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Recommended Citation

Jacques Semmelman, *Federal Courts the Constitution and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 Cornell L. Rev. 1198 (1991)
Available at: <http://scholarship.law.cornell.edu/clr/vol76/iss6/2>

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FEDERAL COURTS, THE CONSTITUTION, AND THE RULE OF NON-INQUIRY IN INTERNATIONAL EXTRADITION PROCEEDINGS

Jacques Semmelman[†]

An international extradition treaty obligates the United States to surrender to a foreign country a person charged with or convicted of an offense in that country. Because many foreign criminal justice systems lack the substantive rights and procedural safeguards embodied in American law, a tension exists between the treaty obligation and the rights of the individual facing extradition.

Under the established "rule of non-inquiry," the court determining whether a defendant is extraditable may not examine the requesting country's criminal justice system or take into account the possibility that the defendant will be mistreated or denied a fair trial in that country. A defendant who anticipates unfair or abusive treatment following extradition may seek relief on that ground only from the Secretary of State, who has discretion to deny the extradition request.¹ This power also enables the Secretary of State to condition extradition upon assurances from the requesting country that the defendant will receive a fair trial and will not be mistreated.² If

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¹ 18 U.S.C. § 3186 (1988); *see also* *Emami v. District Court*, 834 F.2d 1444, 1454 (9th Cir. 1987) (the decision to extradite is left to the discretion of the executive branch); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 584 (6th Cir. 1985) (Courts are not "empowered to order the extradition of any person. Extradition is an act of the Executive Branch."), *cert. denied*, 475 U.S. 1016 (1986); *In re United States*, 713 F.2d 105, 109 (5th Cir. 1983) ("[t]he court lacked the authority to order final extradition; [this] could only be accomplished by the Secretary of State."); *Escobedo v. United States*, 623 F.2d 1098, 1105 (5th Cir.) ("[T]he ultimate decision to extradite is a matter within the exclusive prerogative of the Executive. . . ."), *cert. denied*, 449 U.S. 1036 (1980) (quoting *Peroff v. Hylton*, 563 F.2d 1099 (4th Cir. 1977)); *Peroff v. Hylton*, *supra*, at 1102 ("[T]he ultimate decision to extradite" rests with the executive branch); *Shapiro v. Secretary of State*, 499 F.2d 527, 531 (D.C. Cir. 1974) ("[E]xtradition is ordinarily a matter within the exclusive purview of the Executive."), *aff'd sub nom. Commissioner v. Shapiro*, 424 U.S. 614 (1976).

² *See, e.g., Emami*, 834 F.2d at 1454 ("[T]he State Department alone has the power to condition the extradition of *Emami* on an agreement with Germany not to deport *Emami* to Iran."); *Demjanjuk*, 776 F.2d at 584 ("A decision to attach conditions to an

assurances are not provided, or if they are untrustworthy or otherwise inadequate to protect the defendant's rights, the Secretary of State can refuse to extradite.

Critics of the rule of non-inquiry argue that it is inappropriate to entrust the protection of an individual's rights solely to the executive branch, which may be more concerned with political expediency than with protecting the rights of the accused.³ They maintain

order of extradition is within the discretion of the Secretary of State . . ."); *Sindona v. Grant*, 619 F.2d 167, 176 (2d Cir. 1980) (Secretary of State may condition extradition on defendant's continued access to American counsel), *cert. denied*, 451 U.S. 912 (1981); *In re Singh*, 123 F.R.D. 127, 137 & n.3 (D.N.J. 1987) (Secretary of State has flexibility to permit extradition subject to certain conditions); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 478 comment d (1987). The *Restatement* asserts that the Secretary of State

may condition extradition on assurances by the requesting state that the accused will be tried before ordinary courts, that he will be prosecuted only for the offense charged, that only the specified penalty will be imposed upon a finding of guilt, or that other practices designed to safeguard the rights of the accused will be observed. Where appropriate, the Secretary [of State] may condition extradition on the right of a United States official to observe the proceedings.

Id.; see also H.R. REP. No. 998, 98th Cong., 2d Sess. 29-30 (1984) ("Secretary of State . . . has broad discretion . . . to refuse to surrender the person to the requesting country, or to condition the person's surrender. . . . [T]he Secretary's decision [may be based upon] humanitarian concerns . . ."); Note, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception*, 61 N.Y.U. L. REV. 654, 692 (1986) (authored by Miriam E. Sapiro) ("[T]he doctrine of specialty enables the requested state to make the grant of extradition contingent upon agreement regarding procedural or substantive aspects of the trial or punishment").

³ See, e.g., *Reform of the Extradition Laws of the United States: Hearings on H.R. 2643 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 77 (1983) [hereinafter *House Hearings, 1983*] (statement of Arthur C. Helton, Lawyers Comm. for Int'l Human Rights) ("To give the Secretary of State an exclusive role in the extradition context would simply introduce the risk that the decision would be made as a matter of political expedience"); *Extradition Reform Act of 1981: Hearings on H.R. 5227 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 60 (1982) [hereinafter *House Hearings, 1982*] (statement of David Carliner, Esq., appearing on behalf of the International Human Rights Law Group) ("[T]he State Department will inevitably look to the interests of the United States in international relations rather than to individual rights of the persons whose extradition is being sought."); *id.* at 65 (testimony of Prof. Richard Falk, Princeton University) ("entrusting discretion in these circumstances to the Secretary of State could be virtually tantamount to making the rights of individuals an incident of foreign policy"); *id.* at 73 (testimony of Wade Henderson, Esq., representing the American Civil Liberties Union) ("The exigencies of diplomacy render claims that constitutional rights have been violated particularly unsuitable to discretionary review by the executive branch. . . ."); *id.* at 213-14 (statement of Prof. Christopher H. Pyle) ("For obvious reasons of state, our diplomats are rarely eager to label foreign governments unjust, particularly when military and economic advantages hang in the balance."); Leslie Anderson, *Protecting the Rights of the Requested Person in Extradition Proceedings: An Argument for a Humanitarian Exception*, in TRANSNATIONAL ASPECTS OF CRIMINAL PROCEDURE 153, 164 (1983) ("there is no assurance that the executive, in its concern to maintain foreign relations, will not sacrifice the interests of the individual in order to achieve national ends"); John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1481 (1988) ("the State Department cannot be trusted to weigh the rights of individuals against the government's own international law enforcement

that a United States court should not participate in a procedure that may lead to the abuse of an individual's rights.⁴ Instead, before extradition may occur, a court should be entitled, or even required, to scrutinize the investigative, judicial, and penal systems of the requesting country and make an independent assessment of how the defendant is likely to be treated following extradition.⁵ Under this view, judicial determination that the defendant would not receive a fair trial or would be subjected to serious mistreatment would be binding on the Secretary of State and would operate to bar extradition.

Although courts have generally not adopted this approach,⁶ some courts have been receptive to the idea that the judiciary has a role in ensuring that defendants receive fair and humane treatment upon extradition. Precisely what that role entails remains largely undefined.⁷

and foreign policy agenda"); Edward M. Wise, *Some Problems of Extradition*, 15 WAYNE L. REV. 709, 722-23 (1969) ("The question of whether a fugitive will meet with oppressive treatment is . . . [not] suitable for consideration by executive departments, which are commonly influenced by a fear of offending some fairly despicable regimes"); Comment, *Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual*, 9 B.C. INT'L & COMP. L. REV. 293, 319 (1986) (authored by Tracy Hughes) (citing view that "[t]he executive branch cannot be expected to adequately protect individual rights within the extradition process"); see also *Gill v. Imundi*, 747 F. Supp. 1028, 1050 n.24 (S.D.N.Y. 1990) ("Judgments by the executive branch on extradition matters may, out of understandable concern for the maintenance of friendly international relations, be constrained"); *Ahmad v. Wigen*, 726 F. Supp. 389, 415 (E.D.N.Y. 1989) ("There may, however, be instances where immediate political, military or economic needs of the United States induce the State Department to ignore the rights of the accused."), *aff'd on other grounds*, 910 F.2d 1063 (2d Cir. 1990).

⁴ See Barbara Ann Banoff & Christopher H. Pyle, "To Surrender Political Offenders": *The Political Offense Exception to Extradition in United States Law*, 16 N.Y.U. J. INT'L L. & POL. 169, 172 (1984) ("American legal processes should not serve to assist political repression"); Kester, *supra* note 3, at 1482 ("United States courts should not hand over persons for trial abroad in countries that do not adhere to certain minimal standards of impartiality and fairness, or that clearly will not provide a reasonably fair trial").

⁵ See, e.g., *House Hearings, 1983*, *supra* note 3, at 83 ("The most appropriate way to protect against [human rights] abuses would be to maintain the role of an independent judiciary in the extradition process."); *House Hearings, 1982*, *supra* note 3, at 100 (testimony of Prof. Cherif Bassiouni) ("I would be in favor of a rule that permits U.S. courts to examine whether or not an individual, upon return, will be subjected to cruel and unusual punishment."); H.R. REP. NO. 998, 98th Cong., 2d Sess. 31 (1984) ("[T]he courts, as impartial arbiters, have an important role to play in the protection of human rights and in ensuring that the extradition process will not be used as a subterfuge for persecution and unfair treatment"); *id.* at 58-64; cf. John Quigley, *The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law*, 15 N.C.J. INT'L L. & COMM. REG. 401, 439 ("The federal courts are required by human rights law to bar extradition to a state that may violate the extraditee's rights.").

⁶ See *Ahmad*, 726 F. Supp. at 413.

⁷ See, e.g., *In re Singh*, 123 F.R.D. 127, 147-158 & n.1 (D.N.J. 1987). *But see infra* text accompanying notes 147-58; Comment, *supra* note 3, at 315-20 (discussing alternative models for proposed statutory modification of rule of non-inquiry).

This Article explores the doctrinal and policy underpinnings of the rule of non-inquiry and argues in favor of the rule's strict application. Part I reviews certain basic concepts of the law of international extradition, including the rule of non-inquiry.⁸ Part II explores the jurisdiction of the federal courts in international extradition proceedings with particular emphasis on issues pertaining to the rule of non-inquiry.⁹ Part III analyzes judicial inroads into the rule of non-inquiry.¹⁰ Part IV examines the rule of non-inquiry in relation to the duty to extradite pursuant to treaty.¹¹ Part V addresses constitutional aspects of the rule of non-inquiry.¹² Part VI considers the rule of non-inquiry in the context of policy considerations.¹³ Part VII analyzes the rule of non-inquiry in light of the "political question" doctrine. Finally, this Article concludes that the rule of non-inquiry should be inviolate; only the Secretary of State, not the judiciary, should be entrusted with the power to deny extradition on the ground that the defendant will not receive fair and humane treatment in the requesting country.¹⁴

I

GENERAL PRINCIPLES

A. Extradition Procedure

An international extradition proceeding is governed by the applicable treaty,¹⁵ statutes,¹⁶ and case law. A defendant¹⁷ facing extradition is entitled to a hearing before a judicial officer,¹⁸ as well as a review of a finding of extraditability by a United States district judge via a petition for a writ of habeas corpus.¹⁹

A foreign government seeking an individual's extradition must submit a formal request for extradition to the State Department, accompanied by the documents specified in the applicable treaty. These generally include copies of pertinent statutes, an arrest warrant, and a certificate of conviction or evidence establishing prob-

⁸ See *infra* text accompanying notes 15-52.

⁹ See *infra* text accompanying notes 53-117.

¹⁰ See *infra* text accompanying notes 118-67.

¹¹ See *infra* text accompanying notes 168-209.

¹² See *infra* text accompanying notes 210-21.

¹³ See *infra* text accompanying notes 222-60.

¹⁴ See *infra* text accompanying notes 261-96.

¹⁵ The United States does not extradite in the absence of a treaty. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8-10 (1936); 18 U.S.C. § 3184 (1988).

¹⁶ 18 U.S.C. §§ 3181, 3184, 3186, 3188-3195 (1988).

¹⁷ The term "defendant" is used herein to refer to any person facing extradition.

¹⁸ A United States magistrate or district judge may preside, although the statute also permits the hearing to be held before a state judge. See 18 U.S.C. § 3184 (1988).

¹⁹ 28 U.S.C. § 2241. The scope of habeas corpus review is discussed *infra* at notes 94-97, 138-44 and accompanying text.

able cause that the defendant committed the crime charged.²⁰ After review and approval by the Departments of State and Justice, the extradition request is forwarded to the United States Attorney for the district in which the defendant is located, who initiates the extradition proceeding in the United States district court by filing a complaint.²¹

Pursuant to statute,²² the defendant is entitled to a hearing before an extradition magistrate.²³ This hearing

is not designed as a full trial. The purpose is to inquire into the presence of probable cause to believe that there has been a violation of one or more of the criminal laws of the extraditing country, that the alleged conduct, if committed in the United States, would have been a violation of our criminal law, and that the extradited individual is the one sought by the foreign nation for trial on the charge of violation of its criminal laws.²⁴

In addition, the defendant has an opportunity at the hearing to raise certain affirmative defenses.²⁵ Most extradition treaties²⁶ allow the defense that the crime charged is a non-extraditable "political offense."²⁷

²⁰ See, e.g., *Eain v. Wilkes*, 641 F.2d 504, 508 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 478 comment a (1987); Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313 (1962).

²¹ See generally authorities cited *supra* note 20.

²² 18 U.S.C. § 3184 (1988).

²³ The presiding judicial officer in an extradition proceeding is traditionally called an extradition "magistrate" even if he or she is a United States district judge.

²⁴ *Peroff v. Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); see also *Charlton v. Kelly*, 229 U.S. 447, 459-61 (1912) ("The issue is confined to the single question of whether the evidence for the State makes a *prima facie* case of guilt sufficient to make it proper to hold the party for trial."); *Benson v. McMahan*, 127 U.S. 457, 463 (1888) ("[T]he proceeding before the commissioner is not to be regarded as in the nature of a fixed trial . . . but rather of the character of those preliminary examinations . . . before an examining or committing magistrate. . ."); *Simmons v. Braun*, 627 F.2d 635, 636 (2d Cir. 1980) ("The purpose of the hearing is simply to determine whether the evidence of the fugitive's criminal conduct is sufficient to justify his extradition under an appropriate treaty."); *Sayne v. Shipley*, 418 F.2d 679, 685 (5th Cir. 1969) ("Hearings held pursuant to Section 3184 are in the nature of a preliminary hearing. . . [T]he foreign country does not have to show actual guilt, only probable cause that the fugitive is guilty."), *cert. denied*, 398 U.S. 903 (1970); 18 U.S.C. § 3184.

²⁵ Very few affirmative defenses may be raised in an extradition proceeding. These do not include the defense of innocence, *Melia v. United States*, 667 F.2d 300, 302 (2d Cir. 1981); alibi, *Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978); or insanity, *Shapiro v. Ferrandina*, 478 F.2d 894, 901 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973).

²⁶ Steven Lubet & Morris Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. & CRIMINOLOGY 193 (1980).

²⁷ See, e.g., *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984), *dismissed*, 615 F. Supp. 755 (S.D.N.Y. 1985). Two types of political offenses, "pure" and "relative," are recognized under the law.

A "pure" political offense is an "act that is directed against the state but which contains none of the elements of ordinary crime," such as sedi-

If all of the elements necessary for extradition are present and the affirmative defenses, if any, are without merit, the magistrate makes a finding of extraditability and certifies the case to the Secretary of State.²⁸

The Secretary of State then conducts an independent review of the case to determine whether to issue a warrant of surrender. This review may consider not only the court record, but also submissions by the parties or materials uncovered independently. The Secretary of State has unfettered discretion whether to issue the warrant,²⁹ and that decision is not reviewable by the courts.³⁰

There is no direct appeal for either the government or the defendant from a court's finding of extraditability.³¹ In the event the extradition magistrate denies an extradition request, the government's only recourse is to file a second extradition complaint with the district court and to commence a *de novo* proceeding.³² If a defendant wishes to challenge a finding of extraditability, he must file a petition for a writ of habeas corpus with the district court.³³ Habeas corpus review tests the legality, as opposed to the wisdom, of extradition.³⁴ The losing party may appeal the outcome of the habeas corpus proceeding to the Court of Appeals.

B. The Rule of Non-Inquiry

Traditionally, courts follow a "rule of non-inquiry" and refrain from assessing the requesting government's investigative, legal, and

tion, treason, and espionage[; a] "relative" political offense is one "in which a common crime is so connected with a political act that the entire offense is regarded as political."

Eain v. Wilkes, 641 F.2d 504, 512 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981) (citations omitted).

²⁸ 18 U.S.C. § 3184 (1988).

²⁹ *See, e.g.*, *Emami v. District Court*, 834 F.2d 1444, 1454 (9th Cir. 1987); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 584 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Escobedo v. United States*, 623 F.2d 1098, 1105 (5th Cir.) ("The ultimate decision to extradite is a matter within the exclusive prerogative of the Executive in the exercise of its powers to conduct foreign affairs."), *cert. denied*, 449 U.S. 1036 (1980); *Peroff v. Hylton*, 563 F.2d 1099, 1102 (4th Cir. 1977); *Shapiro v. Secretary of State*, 499 F.2d 527, 531 (D.C. Cir. 1974), *aff'd sub nom. Commissioner v. Shapiro*, 424 U.S. 614 (1976).

³⁰ *Peroff*, 563 F.2d at 1102-03; *Shapiro*, 499 F.2d at 530-31; *Escobedo*, 623 F.2d at 1105.

³¹ *Collins v. Miller*, 252 U.S. 364 (1920); *Eain*, 641 F.2d at 508.

³² *United States v. Doherty*, 786 F.2d 491, 501 (2d Cir. 1986); *Hooker v. Klein*, 573 F.2d 1360, 1366 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978); *In re Atta*, 706 F. Supp. 1032, 1036 & n.2 (E.D.N.Y. 1989).

³³ *See, e.g.*, *Ornelas v. Ruiz*, 161 U.S. 502, 508 (1896); *Eain*, 641 F.2d at 508; *Greci v. Birknes*, 527 F.2d 956 (1st Cir. 1976). There is some authority, however, that a defendant may challenge a finding of extraditability via a declaratory judgment action. *See Wacker v. Bisson*, 348 F.2d 602 (5th Cir. 1965); *Sayne v. Shipley*, 418 F.2d 679, 685 n.17 (5th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970).

³⁴ *Wacker*, 348 F.2d at 606.

penal systems.³⁵ They leave the determination of whether the defendant is likely to be treated fairly and humanely entirely to the Department of State.³⁶

Courts have applied the rule of non-inquiry in situations involving a wide variety of allegations, many of which, if proven, would violate due process were the United States Government the offending party. Such situations have included those in which the defendant anticipates abuse, torture, or even murder at the hands of the requesting country's authorities;³⁷ inadequate protection from lawless elements in the requesting country;³⁸ prosecution for crimes not covered by the extradition request;³⁹ or a fundamentally unfair trial, due to bias,⁴⁰ restrictions on presenting a defense,⁴¹ or the use of illegally obtained evidence.⁴² The rule of non-inquiry has also governed when a defendant has claimed the protection of the stat-

³⁵ A separate rule also prohibits courts from examining the motives behind the extradition request: "It is the settled rule that it is within the Secretary of State's sole discretion to determine whether or not a country's requisition for extradition is made with a view to try or punish the fugitive for a political crime, i.e., whether the request is a subterfuge." *Eain*, 641 F.2d at 513 (citing *In re Lincoln*, 228 F. 70 (E.D.N.Y. 1915), *aff'd per curiam*, 241 U.S. 651 (1916)). See, e.g., *Quinn v. Robinson*, 783 F.2d 776, 789 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986); *In re Mackin*, 668 F.2d 122, 133 (2d Cir. 1981); *Jhirad v. Ferrandina*, 536 F.2d 478, 484-85 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); *Laubenheimer v. Factor*, 61 F.2d 626, 628 (7th Cir. 1932), *aff'd*, 290 U.S. 276 (1933); *In re Locatelli*, 468 F. Supp. 568, 575 (S.D.N.Y. 1979); *In re Gonzalez*, 217 F. Supp. 717, 722-23 (S.D.N.Y. 1963).

³⁶ *Sindona v. Grant*, 619 F.2d 167, 174 (2d Cir. 1980) ("The degree of risk to [defendant's] life from extradition is an issue that properly falls within the exclusive purview of the executive branch"), *cert. denied*, 451 U.S. 912 (1981); *Escobedo v. United States*, 623 F.2d 1098, 1107 (5th Cir.) (only executive branch may consider defendant's argument that he should not be extradited because he "may be tortured or killed" in the requesting country), *cert. denied*, 449 U.S. 1036 (1980); *Peroff v. Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976) (executive branch has sole discretion to deny extradition on humanitarian grounds "when it appears that, if extradited, the individual will be persecuted, not prosecuted, or subjected to grave injustice"); *Garcia-Guillern*, 450 F.2d at 1192 ("Neither are we permitted to inquire into the procedure which awaits the appellant upon his return Such matters, so far as they may be pertinent, are left to the State Department."); *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir.) ("The conditions under which a fugitive is to be surrendered to a foreign country are to be determined solely by the non-judicial branches of the Government."), *cert. denied*, 364 U.S. 851 (1960).

³⁷ *Linnas v. I.N.S.*, 790 F.2d 1024, 1031-32 (2d Cir.) (deportation case), *cert. denied*, 479 U.S. 995 (1986); *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir. 1983); *Escobedo*, 623 F.2d at 1098; *In re Singh*, 123 F.R.D. 127 (D.N.J. 1987).

³⁸ *In re Manzi*, 888 F.2d 204, 206 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 1321 (1990); *Sindona*, 619 F.2d at 174-75; *Geisser v. United States*, 627 F.2d 745, 749-53 (5th Cir. 1980), *cert. denied*, 450 U.S. 1031 (1981); *Peroff*, 542 F.2d at 1249.

³⁹ *Garcia-Guillern*, 450 F.2d at 1192.

⁴⁰ *In re Singh*, 123 F.R.D. 127, 128-29 (D.N.J. 1987).

⁴¹ *Gallina v. Fraser*, 278 F.2d 77, 78 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960).

⁴² *Magisano v. Locke*, 545 F.2d 1228, 1230 (9th Cir. 1976).

ute of limitations;⁴³ double jeopardy;⁴⁴ breach of a plea agreement by the requesting country;⁴⁵ or that the requesting country lacks jurisdiction.⁴⁶ For those already convicted, the rule of non-inquiry has precluded claims that extradition should be barred because the conviction was secured unfairly⁴⁷ or in absentia.⁴⁸

All circuits that have considered the issue have adopted the rule of non-inquiry,⁴⁹ even when the defendant is a United States citizen.⁵⁰ Courts have also applied the rule in cases involving deportation⁵¹ as well as the transfer of military personnel pursuant to the NATO Status of Forces Agreement.⁵²

⁴³ *Kamrin v. United States*, 725 F.2d 1225 (9th Cir.), *cert. denied*, 469 U.S. 817 (1984).

⁴⁴ *In re Ryan*, 360 F. Supp. 270, 274 (E.D.N.Y.), *aff'd*, 478 F.2d 1397 (2d Cir. 1973).

⁴⁵ *United States v. Clark*, 470 F. Supp. 976, 979-80 (D. Vt. 1979).

⁴⁶ *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

⁴⁷ *Holmes v. Laird*, 459 F.2d 1211, 1214 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972) (NATO SOFA Treaty); *see infra* note 52.

⁴⁸ *Gallina v. Fraser*, 278 F.2d 77, 78-79 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960); *Argento v. Horn*, 241 F.2d 258, 263-64 (6th Cir.), *cert. denied*, 355 U.S. 818 (1957); *cf. In re Mylonas*, 187 F. Supp. 716, 721 (N.D. Ala. 1960) (although "[t]he fact that the accused was convicted in absentia would not preclude his extradition," the court denied extradition on other grounds).

⁴⁹ *In re Manzi*, 888 F.2d 204, 206 (1st Cir. 1989) (defendant's "request for a deposition and an evidentiary hearing concerning his safety in returning to Italy runs afoul of the well-established rule of 'non-inquiry' in these matters"), *cert. denied*, 110 S. Ct. 1321 (1990); *Emami v. District Court*, 834 F.2d 1444, 1452-53 (9th Cir. 1987) ("[a]n extraditing court will generally not inquire into the procedures or treatment which await a surrendered fugitive in the requesting country"); *Demjanjuk*, 776 F.2d at 583 ("We do not supervise the conduct of another judicial system . . . [and] this court will not inquire into the procedures which will apply after [the defendant] is surrendered to Israel"); *In re Assarsson*, 635 F.2d 1237, 1244 (7th Cir. 1980) ("Respect for the sovereignty of other nations" precludes judicial scrutiny of requesting country's legal system), *cert. denied*, 451 U.S. 938 (1981); *Jhirad v. Ferrandina*, 536 F.2d 478, 484-85 (2d Cir.) ("It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation"), *cert. denied*, 429 U.S. 833 (1976); *Peroff v. Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976) (upholding lower court's refusal to permit defendant to "introduce testimony about the . . . physical risks he would encounter if actually delivered to the custody of Swedish authorities"), *cert. denied*, 429 U.S. 1062 (1977); *Holmes v. Laird*, 459 F.2d 1211, 1218 (D.C. Cir.) (declining to review record of defendants' trial in requesting country), *cert. denied*, 409 U.S. 869 (1972); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971) ("Neither are we permitted to inquire into the procedure which awaits the appellant upon his return"), *cert. denied*, 405 U.S. 989 (1972); *In re Singh*, 123 F.R.D. 127, 136 (D.N.J. 1987) (declining to conduct evidentiary hearing "on the current and future practices of the Government of India and the fate of the defendants should they be extradited").

⁵⁰ *Kamrin v. United States*, 725 F.2d 1225 (9th Cir.), *cert. denied*, 469 U.S. 817 (1984); *Escobedo v. United States*, 623 F.2d 1098, 1100, 1107 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980); *Holmes*, 459 F.2d at 1217-19 & n.57; *United States v. Clark*, 470 F. Supp. 976 (D. Vt. 1979).

⁵¹ *Linna v. I.N.S.*, 790 F.2d 1024 (2d Cir.), *cert. denied*, 479 U.S. 995 (1986).

⁵² Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846 (effective August

II

JURISDICTION OF THE FEDERAL COURTS IN EXTRADITION
PROCEEDINGS

In 1800, in a celebrated speech to the House of Representatives, John Marshall, then a congressman, declared that the power to extradite pursuant to treaty rests in the executive branch as part of its power to conduct foreign affairs.⁵³ Marshall's view has since been endorsed by the Supreme Court.⁵⁴ Thus, in the absence of voluntary delegation by the executive,⁵⁵ judicial involvement in the extradition process, and the resulting encroachment upon executive authority, must be premised upon treaty, statute, or the Constitution.⁵⁶

A. Extradition between 1794 and 1848

The first reported extradition case was *United States v. Robins*,⁵⁷ in which the defendant, a United States citizen, was accused of participating in a mutiny aboard a British ship. The British government located the defendant in Charleston, South Carolina; the federal district judge there issued an arrest warrant, pursuant to which the defendant was arrested and detained. The defendant contended that the British navy had impressed him into service and that he had escaped during a mutiny carried out by other crew members. The British government asked the President for the defendant's extradi-

23, 1953) ("NATO SOFA Treaty"). See *In re Burt*, 737 F.2d 1477 (7th Cir. 1984); *Plaster v. United States*, 720 F.2d 340 (4th Cir. 1983); *Holmes*, 459 F.2d at 1211.

⁵³ See 10 ANNALS OF CONG., 6th Cong., 1st Sess. 596-618 (Mar. 7, 1800), reprinted in *U.S. v. Furlong*, 18 U.S. (5 Wheat.) 184, 198-202 (1800). Indeed, between 1794 and 1842 "the Executive exercised complete control over extradition without reference to the courts." *Eain v. Wilkes*, 641 F.2d 504, 513 n.13 (7th Cir.), cert. denied, 454 U.S. 894 (1981) (citing M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 505 (1974)); Note, *supra* note 2, at 669.

⁵⁴ *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 319-20 (1936); *Fong Yue Ting v. United States*, 149 U.S. 698, 714 (1893) ("The surrender, pursuant to treaty stipulations, of persons residing or found in this country, and charged with crime in another, may be made by the executive authority of the President alone, when no provision has been made by treaty or by statute for an examination of the case by a judge or magistrate"); see also *Wacker v. Bisson*, 348 F.2d 602, 606, 612 (5th Cir. 1965) ("When there is a treaty or convention for extradition the power is vested in the executive to surrender the person to a foreign government."); 1 JOHN B. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 549 (1891) ("The function of surrendering fugitive criminals to foreign powers is vested in the United States, in the President").

⁵⁵ See *In re Metzger*, 46 U.S. (5 How.) 176, 188 (1847) ("The executive, when the late demand of the surrender of Metzger was made, very properly as we suppose, referred it to the judgment of a judicial officer."); *infra* text accompanying notes 69-74.

⁵⁶ *Reid v. Covert*, 354 U.S. 1, 16-18 (1957); *Fong Yue Ting*, 149 U.S. at 714; *Doe v. Braden*, 57 U.S. (16 How.) 635, 656 (1853).

⁵⁷ 27 F. Cas. 825 (D.S.C. 1799) (No. 16,175).

tion pursuant to Jay's Treaty,⁵⁸ which did not specify the procedures to be followed in an extradition case. The Secretary of State wrote to the judge, indicating that the British government had requested the defendant's extradition and that the "President 'advises and requests' you to deliver him up."⁵⁹ The judge held that he had jurisdiction over the subject matter and ordered the United States marshal to deliver the prisoner to a representative of the British government.⁶⁰ The defendant was subsequently hanged by British authorities.⁶¹

The case provoked a great deal of controversy⁶² and led to a national demand that there be some exercise of independent judicial authority before an extradition could proceed.⁶³ The extradition provision of Jay's Treaty, however, expired in 1807. Between that year and 1842 there were no extradition treaties in effect between the United States and any foreign country.⁶⁴

In 1842 the United States and the United Kingdom entered into the Webster-Ashburton Treaty.⁶⁵ Based in part upon the outcry over the *Robins* case,⁶⁶ the treaty specifically provided for judicial involvement in the extradition process:

the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the

⁵⁸ The Treaty of Amity, Commerce, and Navigation, 19 November 1794, United States-Great Britain, art. 27, 8 Stat. 116, T.S. No. 105, reprinted in 12 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 13 (Charles I. Bevans, ed. 1974).

⁵⁹ *Robins*, 27 F. Cas. at 826-27.

⁶⁰ *Id.* at 833.

⁶¹ See Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 304, 325 (1990).

⁶² *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570 (1840); *In re Mackin*, 668 F.2d 122, 134 (2d Cir. 1981); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION, UNITED STATES LAW AND PRACTICE, ch. II, at 48-49 (1987); J. MOORE, *supra* note 54, at 550 ("The case created great excitement, and was one of the causes of the overthrow of John Adams' administration"). In his speech to the House of Representatives, see *supra* text accompanying note 53, John Marshall endorsed the handling of the *Robins* case. The House debated at length and ultimately affirmed, by a vote of 65 to 39, the correctness of the procedures that had been followed. See *In re Metzger*, 17 F. Cas. 232, 233 (C.C.S.D.N.Y. 1847) (No. 9,511).

⁶³ *In re Kaine*, 55 U.S. (14 How.) 103, 112-13 (1852); M. BASSIOUNI, *supra* note 62, ch. II, at 49, 51.

⁶⁴ *Holmes*, 39 U.S. (14 Pet.) at 574; *In re Stupp*, 23 F. Cas. 281, 284-85 (C.C.S.D.N.Y. 1873).

⁶⁵ Webster-Ashburton Treaty, Aug. 9, 1842, United States-United Kingdom, 8 Stat. 572, T.S. No. 119, reprinted in 12 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 82 (Charles I. Bevans, ed. 1974).

⁶⁶ See *Kaine*, 55 U.S. (14 How.) at 112.

evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper Executive authority, that a warrant may issue for the surrender of such fugitive.⁶⁷

The 1843 treaty between the United States and France⁶⁸ contained no comparable provision. Nevertheless, in *In re Metzger*,⁶⁹ apparently due to political pressure,⁷⁰ the President solicited judicial participation in the extradition process.⁷¹ In that case, a representative of the French government presented the extradition request directly to the President, who referred the matter to a United States district judge. The judge conducted a hearing and found sufficient evidence to find the defendant extraditable.⁷²

The defendant then filed a habeas corpus petition with the Supreme Court. The Court expressed approval of the President's action in voluntarily referring the matter to a district judge, but held that it had no jurisdiction either to issue a writ of habeas corpus or to conduct appellate review of the judge's decision.⁷³ The Court could not act because the judge had not been exercising article III powers, but rather a "special authority" in "his chambers, and not in court."⁷⁴

B. The 1848 Statute

Concern arose in Congress that the absence of federal district judges in certain parts of the United States was impairing this country's ability to fulfill its treaty obligations.⁷⁵ This concern, coupled with the public clamor for judicial involvement in the extradition process,⁷⁶ led to the 1848 enactment of the first extradition statute.⁷⁷ The statute, echoing the language of the Webster-Ashburton Treaty,⁷⁸ created the office of extradition magistrate by vesting ju-

⁶⁷ Webster-Ashburton Treaty, *supra* note 65, at art. X.

⁶⁸ Convention for the Surrender of Criminals, Nov. 9, 1843, 8 Stat. 580, T.S. No. 89.

⁶⁹ 46 U.S. (5 How.) 176 (1847).

⁷⁰ See M. BASSIOUNI, *supra* note 62, ch. II, at 49 & n.61.

⁷¹ *Id.* at 72.

⁷² *In re Metzger*, 17 F. Cas. 232 (C.C.S.D.N.Y. 1847) (No. 9,511).

⁷³ *Metzger*, 46 U.S. (5 How.) at 191.

⁷⁴ *Id.*

⁷⁵ CONG. GLOBE, 30th Cong., 1st Sess. 867 (1848) (statement of Rep. Ingersoll); see also *In re Mackin*, 668 F.2d 122, 126 (2d Cir. 1981) ("The prime purpose of the 1848 statute. . . was to provide additional judicial officers to handle extradition requests." (citation omitted)).

⁷⁶ *In re Kaine*, 55 U.S. (14 How.) 103, 112-13 (1852); see *supra* text accompanying notes 62-63.

⁷⁷ Act of Aug. 12, 1848, ch. 167, § 5, 9 Stat. 302, 303 [hereinafter 1848 statute].

⁷⁸ See *supra* text accompanying note 67.

risdiction in the Justices of the Supreme Court, judges of the United States district courts, state court judges, and Commissioners specially appointed for the purpose by any United States court. Extradition magistrates were granted the power to issue arrest warrants for the apprehension of fugitives sought by a foreign government and to examine the sufficiency of the evidence of criminality.⁷⁹ If the evidence was sufficient, it was the judicial officer's obligation to certify the defendant for extradition.⁸⁰

Under the 1848 statute, extradition magistrates acted "under special authority conferred by treaties and acts of Congress";⁸¹ while the extradition magistrate's responsibility was "in form and effect judicial,"⁸² it was "not an exercise of any part of what is technically considered the judicial power of the United States."⁸³

This principle continues to be reflected in the current statute,⁸⁴ which vests jurisdiction in individual *judges* rather than in the *courts*.⁸⁵ This principle is also reflected in the fact that an extradition magistrate's ruling is not appealable.⁸⁶

Amendments to the 1848 statute have not materially altered the duties or enlarged the jurisdiction of extradition magistrates.⁸⁷ The jurisdiction of a judicial officer conducting an extradition hearing is limited to the authority granted by statute:⁸⁸ the power to issue arrest warrants; to "hear[] and consider[]" the "evidence of crimi-

⁷⁹ *In re Kaine*, 55 U.S. (14 How.) at 109. The nature of the proceeding conducted by the extradition magistrate has been likened to that of a preliminary hearing in a criminal case. See *Charlton v. Kelly*, 229 U.S. 447, 459-61 (1912); *Benson v. McMahon*, 127 U.S. 457, 463 (1888); see also *supra* note 24 and accompanying text.

⁸⁰ *In re Kaine*, 55 U.S. (14 How.) at 109 (1848 statute makes it "the duty of the Judge or Commissioner to certify" the defendant for extradition if the evidence is sufficient); *id.* at 128 (Curtis, J., concurring) ("The act of Congress requires the Judge, or Commissioner, to certify to the Secretary of State" his finding of extraditability).

⁸¹ *In re Muller*, 10 Op. Att'y Gen. 501, 506 (1863).

⁸² *Id.*

⁸³ *Id.*; see also *Kaine*, 55 U.S. (14 How.) at 120 (Curtis, J., concurring) (U.S. Commissioner's authority under 1848 statute is not based upon "any part of the judicial power of the United States"); *United States v. Ferreira*, 54 U.S. (13 How.) 39 (1851); *United States v. Doherty*, 786 F.2d 491, 495 (2d Cir. 1986); *In re Mackin*, 668 F.2d 122, 126 & n.8 (2d Cir. 1981); *William Calder's Case*, 6 Op. Att'y Gen. 91, 96 (1853).

⁸⁴ 18 U.S.C. § 3184 (1988).

⁸⁵ See *Doherty*, 786 F.2d at 495; *Mackin*, 668 F.2d at 129-30 & n.11; *Shapiro v. Ferrandina*, 478 F.2d 894, 901 n.3 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973); *Jimenez v. Aristeguieta*, 290 F.2d 106, 107 (5th Cir.), *cert. granted*, 365 U.S. 840 (1961), *vacated as moot*, 375 U.S. 49 (1963); *Lubet & Czackes*, *supra* note 26, at 197 n.34, 199.

⁸⁶ *Mackin*, 668 F.2d at 129-30. *But cf.* *Collins v. Miller*, 252 U.S. 364, 369 (1919) (extradition magistrate's ruling is not appealable because it is not a final order).

⁸⁷ See Act of August 12, 1848, ch. 167, 66 Rev. Stat. § 5270 (1873-74); Act of June 6, 1900, ch. 93, 31 Stat. 656; Act of June 25, 1948, ch. 645, 62 Stat. 822; Act of Oct. 17, 1968, Pub. L. No. 90-578, 82 Stat. 1115. The current statute is codified at 18 U.S.C. § 3184 (1988). A comprehensive listing of extradition legislation may be found in M. BASSIOUNI, *supra* note 62, ch. 11, at 42.

⁸⁸ See *Gomez v. United States*, 490 U.S. 858, 864 (1989) ("When a statute creates

nality"; and to determine if the evidence is "sufficient to sustain the charge under the provisions of the proper treaty or convention."⁸⁹ Nothing in the statute permits an extradition magistrate to examine the requesting country's procedures,⁹⁰ nor can it reasonably be said that such authority is inherent.⁹¹

The language and history of the extradition statute, therefore, compel the conclusion that an extradition magistrate is jurisdictionally bound by the rule of non-inquiry.⁹²

C. Habeas Corpus and the Origin of the Rule of Non-Inquiry

If an extradition magistrate has found the defendant extraditable, the defendant may obtain access to a federal district court by

an office to which it assigns specific duties, those duties outline the attributes of the office.").

⁸⁹ 18 U.S.C. § 3184 (1988).

⁹⁰ See *Ahmad v. Wigen*, 910 F.2d 1063, 1066 (2d Cir. 1990) ("there is substantial authority for the proposition that" inquiry into the foreign country's procedures "is not a proper matter for consideration by the certifying judicial officer."). By contrast, an extradition magistrate may consider whether or not a crime charged falls within the political offense exception contained in the treaty, since the statute authorizes the magistrate to consider whether "the evidence [is] sufficient to sustain the charge under the provisions of the proper treaty." 18 U.S.C. § 3184 (1988); see *Quinn v. Robinson*, 783 F.2d 776, 787 (9th Cir.), cert. denied, 479 U.S. 882 (1986); *In re Doherty*, 599 F. Supp. 270, 277 n.6 (S.D.N.Y. 1984). In addition, the case of *United States v. Robins*, see *supra* text accompanying notes 57-61, had overtones suggesting the crime charged was, in some broad sense, a "political" offense. Insofar as Congress enacted the 1848 statute in response to the public outcry over *Robins*, allowing extradition magistrates to decide the political offense issue is consistent with legislative intent. See *Mackin*, 668 F.2d at 134-35.

⁹¹ *Gomez*, 490 U.S. at 864-65 (even where statute expressly authorizes performance by federal magistrates of "such additional duties as are not inconsistent with the Constitution and laws of the United States," statute must be construed as authorizing only those duties that bear some reasonable relation to the ones specified) (citing 28 U.S.C. § 636(b) (1988)); see also *First Nat'l City Bank v. Aristegnieta*, 287 F.2d 219, 225-26 (2d Cir. 1960) (refusing to interpret 18 U.S.C. § 3184 as providing extradition magistrate with general inherent power even to issue deposition subpoenas on behalf of requesting government in extradition proceeding), cert. granted, 365 U.S. 840 (1961), vacated as moot, 375 U.S. 49 (1963). *But cf.* *Quinn v. Robinson*, 783 F.2d 776, 817 n.41 (9th Cir. 1986) (extradition magistrate may order discovery).

⁹² Some courts, even while following the rule of non-inquiry, have apparently overlooked this jurisdictional limitation on the extradition magistrate. See, e.g., *In re Singh*, 123 F.R.D. 127 (D.N.J. 1987) (extradition magistrate's decision to adhere to rule of non-inquiry based upon non-jurisdictional concerns); *In re Paziienza*, 619 F. Supp. 611, 621 (S.D.N.Y. 1985) (extradition magistrate following rule of non-inquiry based upon principle that "extradition is an international legal act between two sovereign States"); *In re Sindona*, 450 F. Supp. 672, 694-95 (S.D.N.Y. 1978) (rejecting on non-jurisdictional grounds defendant's argument that extradition magistrate should inquire into requesting country's procedures), *aff'd in part and rev'd in part on other grounds sub nom. Sindona v. Grant*, 619 F.2d 167, 174-75 (2d Cir. 1980), cert. denied, 451 U.S. 912 (1981); *cf.* *Gill v. Imundi*, 747 F. Supp. 1028, 1049-50 (S.D.N.Y. 1990) (suggesting that extradition magistrate, as opposed to habeas corpus judge, may inquire into requesting country's procedures).

filing a petition for a writ of habeas corpus.⁹³ The scope of habeas corpus review of a finding of extraditability, as originally delineated in a series of Supreme Court decisions,⁹⁴ is extremely limited.

In 1888, the Court listed, as the issues properly before it on habeas corpus review, whether the Commissioner had jurisdiction and

whether, under the construction of the act of Congress and the treaty entered into between this country and Mexico, there was legal evidence before the commissioner to justify him in exercising his power to commit the person accused to custody to await the requisition of the Mexican government.⁹⁵

Two years later, the Court elaborated:

A writ of *habeas corpus* in a case of extradition cannot perform the office of a writ of error. If the commissioner has jurisdiction of the subject matter and of the person of the accused, and the offence charged is within the terms of a treaty of extradition, and the commissioner, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused, for the purposes of extradition, such decision of the commissioner cannot be reviewed by a Circuit Court or by this court, on *habeas corpus*, either originally or by appeal.⁹⁶

The Court has repeatedly reaffirmed that these listed issues are the only ones within the scope of a court's authority on habeas corpus review of a finding of extraditability. However, the Court has not spoken on the subject since 1926.⁹⁷

The rule of non-inquiry thus initially arose by implication, originating in the fact that "the procedures which will occur in the

⁹³ 28 U.S.C. § 2241 (1988).

⁹⁴ In recent years certain lower courts have begun to expand the scope of habeas corpus review in extradition cases. See, e.g., *In re Burt*, 737 F.2d 1477 (7th Cir. 1984); *Plaster v. United States*, 720 F.2d 340, 347-48 (4th Cir. 1983); *In re Geisser*, 627 F.2d 745 (5th Cir. 1980), cert. denied, 450 U.S. 1031 (1981); see also *infra* text accompanying notes 138-44.

⁹⁵ *Benson v. McMahon*, 127 U.S. 457, 463 (1888).

⁹⁶ *In re Luis Oteiza y Cortes*, 136 U.S. 330, 334 (1890).

⁹⁷ See *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *Collins v. Loisel*, 259 U.S. 309, 314-15 (1922); *Bingham v. Bradley*, 241 U.S. 511, 516-17 (1916); *Charlton v. Kelly*, 229 U.S. 447, 456 (1913); *McNamara v. Henkel*, 226 U.S. 520, 523 (1913); *Elias v. Ramirez*, 215 U.S. 398, 406-07 (1910); *Terlinden v. Ames*, 184 U.S. 270, 278 (1902); *Bryant v. United States*, 167 U.S. 104, 105 (1897); *Ornelas v. Ruiz*, 161 U.S. 502, 508-09 (1896); see also *Hughes v. Gault*, 271 U.S. 142, 151-52 (1926) (dictum). The abrupt cessation of Supreme Court consideration of the issue coincided with the enactment of the so-called "Judges' Bill." Act of Feb. 13, 1925, ch. 229, 43 Stat. 936. The bill "radically altered the [Supreme] Court's function, converting what had been a largely mandatory jurisdiction into a predominantly certiorari (or discretionary) docket." SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT'S ROLE* 12 (1986).

demanding country subsequent to extradition were not listed [by the Supreme Court] as a matter of a federal court's consideration."⁹⁸

The Supreme Court expressly adopted the rule of non-inquiry in *Neely v. Henkel*.⁹⁹ Congress had amended the extradition statutes in 1900 to include a provision for the extradition of fugitives found in the United States who committed certain enumerated crimes in "any foreign country or territory . . . occupied by or under the control of the United States."¹⁰⁰ The statute provided for the return of the fugitive "to the authorities in control of such foreign country or territory . . . [who] shall secure to such a person a fair and impartial trial."¹⁰¹ The defendant, facing extradition to Cuba (then under United States occupation), challenged the constitutionality of the statute. He argued that it did not ensure him "all of the rights, privileges and immunities that are guaranteed by the Constitution"¹⁰² upon his surrender to the foreign country, including "the fundamental guarantees of life, liberty and property embodied in that instrument."¹⁰³

The Court rejected the argument, holding that constitutional provisions "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country."¹⁰⁴ The defendant's United States citizenship made no difference:

When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.¹⁰⁵

The Court interpreted the statutory requirement of "a fair and impartial trial" to require nothing more than "a trial according to the modes established in the country where the crime was committed, provided such trial be had without discrimination against the accused because of his American citizenship."¹⁰⁶ It noted that

[i]n the judgment of Congress these provisions were deemed ade-

⁹⁸ *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960) (citing *Ornelas*, 161 U.S. at 508).

⁹⁹ 180 U.S. 109 (1901).

¹⁰⁰ Act of June 6, 1900, ch. 793, 31 Stat. 656 (codified as amended at 18 U.S.C. § 3185 (1988)).

¹⁰¹ *Id.* at 657.

¹⁰² *Neely*, 180 U.S. at 122.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 123.

¹⁰⁶ *Id.*

quate to the ends of justice in cases of persons committing crimes in a foreign country . . . and subsequently fleeing to this country. We cannot adjudge that Congress in this matter has abused its discretion, nor decline to enforce obedience to its will as expressed in the [statute]."¹⁰⁷

Thus, the Court only required that the foreign country apply its customary procedures (whatever they entailed), and that it not discriminate based upon United States citizenship.¹⁰⁸ Those requirements were, according to the Court, mandated by the statute, not the Constitution.¹⁰⁹

The court further solidified the rule of non-inquiry in *Glucksman v. Henkel*.¹¹⁰ The defendant, found extraditable to Czarist Russia to stand trial on forgery charges, argued that he could not be extradited because the complaint against him was "insufficient and defective."¹¹¹ Further, since he was about to be "deprived of his liberty and sent four thousand miles away as a prisoner to stand trial upon a criminal charge," he maintained the court was obligated to exercise the "greatest caution" in determining the legality of his extradition.¹¹²

Finding the complaint legally sufficient, the Court noted that an extradition proceeding does not require "all the factitious niceties of a criminal trial at common law";¹¹³ so long as there is "reasonable ground to suppose [the defendant] guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender."¹¹⁴ The Court then added that "[w]e are bound by the existence of an extradition treaty to assume that the trial will be fair."¹¹⁵

A Supreme Court decision outside of the extradition context has added support for the rule of non-inquiry. Several courts have cited *Wilson v. Gerard*,¹¹⁶ in which the Supreme Court reversed a lower court's judgment enjoining the Secretary of Defense from turning over an American soldier to Japan for criminal prosecution. In its decision, the Court did not consider the nature of the proceedings the defendant faced in the Japanese courts.¹¹⁷

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 122-23.

¹⁰⁹ See also *In re Singh*, 123 F.R.D. 127, 138 (D.N.J. 1987) (fair trial requirement in *Neely* is based entirely on statute, not the Constitution.).

¹¹⁰ 221 U.S. 508 (1911).

¹¹¹ *Id.* at 510.

¹¹² *Id.* at 511.

¹¹³ *Id.* at 512.

¹¹⁴ *Id.*

¹¹⁵ *Id.* (dictum).

¹¹⁶ 354 U.S. 524 (1957).

¹¹⁷ Although the Court made no direct reference to the issue, evidence regarding

III

INROADS INTO THE RULE OF NON-INQUIRY

In an era which has witnessed the unprecedented expansion of the rights of criminal defendants,¹¹⁸ it is not surprising that the rule of non-inquiry has not remained wholly unaffected. Unlike the radical changes in other areas of the law, however, the erosion of the rule of non-inquiry has been gradual and very limited. Some courts have begun to speak of exceptions to the rule of non-inquiry and have implied that circumstances may exist which would allow a court to bar extradition due to the treatment the defendant is likely to receive in the requesting country.

The first inroad into the rule of non-inquiry, and the source of nearly every attempt to undermine the rule, appeared in 1960 in the form of *dictum* issued by the Second Circuit in *Gallina v. Fraser*.¹¹⁹

Gallina had been convicted in absentia in Italy, which sought his extradition from the United States. He contended that if extradited, Italy would imprison him without retrial and without giving him the opportunity to confront his accusers or present a defense.¹²⁰ The Second Circuit applied the rule of non-inquiry and reaffirmed its validity, noting:

[W]e have discovered no case authorizing a federal court, in a habeas corpus proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await the relator upon extradition . . . The authority that does exist points clearly to the proposition that the conditions under which a fugitive is to be surrendered to a foreign country are to be determined solely by the non-judicial branches of the Government.¹²¹

The court, however, "confess[ed] to some disquiet"¹²² over this rule. It suggested that reconsideration of the rule might be appropriate where a defendant faced procedures sufficiently "antipathetic

the Japanese procedures was in the record, *id.* at 547-48, and the defendant had specifically raised the issue with the Court. *See* *Rosado v. Civiletti*, 621 F.2d 1179, 1195 (2d Cir.), *cert. denied*, 449 U.S. 856 (1980); *Holmes v. Laird*, 459 F.2d 1211, 1219 n.58 (D.C. Cir.) ("notwithstanding the serviceman's specific claim that the absence of due process in the Japanese judicial system would deprive him of a fair trial in the Japanese courts . . . the Court found 'no constitutional or statutory barrier' to the surrender"), *cert. denied*, 409 U.S. 869 (1972); *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960); *In re Ryan*, 360 F. Supp. 270, 274 (E.D.N.Y.), *aff'd*, 478 F.2d 1397 (2d Cir. 1973).

¹¹⁸ *See, e.g.*, WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE*, 33-34, 60-68 (1985) (describing the Supreme Court's expansion of the rights accorded criminal defendants).

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

¹²⁰ *Id.* at 78.

¹²¹ *Id.* at 78-79.

¹²² *Id.* at 79.

to a federal court's sense of decency."¹²³ The court did not identify the source of its power to examine the requesting country's procedures. Indeed, the court offered no analysis whatsoever and made no effort to reconcile its *dictum* with the holding of *Neely v. Henkel*.¹²⁴ Although the *Gallina dictum* has never gained the force of law,¹²⁵ it has been cited by some courts with approval.¹²⁶

The Second Circuit itself has expressed varying views on the *Gallina dictum*, ranging from apparent endorsement¹²⁷ to qualified approval¹²⁸ to, most recently, strong disapproval.¹²⁹

That court expressed its strongest endorsement of the *Gallina dictum* in *Rosado v. Civiletti*.¹³⁰ The court held that prisoners convicted in Mexico under procedures utterly devoid of due process, and then incarcerated in the United States pursuant to a prisoner transfer treaty, could utilize the habeas corpus mechanism to challenge the legality of their detention.¹³¹ Foraging for support, the court digressed into the law of extradition. Citing the *Gallina dictum*, the court suggested that "the presumption of fairness routinely accorded the criminal process of a foreign sovereign may require closer scrutiny if a relator persuasively demonstrates that extradition would expose him to procedures or punishment 'antipathetic to a federal court's sense of decency.'"¹³² Circumventing *Neely v. Henkel*,¹³³ the Second Circuit mischaracterized that case as standing for the proposition that a defendant "cannot prevent his extradition simply by alleging that the criminal process he will receive fails to accord with constitutional guarantees."¹³⁴ The court thus implied that the Supreme Court had stated or suggested that a defendant who could prove the allegation could thereby prevent his extradition. The court further attempted to limit the applicability of *Neely*

¹²³ *Id.*

¹²⁴ 180 U.S. 109 (1901). See *supra* text accompanying notes 99-109.

¹²⁵ *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir. 1983) (the exception suggested in the *Gallina dictum* "has yet to be employed in an extradition case"); *Ahmad v. Wigen*, 726 F. Supp. 389, 413 (E.D.N.Y. 1989) ("The *Gallina* exception to the rule of non-inquiry has apparently yet to be invoked to prevent extradition."), *aff'd*, 910 F.2d 1063 (2d Cir. 1990).

¹²⁶ See, e.g., *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Arnbjornsdottir-Mendler*, 721 F.2d at 683.

¹²⁷ *Rosado v. Civiletti*, 621 F.2d 1179, 1195 (2d Cir.), *cert. denied*, 449 U.S. 856 (1980).

¹²⁸ *Sindona v. Grant*, 619 F.2d 167, 174-75 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981); *United States ex rel. Bloomfield v. Gengler*, 507 F.2d 925, 928-29 (2d Cir. 1974).

¹²⁹ *Ahmad v. Wigen*, 910 F.2d 1063, 1066-67 (2d Cir. 1990).

¹³⁰ 621 F.2d 1179 (2d Cir.), *cert. denied*, 449 U.S. 856 (1980).

¹³¹ The court found, however, that as part of the transfer agreement, the petitioners had waived their rights to challenge the validity of the Mexican convictions. *Id.* at 1182.

¹³² *Id.* at 1195 (quoting *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960)).

¹³³ For a discussion of the *Neely* decision, see *supra* text accompanying notes 99-109.

¹³⁴ *Rosado*, 621 F.2d at 1195 (emphasis added).

by observing that in that case, "minimal safeguards to ensure a fair trial in the foreign tribunal were provided."¹³⁵ Again the Second Circuit implied that the absence of such safeguards could serve as a constitutional bar to extradition—a conclusion nowhere to be found, even by implication, in the Supreme Court's opinion.¹³⁶

The Second Circuit concluded that "although the Constitution cannot limit the power of a foreign sovereign to prescribe procedures for the trial and punishment of crimes committed within its territory, it does govern the manner in which the United States may join the effort."¹³⁷ The court did not explain what it meant by joining the effort. The ambiguity suggests two possible approaches, each of which expands the scope of habeas corpus review beyond that outlined by the Supreme Court.¹³⁸ Both have found at least some support among lower courts.

The first approach focuses exclusively upon the conduct of the United States.¹³⁹ Under this approach, extradition may be barred upon a showing that wrongful behavior of the United States, usually unrelated to the defendant's expected treatment in the requesting country, renders extradition violative of the defendant's constitutional rights.¹⁴⁰ This approach preserves the traditional rule of non-

¹³⁵ *Id.*

¹³⁶ See *supra* text accompanying notes 104-09.

¹³⁷ *Rosado*, 621 F.2d at 1195-96.

¹³⁸ See *supra* text accompanying notes 95-97.

¹³⁹ Traditionally, courts have held that the conduct of the United States government in an extradition proceeding is subject to constitutional constraints. *Grin v. Shine*, 187 U.S. 181, 184 (1902); *Plaster v. United States*, 720 F.2d 340, 348 (4th Cir. 1983); *Geisser v. United States*, 627 F.2d 745, 749-50 (5th Cir. 1980), *cert. denied*, 450 U.S. 1031 (1981); *Gallina v. Fraser*, 278 F.2d 77, 78 (2d Cir. 1960). Extradition proceedings conducted in accordance with 18 U.S.C. §§ 3181 - 3195 (1988), comply with the requirements of procedural due process. *Escobedo v. United States*, 623 F.2d 1098, 1105 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980); *Peroff v. Hylton*, 563 F.2d 1099, 1103 (4th Cir. 1977); see also *Sayne v. Shipley*, 418 F.2d 679, 686 (5th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970) (extradition of United States citizen from Canal Zone to Panama without judicial hearing and solely upon determination by Chief Executive of Canal Zone that defendant is extraditable is not a denial of due process because habeas corpus review is available in United States district court).

¹⁴⁰ See *Sahagian v. United States*, 864 F.2d 509, 513 (7th Cir. 1988) ("to the extent Sahagian challenges the procedures under which the federal officials procured his arrest and extradition, those procedures 'must be assessed in light of the Constitution'"), *cert. denied*, 489 U.S. 1087 (1989); *Romeo v. Roache*, 820 F.2d 540, 545 (1st Cir. 1987) ("More egregious [United States] governmental conduct than that alleged here would be required before a court should interfere in international affairs by denying foreign states their rights under extradition treaties."); *In re Burt*, 737 F.2d 1477, 1487 (7th Cir. 1984) (decision of United States government to extradite may not be based upon "such constitutionally impermissible factors as race, color, sex, national origin, religion, or political beliefs"); *Prushinowski v. Samples*, 734 F.2d 1016, 1018 (4th Cir. 1984) ("It is established that constitutional questions of deprivation of rights are addressed only to the acts of the United States Government and not to those of a foreign nation, at least for purposes of determining questions of extraditability."); *Plaster*, 720 F.2d at 349 n.9

inquiry into the foreign country's procedures and is thus fully consistent with *Neely v. Henkel*. However, it expands the scope of habeas corpus review¹⁴¹ to encompass violations of constitutional rights by agents of the United States.¹⁴²

The second approach expands the scope of habeas corpus review even further to allow at least some inquiry into the procedures the defendant faces in the requesting country. This approach, which would theoretically permit the court to bar extradition upon a showing that the procedures are "particularly atrocious" or "shock the conscience,"¹⁴³ raises serious doctrinal and policy

("It is settled that the petitioner cannot block his extradition simply because the other country's judicial procedures do not comport with the requirements of our constitution Instead, he must claim that the conduct of our government is violating his constitutional rights."); *Holmes v. Laird*, 459 F.2d 1211, 1218 (D.C. Cir.) (while "American officials having custody of appellants are fully subject to constitutional commands, it must be remembered that the contemplated surrender is the precise response required of the United States by its treaty commitments to the [requesting nation]. The Constitution plays no part in this case unless somehow it operates to negate those commitments in the circumstances appellants allege."), *cert. denied*, 409 U.S. 869 (1972); *In re Singh*, 123 F.R.D. 127, 139 (D.N.J. 1987) ("Defendants here do not challenge any action of the [United States] Government. Instead, they challenge the actions of the Government of India.").

¹⁴¹ In the related cases of *Burt*, 737 F.2d at 1482-84 and *Plaster*, 720 F.2d at 348, the courts rejected the government's contention that the scope of habeas corpus review was narrowly confined to the issues delineated by the Supreme Court in the line of cases which culminated with *Fernandez v. Phillips*, 268 U.S. 311 (1925). See *supra* text accompanying notes 95-97. The Seventh Circuit observed that "[o]nly subsequent to *Fernandez* did the Supreme Court substantially redefine the scope of habeas corpus review, which previously had been tied to an examination of jurisdictional defects, to include an evaluation of whether the petitioner is being held in violation of any of his or her constitutional rights." *Burt*, 737 F.2d at 1484. Both courts concluded that habeas corpus could be used to challenge any unconstitutional conduct by the executive branch, including a decision to extradite based upon constitutionally impermissible considerations such as race or religion. Cf. *Ahmad v. Wigen*, 910 F.2d 1063, 1064-65 (2d Cir. 1990) (expressly reaffirming *Fernandez* as defining the scope of habeas corpus review in an extradition proceeding, but also observing that "the Government's conduct violated neither the Constitution nor established principles of international law.").

¹⁴² Several courts have recognized that extradition may be barred if it would violate promises made by representatives of the United States. See *Burt*, 737 F.2d at 1487 (courts will not bar extradition on constitutional grounds "so long as the United States has not breached a specific promise to an accused regarding his or her extradition"); *Plaster*, 720 F.2d at 332 (breach of immunity agreement by the United States, if proven, could serve as constitutional bar to defendant's extradition); *Geisser*, 627 F.2d at 749-50 (fact that defendant, upon extradition to Switzerland, faced realistic possibility of being murdered in prison by drug traffickers did not present a constitutional issue; defendant's "claim of constitutional right has no independent strength beyond the resolution of the single question of whether the [United States] government has carried out its promise under the plea bargain which was made"); *Freedman v. United States*, 437 F. Supp. 1252, 1258 n.4 (N.D. Ga. 1977) ("[A] breached plea bargain may in some instances form the basis for an order enjoining extradition.").

¹⁴³ *Sahagian*, 864 F.2d at 514 (While "[t]he Constitution may impose some limitations upon extradition decisions in exceptional cases due to some 'particularly atrocious procedures or punishments employed by the foreign jurisdiction,' " such a circumstance

concerns.¹⁴⁴

No court has yet denied extradition based upon the defendant's anticipated treatment in the requesting country. Citing the rule of non-inquiry, most courts have refused to conduct hearings into requesting countries' procedures.¹⁴⁵ Nevertheless, some of these courts have implicitly endorsed the second approach by qualifying findings of extraditability with the observation that the defendant failed to make a showing of possible mistreatment.¹⁴⁶

was not present.); *Burt*, 737 F.2d at 1487 ("exceptional constitutional limitations [on extradition] . . . may exist because of particularly atrocious [sic] procedures or punishments employed by the foreign jurisdiction"); *Prushinowsky v. Samples*, 734 F.2d 1016, 1019 (4th Cir. 1984) (court would not likely permit extradition to a country where "the prisons . . . regularly opened each day's proceedings with a hundred lashes applied to the back of each prisoner who did not deny his or her God or conducted routine breakings on the wheel for every prisoner"); *Esposito v. Adams*, 700 F. Supp. 1470, 1481 (N.D. Ill. 1988) (allowing extradition after finding that circumstances of defendant's conviction in Italy in absentia "were far from lacking 'even the barest rudiments of a process calculated to arrive at the truth of the accusations'"); see also *Barr v. United States Dep't of Justice*, 819 F.2d 25 (2d Cir. 1987). In that case, which involved the Swiss government's freezing of plaintiff's assets at the request of the United States, the court noted that plaintiff

does not claim, nor do we find, that the actions of the Swiss authorities were intrinsically violative of fundamental fairness. Accordingly, there is no need to apply in this case the recognized principle that, regardless of the degree of American government involvement in the conduct of a foreign sovereign, the federal courts will not allow themselves to be placed in the position of putting their imprimatur on unconscionable conduct.

Id. at 27 n.2.

¹⁴⁴ See *infra* discussion accompanying notes 168-296.

¹⁴⁵ See, e.g., *In re Manzi*, 888 F.2d 204, 206 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 1321 (1990); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir. 1983); *Sindona v. Grant*, 619 F.2d 167, 175 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981); *Peroff v. Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *In re Tang Yee-Chun*, 674 F. Supp. 1058, 1068-69 (S.D.N.Y. 1987); *In re Singh*, 123 F.R.D. 127, 140 (D.N.J. 1987).

¹⁴⁶ See, e.g., *Manzi*, 888 F.2d at 206 ("Given this well-established rule [of non-inquiry] and Manzi's failure to produce any factual evidence of a threat to his safety, the magistrate acted properly in denying Manzi's request for a deposition and an evidentiary hearing."); *Sahagian*, 864 F.2d at 514 (7th Cir. 1988) (while "[t]he Constitution may impose some limitations upon extradition decisions in exceptional cases due to some 'particularly atrocious procedures or punishments employed by the foreign jurisdiction,' " such a circumstance was not present) (quoting *Burt*, 737 F.2d at 1487); *Emami v. District Court*, 834 F.2d 1444, 1453 (9th Cir. 1987) (court rejected the defendant's claim that he should not be extradited due to ill health, because court-appointed cardiologist found no serious health condition, and because requesting country indicated that it would provide adequate medical treatment); *Demjanjuk*, 776 F.2d at 583 ("There is absolutely no showing in this record that Israel will follow procedures which would shock this court's 'sense of decency.' "); *Arnbjornsdottir-Mendler*, 721 F.2d at 683 ("In light of Iceland's outstanding human rights [sic] record and appellant's uncorroborated prediction of maltreatment, the district court had no obligation to hold an evidentiary hearing to consider the claim"); *United States ex rel. Bloomfield v. Gengler*, 507 F.2d 925, 928 (2d Cir. 1974) (the court's "sense of decency" was "not shocked" by the circumstances of the defendants' convictions or by the sentences they faced upon extradition to Canada);

Recently, in *Ahmad v. Wigen*,¹⁴⁷ the Second Circuit apparently repudiated the *Gallina dictum*. Ahmad belonged to the Abu Nidal Organization, an international terrorist group with roots in the Middle East. The court found him extraditable to Israel to stand trial for murder.¹⁴⁸ On habeas corpus review of the extradition magistrate's decision, Ahmad claimed that if extradited, he would be tortured by Israeli agents, denied a fair trial, and subjected to inhumane treatment in prison. He contended that extradition should be barred because it would violate "fundamental principles of due process and human rights."¹⁴⁹ While disagreeing with the allegations, the United States Government¹⁵⁰ contended that even if true they could only be addressed to the Secretary of State; the rule of non-inquiry prohibited the court from considering the defendant's claims.¹⁵¹

The district judge rejected the government's position and created a "Due Process Exception to the Rule of Non-Inquiry,"¹⁵² declaring that another nation cannot use American courts "to obtain power over a fugitive intending to deny that person due process."¹⁵³ The court maintained that "we cannot blind ourselves to the foreseeable and probable results of the exercise of our jurisdiction."¹⁵⁴ Rejecting the rule of non-inquiry, the district judge found that as an independent branch of government, the courts have a duty "to stand between the executive and the accused where a case of abdication of State Department responsibility for the protection of the accused has been made out."¹⁵⁵ Furthermore, "court[s] must ensure that [they are] not used for purposes which do not comport

Esposito v. Adams, 700 F. Supp. 1470, 1481 (N.D. Ill. 1988) ("the 'evidence' provided by the petitioner is not sufficient to justify his attack on the Italian criminal justice system."); *In re Sindona*, 450 F. Supp. 672, 695 (S.D.N.Y. 1978) ("Sindona has not made even a threshold showing that he would be subjected to procedures in Italy which would be so violative of human rights as to prevent extradition."), *aff'd in part and rev'd in part on other grounds sub nom. Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981).

¹⁴⁷ 910 F.2d 1063 (2d Cir. 1990).

¹⁴⁸ For the details of the crime and Ahmad's subsequent arrest, see *In re Atta*, 706 F. Supp. 1032 (E.D.N.Y. 1989) (proceeding to extradite Ahmad to Israel).

¹⁴⁹ *Ahmad v. Wigen*, 726 F. Supp. 389, 409 (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063 (2d Cir.), *stay denied*, 111 S. Ct. 23 (1990).

¹⁵⁰ The author was counsel for the government.

¹⁵¹ The government petitioned the Court of Appeals for the Second Circuit for a writ of mandamus to prevent the district court from inquiring into the requesting country's procedures. *Ahmad*, 726 F. Supp. at 395. The petition was denied without opinion. *In re United States*, No. 89-3025 (2d Cir. June 19, 1989).

¹⁵² *Ahmad*, 726 F. Supp. at 410-11.

¹⁵³ *Id.* at 410.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 412.

with our Constitution or principles of fundamental fairness."¹⁵⁶

The district court heard extensive testimony from expert and fact witnesses, and reviewed numerous reports, affidavits, and other written materials concerning Israel's law enforcement procedures and the treatment of its prisoners.¹⁵⁷ After the hearing, the judge found that Ahmad had failed to show by a preponderance of the evidence that he would be tortured, denied a fair trial, or would otherwise suffer mistreatment.¹⁵⁸ The habeas corpus petition was dismissed.

Ahmad appealed. The Second Circuit affirmed the dismissal and found it "improper" for the district judge to have inquired into Israel's criminal justice system. The court noted that

[t]he interests of international comity are ill-served by requiring a foreign nation such as Israel to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced. It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds.¹⁵⁹

The Court of Appeals ruled that "[a] consideration of the procedures that will or may occur in the requesting country is not within the purview of a habeas corpus judge."¹⁶⁰

Diversity of opinion on the rule of non-inquiry has not been confined to courts and commentators. In the early 1980s Congress attempted to implement broad extradition reforms. Legislation passed by the Senate¹⁶¹ would have codified the rule of non-inquiry.¹⁶² Originally, legislation proposed in the House¹⁶³ would

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 416-20.

¹⁵⁸ *Id.*

¹⁵⁹ *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d. Cir.), *stay denied*, 111 S. Ct. 23 (1990) (citation omitted).

¹⁶⁰ *Id.* at 1066. Strictly speaking, the ruling was dictum because the Court of Appeals agreed with the district judge's finding that Ahmad would be treated fairly and humanely in Israel. *Id.* Nevertheless, the Second Circuit left no doubt that it strongly disapproved of the district judge's behavior.

¹⁶¹ S. 1940, 97th Cong., 2d Sess., 128 CONG. REC. 22,379-83 (1982).

¹⁶² The proposed codification included the following language: "Any issue as to whether the extradition of a person to a foreign state would be incompatible with humanitarian considerations shall be determined by the Secretary of State in the discretion of the Secretary of State." *Id.* § 3194(g)(2), 128 CONG. REC. at 22,381. The proposed statute required the Secretary of State to "consult with the appropriate Bureaus and Offices of the Department of State including the Bureau of Human Rights and Humanitarian Affairs." *Id.* at § 3194(g)(3), 128 CONG. REC. at 22,381. After various amendments by the Committee on the Judiciary and the Committee on Foreign Relations, the bill passed the Senate on August 19, 1982. *See* 128 CONG. REC. at 22,353. Its counterpart, H.R. 6046, was approved by the Committee on Foreign Affairs and the Committee on the Judiciary, *see* H.R. REP. No. 627, 97th Cong., 2d Sess. (1982), but did not pass the House.

have had the same effect. However, the Judiciary Committee amended proposed House legislation¹⁶⁴ to include a proposal¹⁶⁵ that would have required a court to examine the procedures facing the defendant in the requesting country.¹⁶⁶ These and other differences were never reconciled. Consequently, no legislation was enacted.¹⁶⁷

IV

THE RULE OF NON-INQUIRY AND THE DUTY TO EXTRADITE

A judicial departure from the rule of non-inquiry does not merely affect "the interests of international comity."¹⁶⁸ Refusal to extradite based upon humanitarian concerns conflicts directly with the duty to extradite pursuant to a treaty. Any departure from the rule of non-inquiry must therefore be premised upon a doctrinal basis sufficient to override a treaty obligation of the United States.

Extradition treaties, which are the "supreme Law of the Land,"¹⁶⁹ are negotiated by the executive and are subject to the "Advice and Consent" of the Senate.¹⁷⁰ Historically commentators have disagreed whether, in the absence of an extradition treaty, nations have a duty to extradite under customary international law.¹⁷¹

¹⁶³ H.R. 2643, 98th Cong., 2d Sess., 129 CONG. REC. H2249 (daily ed. April 20, 1983).

¹⁶⁴ The amended bill was reintroduced as H.R. 3347. See 129 CONG. REC. H4102 (daily ed. June 16, 1983). It was ordered reported to the House, but no report was filed, apparently because of Justice Department opposition and controversy within the Committee. M. BASSIOUNI, *supra* note 62, ch. 11, at 47. The proposed elimination of the rule of non-inquiry was one of the controversial subjects. *Id.*

¹⁶⁵ H.R. REP. NO. 998, 98th Cong., 2d Sess. 5-6, 58-64 (1984).

¹⁶⁶ The amended bill provided that "[t]he court shall not order a person extraditable after a hearing . . . if the court finds . . . the person has established by a preponderance of the evidence that such person . . . would, as a result of extradition, be subjected to fundamental unfairness." H.R. 3347, 98th Cong., 2d Sess. § 3194(d)(2)(D)(ii). This amendment, proposed by Congressman Robert Kastenmeier, would have imposed an "affirmative duty" on the court to inquire into the requesting country's procedures. H.R. REP. NO. 998, 98th Cong., 2d Sess. 6. It followed a less drastic proposal by Congressman Charles Schumer that would have given courts discretion to circumvent the rule of non-inquiry in cases "shocking to the conscience" of the court. *Id.* at 4.

¹⁶⁷ A comprehensive listing of the various legislative proposals put forth between 1981 and 1984 may be found in M. BASSIOUNI, *supra* note 62, ch. 11, at 43-48. See also Note, *supra* note 2, at 681-83 (discussing legislative proposals).

¹⁶⁸ Ahmad v. Wigen, 910 F.2d 1063, 1067 (2d Cir.), *stay denied*, 111 S. Ct. 23 (1990).

¹⁶⁹ U.S. CONST. art. VI, § 2.

¹⁷⁰ *Id.* art. II, § 2.

¹⁷¹ See M. BASSIOUNI, *supra* note 62, ch. I, at 10-12. The prevailing contemporary view is that, in the absence of a treaty, a state may refuse extradition and grant asylum. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, Introductory Note at 557 (1987); CHRISTINE VAN DEN WIJNGAERT, THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION 44-45 (1980); C.L. Cantrell, *The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland*, 60 MARQ. L. REV. 777, 783 (1977).

The United States, which considers extradition to be strictly a function of domestic law,¹⁷² does not recognize a duty to surrender in the absence of a treaty.¹⁷³ Indeed, United States law prohibits extradition not based upon a statute¹⁷⁴ or treaty obligation.¹⁷⁵

Substantial authority supports the proposition that by entering into an extradition treaty, a state waives its right to grant asylum under international¹⁷⁶ and domestic law.¹⁷⁷ The Supreme Court has repeatedly spoken of the obligation to surrender fugitives pursuant to extradition treaties.¹⁷⁸ The Court has noted: "The surrender of a fugitive, duly charged in the country from which he has fled with a non-political offense and one generally recognized as criminal at the place of asylum, involves no impairment of *any* legitimate public or private interest."¹⁷⁹

A few extradition treaties contain provisions that permit¹⁸⁰ or

¹⁷² M. BASSIOUNI, *supra* note 62, ch. II, at 56; Cantrell, *supra* note 171, at 815. However, courts do rely upon principles of customary international law "in construing the meaning of treaty provisions." M. BASSIOUNI, *supra* note 62, ch. II, at 94.

¹⁷³ *Factor v. Laubheimer*, 290 U.S. 276, 287 (1933).

¹⁷⁴ *Charlton v. Kelly*, 229 U.S. 447, 463 (1912); *Grin v. Shine*, 187 U.S. 181, 191 (1902).

¹⁷⁵ *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936); 18 U.S.C. § 3184 (1988).

¹⁷⁶ M. BASSIOUNI, *supra* note 62, ch. II, at 102-03; C. VAN DEN WIJNGAERT, *supra* note 171, at 45 ("extradition treaties have to be viewed as exceptions to the general principle of asylum: they contemplate the creation of a duty to extradite"); see *United States v. Rauscher*, 119 U.S. 407, 411-412 (1886).

¹⁷⁷ Extradition treaties generally provide that the requested state "shall" surrender the fugitive if the specified conditions for surrender have been met. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 475 comment g (1987). *But see* M. BASSIOUNI, *supra* note 62, ch. II, at 102 ("U.S. jurisprudence reflects the view that an extradition treaty does not *per se* create an obligation to extradite").

¹⁷⁸ *Factor v. Laubheimer*, 290 U.S. 276, 287 (1933) (extradition treaty gives rise to "legal right to demand [a fugitive's] extradition and the correlative duty to surrender him to the demanding country"); *Bingham v. Bradley*, 241 U.S. 511, 518 (1916) (whenever statutory requirements are satisfied, "a fair observance of the obligations of the treaty requires that [the fugitive] be surrendered."); *Charlton v. Kelly*, 229 U.S. 447, 476 (1912) ("the obligation to surrender [a fugitive is] imposed by the treaty as the supreme law of the land"); *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911) (as long as there is probable cause to believe defendant guilty, "good faith to the demanding government requires his surrender"); *Wright v. Henkel*, 190 U.S. 40, 62 (1902) ("The demanding government, when it has done all that the treaty and the law require it to do is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender."); *Grin v. Shine*, 187 U.S. 181, 191 (1902) (extradition pursuant to treaty "is undoubtedly obligatory upon both powers"); see also *Argento v. Horn*, 241 F.2d 258, 263-64 (6th Cir.) (while reluctant to find defendant extraditable to Italy to face life in prison pursuant to conviction in absentia for crime committed 30 years earlier, court nevertheless acknowledged such an obligation), *cert. denied*, 355 U.S. 818 (1957).

¹⁷⁹ *Factor*, 290 U.S. at 298 (emphasis added).

¹⁸⁰ *E.g.*, Extradition Treaty, May 11, 1980, United States-Finland, art. 7, no. 1(c), 31 U.S.T. 944, T.I.A.S. No. 9626; Extradition Treaty, June 24, 1980, United States-Netherlands, art. 7, no. 2, T.I.A.S. No. 10733, at 5.

require¹⁸¹ the requested state to refuse to extradite where there is reason to believe extradition would be incompatible with humanitarian considerations.¹⁸² Since extradition treaties are considered self-executing,¹⁸³ such provisions are judicially enforceable.¹⁸⁴

Absent an exception contained in the treaty itself, a judicial¹⁸⁵ bar to extradition on humanitarian grounds must be premised upon another treaty, a statute,¹⁸⁶ or the Constitution.¹⁸⁷ Each provides authority to override the treaty obligation. Pursuant to its broad power to pass legislation regarding enforcement of treaties,¹⁸⁸ and

¹⁸¹ *E.g.*, Convention on Extradition, Oct. 24, 1961, United States-Sweden, art. V, no. 6, 14 U.S.T. 1845, T.I.A.S. No. 5496; *see also* Treaty on Extradition, July 13, 1983, United States-Ireland, art. IV, § c, T.I.A.S. No. 10813, at 7 (extradition precluded if "there are substantial grounds for believing that a request for extradition . . . has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, or political opinion."). The Supplementary Extradition Treaty, June 25, 1985, United States-United Kingdom, art. 3(a), S. EXEC. REP. No 17, 99th Cong., 2d Sess. 15-17 (1986), *reprinted in* 24 I.L.M. 1104 (1985), precludes extradition if the defendant "establishes to the satisfaction of the competent judicial authorities . . . that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions." For a discussion of the treaty, *see* Note, *Questions of Justice: U.S. Courts' Powers of Inquiry Under Article 3(a) of the United States-United Kingdom Supplementary Extradition Treaty*, 62 NOTRE DAME L. REV. 474 (1987).

¹⁸² Scandinavian countries "are required by their domestic extradition laws to include treaty provisions granting a requested nation absolute discretion to refuse to allow extradition on any 'humanitarian' grounds." *Hu Yau-Leung v. Soscia*, 649 F.2d 914, 920 (2d Cir.), *cert. denied*, 454 U.S. 971 (1981); *see* Anderson, *supra* note 3, at 164 & n.89.

¹⁸³ M. BASSIOUNI, *supra* note 62, ch. II, at 74; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 476 comment a (1987) ("typically observance of the requirements and conditions for extradition may be invoked by the person sought to be extradited").

¹⁸⁴ Absent, of course, an express contrary provision in the treaty. *See, e.g.*, Extradition Treaty, June 24, 1980, United States-Netherlands, art. 7, no. 2, T.I.A.S. No. 10733, at 5 (applicability of humanitarian exception to extradition is to be assessed by "the Executive Authority of the Requested State"); *see also* Treaty on Extradition, July 13, 1983, United States-Ireland, art. IV, § c, T.I.A.S. No. 10813, at 7 (decision whether to deny extradition because request has been made in order to punish defendant on account of race, religion, nationality, or political opinion should be made by the executive branch).

¹⁸⁵ Courts are "under the same obligation to enforce extradition treaties as they are to enforce the Constitution and the laws of Congress." M. BASSIOUNI, *supra* note 62, ch. II, at 74. By contrast, the President arguably may constitutionally refuse to comply with a treaty obligation. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 214 (1972). *Cf.* Jordan J. Paust, *The President Is Bound by International Law*, in *Agora: May the President Violate Customary International Law (cont'd)*, 81 AM. J. INT'L L. 371, 383 (1987) ("[t]he President has no authority or power lawfully to act inconsistently with a treaty obligation").

¹⁸⁶ *Fong Yue Ting v. United States*, 149 U.S. 698, 714 (1893); *Head Money Cases*, 112 U.S. 580, 598-99 (1884); M. BASSIOUNI, *supra* note 62, ch. II, at 75; L. HENKIN, *supra* note 185, at 163.

¹⁸⁷ *Reid v. Covert*, 354 U.S. 1, 16-18 (1957); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *Doe v. Braden*, 57 U.S. (16 How.) 635, 656 (1853); 28 U.S.C. § 2241(c)(3); L. HENKIN, *supra* note 185, at 137.

¹⁸⁸ *Head Money Cases*, 112 U.S. at 598-99.

comparable authority to pass legislation concerning extradition,¹⁸⁹ Congress has enacted a statute that expressly provides the Secretary of State with discretionary power to refuse to extradite.¹⁹⁰ However, no statute provides the judiciary with similar authority.¹⁹¹ To the contrary, existing statutory language¹⁹² and the history of extradition legislation¹⁹³ evidence an intent by Congress *not* to confer such authority upon the judiciary.¹⁹⁴

It has been suggested that deviation from the rule of non-inquiry might be justified pursuant to various international conventions,¹⁹⁵ such as the Universal Declaration of Human Rights,¹⁹⁶ the International Covenant on Civil and Political Rights,¹⁹⁷ or the American Convention on Human Rights.¹⁹⁸ However, these conventions are not treaties of the United States and therefore do not

¹⁸⁹ *Grin v. Shine*, 187 U.S. 181, 191 (1922) ("Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient"); *Charlton v. Kelly*, 229 U.S. 447, 463-64 (1913).

¹⁹⁰ 18 U.S.C. § 3186 (1988) (Secretary of State "may order the person" extradited following judicial finding of extraditability) (emphasis added); see also *In re Stupp*, 23 F. Cas. 296, 302 (C.C.S.D.N.Y. 1875) (No. 13,563) (interpreting similarly-worded predecessor statute to 18 U.S.C. § 3186 as endowing Secretary of State with power to refuse to surrender the accused). In addition, the Constitution does not prohibit the executive from refusing to extradite in violation of a treaty obligation. See L. HENKIN, *supra* note 185, at 214.

¹⁹¹ A number of countries have statutes allowing their courts to deny extradition based upon proof that the defendant will be persecuted in the requesting country. See H.R. REP. NO. 998, 98th Cong., 2d Sess. 59-60 (1984) (citing statutes of Australia, Federal Republic of Germany, Great Britain, India, Israel, New Zealand, Sweden, and Switzerland).

¹⁹² The only United States statute expressly calling for the involvement of members of the judiciary in the extradition process provides that an extradition magistrate who "deems the evidence sufficient to sustain the charge under the provisions of the proper treaty . . . shall certify the same . . . to the Secretary of State." 18 U.S.C. § 3184 (1988) (emphasis added).

¹⁹³ See *supra* notes 75-92 and accompanying text.

¹⁹⁴ See H.R. REP. NO. 998, 98th Cong., 2d Sess. 59 (1984) (questioning whether, in the absence of additional statutory authorization, "the Federal courts would have clear jurisdiction to protect persons being sought for extradition from political persecution and/or fundamental unfairness upon their return"); see also *supra* notes 161-67 and accompanying text (discussing attempts at legislative reform and failure to enact legislation eliminating or modifying rule of non-inquiry).

¹⁹⁵ M. BASSIOUNI, *supra* note 62, ch. VII, at 376 (arguing that departure from rule of non-inquiry "could easily rely on existing international instruments binding upon the United States").

¹⁹⁶ G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948); cf. C. VAN DEN WIJNGAERT, *supra* note 171, at 7 n.38 ("the right of asylum as meant by art. 14 of the United Nations *Universal Declaration of Human Rights*" does not encompass relief for "those who have committed very serious common crimes").

¹⁹⁷ G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).

¹⁹⁸ O.A.S. Official Records OEA Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2, *reprinted* in 9 I.L.M. 673 (1970).

provide a basis for overriding a treaty obligation.¹⁹⁹ Moreover, they are not self-executing. Accordingly, absent a protest by a government, courts cannot base a denial of extradition on the conventions.²⁰⁰

The Protocol to the United Nations Convention Relating to the Status of Refugees²⁰¹ is a treaty of the United States but provides no basis for refusing extradition for "serious non-political" crimes.²⁰² The United States has yet to ratify the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which would prohibit extradition where there are "substantial grounds for believing" the defendant "would be in danger of being subjected to torture."²⁰³

199 *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985); S. TREATY DOC. NO. 20, 100th Cong., 2d Sess. 1-2 (1988); TREATIES AFFAIRS STAFF, OFFICE OF THE LEGAL ADVISER, DEPARTMENT OF STATE, TREATIES IN FORCE (1990). *But cf.* *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (1980) ("[I]t has been observed that the Universal Declaration of Human Rights 'no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the international community.'") (quoting E. SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY 70 (1964)).

200 M. BASSIOUNI, *supra* note 62, ch. X, at 630; *see* *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373-76 (7th Cir. 1985); *Dickens v. Lewis*, 750 F.2d 1251, 1254 (5th Cir. 1984); *Tel-Oren*, 726 F.2d at 808-10, 818-19 (Bork, J., concurring); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975); *Ahmad v. Wigen*, 726 F. Supp. 389, 406 (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063 (2d Cir. 1990); *American Baptist Churches v. Meese*, 712 F. Supp. 756, 767-70 (N.D. Cal. 1989) (deportation case).

201 19 U.S.T. 6223, T.I.A.S. No. 6577 (1967).

202 *See* *Sindona v. Grant*, 619 F.2d 167, 174 (2d Cir. 1980) (Protocol excludes from protection "any person with respect to whom there are serious reasons for considering that . . . he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee"), *cert. denied*, 451 U.S. 912 (1981). *But cf.* *Nicosia v. Wall*, 442 F.2d 1005, 1006-07 (5th Cir. 1971) (extradition may be barred pursuant to U.N. Protocol Relating to the Status of Refugees where "the government concedes" its applicability); RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 476 comment h (1987); M. BASSIOUNI, *supra* note 62, ch. VII, at 376; Comment, *supra* note 3, at 311 ("If a person qualifies as a refugee, the Protocol forbids the individual's return unless a reason exists to regard the individual as a security risk to the country of refuge or a danger to the community.").

203 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/506 (1984), *entered into force* June 26, 1987, *reprinted in* 23 I.L.M. 1027, 1028 (1984), *as mod.* 24 I.L.M. 535 (1985). Article 3 provides that "No State Party shall . . . extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Whether or not such grounds exist are to be determined by "competent authorities." The United States signed the Convention on April 18, 1988. On May 20, 1988, President Reagan formally transmitted the Convention to the Senate for its "advice and consent to ratification." S. TREATY DOC. NO. 20, 100th Cong., 2d Sess. iii-iv (1988). The Letter of Transmittal noted that "it was not possible to negotiate a [multi-lateral] treaty that was acceptable to the United States in all respects," so that ratification was recommended subject to "certain reservations, understandings, and declarations." *Id.* Among these were that "[t]he United States declares that the phrase 'competent authorities,' as used in Article 3 of the Convention, refers to the Secretary of State in extradition cases and to the Attorney General in deportation cases." *Id.* at 7.

Nor does customary international law provide a basis for courts to bypass the rule of non-inquiry. Arguably, individual human rights law is now part of the law of nations.²⁰⁴ If so, a nation could, consistent with international law, refuse to comply with a request for extradition on humanitarian grounds.²⁰⁵ Such a view, however, is not unanimous.²⁰⁶ In any event, although customary international law is part of United States law,²⁰⁷ a statute or treaty overrides it.²⁰⁸ Therefore, customary international law does not provide the judiciary with a basis for overriding a treaty obligation.²⁰⁹

V

THE RULE OF NON-INQUIRY AND THE CONSTITUTION

In the absence of a statute or treaty provision enabling the judiciary to bar extradition on humanitarian grounds, only the Constitution can provide a basis for overriding a treaty obligation.²¹⁰ The Supreme Court once stated that the Constitution has no extraterritorial

Thus, ratification of the Convention (with reservations) would not affect the rule of non-inquiry. On July 19, 1990, the Senate Committee on Foreign Relations ordered the Convention, with reservations, favorably reported. 136 CONG. REC. D905-06 (daily ed. July 19, 1990).

²⁰⁴ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

²⁰⁵ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 476 comment h (1987). In *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (1989), reprinted in 28 I.L.M. 1063 (1989), the European Court of Human Rights barred extradition of an accused murderer from Great Britain to the United States on the ground that the defendant would face conditions on death row in Virginia which would violate Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, 224 (1955). The Convention provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." *Id.* at art. 3. The United States is not a signatory to the Convention. *Soering* was ultimately extradited to the United States after Virginia represented that he would not face capital punishment.

²⁰⁶ See *In re Geisser*, 554 F.2d 698, 701 n.3 (5th Cir. 1977) (quoting view of Deputy Secretary of State that "the treaty in question does not provide discretionary authority to the Secretary of State to withhold extradition properly requested by the Government of Switzerland" even on humanitarian grounds); M. BASSIOUNI, *supra* note 62, ch. II, at 102 ("[T]he view that executive discretion negates any duty to extradite under treaty obligations may be in contradiction to international law"); Anderson, *supra* note 3, at 162 (questioning even "the executive's power to deny an extradition on humanitarian principles"); Comment, *supra* note 3, at 298 ("the exact scope of the Executive's power [to deny extradition] has never been expressly delineated.").

²⁰⁷ *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Filartiga*, 630 F.2d at 880-81. *But cf.* L. HENKIN, *supra* note 185, at 463 n.69 ("the courts of the United States will not apply international law to acts of foreign governments").

²⁰⁸ *Tag v. Rogers*, 267 F.2d 664, 666 & n.8 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 904 (1960); *American Baptist Churches v. Meese*, 712 F. Supp. 756, 770-71 (N.D. Cal. 1989).

²⁰⁹ *Cf.* L. HENKIN, *supra* note 185, at 188 ("the Constitution does not forbid Congress or the President to exercise their powers in disregard of customary international law").

²¹⁰ *Reid v. Covert*, 354 U.S. 1, 16-18 (1957); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); 28 U.S.C. § 2241(c)(3) (1988); M. BASSIOUNI, *supra* note 62, ch. II, at 73; L. HENKIN, *supra* note 185, at 137, 140.

torial application.²¹¹ That doctrine has since been repudiated,²¹² at least in situations involving United States citizens²¹³ and the violation of "fundamental" constitutional rights.²¹⁴

However, a defendant's treatment by foreign officials on foreign soil remains beyond the scope of constitutional protection.²¹⁵ Lower courts have recognized an exception when a foreign government acts as an agent of, or joint venturer with, the United States in violating a defendant's rights.²¹⁶ However, since the government

²¹¹ *In re Ross*, 140 U.S. 453, 464 (1891).

²¹² *Reid*, 354 U.S. at 12; *Johnson v. Eisentrager*, 339 U.S. 763 (1950); see L. HENKIN, *supra* note 185, at 266-67.

²¹³ *Reid*, 354 U.S. at 5-6; *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) ("[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens"); L. HENKIN, *supra* note 185, at 267 & n.69; see also *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (holding fourth amendment inapplicable to searches, even by agents of the United States, of property owned by nonresident aliens located on foreign soil), *reh'g denied*, 110 S. Ct. 1839 (1990).

²¹⁴ *Reid*, 354 U.S. at 13; *Barr v. United States Dep't of Justice*, 819 F.2d 25, 27 & n.2 (2d Cir. 1987). In the "Insular Cases," (*Balzac v. Puerto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); and *Downes v. Bidwell*, 182 U.S. 244 (1901)), the Court held that only "fundamental" constitutional rights are guaranteed to inhabitants of unincorporated territories controlled by the United States. Fundamental rights are those which are "basic to a free society," that are "implied in the concept of ordered liberty," and the denial of which would "shock the conscience." L. HENKIN, *supra* note 185, at 269, 501 n.75. The "Insular Cases" recognized that the full scope of constitutional protection cannot be imposed upon regions of the world "with wholly dissimilar traditions and institutions," even when those regions are under United States control. *Reid*, 354 U.S. at 14.

²¹⁵ See, e.g., *Kamrin v. United States*, 725 F.2d 1225, 1228 (9th Cir.), *cert. denied*, 469 U.S. 817 (1984); *Rosado v. Civiletti*, 621 F.2d 1179, 1195-96 (2d Cir.), *cert. denied*, 449 U.S. 856 (1980); *United States v. Toscanino*, 500 F.2d 267, 280 n.9 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (1974); *Birdsell v. United States*, 346 F.2d 775, 782 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965); *Pfeifer v. United States Bureau of Prisons*, 468 F. Supp. 920, 924 (S.D. Cal. 1979), *aff'd*, 615 F.2d 873 (9th Cir.), *cert. denied*, 447 U.S. 908 (1980).

²¹⁶ See *United States v. Cordero*, 668 F.2d 32, 37 (1st Cir. 1981); *United States v. Emery*, 591 F.2d 1266, 1268 (9th Cir. 1978); *United States v. Lira*, 515 F.2d 68, 71 (2d Cir.) (United States government not vicariously responsible for defendant's torture by Chilean authorities merely because United States had requested defendant's arrest and expulsion; constitutional violation occurs only when United States plays a "direct or substantial role" in the misconduct or where foreign police act as agents of the United States rather than on behalf of their own government), *cert. denied*, 423 U.S. 847 (1975); *Toscanino*, 500 F.2d at 281 (defendant's torture by foreign officials gives rise to constitutional violations only if "the action was taken by or at the direction of United States officials"); *United States v. Lara*, 539 F.2d 495 (5th Cir. 1976); *Stonehill v. United States*, 405 F.2d 738, 743 (9th Cir.), *cert. denied*, 395 U.S. 960 (1969). Some courts have indicated that their supervisory authority over proceedings before them enables them to exclude evidence seized by foreign authorities behaving in a manner that shocks the judicial conscience, even absent participation by the United States. *Barr*, 819 F.2d at 27 n.2; *Stowe v. Devoy*, 588 F.2d 336, 341 (2d Cir. 1978); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976). United States courts have no supervisory authority over foreign proceedings. Therefore, they cannot utilize this rationale to bar extradition on the ground that the defendant will not receive a fair trial in the requesting country. See, e.g., *Jhirad v. Ferrandina*, 536 F.2d 478, 484-85 (2d Cir.), *cert. denied*, 429 U.S. 988

seeking extradition ordinarily acts strictly on its own behalf, the exception does not apply. Thus, the prevailing view that the Constitution does not bar extradition²¹⁷ or deportation²¹⁸ to a foreign country likely to mistreat the defendant is consistent with both the general doctrinal principle and the exception.

One commentator has suggested that the United States government's "voluntary decision to extradite, knowing" that the defendant will likely be denied fundamental fairness in the requesting country, should be deemed a violation of due process: "a constitutional government should accept responsibility for the natural and intended results of governmental actions"²¹⁹ This approach has ramifications far beyond international extradition, and its adoption would immediately raise serious separation of powers concerns. For example, strict application of this approach could lead courts to prohibit foreign aid to governments likely to use it in a manner inconsistent with humanitarian standards, a result irreconcilable with

(1976). Even if the requesting government's wrongdoing pertains to the manner in which the defendant has been brought to the United States for extradition, United States courts have no authority to impose sanctions on the requesting country. See *David v. Attorney General*, 699 F.2d 411, 414-15 (7th Cir. 1983).

²¹⁷ *Neely v. Henkel*, 180 U.S. 109, 122 (1901) (Constitution has "no relation to the crimes committed without the jurisdiction of the United States against the laws of a foreign country"); *Kamrin v. United States*, 725 F.2d 1225, 1228 (9th Cir.) ("it has long been settled that United States due process rights cannot be extended extraterritorially"), *cert. denied*, 469 U.S. 817 (1984); *Plaster v. United States*, 720 F.2d 340, 349 n.9 (4th Cir. 1983) ("It is settled that the petitioner cannot block his extradition simply because the other country's judicial procedures do not comport with the requirements of our Constitution"); *In re Assarsson*, 635 F.2d 1237, 1244 (7th Cir. 1980) ("While our courts should guarantee that all persons on our soil receive due process under our laws, that power does not extend to overseeing the criminal justice system of other countries"), *cert. denied*, 451 U.S. 938 (1981); *Holmes v. Laird*, 459 F.2d 1211, 1218 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972) (NATO SOFA Treaty); *Argento v. Horn*, 241 F.2d 258, 264 (6th Cir. 1957) ("The guarantees [the defendant] seeks in this country have no relation to offenses which have been committed within the jurisdiction of the demanding country"), *cert. denied*, 355 U.S. 818 (1957) (quoting *Neely*, 180 U.S. at 122); *In re Singh*, 123 F.R.D. 127, 139 (D.N.J. 1987); *Gallina v. Fraser*, 177 F. Supp. 856, 866 (D. Conn. 1959) ("Regardless of what constitutional protections are given to persons held for trial in the . . . United States . . . , those protections cannot be claimed by an accused whose trial and conviction have been held or are to be held under the laws of another nation"), *aff'd*, 278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960) (emphasis in original).

²¹⁸ *Linnas v. I.N.S.*, 790 F.2d 1024, 1031 (2d Cir.) ("It is well established that the federal judiciary may not require that persons removed from the United States be accorded constitutional due process."), *cert. denied*, 479 U.S. 995 (1986). Deportation presents a more compelling situation in which to extend the reach of constitutional protection than does extradition, because "[e]xtradition is subject to specific international obligations while deportation is essentially at the option of the deporting country." *In re Geisser*, 627 F.2d 745, 746 n.1 (5th Cir. 1980), *cert. denied*, 450 U.S. 1031 (1981).

²¹⁹ Note, *Foreign Trials in Absentia: Due Process Objections to Unconditional Extradition*, 13 STAN. L. REV. 370, 375 (1961) (analyzing the *Gallina dictum*); see *Gill v. Imundi*, 747 F. Supp. 1028, 1048 (S.D.N.Y. 1990); *Ahmad v. Wigen*, 726 F. Supp. 389, 410 (E.D.N.Y. 1989).

the separation of powers.²²⁰

In short, present constitutional doctrine provides no basis for bypassing the rule of non-inquiry. Any attempt to expand constitutional protection to shield defendants from extradition to foreign countries which might treat them unfairly could result in highly undesirable doctrinal ramifications and should therefore be avoided.²²¹

VI

POLICY CONSIDERATIONS AND THE RULE OF NON-INQUIRY

Even if the undesirable doctrinal ramifications could somehow be eliminated or overcome, policy considerations counsel strongly against eliminating the rule of non-inquiry.

Courts have repeatedly acknowledged that extradition cases often implicate important foreign policy considerations.²²² Those considerations are often known solely to those at the highest levels of the executive branch. By virtue of his absolute discretion to refuse to extradite, the Secretary of State²²³ has both the legal authority and the practical ability to elicit and enforce²²⁴ express assurances from the requesting country regarding the treatment of the defendant. The Secretary of State can thereby ensure that the defendant will be treated fairly and humanely.

Unlike the courts, however, the Secretary of State is able to safeguard the defendant's rights without jeopardizing any foreign

²²⁰ See, e.g., *Dickson v. Ford*, 521 F.2d 234 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1976); see also *Crockett v. Reagan*, 558 F. Supp. 893, 902 (D.D.C. 1982) (In suit seeking to enjoin U.S. military aid to El Salvador, court refused "to examine independently the President's certifications of the progress of El Salvador's government in the human rights field . . ."), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983).

²²¹ See *Matthews v. Diaz*, 426 U.S. 67, 81 (1976) ("Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution").

²²² See, e.g., *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 577 (1840); *Geisser*, 627 F.2d at 755 (refusing to block extradition to Switzerland, noting that the Swiss government was representing the United States in negotiations to free the hostages being held in Iran. "This Court cannot conclude that the case of [this defendant] must take precedence over the other important friendly and cooperative relationships between the two nations involved."); *Peroff v. Hylton*, 563 F.2d 1099, 1102 (4th Cir. 1977) ("The need for flexibility in the exercise of Executive discretion is heightened in international extradition proceedings which necessarily implicate the foreign policy interests of the United States."); *Shapiro v. Ferrandina*, 478 F.2d 894, 906 (2d Cir.) (recognizing that judicial attempt to impose limitations on requesting government in extradition case "might cause embarrassments [sic] to the executive branch in the conduct of foreign affairs"), *cert. dismissed*, 414 U.S. 884 (1973); *In re Singh*, 123 F.R.D. 127 (D.N.J. 1987).

²²³ See cases cited *supra* note 29.

²²⁴ Enforcement, of course, would be through diplomatic means. *Shapiro*, 478 F.2d at 906 n.10. The implied threat that all further extradition to the requesting country would be barred by the Secretary of State is perhaps the most effective means of enforcing that country's assurances regarding a defendant's treatment.

policy interests of the United States. The Secretary of State is also in the best position to engage in the discreet diplomatic maneuvering the process may require.²²⁵

In addition, unlike courts, the Secretary of State controls the circumstances of surrender to the foreign country. Whereas a court could only bar extradition upon finding the foreign country's procedures unacceptable, the Secretary of State can extradite subject to conditions.²²⁶

A judicial decision not to allow extradition to a particular country on humanitarian grounds may adversely affect important foreign policy concerns.²²⁷ At a minimum, such a refusal would offend the requesting country²²⁸ and could lead to a retaliatory refusal to ex-

²²⁵ See, e.g., *Societe Nationale Industrielle Aerospatiale v. District Court*, 482 U.S. 522, 552 (1987) (Blackmun, J., dissenting); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.") (citation omitted); S. REP. No. 225, 98th Cong., 1st Sess. 354 (1983) (Secretary of State "is considered uniquely qualified" to inquire into foreign country's procedures "as this practice is already a significant aspect of his foreign policymaking responsibilities").

²²⁶ See *In re Singh*, 123 F.R.D. 127, 137 (D.N.J. 1987); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 478 comment d (1987); Note, *supra* note 2, at 692.

²²⁷ See *Eain v. Wilkes*, 641 F.2d 504, 516-17 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981); *In re Doherty*, 599 F. Supp. 270, 277 (S.D.N.Y. 1984) (courts should avoid "the delicate situation of having to assess the neutrality and indirectly the good faith of the sovereign seeking extradition, a circumstance that could adversely affect the conduct of foreign relations" (footnote omitted)); *Singh*, 123 F.R.D. at 136-37 ("any judicial determination might embarrass the United States in its foreign relations and do harm to those relations"); see also *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 375 (7th Cir. 1985) ("judicial resolution of cases bearing significantly on sensitive policy matters . . . might have serious foreign policy implications which courts are ill-equipped to anticipate or handle"); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring) (court sitting in judgment of foreign official's torture of civil plaintiff "raises prospects of judicial interference with foreign affairs"), *cert. denied*, 470 U.S. 1003 (1985); *In re Geisser*, 627 F.2d 745, 755 (5th Cir. 1980) (even "while properly protecting the constitutional rights of individuals, the courts must tread carefully when they draw conclusions concerning delicate problems of international relations in the world of diplomacy"), *reh'g denied*, 632 F.2d 894 (1980), *cert. denied sub nom.*, *Bauer v. U.S.*, 450 U.S. 1031 (1981).

²²⁸ See, e.g., *Wise*, *supra* note 3, at 722 ("it is a grave matter to accuse another State of treating its criminals unfairly"). Even in civil litigation, the "act of state" doctrine, see *infra* notes 293-96 and accompanying text, recognizes that "any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432 (1964); see also *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (courts have "little competence in determining precisely when foreign nations will be offended by particular acts"), *reh'g denied*, 464 U.S. 909 (1983); *Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 552 (Blackmun, J., dissenting) ("It is the Executive that normally decides when a course of action is important enough to risk affronting a foreign nation"); *Banoff & Pyle*, *supra* note 4, at 174 n.23 ("Several cases have arisen in which a refusal to extradite created serious tensions between the requested and requesting state.").

tradite fugitives to the United States.²²⁹ The extradition treaty with that country could be severely undercut or even rendered worthless.²³⁰ Any judicial inquiry would necessarily touch upon highly sensitive issues and thus potentially affect the relations between the United States and the requesting country even if the court ultimately permitted extradition.²³¹

A different conclusion is not compelled by the fact that courts regularly decide whether or not the political offense exception bars extradition. Unlike humanitarian exceptions to extradition, the political offense exception is expressly encompassed within the terms of extradition treaties.²³² Thus, the requesting country has specifically consented to the determination, by a branch of the United States government, as to whether the crime charged is a political offense.²³³ That the determination is made by the judiciary as opposed to the executive should be of no concern to the requesting government.²³⁴

A humanitarian exception, however, is not encompassed within most extradition treaties. Under international law there is even some question as to the executive's right to deny extradition on humanitarian grounds.²³⁵ Were such a denial to occur, the requesting country might be justified in alleging a violation of international law. The United States, by using purported deficiencies in the requesting country's procedures as a basis for refusing to extradite, would be unilaterally depriving that country of the benefit of its bargain, the mutual exchange of fugitives. The Secretary of State, who is in the

²²⁹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 475 comment g (1987) (refusal to extradite on ground that defendant would not receive fair trial or would risk suffering other human rights violations "may give rise to diplomatic representations and protests, and in some instances has led to retaliatory measures").

²³⁰ Courts have no authority to terminate treaties. L. HENKIN, *supra* note 185, at 170.

²³¹ *Singh*, 123 F.R.D. at 136; see also *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990) ("The interests of international comity are ill-served by requiring a foreign nation . . . to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced."); *Jhirad v. Ferrandina*, 536 F.2d 478, 484-85 (2d Cir.) ("It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation. Such an assumption would directly conflict with the principle of comity. . . ."), *cert. denied*, 429 U.S. 833, *reh'g denied*, 429 U.S. 988 (1976).

²³² Lubet & Czackes, *supra* note 26, at 193 ("The political offense exemption is found in virtually every modern treaty of extradition.").

²³³ Typically, the extradition treaty provides that the requested party determines whether or not the crime charged is a political offense. See *In re Mackin*, 668 F.2d 122, 132-33 (2d Cir. 1981) (citing treaties); see also C. VAN DEN WIJNGAERT, *supra* note 171, at 45 (political offense exception is a freely made reservation of right to refuse to extradite for certain crimes).

²³⁴ See, e.g., L. HENKIN, *supra* note 185, at 399 n.81.

²³⁵ See *supra* note 206 and accompanying text.

best position to assess the risks involved, should be the one to decide whether to take those risks.

Furthermore, as one court critical of the rule of non-inquiry has admitted, "Congress [sic] and the executive branch do not enter into extradition treaties with countries in whose criminal justice system they lack confidence."²³⁶ This observation ignores the possibility that the ruling regime in the requesting country may be different than the one which negotiated the treaty.²³⁷ However, it has been noted that the "State and Justice Departments apparently shy away from presenting extradition requests from" regimes "whose notions of due process and fair punishment are dubious."²³⁸

Nor is there any reason not to continue to entrust the Secretary of State with the responsibility of ensuring defendants' fair treatment abroad. There is no indication that past Secretaries of State have been less than diligent in safeguarding the rights of extradited persons.²³⁹ Although outright denial of extradition following a ju-

²³⁶ *Ahmad*, 726 F. Supp. at 411 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS Introductory Note, at 558); see *Ex parte Kaine*, 14 Fed. Cas. 78, 81 (C.C.S.D.N.Y. 1853); H.R. REP. NO. 998, 98th Cong., 2d Sess. 61 n.19 (1984) (citing Senate's refusal to consent to extradition treaty with the Philippines based upon human rights concerns); Anderson, *supra* note 3, at 160 (quoting 1977 testimony of Herbert J. Hansell, State Department Legal Adviser, to the Senate Foreign Relations Committee). One commentator has noted that "[u]ntil the 1840's the United States actually refused to enter into extradition agreements because of concern that delivery of fugitives would be tantamount to becoming an accomplice of nations whose criminal codes were unjust." Note, *Extradition Reform and the Statutory Definition of Political Offenses*, 24 VA. J. INT'L L. 419, 426 (1984) (authored by Catherine Nicols Currin) (footnote omitted).

²³⁷ See H.R. REP. NO. 998, 98th Cong., 2d Sess. 61-62 (1984) (pointing out questionable criminal procedures in 11 Communist nations with which the United States still has extradition treaties, as well as in Nicaragua, El Salvador, Pakistan, Iraq, Turkey, and Haiti, all of which have extradition treaties with the United States); Banoff & Pyle, *supra* note 4, at 172 ("almost half the countries with which the United States has extradition treaties are reported to have engaged in human rights violations ranging from detention without trial to torture and abduction").

²³⁸ Kester, *supra* note 3, at 1480. Kester speculates that the reason for this self-restraint is that the *Gallina dictum* "probably has substantial *in terrorem* effect on United States officials in deciding which extradition requests they will endorse." *Id.* There is, however, no evidence to support that conjecture, which is especially dubious given the fact that no court has actually applied the *Gallina dictum* to bar extradition in the 31 years since it appeared. See *supra* note 125 and accompanying text. See also *Prushinowski v. Samples*, 734 F.2d 1016, 1019 n.2 (4th Cir. 1984) ("It is, we should not forget, the State Department that initiated the extradition proceedings, an unlikely occurrence were the threat [of starvation in prison] articulated by Prushinowski real . . .").

²³⁹ See *Ahmad*, 910 F.2d at 1067 (Secretary of State has never directed extradition in the face of proof that the defendant would be subject to indecent procedures or punishment; "[i]ndeed, it is difficult to conceive of a situation in which a Secretary of State would do so."). One commentator who disfavors the rule of non-inquiry concedes "the absence of hard evidence of persons being persecuted flagrantly after extradition from the United States." Kester, *supra* note 3, at 1480; see also *House Hearings, 1983*, *supra* note 3, at 88 (testimony of Prof. Steven Lubet: "the executive has, as far as anyone can tell, a perfect track record; there is not a single case where anyone has suggested that the

dicial finding of extraditability is unusual,²⁴⁰ the Secretary of State has commonly exerted diplomatic pressure or formally imposed conditions to guard against the dangers a defendant is most likely to face.²⁴¹

For example, the Department of State has frequently surren-

executive has turned a fugitive or a refugee over to a duplicitous or inhumane government"). Subsequent to Professor Lubet's testimony, the United States extradited an accused Nazi war criminal to Yugoslavia, *see Artukovic v. Rison*, 784 F.2d 1354 (9th Cir. 1986), and deported two others to the Soviet Union, *see Linnas v. I.N.S.*, 790 F.2d 1024 (2d Cir. 1986); *United Press International*, Dec. 22, 1984 (reporting deportation to Soviet Union of Feodor Fedorenko, an admitted former guard at Treblinka, a Nazi death camp). These cases, however, are unusual and may be explained by the extraordinarily heinous nature of the crimes involved. *See Kester, supra* note 3, at 1480 nn.223-24. In two of the cases, moreover, the courts expressly endorsed sending the defendant back for punishment. *See Artukovic*, 784 F.2d at 1356 ("the public interest will be served" by extradition of Nazi war criminal to Yugoslavia); *Linnas*, 790 F.2d at 1032 (expressing total lack of sympathy over possibility of mistreatment in Soviet penal system of "a man who ordered the extermination of innocent men, women, and children kneeling at the edge of a mass grave"). *Cf. Fedoreuko v. United States*, 449 U.S. 490, 514 n.34 (1981) ("[T]here can be no question that a [concentration camp] guard who was issued a uniform and armed with a rifle and a pistol . . . and who admitted to shooting at escaping inmates . . . fits within the statutory language about persons who assisted in the persecution of civilians" and was therefore ineligible for a visa to enter the United States.). The most infamous instance of State Department dereliction likewise involved the Nazi regime, albeit in a very different manner. In *In re Normano*, 7 F. Supp. 329 (D. Mass. 1934), a Jew was found extraditable to Nazi Germany. Although the State Department refused to bar extradition, it requested that Germany withdraw its extradition request, which it refused to do. Ultimately, Normano was not extradited on the technical ground that Germany had failed to deliver the extradition warrant to the marshal within the statutory two month period. *See Anderson, supra* note 3, at 162 & 169 nn.76-77. It is illuminating that critics of the rule of non-inquiry have to reach back to 1934 to provide an example in which the rule—almost—led to a horrible injustice.

²⁴⁰ On only two occasions between 1940 and 1961 did the Secretary of State refuse to extradite after a judicial finding of extraditability. Note, *supra* note 20, at 1328; *see also Banoff & Pyle, supra* note 4, at 191-92 ("Rarely has the executive branch refused to return an offender once the courts have approved extradition.") More recently, the Executive refused to extradite, despite a judicial finding of extraditability, in *Jhirad v. Ferrandina*, 355 F. Supp. 1155 (S.D.N.Y.); 362 F. Supp. 1057 (S.D.N.Y.), *rev'd and remanded*, 486 F.2d 442 (2d Cir. 1973); 401 F. Supp. 1215 (S.D.N.Y. 1975), *aff'd*, 536 F.2d 478 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976). Although formally basing his ruling on a technical statute of limitations defense which the courts had earlier rejected, the Secretary of State may have refused extradition because Jhirad had contended that he faced religious persecution in India, the country seeking his extradition. *See Anderson, supra* note 3, at 161-62; H.R. REP. No. 998, 98th Cong., 2d Sess. 36 (1984). According to Murray R. Stein, Esq., of the Office of International Affairs, United States Department of Justice, the Secretary of State in several cases during the 1960s, 1970s, and 1980s refused to extradite following a judicial finding of extraditability. They include the cases of Harold C. Banks (sought by Canada) and a Mr. Rodriguez (sought by France). In the Rodriguez case, the Secretary of State refused extradition because France failed to provide adequate assurances regarding reopening the proceedings in which the defendant had been convicted.

²⁴¹ *See Banoff & Pyle, supra* note 4, at 206 n.136 (discussing assurances provided by Venezuela before United States would return ex-President for trial); Note, *supra* note 20, at 1326 ("When surrendering the fugitive, the State Department has frequently exerted diplomatic pressure on the demanding nation to provide fair treatment"); Note, *supra*

dered fugitives convicted in absentia on condition that the foreign country permit a retrial.²⁴² In cases involving allegations of political persecution, the State Department tends to "instruct our Embassy in the requesting state . . . to follow the case and report to the Department of State."²⁴³ The Secretary of State has even sent his Assistant Legal Adviser for Human Rights and Refugees to attend the trial as an observer.²⁴⁴

While assurances by the foreign government may ultimately prove disingenuous,²⁴⁵ the requesting government's interest in maintaining good relations with the United States²⁴⁶ and in obtaining the extradition of fugitives in the future provide strong incentives for a foreign government to honor its assurances.²⁴⁷ While perhaps imperfect, the system effectively balances the defendant's interests against United States international treaty obligations.

A statute²⁴⁸ requires the State Department to prepare and submit to Congress an annual report on human rights conditions throughout the world. By entrusting this responsibility to the Department of State, Congress has manifested its confidence in that Department's ability to act as a responsible and impartial human rights observer in foreign lands.²⁴⁹

note 2, at 692 (listing assurances obtained by Secretary of State before extraditing PLO terrorist to Israel to stand trial for murder).

²⁴² S. REP. NO. 225, 98th Cong., 1st Sess. 353 n.85 (1983); see Comment, *supra* note 3, at 306 n.147.

²⁴³ *Sindona v. Grant*, 619 F.2d 167, 174 n.10 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981); see also *Ahmad*, 726 F. Supp. at 410 ("the State Department will observe the trial abroad to ensure that its conditions are fulfilled"); Banoff & Pyle, *supra* note 4, at 192 n.88 (State Department "will make its concerns known to the requesting state, and will sometimes condition the extradition upon appropriate assurances"); *id.* at 206 n.137 (referring to the "present American practice" of sending an observer to attend the trial after "an American national is extradited").

²⁴⁴ Following the defendant's extradition to Israel in *Eain v. Wilkes*, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981), the State Department sent its Assistant Legal Adviser for Human Rights and Refugees to serve as an observer at the trial. See *Ahmad*, 726 F. Supp. at 417.

²⁴⁵ See Anderson, *supra* note 3, at 163.

²⁴⁶ See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 435 (1964) (recognizing that "[f]oreign aid . . . provides a powerful lever in the hands of the political branches to ensure fair treatment of United States nationals").

²⁴⁷ See H.R. REP. NO. 998, 98th Cong., 2d Sess. 35-36 (1984) (violation of condition imposed by Secretary of State "should be taken into account the next time the foreign state makes an extradition request, and should cause the Secretary and the Senate to reevaluate the extradition treaty relationship with the offending country").

²⁴⁸ 22 U.S.C. § 2304(b) (1988).

²⁴⁹ It has been suggested that "the embarrassment to United States foreign relations is likely to be more attenuated if a court questions another country's good faith procedures than if the State Department itself does so." Kester, *supra* note 3, at 1481-82 (footnote omitted); see H.R. REP. NO. 998, 98th Cong., 2d Sess. 64 (1984). This argument fails for several reasons: (1) the State Department is already required to comment on the requesting nation's human rights practices in its annual report to Congress;

Moreover, the political offense exception protects some of those most likely to face abusive treatment in the requesting country.²⁵⁰ Additional protections against abuse include the principle of double criminality, which prohibits extradition for an offense not criminal in the United States,²⁵¹ and the doctrine of speciality,²⁵² which restricts the foreign prosecution to crimes for which the defendant has been surrendered.²⁵³

Allowing the unfairness of a country's system to serve as a bar to extradition would effectively immunize the defendant from prosecution.²⁵⁴ It could have the added effect of turning the United States into a haven for those who have committed crimes in that particular country.²⁵⁵

Deviation from the rule of non-inquiry raises other concerns. Possibly inconsistent²⁵⁶ or even anomalous²⁵⁷ results will occur if different courts, applying largely subjective standards, reach different conclusions regarding the procedures in various foreign countries.²⁵⁸ Also, the expenditure of time and resources required to examine the requesting country's procedures, including the use of foreign expert and fact witnesses, would constitute an inappropriate

(2) the State Department can limit the embarrassment to foreign relations by controlling the tone of its public pronouncements on the matter; (3) the State Department can extradite subject to conditions; and (4) the State Department, unlike the courts, can ensure uniformity in its decisions.

²⁵⁰ Banoff & Pyle, *supra* note 4, at 201-02; Wise, *supra* note 3, at 721, 723.

²⁵¹ See, e.g., *Collins v. Loisel*, 259 U.S. 309, 311-12 (1922).

²⁵² See, e.g., *Shapiro v. Ferrandina*, 478 F.2d 894, 905 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973).

²⁵³ Wise, *supra* note 3, at 721-22 ("The problem of ensuring fair treatment may be met, to some extent, by the principle of speciality . . ."); see generally Note, *supra* note 2, at 690-92 (discussing principle of double criminality and doctrine of speciality).

²⁵⁴ By contrast, in the *Soering* case, the European Court of Human Rights barred extradition of an accused murderer from Great Britain to the United States, taking into account the fact that the defendant would be extradited to West Germany and prosecuted there. For a discussion of this case, see *supra* note 205.

²⁵⁵ In a similar vein, courts have noted that the political offense exception "should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere." *Eain v. Wilkes*, 641 F.2d 504, 520 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981); *accord*, *In re Atta*, 706 F. Supp. 1032, 1041 (E.D.N.Y. 1989).

²⁵⁶ See *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 578 (1840) (recognizing importance of "uniformity" in extradition decisions).

²⁵⁷ See, e.g., Note, *supra* note 219, at 375-76 (noting that facially plausible standards can easily lead to "anomalous" results, and providing example thereof).

²⁵⁸ See, e.g., *Holmes v. Laird*, 459 F.2d 1211, 1218 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972). The Supreme Court has recognized the difficulty, even in civil litigation, for a court to attempt to "discover not only what is provided by the formal structure of the foreign judicial system, but also what the practical possibilities of fair treatment are." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 412 (1964). Nevertheless, a somewhat similar function is performed by judicial and administrative officers in deciding applications for asylum and withholding of deportation on grounds of persecution. See Kester, *supra* note 3, at 1481 & n.231.

and unnecessary burden on both the United States and its treaty partners. As noted by the Supreme Court, requiring the requesting government to send witnesses to the United States for an extradition proceeding "would defeat the whole object of the treaty."²⁵⁹

In sum, the rule of non-inquiry is supported by strong policy considerations, any of which could be undermined by a judicial attempt to sidestep the rule. Only the Secretary of State is qualified to consider all factors in deciding whether to bar extradition on humanitarian grounds.²⁶⁰

VII

THE RULE OF NON-INQUIRY AND THE POLITICAL QUESTION DOCTRINE

Courts have yet to address carefully whether the rule of non-inquiry is mandated by the "political question" doctrine. The Ninth Circuit has implied that it is.²⁶¹ In addition, a district court has noted without analysis that judicial inquiry into the requesting country's procedures "would directly encroach on the power of the President and the Senate to make treaties, raising potential problems under the political question doctrine."²⁶² Courts seeking to inquire into the requesting country's procedures will have to confront this

²⁵⁹ *Bingham v. Bradley*, 241 U.S. 511, 517 (1916), cited in *Shapiro v. Ferrandina*, 478 F.2d 894, 902 (2d Cir. 1973) ("even today the transportation of witnesses thousands of miles has elements of trouble and expense" and is therefore incompatible with the purpose of an extradition treaty); see also S. REP. NO. 225, 98th Cong., 1st Sess. 341 n.46 (1983) ("The Supreme Court has indicated that requiring the foreign state to produce live witnesses in extradition hearings would tend to 'defeat the whole object of the treaty.'" (quoting *Bingham*, 241 U.S. at 517)).

²⁶⁰ In *Jennison*, 39 U.S. (14 Pet.) at 575, the Supreme Court observed that the power to extradite

is the power of deciding the very delicate question, whether the party demanded ought or ought not to be surrendered. And in determining this question, whether the determination is made by the United States or a state, the claims of humanity, the principles of justice, the laws of nations, and the interests of the Union at large, must all be taken into consideration, and weighed when deliberating on the subject.

Although that case established the exclusive authority of the federal government vis-a-vis the states over international extradition, the Court's observation could readily apply to the authority of the executive vis-a-vis the judiciary. The opinion does not refer to the judiciary; however, the case was decided in 1840, a time when the executive exercised complete control over extradition, so that the Court would have had no reason to comment upon judicial interference in the extradition process. See *supra* note 53.

²⁶¹ *Quinn v. Robinson*, 783 F.2d 776, 789-90 (9th Cir.), cert. denied, 479 U.S. 882 (1986) (concluding that judicial determination of whether the crime charged is a protected "political offense" is not barred by the "political question" doctrine, but immediately contrasting that with "refus[al] to extradite on humanitarian grounds," for which the "Secretary of State has sole discretion.").

²⁶² *In re Tang Yee-Chun*, 674 F. Supp. 1058, 1068-69 (S.D.N.Y. 1987) (citing *Baker v. Carr*, 369 U.S. 186, 211-213 (1962)); see also *In re Singh*, 123 F.R.D. 127, 131-37 (D.N.J. 1987).

doctrine, which confines the adjudication of "political questions" to the nonjudicial branches of government.

The precise contours of the political question doctrine are "murky and unsettled,"²⁶³ and the doctrine apparently encompasses issues for which judicial abstention is mandatory as well as those for which it is self-imposed.²⁶⁴ Whether or not a particular issue constitutes a nonjusticiable political question is subject to case-by-case analysis according to guidelines established by the Supreme Court.

In *Baker v. Carr*,²⁶⁵ the Court outlined the parameters of the political question doctrine.²⁶⁶ After noting that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers,"²⁶⁷ the Court analyzed the political question doctrine in a variety of contexts and found several recurring themes:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²⁶⁸

The Court concluded that "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence."²⁶⁹

The Court specifically addressed the political question doctrine in the context of foreign relations, noting that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."²⁷⁰ Nevertheless the Court observed that "[n]ot only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a

²⁶³ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985); see also L. HENKIN, *supra* note 185, at 210 ("That there is a constitutional 'political question' doctrine is not disputed, but there is little agreement as to anything else about it . . .").

²⁶⁴ L. HENKIN, *supra* note 185, at 212-13.

²⁶⁵ 369 U.S. 186 (1962).

²⁶⁶ *Id.* at 208-14.

²⁶⁷ *Id.* at 210.

²⁶⁸ *Id.* at 217.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 211.

discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views."²⁷¹

The absence of case law analyzing the issue makes it difficult to predict whether courts will decide that the political question doctrine requires adherence to the rule of non-inquiry. Some insight, however, may be derived from cases involving the political offense exception. Courts have held that judicial determination of the political offense issue is not barred by the political question doctrine.

In *Eain v. Wilkes*,²⁷² and again in *Quinn v. Robinson*,²⁷³ the government contended that the political question doctrine mandated that only the executive could decide whether a crime was a protected "political offense" for which the defendant was exempt from extradition.²⁷⁴ The government advanced three arguments in support of its position: (1) resolution of the issue entailed a type of policy determination wholly inappropriate for the exercise of judicial discretion; (2) pronouncements by the courts might conflict with those of the executive branch, giving rise to potential embarrassment in the conduct of foreign relations; and (3) the issue lacked judicially discoverable and manageable standards.²⁷⁵

Both courts rejected the government's position, noting that a determination that a crime was a protected political offense required a court to determine only whether the crime charged was committed during, and in furtherance of, a violent political uprising. These are issues of "past fact" which courts are competent to adjudicate and which require no policy determinations or political value judgments.²⁷⁶

The *Quinn* court further emphasized the politically neutral nature of the test used to determine whether a crime is a political offense. It observed that "[c]learly, if the application of the exception required us to approve of the political goals of an uprising group, executive discretion in granting protection from extradition would be more appropriate than judicial review."²⁷⁷

Likewise rejected in both cases, as well as in *In re Mackin*,²⁷⁸ was the government's analogy between the political offense issue and the examination of the requesting country's motives for extradi-

²⁷¹ *Id.* (footnotes omitted).

²⁷² 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981).

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

²⁷⁴ *Eain*, 641 F.2d at 513-17; *Quinn*, 783 F.2d at 787-90.

²⁷⁵ *Eain*, 641 F.2d at 514-16; *Quinn*, 783 F.2d at 787-90.

²⁷⁶ *Eain*, 641 F.2d at 514; *Quinn*, 783 F.2d at 788, 804.

²⁷⁷ *Quinn*, 783 F.2d at 788 n.6.

²⁷⁸ 668 F.2d 122 (2d Cir. 1981).

tion.²⁷⁹ The *Eain* court acknowledged that courts refuse to examine a requesting country's motives to determine if its real objective is to try the defendant for political crimes.²⁸⁰ The court, however, found that principle inapposite to a determination that a crime was a non-extraditable political offense:

[E]valuations of the motivation behind a request for extradition so clearly implicate the conduct of this country's foreign relations as to be a matter better left to the Executive's discretion. The Executive's evaluation would look at the actual operation of a government with which this country has on-going, formal relations evidenced by the extradition treaty and imply that the government may be disingenuous. This obviously would be an embarrassing conflict A judicial decision, however, that establishes an American position on the honesty and integrity of a requesting foreign government is distinguishable from a judicial determination that certain events occurred and that specific acts of an individual were or were not connected to those events. . . . Thus, the Judiciary's deference to the Executive on the "subterfuge" question is appropriate since political questions would permeate any judgment on the motivation of a foreign government.²⁸¹

That analysis, subsequently endorsed in both *Mackin*²⁸² and *Quinn*,²⁸³ suggests that the rule of non-inquiry may be mandated by the "political question" doctrine.²⁸⁴ Scrutiny of a foreign government's investigative, legal, and penal systems for fairness and humaneness is at least as intrusive as examining the motives underlying a particular extradition request.²⁸⁵ Indeed, such a determination would require courts to examine the requesting country's "actual operation" and assess the "honesty and integrity of" that government²⁸⁶—activities the *Eain* court found unsuitable for the judiciary.²⁸⁷ In addition, deciding whether the defendant will receive a fair trial and humane treatment in the requesting country can come perilously close to requiring a political value judgment of the type whose absence was deemed so significant in *Quinn*.²⁸⁸

²⁷⁹ *Quinn*, 783 F.2d at 789; *Eain*, 641 F.2d at 516-17; *In re Mackin*, 668 F.2d 122, 133 (2d Cir. 1981); see *supra* note 35.

²⁸⁰ *Eain*, 641 F.2d at 516.

²⁸¹ *Id.* at 516-17 (footnote omitted).

²⁸² 668 F.2d at 133.

²⁸³ 783 F.2d at 788-89.

²⁸⁴ See also *In re Singh*, 123 F.R.D. 127, 136 (D.N.J. 1987).

²⁸⁵ *Singh*, 123 F.R.D. at 136-37; see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 412, 423, 431-432 (1964) ("act of state" doctrine recognizes that even in civil litigation, scrutiny of foreign legal system may interfere with foreign relations and should be left to political branches).

²⁸⁶ *Eain*, 641 F.2d at 516.

²⁸⁷ See *supra* text accompanying note 281.

²⁸⁸ See *supra* text accompanying note 277.

These considerations, combined with the fact that extradition is inherently a function of the executive branch,²⁸⁹ as well as the customary deference to the executive in matters involving foreign relations,²⁹⁰ must be balanced against the rights of the defendant. Although the need for judicial involvement is reduced by virtue of the executive's discretion,²⁹¹ it is difficult to predict how courts will effectuate the balance.²⁹²

Even if courts ultimately determine that the rule of non-inquiry is not mandated by the political question doctrine, the rule bears sufficient indicia of a political question to warrant continued judicial deference. The rule of non-inquiry is in many ways analogous to the "act of state" doctrine,²⁹³ which prohibits courts from judging governmental acts of a foreign country performed within its territory.²⁹⁴ That doctrine, although compelled neither by the Constitution, the political question doctrine, international law, nor by notions of sovereignty,²⁹⁵ nevertheless

ha[s] "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine . . . expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder

²⁸⁹ See *supra* text accompanying notes 53-54.

²⁹⁰ See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (matters pertaining to conduct of foreign relations "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"), *reh'g denied*, 343 U.S. 936 (1952); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

²⁹¹ See *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 66 n.5 (2d Cir.) (court more likely to intervene in protecting against unconscionable treatment of defendant by United States when "conscience and justice demand a remedy"), *cert. denied*, 421 U.S. 1001 (1975).

²⁹² Courts have avoided invoking the political question doctrine where significant individual rights are at stake. See *Flynn v. Shultz*, 748 F.2d 1186, 1191 (7th Cir. 1984), *cert. denied*, 474 U.S. 830 (1985); Fritz W. Sharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 584 (1966); cf. LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 98 (1990) (political question doctrine "has been invoked to foreclose judicial review" even where acts of Congress or executive acts related to foreign affairs have "impinge[d] on an individual's rights").

²⁹³ See Michael Scharf, *Foreign Courts on Trial: Why U.S. Courts Should Avoid Applying the Inquiry Provision of the Supplementary U.S.-U.K. Extradition Treaty*, 25 STAN. J. INT'L L. 257, 275-76, 279 (1988).

²⁹⁴ See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

²⁹⁵ *Id.* at 421-23; L. HENKIN, *supra* note 185, at 218. Scharf, *supra* note 293, at 270-75, 279, takes the position that the act of state doctrine is mandated by the political question doctrine. Cf. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 787-88 (1972) (Brennan, J., dissenting) ("[T]he validity of a foreign act of state in certain circumstances is a 'political question' . . .").

rather than further this country's pursuit of goals²⁹⁶

That analysis of the "act of state" doctrine by the Supreme Court is equally applicable to the rule of non-inquiry.

CONCLUSION

Balancing the right of a defendant to fair and humane treatment against international treaty obligations and foreign relations concerns of the United States is a delicate matter. These competing interests have been effectively reconciled by conferring exclusive responsibility for safeguarding the defendant's rights to the Secretary of State. Allowing a defendant to challenge the fairness of the requesting country's investigative, legal, and penal systems in a United States court would require a doctrinally problematic expansion of the scope of constitutional protection, could undermine important foreign policy concerns, and would entail undesirable, if not impermissible, judicial interference in foreign affairs. Congressional efforts to enact legislation eliminating the rule of non-inquiry have so far been unsuccessful. Unless and until such legislation is enacted, the rule of non-inquiry should be inviolate.

²⁹⁶ *Banco Nacional de Cuba*, 376 U.S. at 423.