192]

185. 119 U.S. 436 (1886).

186. *Id.* at 438, 440.

187. *Id.*

188. *Id.*

189. *Id.* at 442-43. Ker was abducted by a Pinkerton agent in the employ of Ker's alleged victim. *Id.*

190. 342 U.S. 519 (1952).

191. *Id.* at 520.

192. *Id.* at 522.

The *Ker-Frisbie* cases, along with *United States v. Rauscher*,[193] constitute the fundamental due process analysis applied to the United States' acquisition of individuals abroad. In *Rauscher*, the Supreme Court acknowledged the right of a person extradited pursuant to a treaty to invoke the rule of specialty to avoid persecution.[194] The court also held that a treaty is the "law of the land," equivalent to an act of the legislature, as distinguished from other countries, in which a treaty is merely an international contract.[195]

The *Ker-Frisbie* doctrine and *Rauscher* originally sketched a hollow and undefined, but at least nominal, balance between state conduct and individual rights. Presently, this balance has, in the name of policy objectives, been almost entirely eviscerated. *Rauscher*, with its promise of adhering to the letter of extradition treaties, has been wrung of most of its potential due process protection, while the *Ker-Frisbie* doctrine has been continually sustained to sanction the methods of foreign drug policy objectives.

Rauscher has been limited in several ways. As with specialty claims brought to stay prosecution in foreign nations, many decisions have determined that an individual cannot avoid prosecution by asserting individual rights under extradition treaties.[196] For example, in *Fiocconi v. United States*,[197] two Italian defendants were indicted on charges that they conspired to import heroin, a crime that was not listed in the existing extradition treaty between the United States and Italy.[198] The United States asked the Italian court to broaden its extradition order, but the Italian government did not respond.[199]

Restricting *Rauscher*'s protective stance over individual rights, the court held that the specialty doctrine was only designed to prevent the United States from violating its international obligations.[200]

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193. 119 U.S 407 (1886).

194. *Id.* at 430.

195. *Id.* at 418-19. This language is ironic, given the development of due process jurisprudence as applied to United States conduct abroad. In many respects treaties, although the "law of the land, equivalent to an act of the Legislature," have been interpreted as contracts, which the United States government can unilaterally enforce, rewrite or rescind at will. Interpretation of doctrines, such as double criminality and specialty, also reflect this contractual notion.

196. *See e.g.*, United States v. Jetter, 722 F.2d 371 (8th Cir. 1983).

197. 462 F.2d 475 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972).

198. *Id.* at 476.

199. *Id.* at 477.

200. Another argument for construing the specialty doctrine as protective of international relations, not individual rights, is found in United States v. Riviere, 924 F.2d 1289, 1300 (3d Cir. 1991), where the court wrote that "while a treaty limits a nation's discretion to grant asylum, it does not change its power to deny asylum. When a nation waives its right to enforce extradition treaty provisions, it essentially refuses to grant asylum to the fugitive for the offense involved."

Therefore the determination of whether or not Fiocconi could be tried turned on the court's determination of whether the Italian government would have considered the United States' prosecution of Fiocconi for a crime he was not extradited for as a breach of the treaty.[201] The court found that Italy would not object to further prosecution because of Italy's lack of formal protest and because the prosecution constituted mere "technical refinements of local law."[202] In reaching its holding, the court interpreted the Treaty's provision that surrendered persons "shall in no case be tried for any . . . crime, committed previously to that for which his . . . surrender is asked . . . "[203] as acquiescence to prosecution for crimes "before surrender, at least of the same general nature, provided only that they were not antecedent to that for which the surrender was asked."[204]

This interpretation of the specialty doctrine as protective only of rights between nations, not individuals, continued in *United States v. Najohn*.[205] *Najohn* built on *Fiocconi* by noting that protection under the rule of specialty exists "only to the extent that the surrendering country wishes" because the primary concern is "satisfaction of the requesting country's obligations."[206] Noting that a defendant could raise a specialty doctrine defense if the extraditing country allowed, the court added that a defendant could be tried for crimes beyond the treaty's reach if the asylum country consented.[207]

The prosecution of an individual for crimes beyond the letter of an extradition treaty was permitted in *United States v. Diwan*,[208] which held that an extradited individual could only assert objections to prosecutions that the asylum nation, Great Britain, might consider a breach of the treaty.[209] Therefore, notwithstanding the defendant's extradition on theft-related offenses, in light of Great Britain's express consent, Diwan could be tried for conspiracy to persuade a minor into sexually explicit conduct.[210] The *Diwan* majority explained that the rule of specialty was "designed to preserve international relationships and to protect the institution of extradition."[211] *Rauscher*'s objective was defined to insure that signatory nations faithfully observe shared treaty obligations. Individual

201. *Fiocconi*, 462 F.2d at 477.
202. *Id.* at 481.
203. *Id.* (quoting Extradition Convention, Mar. 23, 1868, U.S.-Italy, art. III, 15 Stat. 629, 631).
204. *Id.*
205. 785 F.2d 1420 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1980).
206. *Id.*
207. *Id.*
208. 864 F.2d 715 (11th Cir.), *cert. denied*, 492 U.S. 921 (1989).
209. *Id.* at 721
210. *Id.* at 720.
211. *Id.*

rights could only be derived from whatever rights Great Britain had under the Treaty.[212]

Narrowing of the specialty doctrine recently continued in *United States v. Riviere*.[213] Riviere was extradited for marijuana possession but tried for firearms offenses, which he contended violated the extradition treaty between Dominica and the United States.[214] While following *Fiocconi*, *Najohn*, and *Diwan*, the court weakened the specialty doctrine further by basing its opinion on the asylum implications inherent in Dominica's waiver of its right under the treaty:

> When a nation waives its right to enforce extradition treaty provisions, it essentially refuses to grant asylum to the fugitive for the offense involved. Inasmuch as Dominica expressly waived its rights under the treaty to object to this country's proceedings after extradition, it effectively expressed its intention that it would not grant asylum to Riviere for any offense for which the United States intended to prosecute him, an act completely within Dominica's discretion as a sovereign nation.[215]

The court added that "the mere existence of a treaty does not create individual rights in fugitives found within the borders of a party nation."[216] By interpreting a waiver of objection to prosecute for a specific charge as a state's express intention that it would not grant asylum for *any* offense for which the United States would prosecute, another potential individual protection under the specialty doctrine was lost.

Finally, even when the specialty doctrine has been invoked, its scope has been narrowed. In *Van Cauwenburghe v. Baird*,[217] the Supreme Court rejected a claim that specialty not only requires that an extradited person be immune from criminal prosecution, but that he be free from any judicial interference, including a civil suit:

> [E]ven if the principle of specialty shields petitioner from service of process in a civil suit while he is detained in the US following his extradition and conviction—an issue on which we express no opinion—the right not to be burdened with a civil trial itself is not an essential aspect of that protection.[218]

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212. *Id.* at 721.

213. 924 F.2d 1289 (3d Cir. 1991).

214. *Id.* at 1290-91.

215. 924 F.2d at 1300-01. "The Attorney General and Minister for Legal Affairs, Immigration and Labor of Dominica on April 14, 1989, executed a waiver of 'any and all Rights and Obligations and Protections of the Commonwealth of Dominica' under Article XII of the US-UK Treaty." *Id.* at 1292. *See* Extradition Treaty, June 8, 1972, US-UK, 28 U.S.T. 227.

216. 924 F.2d at 1301.

217. 486 U.S. 517 (1988).

218. *Id.* at 525.

The Court, adopting *Diwan*'s reasoning that specialty governs international treaty obligations, predicted that the impact of its decision would not be severe:

> The conduct of a civil trial, prior to any attempt to subject the defendant to a binding judgment of the court, does not significantly implicate the receiving state's obligation under the doctrine. Unlike a criminal prosecution, in which the coercive power of the state is brought to bear, the state's involvement in the conduct of a private suit is minimal. The state's role is simply to provide a forum for the resolution of a private dispute.[219]

Rauscher has largely been stripped of its value as a potential individual rights protection. First, it has been interpreted as protecting the relationships between states, not individuals.[220] Second, courts have made the burden for state intervention on behalf of individuals exceedingly high, requiring official state protest, while they have been extremely permissive in interpreting foreign state action (or inaction) as consent to prosecution.[221] They have also ex-

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219. *Id.*

220. This Comment has considered how doctrines, such as specialty, are more protective of international relations than individual rights. This is consistent with the general difficulties international law has in considering individual rights claims. Professor Bassiouni, for example, has noted that international law is "unable to fit [the individual] in the conceptual framework of that discipline which was historically developed out of the need to regulate institutions and not interpersonal relationships." BASSIOUNI, *supra* note 5, at 563. Bassiouni also commented that "nowhere in extradition law and practice can the individual . . . compel the requesting or requested state to adhere to internationally recognized principles of extradition law if either state wishes not to apply them or to circumvent them." *Id.* Finally, he has noted that "extradition is still regarded . . . as an institutional practice. States are the subjects of its regulation, while individuals are the objects of its outcome." *Id.* at 562.

These theoretical impediments to individual rights claims should be considered against the changing function of extradition. Historically, extradition has rarely been used. The early perception may have been that individual rights were built into international thinking via the presumption against granting extradition. Today extradition is fast becoming a common form of criminal discourse between nations. Second, as the science of international politics advances, states are becoming more adept at furthering policy goals through incentives. This presents individuals with less chance to have their rights defended.

Despite these impediments, there are ways that abduction can be challenged on international law grounds. One argument is that "any exercise of law enforcement by one state on the territory of another is a violation of the latter's sovereignty." Lowenfeld, *supra* note 36, at 472. A second argument is that "*extradition treaties* not only serve the interests of states in law enforcement but also provide safeguards for persons whose arrest and transfer is being sought." *Id.* at 473. A third argument is that "forcible abduction carried out by a state is a violation of international human rights law." *Id.* The Universal Declaration of Human Rights states that "[n]o one shall be subjected to arbitrary arrest, detention or exile." G.A. Res. 217A(III), U.N. GAOR, 3d Sess., Supp. No. 71, art. 9, U.N. Doc. A/810 (1948).

221. *See* Fiocconi v. United States, 462 F.2d 475 (2d. Cir.), *cert. denied*, 409 U.S. 1059 (1972).

panded the significance of non-protest, typically by broadening the asylum countries' prosecutorial options.[222] Third, the specialty doctrine has been rejected outright at times, allowing individuals to be prosecuted for crimes beyond the letter of extradition treaties with what has been interpreted to be the requested countries' permission. Fourth, even when the doctrine can be invoked, its use has been limited.[223]

While *Rauscher* was being eroded, the *Ker-Frisbie* doctrine continued to be affirmed. The major challenge to the broad reach of the *Ker-Frisbie* doctrine came in *United States v. Toscanino*.[224] Toscanino was lured to a deserted area in Uruguay by Uruguayan policemen.[225] Toscanino was knocked unconscious, thrown into a car,[226] and brought to Brasilia, where he was tortured and interrogated by Brazilian authorities who were acting as United States agents.[227] Toscanino was denied food and sleep and only fed intravenously.[228] He was forced to walk without rest and was beaten when he fell.[229] To induce Toscanino to answer questions, his fingers were pinched with pliers, alcohol was flushed into his eyes and nose, and fluids were forced into his anal passage.[230] Electrodes were attached to his earlobes, toes, and genitals, and he was shocked with electricity, which left him unconscious.[231]

Toscanino asserted that the United States government and the United States Attorney for the Eastern District of New York were aware of the interrogation and received reports of its progress.[232] He also averred that a member of the Bureau of Narcotics and Dangerous Drugs of the Department of Justice was present and even participated in some of the interrogation.[233]

On appeal from his conviction, the Second Circuit first noted that, since *Frisbie*, the Supreme Court had expanded due process "beyond the mere guarantee of a fair procedure at trial."[234] The court

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222. *See* United States v. Najohn, 785 F.2d 1420 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986).

223. *See* Van Cauwenburghe v. Baird, 486 U.S. 517 (1988). *See generally* John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1465-68 (1988).

224. 500 F.2d 267 (2d Cir. 1974).

225. *Id.* at 269.

226. *Id.*

227. *Id.*

228. *Id.* at 270.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 272. The court listed a series of Supreme Court decisions which "bar[red] the government from realizing directly the fruits of its own deliberate and unnecessary

cited *Rochin v. California*,[235] where the Supreme Court set aside a conviction that rested on evidence obtained through police brutality.[236] *Toscanino* then held that due process requires a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's "deliberate, unnecessary and unreasonable" invasion of the accused's constitutional rights.[237]

Despite its promise, *Toscanino* has not stopped, or even slowed, the broad and continued use of the *Ker-Frisbie* doctrine. It has been eviscerated in the Second Circuit and rejected outright in others, typically on the grounds that the Fifth Amendment places no restraints on the Government's power to seize criminals abroad.[238]

The Second Circuit has narrowed *Toscanino* through both its level-of-force analysis and by raising the prima facie elements of proving actionable governmental "involvement."[239] The level-of-force analysis was announced in *United States ex rel. Lujan v. Gengler*,[240] just one year after the *Toscanino* decision. Lujan was lured into Bolivia by a United States agent.[241] He was taken into custody by the Bolivian police, who were also acting as agents of the United States.[242] Lujan was not permitted to communicate with his embassy, or an attorney, and was involuntarily placed on a plane to New York.[243] He was never formally charged by the Bolivian police, and the United States government never filed an extradition request.[244]

Citing *Rochin*'s reference to government conduct which "offends

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lawlessness in bringing the accused to trial." *Id.*

235. 342 U.S. 165 (1952).

236. *Id.*

237. *Toscanino*, 500 F.2d at 275.

238. *See* Matta-Ballesteros v. Henman, 896 F.2d 255, 263 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990); United States v. Darby, 744 F.2d 1508, 1531 (11th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985); United States v. Winter, 509 F.2d 975, 986-88 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975).

239. The Sixth Circuit has also limited *Toscanino*'s holding. In United States v. Palaez, 930 F.2d 520 (6th Cir. 1991), Palaez argued that the District Court erred in refusing to divest itself of jurisdiction over him and return him to Colombia. He argued that the Fifth Amendment's Due Process Clause was violated by the alleged "forcible" abduction from Colombia. The court responded that Palaez did not contend that United States officials had any involvement in the abduction and that he did not allege any physical force or brutality. The court noted that the Supreme Court has held that a body or person of a defendant is never "suppressible as a fact of an unlawful police arrest" or detention. *Id.* at 525 (quoting I.N.S. v. Lopez Mendoza, 468 U.S. 1032, 1039 (1984); United States v. Crews, 445 U.S. 463, 474 (1980); Gerstein v. Pugh, 420 U.S. 103, 119 (1975)).

240. 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

241. *Id.* at 63.

242. *Id.*

243. *Id.*

244. *Id.*

those canons of decency and fairness which express the notions of justice of English speaking peoples,"[245] the court first wrote that "lacking from Lujan's petition is any allegation of that complex of shocking governmental conduct sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process."[246] Second, the court noted that "the failure of Bolivia or Argentina to object to Lujan's abduction . . . preclude[s] any violation of international law which otherwise might have occurred."[247]

The prohibitive force of *Toscanino* also has been weakened by defining "governmental conduct" narrowly. In *United States v. Lira*,[248] the Second Circuit found that *Toscanino* was not applicable if the alleged mistreatment did not occur at the hands of United States officials.[249] Lira argued that he had been abducted illegally from Chile and tortured by United States government agents.[250] After his arrest and torture by the Chilean police, Lira was forced to sign a decree expelling him from Chile.[251] He was then placed aboard a plane and arrested in New York.[252] Despite the fact that the United States had specifically requested Lira's arrest in and expulsion from Chile, the court found that "the evidentiary hearing produced no proof that representatives of the United States participated or acquiesced in the alleged misconduct of the Chilean offi-

245. *Id.* at 65 (quoting Rochin v. California, 342 U.S. 165, 169 (1952)).

246. *Id.* at 66.

247. *Id.* at 67.

248. 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975).

249. *Id.* at 70. Raising the level of proof required to demonstrate "governmental conduct" is observable in areas outside of the abduction/extradition context. In United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991), Yunis challenged his conviction for charges of conspiracy, aircraft piracy, and hostage-taking because of U.S. Navy involvement in the incident.

A basis for his appeal was the Posse Comitatus Act, which prohibits military involvement in police action unless expressly authorized by law. *Id.* at 1093. Looking to other courts for instruction, the court found "that the Posse Comitatus Act imposes no restrictions on use of American armed forces abroad, [and] that Congress intended to preclude military intervention in domestic civil affairs." *Id.* (citing Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949); D'Aquina v. United States, 192 F.2d 338, 351 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952)). The court rejected Yunis' challenge, concluding that the Navy had played only a "passive" role in the capture and had not violated the Posse Comitatus Act. *Id.* at 1094.

For another case expanding the bounds of Navy law enforcement activity, see United States v. Roberts, 779 F.2d 565 (9th Cir.) (despite finding a violation of a federal law prohibiting use of Navy equipment to interdict the passage of vessels, the court refused to sanction the Navy), *cert. denied*, 479 U.S. 839 (1986).

250. *Lira*, 515 F.2d at 68-69.

251. *Id.* Under the extradition treaty between the United States and Chile, a Chilean national could not be extradited to the United States. Extradition Treaty, May 27, 1902, U.S.-Chile, art. V, 32 Stat. 1850.

252. *Lira*, 515 F.2d at 70.

cials."[253]

Second Circuit holdings which have limited the reach of the *Toscanino* holding have been adopted by other Circuits. Recently, in *United States v. Zapata*,[254] Zapata claimed that United States courts lacked jurisdiction to try him because he was seized in Peru and was forcefully brought to the United States. Applying *Lujan*'s level-of-force analysis, the Ninth Circuit determined that Zapata had not alleged governmental conduct sufficiently "shocking and outrageous" to preclude the District Court from exercising jurisdiction over him.[255]

The Seventh Circuit addressed an abduction claim in *Matta-Balesteros v. Henman*.[256] Matta-Balesteros escaped from prison and fled to his native Honduras.[257] Matta-Ballesteros was later confronted by Honduran special troops and United States Marshals.[258] He was allegedly handcuffed, arrested, beaten, and shocked with a stun gun at the direction of United States Marshals.[259] En route to the United States, he was also allegedly beaten and burned by United States Marshals.[260] Upon arrival in the United States, an examining physician found that the bruises on his head, face, scalp, neck, feet and penis, as well as blisters on his back were consistent with those caused by a stun gun.[261] Matta-Ballesteros claimed, *inter alia*, that his abduction by United States officials to face criminal charges in the United States violated the Due Process Clause.[262]

First, the court noted that individuals have no standing to challenge violation of international treaty in the absence of a protest by a sovereign nation.[263] Next, the court criticized *Toscanino*, finding it of "ambiguous" constitutional origins, and noting that the remedy

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253. *Id.* The court wrote that "no purpose would be served by holding the Government responsible for the actions of the Chilean police." *Id.* at 71.

254. No. 88-5289, 1991 U.S. App. LEXIS 4644 (9th Cir. March 15, 1991).

255. *Id.* at *7.

256. 896 F.2d 255 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990).

257. *Id.* at 256. Honduras does not extradite its nationals.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 257.

263. *Id.* at 259. Many courts have held that individuals do not have standing under an extradition treaty to claim a violation. *See, e.g.*, United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir.) ("even where a treaty provides certain benefits for nationals . . . individual rights are only derivative through the states"), *cert. denied*, 421 U.S. 1001 (1975); United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981) ("absent protest or objection by the offended sovereign, [a defendant has] no standing to raise violation of international law as an issue"); United States v. Cordero, 668 F.2d 32, 37 (1st Cir. 1981) (criminal defendant lacks standing to challenge a violation of formal extradition procedures).

for due process violations during pretrial detention was an injunction or money damages, not divestiture of jurisdiction. The court then concluded that *Toscanino*, to the extent that it effectively created an exclusionary rule, was not law in the Seventh Circuit.[264]

The Eleventh Circuit questioned *Toscanino* in *United States v. Darby*.[265] *Darby* concerned appeals from individuals convicted for drug related offenses.[266] One of the petitioners, Yamanis, claimed that the District Court lacked jurisdiction to try him because of the manner in which he was brought before the court.[267] Yamanis claimed that he was arrested in Honduras and forcibly brought to the United States by an American agent acting with the assistance of Honduran officials.[268] The court situated the case "squarely within the *Ker-Frisbie* doctrine, which holds that a defendant cannot defeat personal jurisdiction by asserting the illegality of the procedure of his presence."[269]

The court then dismissed Yamanis' use of *Toscanino*, for three reasons. First, the court concluded that Yamanis did not allege the treatment that was dispositive in *Toscanino*.[270] Second, the court rejected the "broad" application of *Toscanino* which Yamanis urged.[271] Finally, the court argued that the validity of *Toscanino* was "questionable"[272] in light of *Gerstein v. Pugh*,[273] where the Supreme Court affirmed the rule that an illegal arrest does not void a subsequent conviction.[274]

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264. 896 F.2d at 25. The court suggested that Matta's claim was in effect a request to create an exclusionary rule of the body, which "might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book." *Id.* (citing United States v. Blue, 384 U.S. 251, 255 (1966)).

The *Matta* court noted there are means by which the United States government could be deterred from abusive conduct: (1) Matta could file a Bivens action alleging a violation of his due process rights; (2) Matta could request that the case be dismissed for prosecutorial misconduct; and (3) "complaints from foreign nations of violations of international law as well as the loss of international standing provide an additional deterrent effect." *Id.* at 262. *But see* Wolf v. Colorado 338 U.S. 25, 48 (1949) (Rutledge, J., dissenting) ("There is but one alternative to the rule of exclusion. That is no sanction at all.").

265. 744 F.2d 1508 (11th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985).

266. *Id.* at 1509.

267. *Id.* at 1530.

268. *Id.*

269. *Id.* The court drew support from United States v. Herrera, 504 F.2d 859 (5th Cir. 1974), which rejected, under the *Ker-Frisbie* doctrine, the claim by a non-resident alien that his forcible abduction from Peru divested the district court of jurisdiction.

270. 744 F.2d at 1531.

271. *Id.*

272. *Id.*

273. 420 U.S. 103 (1975).

274. *Id.*

In *United States v. Matta*,[275] the Eleventh Circuit rejected a claim that the United States violated international law and the Due Process Clause when its agents allegedly kidnapped Matta from Honduras and tortured him before transporting him to the United States.[276] The court wrote first, citing *Darby*, that the Eleventh Circuit does not recognize the *Toscanino* exception to the *Ker-Frisbie* doctrine,[277] and second, that Matta did not allege the brutality that occurred in *Toscanino*.[278]

Part A of this Section levelled three criticisms at the United States' extradition of defendants to foreign countries: first, the narrow rights of extradition defendants are inappropriately accorded as a function of the form, not the substance, of extradition proceedings; second, our extradition jurisprudence unreflectively interprets jurisdictional challenges to extradition as only protecting nations, not individuals; and third, extradition law wrongfully interprets constitutional protections in extradition proceedings as a function of United States diplomacy and policy interests, not as expressive of an independent set of guaranteed rights.

This Section adds to these comments by raising three additional criticisms at the law regarding the United States' acquisition of foreign defendants: first, the assumptions the extradition law makes about the critical capacity of foreign nations are unreflective of both international realities and the United States' role in constructing those international realities; second, the nature of the conduct that the courts are sanctioning, regardless of how it is constitutionally or politically framed, offends "fundamental notions of fairness"; and third, extraterritorial due process holdings, combined with emerging political realities, will create an even wider, less scrutinized window of opportunity for abusive governmental practices.

Extraterritorial extradition jurisprudence rests on inaccurate assumptions about the critical role of foreign nations. The specialty doctrine, as *Fiocconi* and *Diwan* held, requires an "official state protest" by the state on behalf of the individual before the individual's claim is cognizable. History and case law, however, suggest that it is unlikely that foreign nations will intervene in extradition proceedings to criticize the United States' policy efforts.

The "official protest" requirement is irrational. First, it is unreflective of the fact that power in the international community is not distributed evenly; nations are severely imbalanced, both politically

275. 937 F.2d 567 (11th Cir. 1991).
276. *Id.* at 568.
277. *Id.*
278. *Id.*

and economically. These imbalances, moreover, are perhaps greatest between the United States and the drug-trafficking countries where potential abduction targets are likely to be domiciled or in hiding.[279] Nations are also imbalanced in terms of their ability to monitor the conduct of foreign countries;[280] in addition to the absence of monitoring capabilities, the political and legal culture may make "protesting" another nation's conduct more likely in some states than others.

Second, in addition to the basic power imbalances between nations, many countries are heavily dependent upon United States' economic and/or military assistance.[281] The United States has exploited this imbalance. It has forced some countries to comply with its extradition goals by making policy compliance a prerequisite for receiving aid.[282] In short, given the United States' increasing use of its political and economic leverage, it is simply unlikely that many of the drug trafficking nations will make a claim on behalf of an individual—especially an unwanted criminal—when it may jeopardize their political or economic interests.[283]

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279. Another factor which makes protest likely is the unwillingness of most individuals to stand up for the rights of drug traffickers. Common sentiment, both public and governmental, is that the Drug War should be broadened, not constrained. For the public, feelings of frustration about the inefficacy of anti-drug measures, and constant reminders of that inefficacy in the form of violence and addiction, are taken out on drug pushers and traffickers. Theoretically, this makes sense. As Freeman and Mensch point out, "the ideal of public community must be constantly affirmed through the social production of imagery." Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237, 245 (1987). Simply, a great deal of the mobilizing rhetoric in the Drug War has been successful because its objects are both politically unpopular and defenseless.

Yet in spite of this, or perhaps because of it, we should consider how rights are affected by public sentiment, which is influenced by matters not directly related to the retraction of individual rights. As deceptive as imagery is, it should not mask the changes in the actual rights people have. The retributive urge perhaps punishes rights more than it punishes the guilty person. One theme of this Comment has been that the myths which inhere in extradition should be stripped away, and the substance, both of extradition proceedings and policy measures, should be analyzed rationally.

280. *See generally* Zagaris, *supra* note 34.

281. *See generally* WISOTSKY, *supra* note 35.

282. Steven Wisotsky points out a few of these attempts, including a plan proposed by the Department of Justice permitting Caribbean tax havens to forfeit bank accounts as the quid pro quo for supplying information leading to the prosecution of drug traffickers for offenses against the United States. He notes that the United States canceled a tax treaty with the British Virgin Islands for lack of cooperation on information exchanges. Furthermore, under the Rangel Amendment to the Foreign Assistance Act of 1961, the President can block the granting of loans by the International Bank for Reconstruction and Development and the International Development Association to a bank that has not taken adequate steps to prevent the flow of illegal drugs to the United States. *Id.*

283. Mark Sherman writes that, "[u]ltimately, when a less developed country is reluctant to cooperate with U.S. international drug control policy, the U.S. wastes no time

The assumptions that the United States' state-centered extradition jurisprudence makes about the international community are rendered even less persuasive when considered against the structural changes in international relations, urged by the United States, which make state protest unlikely.[284] The increasing focus on law enforcement in the Drug War has generated tremendous criticism of extradition treaties.[285] One such criticism, not surprisingly, has been directed at specialty provisions, suggesting that treaties can not be rewritten fast enough to list the changing crimes which might constitute extraditable offenses.[286] Double criminality requirements have also been criticized, on the grounds that the laws of many states vary on the penalties they assign to similar crimes. Since states do not always agree on exactly what constitutes criminal and non-criminal conduct, double criminality critics suggest that alternate international criminal perspectives thwart the international effort to combat drug trafficking.[287]

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in resorting to its substantial bargaining power. Thus, the United States' drug control relationship with many third world countries is actually one of least partial coercion." Mark Andrew Sherman, *United States International Drug Control Policy, Extradition, and the Rule of Law in Colombia*, 15 NOVA L. REV. 661, 664 (1991). The United States and other Western European governments tend not to utilize the more irregular methods of rendition against each other. *See* 28 *Harvard Conference supra* note 5, at 74.

Customary international law maintains limitations on a state's criminal jurisdiction over the person by the state of nationality of the person. *See, e.g.*, S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J (ser. A) No. 10 (Sept 7). Generally, only the state of nationality may bring an international claim for an injury to a particular person. Nottenbohm Case (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6); Advisory Opinion No. 4, Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (Apr. 11); *see* John M. Rogers, *Prosecuting Terrorists: When Does Apprehension in Violation of International Law Preclude Trial?*, 42 U. MIAMI L. REV. 447 (1987).

284. What renders these changes somewhat inexplicable is that "Congress has been far from enthusiastic about extraterritorial arrests and abductions." Lowenfeld, *supra* note 36, at 477. But see the evolving history of 22 U.S.C. § 2291(c), *supra* note 36.

285. *See generally* Patel, *supra* note 32, at 709. Extradition was employed almost exclusively against political and religious offenders until the nineteenth century. Since then, with increased political and religious tolerance, extradition has been recast as a method of international crime control. *See* Yvonne G. Grassie, Note, *Federally Sponsored International Kidnapping: An Acceptable Alternative to Extradition?*, 64 WASH U. L.Q. 1205 (1986); Kenneth S. Sternberg & David L. Skelding, *State Department Determinations of Political Offenses: Death Knell for the Political Offense Exception in Extradition Law*, 15 CASE W. RES. J. INT'L L. 137, 138 (1983).

286. One scholar has commented that "international law has not been as flexible and as dynamic as either the organized criminals or the narco-terrorists." Zagaris, *supra* note 34, at 712. It generally takes two to four years to conclude, ratify, and exchange bilateral extradition treaties. Multilateral treaties take much more time. *Id.*

287. Double criminality requirements can be interpreted liberally or strictly. Countries that interpret these requirements liberally do so because, in their view, the benefits of international cooperation outweigh the impact on sovereignty dictates in this area. *See generally* Sicaledes, *supra* note 63.

In response to these criticisms, many recent extradition treaties have been altered. These alterations have included: (1) more flexible formulas for defining extraditable offenses;[288] (2) provisions that conspiracies and criminal attempts constitute extraditable offenses;[289] (3) changes to better accommodate international law enforcement efforts, including the movement to outline penal zones rather than exhaustively list extraditable offenses;[290] and (4) provi-

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Most extradition treaties contain no obligation on the part of the host state to deliver up their own nationals. The current treaty in force between the United States and Italy is the only one that mandates the extradition of nationals. Extradition Treaty with Italy, Oct. 13, 1983, U.S.-Italy, art. IV, T.I.A.S. No. 10,837, at 6 ("A Requested Party shall not decline to extradite a person because such a person is a national of the Requested Party."). Some treaties, in fact, explicitly bar such extradition. *See, e.g.*, Extradition Treaty with Mexico, May 4, 1978, U.S.-Mex., art. 9, 31 U.S.T. 5059, 5065 (allowing narrow discretionary exception). This provision, according to critics, necessarily and disproportionately harms nations like the United States, who are often trying to prosecute the nationals of other countries.

Finally, "exceptions" constitute another criticized extradition barrier. The political offense exception allows a requested country to refuse to extradite an individual if it considers the crime for which the individual is charged to be a "political" offense.

> Political offenses fit into two broad categories: pure and relative offenses. A pure political offense is a crime that is directed against the "security and structure of the state" or "the regime of official power," and that contains none of the elements of a common crime. This category of offenses is limited to treason, espionage, and sedition. Pure political offenses are rarely extraditable crimes. Relative political offenses are common crimes, such as murder or theft, which are connected with a political act. These offenses may qualify for the political offense exception.

Michael R. Littenberg, Comment, *The Political Offense Exception: An Historical Analysis and Model for the Future*, 64 TUL. L. REV. 1195, 1198 (1990). The exception was based on three principles: (1) recognition of the legitimacy of political dissent; (2) the desire to protect the political offender from summary execution or delivery to a biased tribunal; and (3) the belief that the extraditing state should remain detached from the internal affairs of the requesting state. *See generally id.*; GILBERT, *supra* note 67, at 113-82.

A second criticized exception is the "death penalty" exception. Nations may refuse to extradite an individual if the offense for which the individual is to be extradited is punishable by death in the requesting state. A typical clause is found in Article 11 of the European Convention on Extradition:

> If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death penalty will not be carried out.

European Convention on Extradition, Dec. 13, 1957, art. II, 359 U.N.T.S. 273.

A third exception is the military offense exception. *See* GILBERT, *supra* note 67, at 101.

288. *See* Barnett, *supra* note 63.

289. *Id.*

290. For example, finding extraditable crimes that are punishable under the laws of both nations for more than one year. *See id.* at 305.

sions for supplementary apprehension measures.[291] These alterations were uniformly designed to facilitate prosecution.

In short, the assumption extradition/abduction jurisprudence makes about the intervention of foreign states is flawed given existing power imbalances between states, the United States' use of economic incentives and disincentives to compel compliance with policy goals, and the restructuring of extradition treaties around prosecutorial interests, which effectively limit the bases from which nation state protest can be sounded.

The nature of the apprehension tactics the courts are sanctioning also merits criticism. It is currently law within our borders that the United States can terrorize and torture an individual and still retain jurisdiction to try him. With the challenge to this law sounded by *Toscanino*, the legality of the abuse turns on whether or not the conduct involved "shocks the conscience." This standard has been further qualified by *Lujan*'s level-of-force analysis. But torture and brutality do not need to be framed in constitutional terms to "shock the conscience"; they are antipathetic to commonly shared values about how people should be treated. It is frightening to think that we live in an age where conduct must rise to the abuse Toscanino suffered before it offends "standards of justice." It is more frightening to think that *Toscanino* is not the law in many circuits, and has been eviscerated in the circuit that decided it. The Constitution is not a static document. It is a challenge to redefine shared political and legal ideas in light of social changes; it should not interpreted to make exceptions for behavior violative of those ideas.[292]

Similarly, regardless of the limitations on judicial inquiry posed by constitutional or international law, it is troubling to think that courts will not intervene to protect individuals in cases like *Matta-Balesteros*, where abuse surpassing *Lujan*'s level-of-force hurdle was affirmed simply because there was no state protest. Nation state protest should not be the floor for intervening on behalf of an abducted individual—it should be the ceiling. The courts, in the absence of protest, should intervene on behalf of foreign states to enforce basic ideas of justice, whether these ideas emanate from our laws, legal obligations which arise from our relationship with the involved nations, or international documents. At least they should calibrate the protest requirement with the political likelihood that foreign nations would protest. This should include an analysis of a

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291. *See generally id.*

292. It is difficult to conceptualize the state as an entity that can cause harm. "States do not have their own system of morality; commentators merely judge a State's activities on the basis of human ideas and ideals of morality." Geoff Gilbert, *The Criminal Responsibility of States*, 39 INT'L & COMP. L.Q. 345, 348 (1990).

country's political and economic position with respect to the United States. Otherwise, a jurisprudential framework arises precisely like the one the United States has produced; one where tacit complicity in human rights violations is explained away by citing the responsibility of other countries to file a claim on behalf of the affected individual.

Emerging Latin American political trends also raise immediate questions about the implications of extradition jurisprudence for future policy practice. *Lira*, with its arguably high threshold for establishing government "involvement," creates incentives for United States officials to pursue methods of rendition which exploit the blind spots in our extradition jurisprudence and public awareness. Rather than try to articulate a patterned or realistic way of thinking about governmental involvement abroad, *Lira* provides a shield for government officials to work clandestinely with foreign operatives, and effectively allows extraterritorial policy to skirt both hard legal analysis and, by extension, the dictates of the Constitution.

Finally, refusal by courts to think realistically about the implications of holdings construing governmental involvement narrowly is even more problematic given Columbia's decision to make extradition unconstitutional. If other countries follow Colombia's protectionist lead, the only way to acquire nationals from drug-trafficking countries would be irregular rendition methods, such as persuading countries to expel drug traffickers.[293] This is dangerous; it will remove governmental conduct farther and farther from points, such as treaty relationships, that the courts have at least felt comfortable analyzing. As this Comment illustrates, our vocabulary for considering extraterritorial policy practice is extremely limited, and tends to marginalize individual claims for protection from governmental abuse.[294] Current political trends, if not accompanied by changes in our constitutional conceptualization of international conduct, will delimit this vocabulary even further.

Both the United States extradition and acquisition of individuals constitute a narrow view of individual rights. The reasons for this narrowness are not just philosophically objectionable; they also proceed, as this Comment has demonstrated, from many inaccurate

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293. Countries have resorted to such methods. *See supra* note 6.

294. One method utilized by the United States, abduction, arguably violates international law because it violates another state's sovereignty. The RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES allows "[l]aw enforcement officers of the United States [to] exercise their function in the territory of another state only . . . with the consent of the other state . . . ." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 433 (1987). *See generally* Joel R. Paul, *The Argument Against International Abduction of Criminal Defendants*, 6 AM. U. J. INT'L L. & POL'Y 527 (1991) (discussing U.S. abduction of foreign defendants abroad).

assumptions, ranging from the characterization of the proceedings to assumptions about participants in those proceedings. It is against this backdrop that this Comment turns to consider *Verdugo-Urquidez I*, *Verdugo-Urquidez II* and *Alvarez-Machain*.

IV. THE *VERDUGO-URQUIDEZ* AND *ALVAREZ-MACHAIN* DECISIONS

A. Verdugo-Urquidez I[295]

Rene Martin Verdugo-Urquidez was allegedly a member of a Mexican drug smuggling organization.[296] The United States obtained a warrant for Verdugo-Urquidez's arrest and in January 1986, Mexican police officers, after conferring with United States Marshals, apprehended Verdugo-Urquidez in Mexico and transported him to the United States Border Patrol Station in Calexico, California, where he was arrested by United States officials.[297] After his arrest, a DEA agent arranged for Verdugo-Urquidez's Mexican residences to be searched.[298] With Mexican authorities, the DEA uncovered a tally sheet, which the government believed reflected the drugs Verdugo-Urquidez smuggled into the United States.[299] The District Court granted Verdugo-Urquidez's motion to suppress this evidence, because the Fourth Amendment applied to the searches and the DEA agents failed to justify searching Verdugo-Urquidez's premises without a warrant.[300]

In affirming the District Court's decision, the Ninth Circuit asserted that one purpose of the Fourth Amendment is to constrain governmental conduct:

> 'When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another country.' . . . The Constitution imposes substantive constraints on the federal government, even when it operates abroad.[301]

Noting that the judiciary has frequently recognized the standing of non-resident aliens to invoke the protections afforded by the United

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295. United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir. 1988), *rev'd*, 494 U.S. 259 (1990).

296. 856 F.2d at 1215.

297. *Id.*

298. *Id.*

299. *Id.* at 1217.

300. *Id.*

301. *Id.* at 1217-18 (citations omitted). *See* Stephen A. Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 VA. J. INT'L L. 741, 745 (1980).

States Constitution,[302] the court concluded that the Fourth Amendment protects non-citizens abroad as well.

The Ninth Circuit's decision in *Verdugo-Urquidez I* was overturned by the Supreme Court.[303] Chief Justice Rehnquist, writing for the majority, found that

> 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.[304]

The Court also disagreed with the Ninth Circuit's extraterritorial application of the Constitution, finding the Ninth Circuit's opinion contrary to the Court's decisions in the Insular Cases,[305] which held that "not every constitutional provision applies to governmental activity even where the United States has sovereign power."[306] Further, the Court found unavailing Verdugo-Urquidez's reliance on cases which accorded constitutional rights to aliens within the United States,[307] because these protections were available

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302. 856 F.2d 1214, 1217-19. Courts have held that the Constitution restrains governmental conduct abroad. For example, residents of Australia have standing under the U.S. Constitution to raise objections to the limitations on liability imposed by the Warsaw Convention. *See In re* Aircrash in Bali, Indon. on April 22, 1974, 684 F.2d 1301, 1308 n.6 (9th Cir. 1982); *see also* United States v. Demanett, 629 F.2d 862, 866 (3d Cir. 1980) (assuming that both American citizens and Colombian nationals aboard a vessel on the high seas are protected by the Fourth Amendment), *cert. denied*, 450 U.S. 910 (1981); Porter v. United States, 496 F.2d 583, 591 (Ct. Cl. 1974) ("The just compensation clause of the Fifth Amendment has, in fact, been applied to takings of property located outside the United States, even in the absence of congressional extension of the Constitution to such foreign soil."), *cert. denied*, 420 U.S. 1004 (1975); Berlin Democratic Club v. Rumsfeld, 410 F.Supp 144 (D.D.C. 1976) (discussing exceptions under which non-resident aliens have standing to sue in U.S. courts).

303. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

304. *Id.* at 265.

305. *Id.* at 268. The Insular Cases were a series of decisions dealing with the legal relationship between the United States and its early twentieth century territories. *See* Roszell Dulany Hunter, IV, Note, *The Extraterritorial Application of the Constitution-Unalienable Rights?*, 72 VA. L. REV. 649, 654 (1986).

306. 494 U.S. at 268.

307. Verdugo-Urquidez had relied on Plyer v. Doe, 457 U.S. 202 (1982) (holding that illegal aliens are protected by Equal Protection Clause); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (holding that a resident alien is a "person" within the meaning of the Fifth Amendment); Bridges v. Wixon, 326 U.S. 135 (1945) (holding that resident aliens have First Amendment rights); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) (holding that a foreign corporation is entitled to protection under the Just Compensation Clause of the Fifth Amendment); Wong Wing v. United States, 163 U.S. 228 (1896) (holding that resident aliens are entitled to Fifth and Sixth Amendment rights); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that Fourteenth Amendment protects resident aliens).

only to aliens who had developed "substantial connections" with the United States.[308]

This "substantial connections" analysis was used to distinguish the Ninth Circuit's reliance on *INS v. Lopez-Mendoza*,[309] which held that the Fourth Amendment applied to illegal aliens in the United States.[310] The question in *Lopez-Mendoza* was whether or not the Fourth Amendment's exclusionary rule should be extended to civil deportation proceedings, not whether the protections of the Fourth Amendment extended to aliens within this country.[311] Even if the illegal aliens in *Lopez-Mendoza* were entitled to the protection of the Fourth Amendment,

> their situation is different than respondent's. The illegal aliens in Lopez-Mendoza were in the United States voluntarily and presumably had accepted some societal obligations; but respondent had no voluntary connection with this country that might place him among "the people" of the United States.... Not only are history and case law against respondent, but... the result of accepting his claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries.[312]

The Court predicted that the application of the Fourth Amendment abroad would (1) disrupt the ability of the political branches to respond to foreign situations involving our national interest; (2) allow aliens with no attachment to the United States to bring suits against its authorities; and (3) throw the legislature and the executive branches of government into "a sea of uncertainty as to what might be reasonable in the way of search and seizures conducted abroad."[313]

In his concurring opinion Justice Kennedy disagreed that the use of the term "people" in the Fourth Amendment restricted its protections.[314] However, the conditions in Mexico, such as differences in conceptions of reasonableness and privacy, proscribed the Fourth Amendment's application there.[315]

The dissent emphasized the anomaly that while the United States is expanding its laws beyond its borders, it is not expanding its constitutional protections to the people those laws cover.[316] It emphasized that the United States may not act extraterritorially

308. 494 U.S. at 271.
309. 468.U.S. 1032 (1984).
310. *Id.*
311. 494 U.S. at 272.
312. *Id.* at 273 (citation omitted).
313. *Id.* at 273-74.
314. *Id.* at 276 (Kennedy, J., concurring).
315. *Id.* at 278.
316. *Id.* at 279-80 (Brennan & Marshall, JJ., dissenting).

without constitutional authority.[317] Nowhere did the majority offer an explanation of how laws could be expanded abroad without an equivalent increase in the reach of the Constitution. The dissent also disagreed that Verdugo-Urquidez had not developed a "sufficient connection" with the United States.[318] The connection was provided when the United States classified him as a criminal, exposing him to its criminal apparatus and the possibility of spending the rest of his life in jail.[319]

B. Verdugo-Urquidez II[320]

On March 16, 1988, Verdugo-Urquidez was indicted for various offenses, including the murder of DEA agent Enrique Camarena-Salazar.[321] Verdugo-Urquidez moved to dismiss the indictment pursuant to the Mexican-United States Extradition Treaty, alleging that the individuals who apprehended him were acting at the behest of the United States government.[322] The District Court held that the abduction did not violate the Treaty, because even if the allegations were accurate, under the *Ker-Frisbie* doctrine an abduction would not violate the treaty.[323]

On appeal to the Ninth Circuit, Verdugo-Urquidez claimed that because his abduction violated the Treaty, the District Court lacked jurisdiction over him.[324] The United States responded that abduction of an individual from another state will not ordinarily bar personal jurisdiction in a criminal trial, even where there is a valid extradition treaty and the other state lodges a formal protest.[325] Additionally, the Treaty with Mexico did not explicitly prohibit kidnapping, and individual defendants do not have standing to raise treaty violation issues before the judiciary.[326]

The court reviewed the *Ker-Frisbie* doctrine and found it an open question whether an individual may challenge the United

317. "'The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with the limitations imposed by the Constitution.'" *Id.* at 281 (quoting Reid v. Covert, 354 U.S. 1, 5-6 (1957)).

318. 494 U.S. at 283.

319. *Id.* at 283-84. The dissent also argued that the Court's sanction of illegal conduct rejected the notion of mutuality, disregarded national values and forgot that the focus of the Fourth Amendment is on what the Government can and cannot do . . . not against whom these actions may be taken." *Id.* at 284-88.

320. United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), *vacated*, 112 S. Ct. 2986 (1992).

321. 939 F.2d at 1343.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.* at 1345.

326. *Id.*

States' ability to try him if the United States abducts that individual from a nation without that nation's consent.[327] The court further challenged the notion that *Ker* could be read as allowing jurisdiction over a defendant "regardless of the circumstances under which he was brought there."[328] The court noted that *Ker* was not a case of authorized kidnapping and further distinguished the case on the grounds that in *Ker* Peru had not lodged a formal complaint while here Mexico had.[329] Also, *Frisbie* did not support a broad reading of *Ker* because *Frisbie* had not involved an extradition treaty, and was a case of domestic, not international kidnapping.[330]

Because extradition treaties impose mutual obligations, the court found that the government's contention that it could disregard an extradition treaty at will contravened the underlying purpose of extradition treaties.[331] State-supported kidnapping violated international law because it breached the sovereignty of the affected nation.[332] Further, the court found that in addition to protecting the sovereignty of signatories, extradition treaties also insure fair treatment of individuals. The court held that

> extradition treaties provide a comprehensive means of regulating the methods by which one nation may remove an individual from another nation for the purpose of subjecting him to criminal prosecution, and that unless the nation from which an individual has been forcibly abducted consents to that act in advance, or subsequently by its silence or otherwise waives its right to object, a government authorized or sponsored abduction constitutes a breach of treaty.[333]

The court also saw no reason why the specialty rule should not apply in the case of a government-authorized or sponsored kidnapping that violates an extradition treaty.

> [T]he rule which permits an individual defendant to raise a treaty violation as a basis for precluding the exercise of personal jurisdiction in a specialty case is equally applicable in a government authorized or sponsored kidnapping case, the only difference being that in the kidnapping case there must be a formal protest from the offended government after the kidnapping, while in the specialty case, some circuits (including ours) the foreign government's original statement of limitation is deemed sufficient to constitute the requisite protest.[334]

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327. *Id.*
328. *Id.*
329. *Id.* at 1345-46.
330. *Id.* at 1347.
331. *Id.* at 1349-50.
332. *Id.* at 1352.
333. *Id.* at 1355.
334. *Id.* at 1356-57. The court wrote that "[o]ur decisions involving the principle of

Finding the government's actions in violation of the treaty and international law, it next addressed the issue of the proper role of the executive and the judiciary in extradition hearings. It started by noting that Congress had placed supervision of the extradition process in the unique province of the courts. It also rejected the arguments that the legality of Verdugo-Urquidez' abduction was a nonjusticiable political question, and that its decision was significantly expanding the role of courts in the field of foreign relations.[335] Thus the Ninth Circuit provided one of the few judicial refusals to surrender the protection of individual rights to the purview of the Executive branch.

In conclusion the court forecasted the impact on American citizens if it found the Verdugo-Urquidez abduction lawful: "Were we to hold . . . that the United States may invade the sovereign territory of Mexico and kidnap an individual without violating this nation's treaty obligations, it would follow inexorably that no treaty bar exists to similar acts by foreign governments against citizens of the United States."[336] Thus the court forcefully insisted that any "new world order in which the use of force is to be subject to the rule of law . . . must begin by holding our own government to its fundamental legal commitments."[337]

C. Alvarez-Machain

The reasoning of *Verdugo-Urquidez II* was effectively overruled by the Supreme Court in *United States v. Alvarez-Machain*.[338] Dr. Alvarez-Machain was a citizen of Mexico indicted for participating in the kidnap and murder of United States Drug Enforcement special agent Enrique Camarena Salazar.[339] Dr. Alvarez-Machain reportedly kept Salazar alive so he could be tortured and interrogated.[340] On April 2, 1990, Alvarez-Machain was forcibly kidnapped from his medical office and flown to Texas, where he was arrested by DEA officials.[341] Alvarez-Machain moved to dismiss the indictment, claiming that his abduction constituted outrageous governmental conduct, and that the District Court lacked jurisdiction to try him because his abduction violated the United States-Mexico extradition

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specialty make clear that in those cases at least 'the person extradited may raise whatever objections the rendering country may have.'" *Id.* at 1355 (quoting United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986).

335. 939 F.2d at 1357.

336. *Id.* at 1362.

337. *Id.*

338. 112 S.Ct 2188 (1992).

339. *Id.* at 2190.

340. *Id.*

341. *Id.*

treaty.[342]

The District Court agreed that his abduction violated the United States-Mexico extradition treaty, and ordered that Alvarez-Machain be repatriated to Mexico.[343] The Ninth Circuit affirmed the dismissal of the indictment and the repatriation of respondent, relying on its decision in *Verdugo-Urquidez II*.

Reversing the Court of Appeals, the Supreme Court began by noting that

> our first inquiry must be whether the abduction of respondent from Mexico violated the extradition treaty between the United States and Mexico. If we conclude that the Treaty does not prohibit respondent's abduction, the rule in *Ker* applies, and the court need not inquire as to how respondent came before it.[344]

For two reasons, the Court found that the treaty did not prohibit the forcible abduction of Mexican citizens. The Court wrote, "[t]he treaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of other nations, or the consequences under the treaty if such an abduction occurs." and that "[t]he history of negotiation and practice under the treaty also fails to show that abductions outside of the Treaty constitute a violation of the Treaty."[345] The Court concluded that

> to infer from this treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice. In *Rauscher*, the implication of a doctrine of speciality into the terms of the Webster-Ashburton treaty which, by its terms, required the presentation of evidence establishing probable cause of the crime of extradition before extradition was required, was a small step to take. By contrast, to imply from the terms of this Treaty that it prohibits obtaining the presence of an individual by means outside of the procedures the Treaty requires a much larger inferential leap, with only the most general of international law principles to support it. The general principles cited by respondent simply fail to persuade us that we should imply in the United States Extradition Treaty a term prohibiting international abductions.[346]

In dissent Justice Stevens disagreed with the majority that the Treaty was not comprehensive.[347] He explained that the Treaty's language, as well as the interest in construing treaties to reduce

342. *Id.*
343. *Id.*
344. *Id.* at 2193.
345. *Id.* at 2193-94.
346. *Id.* at 2196.
347. *Id.* at 2198 (Stevens, J., dissenting).

international conflict, both counseled reading the Treaty to prohibit state-sponsored abduction.[348] Next he illustrated how *Rauscher* limited the offenses for which an individual could be prosecuted, even though no such limitation was found at in the extradition treaty at issue.[349] Recognizing the instability of *Rauscher* since it was decided, Stevens noted that the international community "condemns one Nation's violation of the territorial integrity of a friendly nation."[350] He concluded by critizing the majority for not distinguishing between governmental and non-governmental forms of kidnapping and for disregarding the practical and symbolic consequence of not binding the executive to the rule of law.[351]

V. THE BALANCE BETWEEN POLICY OBJECTIVES AND INDIVIDUAL RIGHTS

A. *The Implications of* Verdugo-Urquidez *and* Alvarez-Machain

A combination of elements, including the sense of international urgency about stopping the drug problem, the existing lack of protections in the extradition process, and the changes in extradition jurisprudence and rendition practice, have resulted in a balance which clearly favors policy interests and prosecutorial efficiency at the expense of individual rights.[352] Practically, this provides individuals in extradition proceedings with almost no recourse to the procedural and substantive protections embodied in our laws. It says that brutality against individuals is permissible, and that extreme brutality can be sanctioned through the invocation of technicalities of international relations. It also says that the courts, charged with monitoring the behavior of the other branches of government, are not willing to do so, even in the face of misuse of the process. The life of extradition jurisprudence has been an exercise not in forcing government to comply with the spirit which inheres in the Constitution, but rather in constructing exceptions to its reach.[353]

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348. *Id.* at 2198-99.

349. *Id.* at 2200.

350. *Id.* at 2201 (citations omitted).

351. *Id.* at 2203-06.

352. Bassiouni points out that "restrictions, limitations, or defenses which exist under extradition law are not, with a few exceptions, primarily designed for the benefit of the individual, instead they are designed to inure to the benefit of states involved." BASSIOUNI, *supra* note 5, at 563.

353. Inquiring into extradition and abduction jurisprudence raises the difficult question of how, apart from formulaic political positions, one can create a flexible jurisprudence around the tension between policy objectives and individual rights. Trying to define individual rights against a situation that is purportedly for the public good has been a common difficulty throughout our legal history. The classical way of thinking

Examining the nature of this balance—or, more appropriately, this imbalance—requires us to face our guiding political and legal values.[354] Most, if not all, extradition jurisprudence stems not from an analysis of the relationship between legal rules and our legal and social traditions, but rather is the product of the utilitarian notion that extradition and abduction are simply tools which further state interests. Extradition and abduction are not seen by the courts as independent expressions of legal or political values. Yet despite their characterization, they *are* expressive of values about the legal process and about individuals. The Tenth Amendment not only allocates duties to federal and state governments,[355] but it is also a normative statement about the boundaries of governmental conduct. Its existence and interpretation are a continuing public statement about how our lives can be lived and what protections we can enjoy. It is also a statement about our political culture: the interaction between the government and its citizens and how authority is exercised.

Verdugo-Urquidez I will have an immediate impact on this balance. First, the decision explicitly limits the class of persons protected by the Constitution, and flatly states that the Fourth Amendment applies only to individuals with "substantial connections" to the United States.[356] This holding fits squarely into the parade of holdings retracting Fourth Amendment protections,[357] and makes it possible to further remove rights of individuals in areas like extradition, which involve people who, by definition, lack "substantial connections" to the United States. It also continues lock step with *Fernandez* and other extradition holdings which apply protections as a function of the form, not the substance of institutional proceedings. The Court's entire constitutional analysis flowed from one element: Verdugo-Urquidez's citizenship. More broadly, *Verdugo-Urquidez I* could undermine the *ratio decidendi* of cases

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about the problem has been to presume that good conduct can not lead to harmful consequences. But it can. The question is how to think about integrating actions done for public good with both short and long- term harms that may inure to individuals. There is a danger that granting of authority for short-term social reasons will have long-term implications on the relationship between the government and the governed. The authority grant becomes the foothold upon which an institution can assert its autonomy. *See* Elizabeth Mensch, *The History of Mainstream Legal Thought, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 30 (David Kairys ed., 1982).

354. *See generally* Philip B. Heymann, *Two Models of National Attitudes Toward International Cooperation in Law Enforcement*, 28 HARV. INT'L L.J. 99, 104 (1990) (describing a "prosecutorial" model and an "international law" model).

355. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST., amend. X.

356. United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).

357. See *supra* note 3.

which have held that foreign nationals do have rights under our Constitution.

Second, *Verdugo-Urquidez I* effectively rules that constitutional protections are entitlements for a class of privileged persons, not a restraint on government conduct.[358] In construing the Constitution to affirm a specific governmental act, the Court has arguably turned its back on much of what the Constitution stands for, and it has done so at a time when extraterritorial governmental conduct is increasingly a fact of daily life. Additionally, the rationale that the Constitution regulates governmental conduct vis-a-vis entitled citizens, does not protect even United States citizens. It teaches that the courts will sanction otherwise proscribed conduct if it is directed at a geographically "constructed" class of defenseless persons.[359]

Third, the Court effectively exempted diplomacy from constitutional scrutiny, elevating the national diplomatic effort to constitutionally protected conduct. The platform upon which this exemption was built merits scrutiny. Although the debate is not settled about the deference our Constitution should accord to diplomacy and other acts of national interest, *Verdugo-Urquidez I*'s arguments about the effect of applying the Fourth Amendment abroad are not compelling. Applying the Fourth Amendment abroad would not "disrupt the ability of the political branches to respond to foreign situations involving our national interest."[360] It would simply require that pursuit of our national interest be consistent with our Constitution. Extraterritorial Fourth Amendment application would not "allow aliens with no attachment to the United States to bring actions for damages" against the United States.[361] It would simply provide courts with the opportunity to review the government's extraterritorial conduct, develop ways to think carefully about that conduct, and insure that that conduct comports with our laws. Furthermore, applying the Fourth Amendment abroad would not throw the executive and legislative branches of government into a "sea of uncertainty as to what might be reasonable in the way of search and

358. Nothing in the Constitution limits or defines its geographical reach. The text itself begs the question of its scope, using the word "person" or "people" at times, and "citizen" at others. For general discussions of the reach of the Constitution, see Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991); Louis Henkin, *The Constitution as Compact and as Conscience*, 27 WM. & MARY L. REV. 11 (1985); Jules Lobel, *The Constitution Abroad*, 83 AM. J. INT'L L. 871 (1989); C.M.A. McCauliff, *The Reach of the Constitution: American Peace-Time Court in West Berlin*, 55 NOTRE DAME L. REV. 682 (1980); Saltzburg, *supra* note 301; Hunter, *supra* note 305.

359. For a general discussion about various models of extraterritorial constitutional jurisprudence, see Neuman, *supra* note 358.

360. *Verdugo-Urquidez I*, 494 U.S. at 273.

361. *Id.*

seizures conducted abroad."[362] To the contrary, it would apply the clearest directive on foreign conduct: the Constitution shall not be abrogated. While diplomacy and foreign policy efforts are certainly valid state endeavors, they should be analyzed in light of and held to constitutional strictures, not used to redefine them.

Practically, *Verdugo-Urquidez I* may sound the end of the *Toscanino* exception to the *Ker-Frisbie* doctrine. Throughout its evisceration, *Toscanino*'s central element has been the legitimacy of scrutinizing governmental conduct abroad, irrespective of who was the object of that conduct. But with the Supreme Court's pronouncement that foreign nationals cannot assert constitutional claims, even against otherwise unconstitutional conduct, this element of the *Toscanino* inquiry may be abandoned. This would leave *Toscanino* with nothing to support it.

Verdugo-Urquidez I, in conjunction with *Lira* and the judiciary's incremental raising of both standing hurdles and the threshold for demonstrating "governmental involvement," creates further incentive for governmental officials to be enterprising in gaining both evidence and the body of suspected criminals. The less the legal costs of irregular rendition are, the greater the likelihood that the Executive will utilize these methods to secure foreign policy goals.

Alvarez-Machain will also effect the individual rights/policy objective balance. The Court said that "[i]f we conclude that the Treaty does not prohibit respondent's abduction, the rule in *Ker* applies, and the court need not inquire as to how respondent came before it."[363] Thus, the Court suggested that (a) either the *Toscanino* exception to the *Ker-Frisbie* exception is not good law or (b) an abduction is not sufficiently "shocking to the conscience" to trigger the *Toscanino* exception.

Beyond what may be the demise of the *Toscanino* exception to the *Ker-Frisbie* rule, *Alvarez-Machain* presents what may be the most extreme example of "instrumental" treaty reading in extradition/abduction cases. The development of the specialty and double criminality doctrines clearly indicates a trend in extradition jurisprudence to look beyond the letter of treaties when searching for their meaning. However, without responding to these jurisprudential developments, the Court simply noted that it would require a "much larger inferential leap" to infer a prohibition against using means outside of the treaty provisions.[364]

This misconstrues Alvarez-Machain's argument. His argument was not that the Treaty prohibits all means outside of those re-

362. *Id.* at 274

363. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2193 (1992).

364. *Id.* at 2196.

quired by the Treaty. There are means of rendition which, although not specifically mentioned, may fall within the Treaty. The legality of these means would depend upon a careful consideration of U.S. law and the specific nature of the means chosen. Rather, Alvarez-Machain's argument was that the Treaty prohibited one specific means—abduction.

Second, the Court apparently forgot a strand of jurisprudence that has been repeatedly used to resolve other extradition claims in favor of the government—the notion that extradition treaties safeguard states', not individuals', rights. The Court conveniently forgot that the largest state safeguard to be observed and protected when reviewing the extradition process is the notion of state sovereignty. The abduction clearly violated Mexico's sovereignty.

Third, the *Alvarez-Machain* decision is also depressing for the way in which the Court reached its decision. Irrespective of its holding, the Court spent no time discussing an extremely complex area of law—the intersection of foreign policy, domestic law, human rights and international law. Even before the *Alvarez-Machain* decision, this intersection is something the courts have not carefully or adequately addressed. One reason for this is the inflexibility of our extradition/abduction jurisprudence itself. *Alvarez-Machain* was an opportunity to make jurisprudential strides forward; instead, by defending the abduction, the Court took strides backward.

B. Verdugo-Urquidez II *as the Beginnings of a Model*

Verdugo-Urquidez II provides at least the beginnings of a workable model for thinking about the issues raised in the *Verdugo-Urquidez I* and *Alvarez-Machain* decisions. First, *Verdugo-Urquidez II* broke from a lengthy tradition of unilaterally favoring the government in extradition and abduction cases. In providing a much needed criticism of the static and one-dimensional nature of extradition jurisprudence, it served as a positive statement about the value of individual rights.

Second, *Verdugo-Urquidez II* provided a criticism of the almost carte blanche use of the *Ker-Frisbie* doctrine. It distinguished authorized from unauthorized kidnapping as a matter of law and also questioned the relevance of *Frisbie* in international matters involving treaties. This stopped what, for decades, had been an almost uninterrupted support of the *Ker-Frisbie* doctrine. It also provided a more effective criticism of the doctrine than *Toscanino*, because it criticized the legitimacy and scope of the doctrine itself, rather than only trying to provide narrow exceptions to its reach. Additionally, by distinguishing between different types of kidnapping, *Verdugo-Urquidez II* evinced a willingness to think

flexibly and critically about our government's overseas conduct. This willingness to examine extraterritorial governmental conduct critically could serve as an impetus for the judiciary to create a more advanced vocabulary for framing and addressing difficult international-domestic problems.

Verdugo-Urquidez II also took a stride forward for individual rights by relying on the understanding that principles of international law are implicitly incorporated into extradition treaties. Despite the rhetoric that treaties are the "law of the land," most courts have analyzed extradition treaties as contracts between sovereign nations.[365] As such, these "contracts" have been construed as incorporating nothing but the expressed will of the contracting parties, and have been used to defend the overt practice of *one* of the parties. While Mexico's protest indicated that the contract had been breached, the holding that the United States also violated international law could have been used to more carefully scrutinize the overall contract relationship defined by treaties and its effect on individuals. This type of contractual analysis could pave the way for third party review of international covenants, which may become consequential in the future if international organizations are granted more legal authority.

This possibility—that concerns apart from those positively expressed by sovereigns may be used to examine the nature of the relationship of the sovereigns—could also affect other elements of extradition jurisprudence. One impact may involve a theoretical reconsideration of the double criminality and specialty doctrines. The interpretation of these doctrines may start emphasizing their letter. Further, just as contracts between private parties are analyzed for their effect on the public interest, so should treaties, if courts interpret them as contracts, be analyzed for their effect on the international public interest.

If treaties can be subjected to broader types of contractual analysis, we might also reexamine the process of treaty interpretation and its place within international and national law. Currently international treaty interpretation is arguably more political than legal; treaty provisions are often seen as fungible requirements that can later be reinterpreted unilaterally, if it suits a given nation's political interest. But, as treaty interpretation is more clearly seen as having an impact beyond the scope of the contracting states, perhaps the international legal community will take a greater interest in monitoring the behavior of states relative to the contractual provisions to which they agree to be bound.

Second, if claims could be based on sources—such as interna-

365. *See supra* part III.B.

tional law—which are opposed to the contractual preferences of the sovereigns involved, there is theoretically no reason why individual rights should be seen as merely "derivative" of states' rights. Once nation state claims to legal exclusivity in international matters are challenged, and international norms affect contractual outcomes, individual claims against international sovereign practice could also become viable. This process of challenging state exclusivity might be seen as doctrines like double criminality and specialty, change from being screens for governmental conduct to an affirmative way to build both international and individual values into international practice.

Verdugo-Urquidez II also represented a rare assertion of the judiciary's role as monitor of the extraterritorial practice of the executive branch. The judiciary has the authority both to directly give substance to the individual rights implicated in the extradition process and to effectively grant individual protection by restraining governmental conduct. Jurisprudentially, this authority stems both from the court's duty not to subject an individual to conditions that would "offend fundamental standards of decency"[366] and the fact that governmental conduct is never completely insulated from judicial review.[367] For the most part, courts have chosen not to exercise this authority, in deference to the diplomatic effort and because the judiciary has insulated itself from individual rights' inquiries by placing the practical burden of asserting individual rights claims on foreign nations.[368]

Verdugo-Urquidez II, however, suggested that the government's self-monitoring of its own policy initiatives is simply not constructing either acceptable domestic policy or acceptable international precedent. *Verdugo-Urquidez II*'s proclamation that law is not the shortest path between two policy points may have also had an impact on our legal culture. Courts could have considered the limitations that inhere in trying to evaluate governmental conduct, and accordingly thought of better ways to evaluate that conduct. This effort at reformation could include a variety of efforts, ranging from direct appellate review in extradition proceedings to reconstituting individual protections to giving courts more authority over the extradition process.

Verdugo-Urquidez I and *Alvarez-Machain* forcefully raise the broader issue of the nature of the relationship between law maker and law. Professor Allott has noted that

366. Gallina v. Fraser, 278 F.2d 77 (2d Cir. 1960).

367. Ahmad v. Wigen, 726 F.Supp. 389 (E.D.N.Y. 1989).

368. Yarnold suggests that extradition is an area where judges can innovate. *See* Yarnold, *supra* note 5, at 23.

> law is objective or it is not law. Law obliges or it is not law. If the subjects of the law are able to regard their interpretation and application of the law as a matter for their judgment, the law is not an objective limitation on their behavior. If the subjects of the law are able to regard law as dependent upon their will to enforce it, the law is not an obligation but merely a possibility of action. In either case, this is the form but not the reality of law.[369]

How willing is the United States to be governed by rules or values which are not in its own immediate self-interest? If it is not willing, this raises questions about the basis of our government's authority. To what degree is our government premised upon the use of force and political strength under the guise *of* law? Our society is too large to effectively monitor everything that government does, or conversely, everything that individuals do. The government expects that individuals will be largely self-policing, and thus that laws will be self-enforcing. We should expect the same of government. And perhaps we should examine which areas of government are monitoring themselves adequately and which are not. This kind of inquiry is even more important given the constant expansion of activity into areas the law has not addressed before. In addition to expanding geographically, the law is also expanding in other areas, such as in pre-conception torts. New social facts and correspondingly new social agendas and programs, simply because of their novelty, should not be used as excuses for skirting legal principles.

The rule of law debate also raises important and timely ethical questions. Conservative anti-crime rhetoric characteristically laments the loss of morals and the absence of a coherent and followed moral social code. The solution to this problem, then, is seen as encouraging or coercing compliance with often not universally shared moral values. Yet the government itself is not willing to follow the moral code it forces on others. It exempts itself from its own moral imperatives—such as the belief that people should not be assaulted, abducted or tortured—when in its own interest to do so. As the majority in *Verdugo-Urquidez II* pointed out, if this is law, there in nothing legally to stop foreign countries from abducting and torturing our own citizens. This problem, however, is not even being addressed, largely because of the judiciary's refusal to situate, in a patterned way, governmental conduct within a broader legal, much less ethical, construct. *Verdugo-Urquidez II* represented a step toward criticizing law as a tool to justify governmental exercise of power.

Perhaps the thinking in *Verdugo-Urquidez II* could be used to encourage a reconceptualization of the extradition process itself.

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369. Allott, *supra* note 174, at 22.

Extradition is a *mixed* proceeding. It is uneasily caught between classification as a criminal and non-criminal trial, it is uneasily caught between the judicial and executive branches, and its objects are uneasily caught, as potential claimants of legal protections, between aliens and citizens. And while the *mixed* nature of extradition practice logically calls out for *mixed* rights, courts have not attempted to fashion an enlightened extradition jurisprudence, but rather have created extradition law by mechanically applying other legal principles. Laws have been unreflectively spliced together which misperceive the extradition process, misperceive the government's use of the extradition process, and misperceive or do not acknowledge the changing macrological conditions which are altering the significance of that process. While extradition is not a criminal trial, it is not completely unlike a criminal trial, as suggested earlier. Too long has extradition law been constituted by form—the perceived form of the process, the perceived form of the political relationships which inhere in extradition proceedings, and the status of the affected individual. It is simply time that extradition jurisprudence be brought up to speed with extradition realities.

Second, the mixed nature of extradition proceedings has also resulted in a very narrow and outdated notion of "harm." Harm under current extradition jurisprudence is a completely legal construction; it arises through and can only be legitimized by glaring factual harm combined with a bona fide state protest. What defines harm is not who extradition proceedings affect the most: the extradited individual. Harm should be broadened to include the actual factual harm defendants suffer—the sum total of the seizure and taking of the person. One way to push the legal definition of harm back toward its factual reality would be to lower the standing hurdles individuals currently fact. Courts should also consider the notion of harm caused by state practice. If, as Van Den Wyngaert points out, there is no theoretical reason why principles of the criminal law can not be applied to states,[370] then we should think more carefully about the consequences of abusive state practice, both in terms of its effect on individuals and the international community, and develop effective sanctions to stop those abuses. Thus, the realities of extradition and abduction practice should lead to a refashioning of the principles which are used to evaluate those processes and the individuals those processes affect.

Finally, it is important to comment that despite *Verdugo-Urquidez II*'s reasoning, its force as a safeguard of individual rights from governmental misconduct, and its value as a statement against the majority of cases that have come before it, was in some a limited

370. *See* Van Den Wyngaert, *supra* note 135.

one. First, *Verdugo-Urquidez II* involved a claim of a treaty violation, not a due process violation. Second, the decision may be limited to its rare facts. *Verdugo-Urquidez II* was factually the perfect plaintiff's case because it involved (a) an abduction, (b) in circumvention of a treaty, and (c) a formal protest by the affected nation. As this Comment has demonstrated, most claims rarely rise to a similar level of prima facie strength. Some element will typically be missing: the state affected will not be deemed to have "protested"; the government will not be deemed to have been "involved"; the abuse will not be deemed to have been severe enough.[371]

A reexamination of extradition and abduction should consider the functions of these processes.[372] What is being served, in extradition, by simply one-dimensionally looking at extradition as not a criminal trial but a procedure which simply transfers a person from one jurisdiction to another? If the controlling ends of extradition are diplomacy and deference to efforts in the national foreign interest, perhaps we should examine more carefully the types of claims which are grouped under the diplomacy umbrella. Do all diplomatic objectives warrant foregoing the application of broader protections in extradition proceedings? Are all diplomatic objectives valid? Are there better ways that the goals of diplomacy could be furthered? In short, we should examine what constitutes diplomacy and we should compute the costs of furthering diplomatic interests.

A similar analysis could be undertaken with regard to abduction. What are the costs and benefits of abduction? Might there be more efficient ways to conduct the Drug War, and apprehend foreign defendants, which pose less of a threat to our constitutional jurisprudence? For example, if current laws prohibit efficient criminal prosecution, perhaps more resources should be spent on creating alternative, possibly international, courts of criminal jurisdiction.

Finally, it is also important to think about the balance between rights and policy in light of admittedly valid national policy goals.

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371. *Verdugo-Urquidez II*'s ruling that sufficient facts were alleged to constitute abduction arguably sounds a more expansive definition of governmental "involvement" than the courts have applied in the past. *Cf.* United States v. Lira, 515 F.2d 68 (2nd Cir. 1975), *cert. denied*, 423 U.S. 847 (1975).

372. These concerns generally have been levelled at the drug war. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (1977). The fact that extradition is considered a "hybrid" process also poses some interesting questions under Posner's analysis. First, it is hard to classify the interests of the "state" in the proceeding and thus somewhat difficult to gauge how well the procedure is working. Second, it raises questions about the value of other elements such as, for example, "morality." Posner notes that "moral principles-honesty, truthfulness, trustworthiness, selflessness, charity, neighborliness, avoidance of negligence and coercion—serve in general to promote efficiency." *Id.* at 185. These qualities have worth, but it is hard to build them into jurisprudence because the benchmark against which they are balanced is vague.

Drug trafficking is a serious problem and governments should be granted the authority to take innovative measures to stop it. Just as our Constitution should not be adverse to protecting people from new harms, it should also not strike down legislative or executive innovation simply because the form of the activity is novel. The question is again one of balance: How can the twin goals of problem solving and the preservation of individual protections be preserved? Further, to what degree is the legal system trying, or even capable, of asking these kinds of questions?[373] To what degree do these legal inabilities make rational political inquiry impossible?[374] While answering these questions systematically is beyond the scope of this Comment, these are questions that should be addressed.

VI. EXTRADITION, ABDUCTION AND THE DYNAMICS OF RIGHTS DISCOURSE

The lessons of extradition and abduction jurisprudence also provide theoretical occasion to examine the way in which individual rights are claimed, formed and altered. There is a current jurisprudential myth that there is no concept of individual rights in international law. The practical consequence of this in extradition law has been that individual rights are "derivative" of states' rights.[375] This

373. Some scholars do not feel that the legal system is capable of asking these kinds of questions. Pierre Schlaag has written:

> The power of traditional legal discourse to repress inquiry into its own form is awesome. Not only does traditional legal discourse repress its own form (at both the formal and substantive levels), but having accomplished this repression, it then conveniently "forgets" that there has been any repression of form at all. Having thus dismissed rhetoric and form from the stage, having instituted this dismissal in its very own rhetorical form, and finally having "forgotten" both of these moves, it is no wonder that traditional legal discourse cannot recognize its own politics.

Pierre Schlaag, *"Le hors de texte, c'est moi": The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631, 1634 (1990).

374. This question resembles the problem of the extent to which institutions are capable of reflecting on these questions. One scholar has pointed out that the institutionalization of political and legal life has had negative effects on our capacity for real societal self-reflection. Particularly, he cites the problems with the judiciary monitoring the federal government.

> Very few governmental decisions have any serious potential for judicial scrutiny. Even at the height of the era of economic due process—the era of the greatest, or at least the broadest, judicial activism—only a tiny fraction of governmental action was actually subject to serious judicial review let alone at risk of invalidation. As a general matter, the courts pose no threat to most governmental resolutions of societal issues.

Neil K. Komesar, *A Job for the Judges: the Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657 (1988). Limited also is the individual ability to participate in this process. *See id.* at 673.

375. Professor Allott notes that "[t]here are no fundamental rights in international

is untrue. While perhaps not explicitly defined in covenants, or enforced by courts or international tribunals, international individual rights exist in practice, and are, in effect, defined by the practice of individual nations, whether that practice is deemed acceptable or not. Rights are not only the sum total of positive statements—they are also the product of practice beneath those statements.[376] Scholars have pointed out that privacy rights, for example, are not defined only by the positive documents, such as the Constitution or statutes, that define their scope; they are also constructed by changing cultural conditions, regardless of whether those conditions are reflected in the positive expressions of privacy rights or not.[377] Thus, international individual rights, even if only defined negatively, do exist. As this Comment discussed, if one looks to positive or negative conceptions of individual rights, as defined by extradition and abduction law or practice, those rights are extremely limited.

Given thus the ability of international practice to define individual rights, it is logical to consider the degree to which international practice is monitored as a process which defines the scope of rights *qua* rights. This monitoring is even more imperative given the evaluative capacity of the international state system. The backdrop of the international drug war, the international arena, constitutes an effective rights "vacuum": a situation in which there is neither a clear rights framework defensibly independent of international practice and no formal apparatus which has the authority to monitor the behavior of other nations.[378] There is also no tribunal with the authority or power to force nations to respect international covenants, much less any definitions of individual rights. The absence of clearly defined and observed rights or international bodies empowered to monitor the rights that *are* being defined constitutes a potentially dangerous situation, because it can allow a relatively small percentage of the international community to, in effect, define what rights will be observed internationally.[379]

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society. There are only peremptory norms." Allott, *supra* note 174, at 20.

376. Yet our perception of right's changes is often tied to the form of those changes. "Labelling changes as procedural makes them easier to accept but also obscures the substantive changes that are taking place." Martha Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 728 (1988).

377. *See* Alan Freeman & Betty Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237 (1987).

378. There are many time periods when great legal changes have been made possible through large structural changes in society. For one analysis of such changes, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

379. "States almost exclusively constitute the present international order." Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585, 588 (1988). This definition is also significant due to its precedential

The rapid jump of the modern Drug War from the fragmented efforts of nations to a malleable and legally relatively unsurveilled international forum has created a vortex in which the adversarial gravity which surrounds most issues has not had a chance to develop, work its course, and act as critical dialogue between supporters of opposing interests. This adversarial gravity is central to Western jurisprudence because it creates precedent and allows competing groups, rather than a single group, to debate over the meaning and scope of law. It also allows the direction of law to be observed and constructively directed in light of experience. However, unlike domestic legal systems, there is simply no adversary in the international legal community to balance the policy objectives of other nations.[380]

The implications of the absence of a real adversarial process in the international community extends far beyond specific guarantees of individual rights or the critical ability of foreign nations. In effect, extraterritorial governmental conduct, free of scrutiny, may be constructing an international social contract, with both individuals and foreign nations. This Comment has examined, in part, what rights are being accorded to individuals in this contract. But we also should inquire as to what rights are being assigned to foreign nations. The rights nations are being functionally assigned by the increasing creation of an international social contract are disturbing, in part, because for a foreign nation to assert its rights it must protest. And yet, at the same time, the United States, through economic, political or military pressure, is pressuring countries to comply with its goals and not to protest—not to assert their role in creating the international social contract. In short, what defines rights under the emerging international social contract is not, as the Bush Administration argued, the rule of law, but rather the use of

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impact. These legally defined steps can become the basis for other trends in the law.

380. One reason for this is time. The internationalization of many problems has occurred in a fraction of the time that it has taken most legal systems to develop and respond in a reasoned way to those problems. While law enforcement has become more internationalized, the experience of the United States in dealing with transnational crime is recent and unsystematic. *See* Ethan A. Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT'L L.J. 37 (1990). A second reason for the creation of a rights vacuum has been the setting of the international drug war. The interstate arena is simply not equipped, jurisdictionally or practically, to make inquiries into the ramifications of the freewheeling nature of the Drug War and its effect on international individual rights. Our adversary system was built upon the value of encouraging a constant clash of articulated interests. The theory is that through the combat of mutually exclusive positions, both factual truth as well as a reasoned legal rule would eventually emerge. Both of these products, factual truth and legal rules, are in turn tested over time and clarified and reconstructed in light of continuing social developments and legal criticism.

power. Further, the power imbalances solidified by this contract may be hidden under the rhetoric of the benefits that the new world order will bring.

This development raises questions about the precedential effect the emerging social contract will have. Precedent does more than define law. It influences juridical direction and constructs the basis from which law is discussed and legal values are imputed. To what degree is governmental extraterritorial conduct setting jurisprudential trends which will be difficult to alter later? Will abduction become a normal component of interstate political relations? Will defining law as a function of state self-interest undermine aspirations for transcendent international norms, such as jus cogens? Also, one might consider whether the normal structure of political discourse—between the individual and the state—is being replaced by a dialogue between states. If this is a natural consequence of the internationalization of the world, it is important to inquire how representative states are of individuals, and what role individuals have in constituting the discourse between states. If one takes extradition jurisprudence as a model for the critical role of individuals in international state discourse, the legitimacy of the dialogue should be questioned. As this Comment has demonstrated, individuals have been completely blocked from monitoring state practice.

Finally, the lesson of how theoretical contracts with nations and individuals are effectively formed and, within that construct, how rights are constructed, raises a broader question. What do rights mean? One way to think about individual rights claims is simply as a way of demanding a set of desired conditions in which to live. The practical path to achieve these conditions has historically been a process of asserting the collective will against the state, or a sovereign, or other individuals, by legitimizing individual claims to autonomy. While there is disagreement on the meaning of rights claims, rights at least are directed at insuring the existence of a certain set of conditions, be those conditions freedom from oppression or a right to food and shelter. Accordingly, in considering the bases of individual rights claims in extradition and abduction, we might inquire into whether or not there is a more direct method of insuring these conditions. Further, we might inquire into whether or not the way in which we try to insure conditions make realizing these conditions more difficult. By arguing that individuals should have more rights in extradition and abduction, and affirming the classically liberal division of state from citizen, perhaps we miss the opportunity to more carefully scrutinize governmental conduct. And perhaps by affirming liberal rights discourse, and with it social contract theory, we are legitimating the creation of the international

social contract, and in the process affirming a legal system which structurally is unreceptive to individual rights claims.

Rethinking extradition law in the face of an increasingly international world calls upon us to examine how demands for freedom from physical violence are translated into legal and political language and inserted into the international state system. Access to this system is not equally available to everyone: states have more power than individuals, and some states have more power than other states. Is this acceptable? Can we transcend the ways we have traditionally tried to insure conditions of liberty domestically and create a system which does that internationally? The irony of extradition law is that it is arguably playing a tremendous role in setting the practice of political dialogue between states and individuals but nevertheless is receiving little scrutiny, both by the courts and individuals. And little scrutiny means that broad questions of legal direction, which will have great practical impact, are largely going unaddressed. They are going unaddressed because the judiciary has not been willing to redefine rights in extradition in light of the experience of extradition practice or the nature of individual-state relations. And they are removed from public discourse, perhaps, because inquiring into the nature of the relationship between the "people" and government is masked by the perception that abusive government initiatives only intrude on the rights of others.

VII. CONCLUSIONS

This Comment has demonstrated that there are precious few protections available to individuals in extradition proceedings. The justification for denying these protections rests on the form of extradition proceedings, not their substance. Extradition law should be based on a realistic analysis of the extradition process, both of its use by the government and its effect on individuals. As far as United States conduct abroad is concerned, our law rests on jurisprudential assumptions which should be questioned. Most notable is the assumption that foreign nations will monitor United States conduct, especially given the political and economic pressure the United States exerts on foreign countries to gain compliance with its foreign policy goals. Additionally United States abduction and abuse flies in the face of increasingly binding human rights instruments. Our obligations to consider and follow these instruments should not be dodged simply by limiting the Constitution's extraterritorial reach. At the last, due process is "that which comports with our deepest notions of what is fair and right and just." This principle should enlighten our definition of the right boundaries of governmental conduct, not political objectives.

Second, the balance between individual rights and policy goals raises broad political and legal questions. How is this balance changing, who is changing it, and what are the effects of those changes? This Comment has argued that within the tripartheid context of the Drug War, extradition and abduction, this balance is increasingly swinging away from the individual. This swing should be carefully considered, both in terms of its legitimacy and its rationality.

Extradition and abduction law further teach that the formal rights we have do not tell the entire story about the actual rights we have as individuals. Rights are constituted by a changing matrix of constitutional and statutory guarantees, international practice and international relations. The legal system is currently having difficulty capturing and reflecting on how rights are being internationally defined and altered. Our jurisprudence needs to catch up with our policy; if the courts and legislature are ignoring consequential realities in their respective processes of institutional deliberation, perhaps we need to develop a more penetrating discourse about rights.

Third, the international trajectory of the policy objective/individual rights balance raises fundamental questions about the relationship between the individual and the state. If the social contract which underscores our Constitution is being replaced by an international social contract which is not bound by our Constitution, we need to inquire into the effect of this contract on individuals. And we also need to consider the ability of individuals to define this contract; the lessons of extradition jurisprudence bear out that the voices of individuals as monitors of international governmental practice are limited.

The ramifications of the Drug War have been great, and are, in part, setting the legal and political tone for how we solve international problems.[381] The social project upon us is to analyze what is being balanced by the brave new world of international policy objectives, and at what cost and benefit. This project, unfortunately, must begin with some somber reflections about the current application of extradition and abduction jurisprudence. It must also begin with reflection on the source and nature of our guiding legal values and what current governmental extraterritorial practice says about

381. *See* Thomas M. Franck, *United Nations Based Prospects for a New Global Order*, 22 N.Y.U. J. INT'L L. & POL., 601, 628 (1990). In arguing that we should seize the moment to rethink basic processes and structures of the international system, Franck notes that (1) the U.N. must recognize and defend normative rights; (2) there must be credible processes for maintaining compliance with those rights; and (3) the international community must exert degrees of nonviolent pressure, such as the deprivation of the privileges that the community bestows on legitimate governments.

those values. All governmental branches, and all citizens, need to think more carefully about the interaction between law and politics, its at times hidden impact, and the ramifications of that impact for the future. Certainly people will disagree on what any balance between rights and policy should look like. But democracy, as our Nation's history has taught us, can withstand disagreement. What is important is that the ramifications of our nascent international policy practice be considered by the courts, the legislature, and the world community, in the open and authentically.[382] This is internationalization of the most fundamental and forward-looking kind; it is the multidimensional, cross-cultural reflection on the steps the world will take together, and the values which will guide those steps—both now and in times to come.

382. Public knowledge of this phenomenon is not great.

> That United States law enforcement officials do roam around the world (particularly in the third world) making or assisting in arrests and other forms of seizure going beyond intelligence gathering is apparent. The lawfulness of such activity has recently aroused considerable controversy in Washington. Much of this controversy remains behind closed doors, or available only through incomplete accounts in the press.

Lowenfeld, *supra* note 36 at 481.