Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual

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Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual

I. INTRODUCTION

Growing recognition of the individual as a subject of international law, and emerging standards of international human rights, have begun to influence extradition practice in the United States. Although the executive branch currently gives some attention to the potential mistreatment an individual might suffer upon rendition, critics of the present system contend that political

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1 Traditionally, only states are the subjects of International Law. In more recent times, this position no longer receives unqualified acceptance. 1 L. Oppenheim, INTERNATIONAL LAW: PEACE §§ 13-13a (H. Lauterpacht 8th ed. 1955). Lauterpacht notes that international legal rights and duties may exist despite an individual's lack of procedural capacity to assert them. H. Lauterpacht, The Subjects of the Law of Nations, in 2 INTERNATIONAL LAW, BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 505 (E. Lauterpacht ed. 1975).


3 Extradition has been defined as "the process by which persons charged with or convicted of crime against the law of a State and found in a foreign State are returned by the latter to the former for trial or punishment." 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 727 (1968) [hereinafter cited as WHITEMAN].

4 Extradition in the United States is regulated by treaty. 18 U.S.C. § 3181; Factor v. Laubenheimer, 290 U.S. 276, 287 (1933). Though these treaties are generally considered self-executing, Congress has passed legislation designed to complement and assist in their administration. See 1 M. Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE ch. 2 § 1 at 3 (1983) [hereinafter cited as Bassiouni].

5 See e.g., Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976), cert. denied, 429 U.S. 1062 (1977). In Peroff, the court refused to consider the requested individual's claim that he would be exposed to potential assassination in a Swedish prison. Id. The court noted that a decision to deny extradition on such grounds lay within the power of the executive branch. Id. "A denial of extradition by the Executive may be appropriate when strong humanitarian grounds are present, but such grounds exist only when it appears that, if extradited, the individual will be persecuted, not prosecuted, or subjected to grave injustice." Id. See also Note, Executive Discretion in Extradition, 62 COLUM. L. REV. 1313, 1325-28 (1962) [hereinafter cited as Executive Discretion].

6 A distinction has been drawn between extradition as the formal means of rendition and other informal methods such as deportation and exclusion. See A. Evans, The Apprehension and Prosecution of Offenders: Some Current Problems in Legal Aspects of International Terrorism, in LEGAL ASPECTS OF THE CONTROL OF INTERNATIONAL TERRORISM 493-94 (A. Evans & J. Murphy eds. 1978). The author points out that in international practice, at least as it applies to the apprehension and rendition of alleged terrorists, deportation rather than extradition is the more commonly utilized and effective means of rendition. Id. at 494-95. Prof. Bassiouni points out, however, that U.S. officials have rarely used the
considerations often inappropriately outweigh humanitarian factors in the executive review process.\(^7\) In recent attempts to revise the U.S. extradition statute,\(^8\) Congress has considered methods of more effectively protecting requested persons.\(^9\) This discussion has sparked a controversy over the role of the federal courts in securing these rights.\(^10\)

At present, the courts play a limited part in reviewing the motives behind an extradition request and the procedures or punishment which await an individual upon return to a requesting state.\(^11\) While the courts\(^12\) are responsible for determining the applicability of the “political offense” exception to extradition,\(^13\) they have generally refrained from inquiring into the treatment a person will receive in the custody of a requesting state.\(^14\) Protection of an individual from potential human rights abuses has largely fallen to the executive branch\(^15\) by virtue of its constitutional role as the “sole organ” of the conduct of U.S. foreign policy.\(^16\) The Secretary of State possesses discretionary power to refuse a request on technical, political, or humanitarian grounds.\(^17\) The Secretary may also condition the rendition upon the requesting state’s agreement to comply with certain specifications set out in the extradition order.\(^18\)

immigration laws as an alternative to extradition with the possible exception of cases involving alleged Nazi war criminals. 1 Bassiouni, supra note 4, ch. IV § 2 at 1. Rendition, as used in this article, refers only to extradition.


\(^10\) Id.


\(^12\) An extradition complaint may be filed before any federal justice, judge, or duly authorized magistrate, or any judge of a state court of general jurisdiction. 18 U.S.C. § 3184. In practice, however, most cases have been filed in federal courts. H.R. REP. No. 998, 98th Cong., 2d Sess. 10 (1984) [hereinafter cited as H.R. Rep. 998]. Both the House and Senate versions of extradition reform proposals would require such cases to proceed in federal courts. Id. at 11.


\(^14\) Anderson, supra note 7, at 153.

\(^15\) Id.


\(^17\) 2 Bassiouni, supra note 4, ch. 9 § 7 at 3.

\(^18\) Id. at 10.
Congressional reform hearings\(^\text{19}\) have provided a convenient forum to debate the efficacy of the current practice in ensuring that extradited individuals will be safe from persecution and afforded some minimum standard of procedural fairness by the requesting state.\(^\text{20}\) Some critics of the State Department's handling of these matters have urged that the courts assume a more active role.\(^\text{21}\) Others contend that these questions, inextricably tied to the formulation and conduct of foreign policy,\(^\text{22}\) are best left in the hands of the political branches.\(^\text{23}\) Three possible models of judicial participation have emerged from the debate over the role of the courts when humanitarian concerns are raised in extradition proceedings. Under the first model, courts would be restricted from inquiring into events that may occur in the requesting state following extradition.\(^\text{24}\) The second model would allow inquiry when the alleged offender raises a fear of treatment in the requesting state which "shocks the conscience" of the court.\(^\text{25}\) The third model imposes an affirmative duty upon the court to inquire into the potential for persecution and the "fundamental unfairness" represented by an extradition request.\(^\text{26}\)

This Comment will explore the common law development of judicial action in this area and detail the statutory proposals which describe possible models of future court conduct. First, the Comment will provide an historical overview of the development of extradition practices in the United States, as well as a brief explanation of current extradition procedures. Next, it focuses upon the extent of current judicial inquiry in three areas: the motivation of, the criminal procedures in, and the threat of persecution posed by the requesting state. This Comment then examines three proposed models of judicial action formulated by Congress to deal with these concerns. Finally, the Comment concludes with an assessment of the models analyzing their potential for reconciling competing U.S. goals in the extradition process.

II. **Historical Background of Extradition in the United States**

Since ancient times, nations have relied upon extradition primarily as a political tool to secure the return of enemies of the state.\(^\text{27}\) By the end of the

\(^{19}\) See, e.g., *House Hearings I*, supra note 9; *House Hearings II*, supra note 9.

\(^{20}\) See, e.g., *House Hearings I*, supra note 9; *House Hearings II*, supra note 9.

\(^{21}\) See, e.g., *House Hearings II*, supra note 9, at 56, 58–59, (testimony of Morton Halperin, Director, Center for National Security Studies).

\(^{22}\) See, e.g., *id.* at 87, 93–97 (testimony of Steven Lubet, Professor of Law).

\(^{23}\) Id. at 95.


\(^{25}\) See H.R. REP. 998, supra note 12, at 4.

\(^{26}\) Id. at 5–6.

\(^{27}\) See Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 Harv. Int'l L.J. 61, 62 (1979); Cantrell, *The Political Offense Exemption in International*
eighteenth century, however, two changes in society forced states to shift the focus of their extradition practices. First, new forms of transportation and communication, developed during the advent of the industrial revolution, raised the specter of increasingly sophisticated international crime. Second, events such as the revolutions in the United States and France spurred a recognition of the legitimacy of political dissent during the Age of Enlightenment.

Prodced by the threat of unmanageable waves of fugitives moving freely across national borders, states began entering into expanded extradition agreements to protect their own security. At the same time, the acceptance by enlightenment theorists of political dissent as a justifiable, even noble, activity led many nations to include provisions within extradition agreements removing political offenders from the reach of illiberal states. Thus, in 1834, France and Belgium entered into the first extradition treaty containing an exception for political offenders.


See Research in International Law Under the Auspices of the Faculty of the Harvard Law School, 29 AM. INT'L. L. SUPP. 15, 35–38 (1935) [hereinafter cited as Harvard Research].

Epps, supra note 27, at 63.

Harvard Research, supra note 28, at 42–43.

See Garcia-Mora, The Present Status of Political Offenses in the Law of Extradition and Asylum, 14 U. Pitt. L. REV. 371, 372 (1953). As John Stuart Mill observed: “Political liberties or rights which it was to be regarded as a breach of duty in the ruler to infringe, and which, if he did infringe, specified resistance, or general rebellion, was to be held justifiable.” J. MILL, ON LIBERTY 2 (1847).

See Garcia-Mora, supra note 31, at 180–81.

See Garcia-Mora, supra note 31, at 373–74, stressing the humanitarian rationale for development of the political offense exception. Compare Hannay, Legislative Reform of U.S. Extradition Statutes: Plugging the Terrorist's Loophole, 13 DEN. J. INT'L. L. & POL'Y 53 (1983). Hannay observes that “the ‘political offense’ exception functions as a useful mechanism by which states may avoid becoming entangled in the internal political upheaval of other nations.” Id. at 59. In the recent case of Quinn v. Robinson, 783 F.2d 776, 793 (9th Cir. 1986), the court cited three justifications upon which the exception is grounded:

First, its historical development suggests that it is grounded in a belief that individuals have a ‘right to resort to political activism to foster political change.’ . . . Second, the exception reflects a concern that individuals — particularly unsuccessful rebels — should not be returned to countries where they may be subjected to unfair trials and punishments because of their political opinions . . . .Third, the exception comports with the notion that governments — and certainly their nonpolitical branches — should not intervene in the political struggles of other nations.

2 BASSIOUNI, supra note 4, ch. 8 § 2 at 2 n.7. Though the 1834 treaty between France and Belgium was the first to explicitly exclude political offenses, in 1833 France and Switzerland substantively adopted the same approach by deleting “crimes contre la surete de l’Etat” from the list of extraditable offenses contained in an existing treaty. See Deere, Political Offenses in the Law and Practice of Extradition, 27 AM. J. INT’L. L. 247, 250 (1933).

The term “political offense” has been applied to two categories of alleged crimes, “pure” and “relative” political offenses. A purely political offense is directed “against the political organization or government of a state, injuring only public rights, and containing no common crime element whatsoever,” whereas a “relative” political offense is connected in some way with a common crime. Deere, id. at 248.
These historical events influenced extradition practices in the United States. In the early years of the republic, the country was reluctant to enter into extradition agreements fearing that the threat of rendition might impede the flow of immigrants. Additionally, in the wake of the colonial overthrow of British rule, pride in the new nation as a refuge for those in need of asylum coupled with a mistrust of monarchical regimes, rendered the practice of extradition distasteful to many in the United States. By the mid-1800s, however, a growing awareness of the need to combat transnational crime and the availability of the political offense exception prompted the country to begin entering into extradition treaties.

The enactment of the first U.S. extradition statute shortly followed. Though extradition treaties in the United States are considered self-executing, legislation dealing with extradition was designed to facilitate implementation of these agreements by providing uniformity of procedures. Though the political offense exception was not specifically included in the statute, requested individuals were guaranteed a hearing and thus furnished with a forum within which to raise the political offense exception. Beginning with the 1843 extradition agreement between France and the United States, an exception for political offenders became a standard clause in U.S. extradition treaties.

By virtue of the political offense exception, U.S. courts were able to protect persons charged with political crimes from potential mistreatment by a request-
ing state. This defense was only available to those individuals who could prove that their acts fit within the rather narrow definition of behavior held to constitute a political offense. Thus, the focus of judicial inquiry was the political nature of the act for which the alleged offender was sought, without regard to the treatment the individual would receive upon return to the requesting state.

Individuals who did not qualify as political offenders could not raise claims before the courts relating to potential mistreatment by a requesting state. Courts generally referred questions concerning the permissibility of a requestor's motives, the fairness of that state's criminal procedures, threats of state persecution, and other humanitarian matters to the executive branch. This refusal to entertain pleas relating to the treatment likely to be accorded an individual upon rendition, came to be referred to as the "Rule of Non-Inquiry."

Since 1875, U.S. courts have recognized that the President, by virtue of the constitutional authority to conduct foreign affairs, possesses broad discretionary power to make the final decision whether to extradite an individual. Though some commentators have suggested that this authority to deny extradition is limited by the obligations imposed upon the U.S. by the applicable treaty, the exact scope of the Executive's power has never been expressly delineated. Thus, the President, through the Secretary of State, may deny or impose conditions upon an extradition request where circumstances indicate that the individual might be mistreated by the requesting state. In practice, however, the Secretary has consistently refused to deny extradition on grounds

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46 Banoff & Pyle, supra note 6, at 182.
47 Courts in the U.S. have basically adhered to the original British definition of political offense articulated in the 1891 case In re Castioni [1891] 1 Q.B. 149 (1890). 2 Bassiouni, supra note 4, ch. 8 § 2 at 25–26. A court explicitly adopted the Castioni definition in the frequently cited case of In re Ezeta, 62 F. 972, 999 (N.D. Cal. 1894). In Eain v. Wilkes, the 7th Circuit observed that in order to constitute a political offense, there must be "a violent political disturbance in the requesting country at the time of the alleged acts, and that the acts charged against the person whose extradition is sought were recognizably incidental to the disturbance." 641 F.2d at 516. See also the 9th Circuit's decision in Quinn, 783 F.2d at 792–803, for an extensive review of the historical background and modern treatment of the political offense exception in U.S. courts.
48 See Banoff & Pyle, supra note 6, at 207.
49 In re Ezeta, 62 F. at 986; In re Lincoln 228 F. 70, 74 (E.D.N.Y. 1915).
51 Peroff, 542 F.2d at 1249.
52 Banoff & Pyle, supra note 6, at 188–89.
54 See In re Stupp, 23 F. Cas. 296, 302 (S.D.N.Y. 1875) (No. 13,563).
55 Executive Discretion, supra note 5, at 1315–16.
56 Quinn, 783 F.2d at 789.
57 Executive Discretion, supra note 5, at 1315.
58 6 Whiteman, supra note 3, at 1051–53.
of procedural fairness, and indeed, from the limited evidence available to the public, it appears that executive discretionary refusal has rarely been exercised.

These procedural safeguards, developed during the 19th century in response to the protection of individuals within the extradition process, have passed virtually unaltered into the 1980s. But technological advances and evolving conceptions of individual rights have created pressure for changes in the existing extradition structure. Air travel, advanced weaponry, drug trafficking, and guerrilla warfare pose new challenges to the suppression of international crime and the preservation of national security. Critics of the present system contend that the courts' interpretation of the political offense exception ignores the reality of illegitimate forms of political dissent and fear that the United States has become a haven for terrorists. They advocate a narrowing of this exception in order to exclude those who engage in acts of terrorism.

Conversely, widespread violations of individual rights perpetrated during the Second World War awakened international interest in defining basic human rights and designing ways to protect them. Promulgation of various international instruments such as the United Nations Charter, the Universal Declaration of Human Rights, the Optional Protocol to the International Covenant on Civil and Political Rights, and the Protocol Relating to the Status of Refugees has spurred discussion in the United States on the content of internationally recognized human rights and how these rights affect domestic practices such as extradition.

This heightened concern for the protection of individual rights has led some commentators to question the ability of the present extradition

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59 See, e.g., Executive Discretion, supra note 5, at 1325.
60 From 1941 to 1962 only two extraditions are believed to have been denied by the executive branch. Id. at 1328. In a 1980 interview, K. Eugene Malmborg, an Assistant Legal Advisor for the State Department, stated that in his 14 years of experience he had no knowledge of an instance when the Executive had refused to return a fugitive who had not fallen within the political offense exception. Banoff & Pyle, supra note 6, at 192 n.88. See also, Quinn, 783 F.2d at 789–90.
61 Lubet, supra note 8, at 253–54.
62 Id. at 254.
63 See House Hearings I, supra note 9, at 69–70 (testimony of Falk); House Hearings II, supra note 9, at 83 (testimony of Helton); Anderson, supra note 7, at 164.
64 D. Lauter, There's No Place To Hide, Nat’l L. J. Nov. 26, 1984, p. 1 col. 1. In 1979 the United States was involved in approximately 150 extraditions, both as the sending and receiving state. In 1982 the figure had risen to 350 and is expected to increase further. Id. at p. 28 col. 2.
66 Hannay, supra note 33, at 66–75.
67 See Sieghart, supra note 2, at 14.
68 U.N. Charter.
72 See generally 2 Bassioumi, supra note 4, ch. 10 § 1, at 10.
process to adequately protect persons from potential abuse by a requesting state.\textsuperscript{73} Factors such as these have convinced Congress of the need for statutory reform and have sparked a debate on the role that the judicial branch should play in safeguarding the individual in the extradition process.\textsuperscript{74}

III. **Extradition Procedures in the United States**

Extradition in the United States will only be granted pursuant to a valid treaty with the requesting state.\textsuperscript{75} Unlike the extradition agreements of many other nations,\textsuperscript{76} U.S. extradition treaties generally provide for the rendition of nationals, as well as aliens.\textsuperscript{77} The proceedings against an individual are governed by both the substantive requirements of the pertinent treaty and the procedural rules set out in the U.S. extradition statute.\textsuperscript{78}

According to the statute, an authorized representative of a foreign state may initiate extradition proceedings against an alleged offender by filing a complaint.\textsuperscript{79} The complaint must refer to the relevant treaty provisions upon which the request is based and specify the charges brought against the individual.\textsuperscript{80} On the basis of this complaint, an arrest warrant may be issued and, following apprehension of the suspect, a hearing held.\textsuperscript{81}

The purpose of the hearing is two-fold. First, the court must decide whether the request complies with the provisions of the relevant extradition treaty.\textsuperscript{82} The requesting country must show that the crime constitutes an extraditable

\textsuperscript{73} See Anderson, \textit{supra} note 7, at 164.

\textsuperscript{74} See infra text accompanying notes 206–85.

\textsuperscript{75} 18 U.S.C. § 3181; 6 Whitman, \textit{supra} note 3, at 734.

\textsuperscript{76} See generally 2 Bassiouini, \textit{supra} note 4, ch. 8 § 3 at I. "As a general rule, European states exempt nationals while common law states do not." \textit{Id.}

\textsuperscript{77} See, e.g., Charlton v. Kelly, 229 U.S. 447, 465 (1912). U.S. treaties generally contain three types of provisions relating to the surrender of nationals. The first type provides for the extradition of "all persons." Courts have consistently held that this language includes nationals. \textit{Id.} at 447–57. The second, and most common treaty provision states "neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention." Though not bound to extradite nationals under this provision, in recent years U.S. policy has favored such rendition. See 2 Bassiouini, \textit{supra} note 4, ch. 8 § 3 at I. The last type provides that "[n]either of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each shall have the power to deliver them up if, in its discretion, it be deemed proper to do so." Many recent treaties have adopted this language. \textit{Id.} at 2.

\textsuperscript{78} 6 Whitman, \textit{supra} note 3, at 734.

\textsuperscript{79} 18 U.S.C. § 3184. The complaint can be filed directly in U.S. courts by the requesting state. 6 Whitman, \textit{supra} note 3, at 905. Sometime prior to the final extradition decision, however, a formal request must be made to the Department of State. \textit{Id.} But see the guidelines for extradition procedure set out in \textit{Eain}, 641 F.2d at 508.

\textsuperscript{80} 18 U.S.C. § 3184.

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.}
offense as contemplated in the agreement\textsuperscript{83} and that the act is prohibited by the laws of both nations.\textsuperscript{84} The second purpose of the hearing is to examine the charges in order to determine whether sufficient evidence exists to justify rendition of the individual to stand trial for the alleged offenses.\textsuperscript{85} Courts have repeatedly stressed that this statutorily mandated extradition proceeding is not a full hearing on the merits of the case; the actual guilt or innocence of the defendant is not at issue.\textsuperscript{86}

Thus, the courts use a probable cause standard\textsuperscript{87} to ascertain whether the evidence supports a reasonable belief that the individual is guilty of the crime charged.\textsuperscript{88} Since the hearing is preliminary in nature,\textsuperscript{89} the Federal Rules of Evidence are inapplicable\textsuperscript{90} and the requesting state may introduce a wide range of proof in order to show probable cause.\textsuperscript{91} Courts sharply limit the type of evidence that the defendant is permitted to present in order to avoid turning the hearing into a trial on the merits.\textsuperscript{92} The alleged offender may only introduce evidence designed to explain the circumstances of the offense\textsuperscript{93} or to show that he or she is not the person sought for the crime. The defendant may not

\begin{itemize}
\item \textsuperscript{83} Id.; Jimenez v. Aristeguieta, 311 F.2d 547, 562–63 (5th Cir. 1962).
\item \textsuperscript{84} This has been termed the requirement of "double criminality." See Collins v. Loisel, 259 U.S. 309, 311 (1922):

\begin{quote}
The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.
\end{quote}

\textit{Id.} at 312. Of course, if the extradition treaty explicitly waives the double criminality requirement, extradition will be allowed. Factor v. Laubenheimer, 290 U.S. at 301.

\item \textsuperscript{85} 18 U.S.C. § 3184 (1976).
\item \textsuperscript{86} See Jimenes, 311 F.2d at 556, Elain, 641 F.2d at 508.
\item \textsuperscript{87} Jimenes, 311 F.2d at 562. The court in \textit{Jimenes} discussed the origin of the probable cause standard, probable cause was given its classic definition on April 1, 1807, by Chief Justice John Marshall . . . [h]e held that he should not require evidence to convince himself that the defendant was guilty, but only that "furnishing good reason to believe that the crime alleged had been committed by the person charged with having committed it."

\textit{Id.}

\item \textsuperscript{88} \textit{Charlton}, 229 U.S. at 459–62.
\item \textsuperscript{89} Benson v. McMahon, 127 U.S. 457, 462–63 (1887). The court explained that the extradition hearing has the character of

Those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him.

\textit{Id.}

\item \textsuperscript{90} Fed. R. Evid. 1101(d)(3). See generally H.R. REP. 998, \textit{supra} note 12, at 21; Elain, 641 F.2d at 508.
\item \textsuperscript{91} Loisel, 259 U.S. at 316–17; Elain, 641 F.2d at 508. "Hearsay is admissible, and the foreign government usually presents its case through affidavits, depositions, and other written statements." \textit{Id.}
\item \textsuperscript{93} \textit{Id.} at 645. The court noted that "[t]he fugitive's right is limited to adducing evidence which explains rather than contradicts the supporting proof." See also Jimenes, 311 F.2d at 556.
\end{itemize}
introduce proof contradicting the case presented by the requesting nation.94 The presiding magistrate possesses great discretionary power to grant or deny the admission of evidence.95

The U.S. extradition statute contains no provision allowing for a direct appeal of the court’s decision as to the extraditability of the individual.96 A defendant wishing to challenge the court’s findings may only seek collateral relief by filing a petition for a writ of habeas corpus.97 In the past, the courts have restricted the scope of their habeas corpus review,98 focusing solely on questions relating to jurisdiction, the existence of a valid treaty, and the identity of the defendant.99 Recent cases indicate, however, that courts are broadening the scope of this review to include challenges to the constitutionality of the U.S. government’s conduct in the extradition proceedings.100 A person opposing extradition on any other ground must apply for executive discretionary review for relief.101

Once a court has found an individual extraditable, the matter is then certified to the Secretary of State.102 Rendition will not occur until the Secretary has had a chance to review the court’s proceedings to determine whether treaty requirements have been met and a surrender warrant should issue.103 The Secretary may rely on the court’s record or conduct a de novo examination of the issues.104 Based upon this review, the Secretary may deny extradition for any of a variety of technical, political, or humanitarian reasons.105 Thus, where a court has approved an extradition request, the final decision whether to extradite lies within the executive branch’s sole discretion.106

If, however, the court denies extradition, finding that the requesting nation has failed to produce evidence sufficient to support the complaint, or that the defendant is entitled to the protection of a relevant defense, this decision is

94 Eain, 641 F.2d at 511.
95 Loisel, 259 U.S. at 317.
99 Fernandez, 268 U.S. at 312.
100 See Matter of Burt, 737 F.2d 1477, 1484 (7th Cir. 1984) holding “that federal courts undertaking habeas corpus review of extraditions have the authority to consider not only procedural defects in the extradition procedures that are of constitutional dimension, but also the substantive conduct of the United States in undertaking its decision to extradite if such conduct violates constitutional rights.” See also Plaster v. United States, 720 F.2d 340, 348 (4th Cir. 1983).
101 See, e.g., Eain, 641 F.2d at 508.
102 Id.
103 Terlinden v. Ames, 184 U.S. 270, 289–90 (1901); Executive Discretion, supra note 5, at 1314.
104 Id. at 1328.
105 Id.
106 Id.
final. The executive branch has no power to appeal or alter the court's verdict.\footnote{107} The court's decision, however, does not operate as res judicata; a requesting state may refile the extradition request before a different magistrate if dissatisfied with the denial.\footnote{108}

IV. EXCEPTIONS TO THE RULE: THE EROSION OF THE RULE OF NON-INQUIRY

Courts in the United States have traditionally refused to consider questions relating to the political motives of a requesting state and the procedures or treatment which await an individual upon rendition.\footnote{109} Though not bound by treaty or statute to refrain from looking into these matters,\footnote{110} courts have chosen to refer such considerations to the discretion of the Secretary of State.\footnote{111} This practice has been termed the "rule of non-inquiry."\footnote{112} However, recent cases\footnote{113} and new treaties recognizing the need to more actively protect basic human rights, cast doubt on the continuing validity of this rule and indicate the courts' willingness to assume a more active role in these areas.\footnote{114}

A. Political Motivation of the Requesting State

Perhaps the most clear-cut instances of judicial abstention have occurred when the requested individual contends that the extradition request is politically motivated.\footnote{115} An early indication of the courts' reluctance to actively intervene in the extradition process appeared in \textit{In Re Lincoln}.\footnote{116} The alleged offender challenged an extradition request from the United Kingdom, claiming that the charge of forgery was being used as a subterfuge to secure his return in order

\begin{thebibliography}{99}
\footnotesize
\item[107] Eain, 641 F.2d at 508.
\item[108] Loisel, 262 U.S. at 429; United States v. Doherty, 786 F.2d 491, 495 (2d Cir. 1986). The most recent versions of extradition reform legislation in both the house and senate provide for direct appeal of the extradition decision by either party in an extradition case. See H.R. Rep. 998, supra note 12, at 32-33; S. Rep. 225, supra note 24, at 351-52.
\item[109] See, e.g., Garcia-Guillern, 450 F.2d at 1192. (Court observed that they were not "permitted to inquire into the procedure which awaits the appellant upon his return" to the requesting country of Peru).
\item[110] See House Hearings II, supra note 9, at 55 (testimony of Daniel W. McGovern, Deputy Legal Advisor, Dept. of State).
\item[111] See, e.g., In re Lincoln, 228 F. 70, 74 (E.D.N.Y. 1915); Matter of Locatelli, 468 F. Supp. 568, 575 (S.D.N.Y. 1979).
\item[112] Banoff and Pyle, supra note 7, at 188-89.
\item[113] See e.g., Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960); Nicosia v. Wall, 442 F.2d 1005, 1006-07 (5th Cir. 1971); Matter of Burt, 737 F.2d at 1484-85.
\item[114] I BASSIOUNI, supra note 4, ch. 7 § 1 at 8.
\item[115] The motivation of the requesting country is not currently considered in determining whether an individual is entitled to claim the political offense exception. \textit{Eain}, 641 F.2d. at 504. The courts have limited the applicability of the exception to acts committed in furtherance of a political uprising or disturbance. \textit{Id}.
\item[116] 228 F. at 70, 74.
\end{thebibliography}
to punish him for statements he had made which were critical of the government.\textsuperscript{117} The court declined to entertain the requested individual's objections noting that "it is not a part of the court proceedings nor of the hearing upon the charge of crime to exercise discretion as to whether the criminal charge is a cloak for political action, nor whether the request is made in good faith."\textsuperscript{118}

According to the court, the Secretary of State could furnish the requested individual with adequate safeguards to ensure that Britain intended to live up to its treaty obligations.\textsuperscript{119}

Two considerations have influenced the courts in this area. First, the courts have taken the position that the political branches of government are responsible for the conduct of U.S. foreign policy. Thus, they are reluctant to question the good faith of the actions of a country with whom the United States has entered into an extradition agreement.\textsuperscript{120} This principle led the Fifth Circuit Court of Appeals in \textit{Garcia-Guilleran v. United States}\textsuperscript{121} to refuse to recognize the former Peruvian Minister of Education's contention that the Peruvian government intended to try him on charges other than embezzlement.\textsuperscript{122} The court observed that it was "not at liberty to speculate that the Republic of Peru will not recognize and live up to the obligations existing between it and the United States."\textsuperscript{123}

Second, the courts have determined that the motives of the requesting state are political matters more aptly assigned to the "sole organ"\textsuperscript{124} of the conduct of foreign policy, the executive branch.\textsuperscript{125} For this reason, the court in \textit{Eain v. Wilkes}\textsuperscript{126} declined to consider the alternative motives behind Israel's request for the return of an alleged PLO terrorist, noting that "evaluations 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."\textsuperscript{127}

Despite these influences, examination of a requesting state's motives has not been universally resisted. In the case of \textit{In Re Mylonas},\textsuperscript{128} the Greek government requested the extradition of Mylonas, an anti-communist hero from the Greek civil war who later served as president of a city council. A communist faction

\textsuperscript{117} Id. at 73–74.
\textsuperscript{118} Id. at 74.
\textsuperscript{119} Id.
\textsuperscript{120} Glucksman v. Henkel, 221 U.S. 508, 512 (1911).
\textsuperscript{121} 450 F.2d 1189 (5th Cir. 1971).
\textsuperscript{122} Id. at 1192.
\textsuperscript{123} Id.
\textsuperscript{124} U.S. v. Belmont, 301 U.S. at 324, 330.
\textsuperscript{125} House Hearings II, supra note 9, at 95 (statement of Lubet).
\textsuperscript{126} 641 F.2d at 504.
\textsuperscript{127} Id. The court contrasted the fact-finding nature of the political offense exception inquiry with the more subjective, policy-oriented determination necessary to ascertain the motive of a requesting state.
later won control of the town and initiated charges of embezzlement against Mylonas. He then emigrated to the United States, with the knowledge of the Greek government. Some time after his departure, the town government reinstated proceedings against Mylonas and convicted him in absentia. During the extradition hearing, the district court judge admitted a wide range of evidence on the political climate in the town during the time of Mylonas' conviction. Though the court rested its decision not to extradite Mylonas on a technicality, it was apparently influenced by the alleged political motivation inspiring the request.

B. Fairness of Procedure in the Requesting State

U.S. courts have generally refused to admit evidence of alleged fundamental unfairness of a foreign state's criminal proceedings as a defense to extradition. They have adhered to the principle that the existence of a valid extradition treaty attests to the acceptability of trial procedures in a signatory state. Additionally, in Neely v. Henkel, the Supreme Court made it clear that constitutional due process guarantees are inapplicable to trials in foreign states for crimes committed outside the United States in violation of another nation's laws. A requested individual “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.”

In compliance with these principles, courts in the United States have largely avoided the task of examining the criminal procedures of a foreign state for constitutional violations or for any degree of minimum fairness. They have...
considered matters relating to the acceptability of proceedings in a requesting state to be appropriate subjects for discretionary executive review. 139

The Court of Appeals for the Sixth Circuit, however, expressed dissatisfaction with this inability to ensure any protection to extradited individuals from unfair practices in the requesting state in Arguento v. Horn. 140 There the court confessed to uneasiness over the prospect of returning a fugitive to Italy on the basis of an in absentia conviction. 141

The first unambiguous indication of judicial willingness to create an exception to the rule of non-inquiry, in certain circumstances, came from the Second Circuit Court of Appeals in Gallina v. Fraser, 142 also involving an in absentia conviction. 143 The plaintiff, after fleeing to the United States in an effort to elude capture, was found guilty of robbery in two separate Italian trials. 144 After surveying prior case law, the Gallina court admitted that they were not authorized to inquire into the fairness of the Italian proceeding which permitted conviction in the absence of the defendant. 145 The court added an important caveat, confessing "to some disquiet at this result. We can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the [rule of non inquiry]." 146 The court then found that this case did not merit application of any exception to the rule of non-inquiry. 147

Despite its availability, no court has yet held that circumstances in an extradition case warrant use of the Gallina exception. 148 Some courts in the second circuit, however, have speculated on situations that might trigger application of

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140 241 F.2d 258 (6th Cir. 1957). Italy requested extradition of petitioner on the basis of a murder conviction in absentia issued thirty years prior to the request. Id. at 259.
141 Id. at 263-64. The court noted, "[t]he appellant has apparently been a law-abiding person during the thirty years that he has been in this country. To enter a judgment that will result in sending him back to life imprisonment in Italy, upon the basis of the record before the Commissioner, does not sit easily with the members of a United States court . . . ."
142 278 F.2d at 77.
143 Id. at 78.
144 Id. at 78. For a more complete recital of the facts of the case as adopted by the Second Circuit Court of Appeals, see 177 F. Supp. 856, 861-62 (D. Conn. 1959).
145 278 F.2d at 78-79.
146 Id. at 79.
147 Id. The Court was apparently persuaded that Gallina's trial was not so devoid of fundamental fairness as to merit further inquiry. Id. During the first trial, despite his absence, Gallina was represented by counsel and in the second he was tried along with his associates in the robbery who were present at the trial and also convicted. Id. Although the State Department approved Gallina's extradition, they conditioned his return upon Italy's agreement to furnish him with a new trial. 6 WHITEMAN supra note 3, at 1120. Gallina was sent to Italy, but under Italian law, could not be given a new trial. Id. He was released and returned to the United States. Id.
148 Anderson, supra note 7, at 156.
the exception. In *United States ex. rel. Bloomfield v. Gengler*, the court proposed that an "inability to assert a defense" might be such an instance. In *Rosado v. Civeletti*, the court intimated that where evidence indicated officially sanctioned torture and abusive criminal proceedings, the presumption of fairness accorded to a requesting nation might be abandoned.

If courts follow these suggestions, they may then be under a duty to scrutinize the foreign state's proceedings to discover whether there exist minimal safeguards to ensure a fair trial. Thus, courts seeking to apply the *Gallina* exception will be confronted with the job of defining what fundamental procedural safeguards are vital to the conduct of a fair trial.

Beyond some sort of acceptable standard of minimum fairness, the *Rosado* court also pointed out that constitutional due process guarantees might, in fact, pose a barrier to the rendition of a requested individual. The court acknowledged the principle that due process protection does not apply extraterritorially to proceedings brought pursuant to a crime committed outside the United States in violation of the laws of another state. The court noted, however, that the Constitution does govern the manner in which U.S. officials may join in the efforts of the prosecuting country.

Most recently, two companion cases, *Plaster v. United States* and *Matter of Burt*, discussed the limits the Constitution imposes upon the acts of the U.S. government in the extradition process. Both cases illustrate the federal courts' attempts to balance the government's responsibility to conduct foreign affairs through extradition agreements, with the protection of the rights of the individual whose return is sought. In *Plaster*, a former U.S. soldier was sought by...
West Germany for crimes he allegedly committed while stationed there.\textsuperscript{159} Plaster contended that the United States could not constitutionally order his extradition due to an agreement he signed with U.S. law enforcement officials promising him immunity from prosecution in any subsequent criminal proceedings in exchange for his testimony.\textsuperscript{160}

The government responded that the constitutionality of the extradition decision was an issue that fell outside the area of limited judicial review in a habeas corpus proceeding, and that consideration of that issue was committed solely to the President and the Secretary of State.\textsuperscript{161} While acknowledging the wide scope of executive discretion in making the final extradition decision,\textsuperscript{162} the Plaster court firmly reserved the power to review the constitutionality of the government's actions.\textsuperscript{163} Regardless of treaty obligations, the court held that the government may not extradite an individual "where such extradition would ... violate the individual's constitutional rights."\textsuperscript{164} The court concluded that the government's breach of a valid prosecutor-defendant agreement constituted just such an impermissible violation of due process rights.\textsuperscript{165}

In \textit{Burt}, another former U.S. soldier contested the government's decision to extradite him to West Germany to stand trial for crimes committed fifteen years earlier.\textsuperscript{166} Unlike the claim in \textit{Plaster}, however, the challenge in \textit{Burt} centered on the length of time that had elapsed between the alleged crime and the extradition proceedings.\textsuperscript{167} Burt contended that in contradicting its original decision not to return him to West Germany, the U.S. government violated his right to due process and a speedy trial.\textsuperscript{168}

As in \textit{Plaster}, the court held that constitutional restraints apply to the government's extradition decisions.\textsuperscript{169} In defining these limitations, however, it distinguished between the standards to be applied to the government acting as prosecutor in U.S. criminal proceedings, and as extraditer in its foreign affairs

\begin{itemize}
\item \textsuperscript{159} 720 F.2d at 343–44.
\item \textsuperscript{160} \textit{Id.} at 346.
\item \textsuperscript{161} \textit{Id.} at 347–49.
\item \textsuperscript{162} \textit{Id.}
\item \textsuperscript{163} \textit{Id.} The court stated,
\[\text{[a]lthough the power and the discretion of the Executive is undoubtedly great in matters of foreign relations, the cases to which we have referred demonstrate that the exercise of this power is limited by the provisions of the federal Constitution. And, unquestionably, it is the province of the judiciary to adjudicate claims that governmental conduct is in violation of the Constitution.}\]
\item \textsuperscript{164} \textit{Id.}
\item \textsuperscript{165} \textit{Id.} at 351.
\item \textsuperscript{166} 737 F.2d at 1482.
\item \textsuperscript{167} \textit{Id.}
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} \textit{Id.} at 1484.
\end{itemize}
capacity.\textsuperscript{170} The court observed that by virtue of the "special prosecutor-defendant relationship" the government exerts a unique control over the fate of the accused.\textsuperscript{171} Thus, in bringing an alleged offender to justice, the government must adhere strictly to the full range of constitutional provisions designed to protect the defendant's rights.\textsuperscript{172}

In contrast, a less direct relationship exists between the U.S. government and a requested individual.\textsuperscript{173} In this context, the government's actions are primarily concerned with carrying out the Executive's duty to conduct foreign policy rather than with the ultimate prosecution of the alleged offender.\textsuperscript{174} The court recognized, however, that decisions based on diplomatic considerations might affect the ability of an extradited individual to defend against charges brought by the requesting state.\textsuperscript{175} Hence, governmental conduct is subject to some restraints.\textsuperscript{176}

The \textit{Burt} court noted that the constitutionality of the government's actions in extraditing an individual would be judged by a less stringent standard than that employed in reviewing the acts of the government as prosecutor.\textsuperscript{177} Though officials may not violate the basic notions of "fair play and decency" implicit in the due process clause of the fifth amendment, the court refused to unduly hamper the Executive's power to conduct foreign policy.\textsuperscript{178} Specifically, the court held that extradition decisions must be formed without regard to constitutionally impermissible factors such as race, color, sex, national origin, religion, and political beliefs, and that the decisions must conform to "such other exceptional constitutional limitations as may exist because of particularly atrocious procedures or punishment employed by the foreign jurisdiction."\textsuperscript{179} The court found that the time delay in prosecuting Burt did not so substantially violate due process as to pose a constitutional barrier to his extradition.\textsuperscript{180}

Though the extent of the impact of \textit{Burt} has yet to be ascertained, the case appears to mandate constitutional restraints upon extradition where circumstances indicate an individual may be subject to "atrocious procedures or punishment" upon rendition.\textsuperscript{181} Thus, under this criterion, a court may abandon non-inquiry and review questions relating to the procedural fairness likely to

\begin{thebibliography}{9}
\bibitem{170} Id. at 1486–87.
\bibitem{171} Id. at 1486.
\bibitem{172} Id.
\bibitem{173} Id. at 1486–87.
\bibitem{174} Id. at 1487.
\bibitem{175} Id.
\bibitem{176} Id.
\bibitem{177} Id. at 1486.
\bibitem{178} Id. at 1486–87.
\bibitem{179} Id. at 1487.
\bibitem{180} Id.
\bibitem{181} Id.
\end{thebibliography}
be accorded an individual. The aim of the court’s investigation would not be to attempt to apply U.S. constitutional standards to those foreign proceedings, but to determine whether it is constitutionally permissible for the U.S. government to decide to return the alleged offender.

C. Persecution and Punishment in the Requesting State

Courts have traditionally refused to consider the threat of persecution, extreme forms of punishment, or other humanitarian factors as a bar to extradition. In the wake of Gallina and Burt courts may be entitled, or even required, to assume a more active role in this area. Indeed, there are indications that courts may already have begun to evaluate the likelihood of human rights abuses. In Arnbjornsdotter-Mendler v. United States, the requested individual, an Icelandic national, challenged her country’s extradition request on the ground that she would be subject to “brutal and unfair” treatment upon her return. The court, relying on Gallina, indicated that in view of Iceland’s outstanding human rights record and the appellant’s unsubstantiated prediction of mistreatment, it would allow her extradition. The court concluded that it was under no obligation to hold an evidentiary hearing to consider the merits of the claim. Thus, the court appeared to apply a prima facie standard to the Gallina line of inquiry.

This prima facie standard was also applied in Prushinowski v. Samples. The court examined the claim of the requested individual, a Chassidic Jew, that he would starve to death in a British prison because of the authorities’ unwillingness to comply with his religious dietary laws. The court rejected Prushinowski’s argument, observing that he would be treated no differently from any other British prisoner; any problems he experienced would be under his own control. Although finding extradition was proper under these circumstances, the

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182 The case of In Re Normano, 7 F. Supp. 329 (D. Mass. 1934), has been cited as the most glaring example of non-inquiry into the threat of persecution. See House Hearings I, supra note 9, at 145–46 (statement of Att’y. Keara O’Dempsey). There, the court refused to take judicial cognizance of the potential abuse the requested individual, a Jew, might suffer at the hands of Germany during World War II if the extradition request was honored. 7 F. Supp. at 330–31.

183 Escobedo v. United States, 623 F.2d 1098, 1107 (5th Cir. 1980). Mexico sought petitioners’ extradition on charges of attempted kidnapping of the Cuban consul and a related murder. Id. at 1101. The court refused to entertain petitioner’s objections to the Mexican criminal proceedings despite the fact that their confessions to the acts may have been obtained by “means of torture.” Id. at 1105.

184 721 F.2d 679 (9th Cir. 1983).

185 Id. at 683.

186 Id.

187 Id.

188 734 F.2d 1016 (4th Cir. 1984).

189 Id. at 1018.

190 Id. at 1019.
court went on to suggest that threats of abusive punishment might in fact constitute grounds for a denial of extradition if, for instance, "the prisons of the foreign country 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."\(^{191}\)

The courts may be under a duty to inquire into evidence of potential persecution if the individual is a refugee within the meaning of the Protocol Relating to the Status of Refugees.\(^{192}\) The Protocol\(^{193}\) defines a refugee as an individual who is unable or unwilling to return to the country of nationality or habitual residence due to a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion . . . ."\(^{194}\) According to the Protocol, however, refugee status may be denied to a person if there are "serious reasons" for believing that the individual has committed a serious non-political crime outside the country of refuge prior to admission as a refugee, a crime against peace or a crime against humanity.\(^{195}\) 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.\(^{196}\)

Since the Protocol applies to requested persons in an extradition hearing,\(^{197}\) courts may be permitted to ignore the rule of non-inquiry in cases alleging potential for persecution.\(^{198}\) This would appear to explain the court's action in *Nicosia v. Wall*.\(^{199}\) Though the court affirmed the district court's finding that the requesting country of Panama had presented sufficient evidence to justify the extradition of the alleged offender, it remanded the case back to the lower court with instructions to consider the affect of the Protocol on the individual's extraditability. The court pointed out that "the United States intends to enforce the terms of that protocol and to deny extradition in cases in which it is demonstrated that a fugitive's life or freedom would be threatened on account of his political opinion."\(^{200}\) Thus, due to the Protocol, the lower court was

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\(^{191}\) Id.

\(^{192}\) See, *House Hearings II*, supra note 9, at 60 (statement of Halperin).


\(^{194}\) Refugee Protocol, art. 1(2), incorporating the definition of refugee set out in the Refugee Convention, ch. 1 art. 1(A)(2) as amended.

\(^{195}\) Refugee Protocol, at art. 1(2), incorporating Refugee Convention, ch. 1 art. 1(F).

\(^{196}\) Refugee Protocol, art. 1(1) incorporating Refugee Convention, ch. 1 art. 33.

\(^{197}\) 442 F.2d 1005 (5th Cir. 1971).

\(^{198}\) Id. at 1006-07.
specifically instructed to consider matters which would otherwise fall within the rule of non-inquiry.

An example of the obligations the Protocol has placed upon the courts to consider these matters was offered in *Sindona v. Grant*.201 Despite an admitted reluctance to inquire into the potential abuse the requested person might suffer if Italy’s extradition request were granted,202 the court tacitly acknowledged the applicability of the Protocol.203 In *Sindona*, however, the court used the serious non-political crime exception contained within the Protocol, to avoid examination of the claim of threatened persecution. The court held that fraudulent bankruptcy was a sufficiently serious crime to trigger operation of the Protocol’s exception hence removing the Protocol as an obstacle to the individual’s extradition.204 Thus, future use of the Protocol as a deterrent to extradition on humanitarian grounds may hinge on judicial interpretations of what constitutes such a “serious crime.”205

V. Statutory Reform

Increased willingness on the part of the courts to inquire into treatment awaiting a requested individual206 reflects a heightened concern in the United States with the protection of fundamental human rights within the extradition process. Despite general agreement on the need to safeguard these rights, recent legislative attempts to reform the extradition statute reveal a division of opinion over the appropriate role of the courts.207

Three possible models of judicial action have emerged from the debate. The first model seeks to foreclose judicial review of these questions by codifying the rule of non-inquiry.208 The second model, taking recent case law into account, proposes to retain the court’s limited discretion to exercise judicial review when faced with conduct that shocks the conscience.209 The third model goes beyond current practice by imposing an affirmative duty upon the courts to inquire

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201 619 F.2d 167 (2d Cir. 1980).
202 Id. at 174–75. In *Sindona*, the court stated that *Gallina* did not require them to consider whether circumstances awaiting the fugitive would offend their sense of decency. Id. at 175.
203 Id. at 174.
204 Id.
205 In the context of asylum proceedings, courts and scholars have looked to the “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees” for guidance in defining the term “serious non-political crime” as well as other terms within the Protocol. See *House Hearings II*, supra note 9, at 81 (statement of Helton).
206 See supra text accompanying notes 138–205.
into the motives of a requesting country and the treatment that awaits the individual if returned.\textsuperscript{210}

A. Model One: The Rule of Non-Inquiry

Model One, embodied in the original 1982 House version\textsuperscript{211} of extradition reform legislation and the most recent Senate proposal,\textsuperscript{212} provides that the motivations of a requesting nation and the subsequent treatment of an extradited person are essentially matters of foreign policy, which are within the scope of the political branches and, therefore, outside the competency of the court.\textsuperscript{213} A refusal to extradite on these grounds should only be made by the executive branch, pursuant to its constitutional duty to regulate the conduct of foreign affairs.\textsuperscript{214} This statutory scheme codifies the traditional rule of non-inquiry by explicitly vesting all power to deny extradition, on the basis of questionable motives or humanitarian concerns, in the Secretary of State.\textsuperscript{215} Courts, by implication, are forbidden to entertain humanitarian defenses.\textsuperscript{216}

\textsuperscript{210} Id. at 30–31.
\textsuperscript{211} H.R. 2643, The Extradition Act of 1983, was introduced on April 20, 1983. House Hearings II, supra note 9, at 2. Proposed § 3194(e)(4) of the bill assigned questions concerning the motives of and procedures in a requesting state to the sole discretion of the Secretary of State. Id. at 14–15. This bill was subsequently amended to give the courts the freedom to exercise judicial review of these matters. See H.R. Rep 998, supra note 12, at 5–6.
\textsuperscript{212} The latest version of the Senate extradition reform bill was introduced as Part M of the Comprehensive Crime Control Act of 1983, S. 1762. The same legislation was also separately introduced as S. 220 by Senator Strom Thurmond. S. Rep. 225, supra note 24, at 332 n.1. The provisions of S. 1762 dealing with extradition were favorably reported out by the Senate Judiciary Committee, Id. at 1–2, and the Foreign Relations Committee, S. Rep. No. 241, 98th Cong. 1st Sess. 1983, [hereinafter cited as S. Rep. 241]. The bills, however, were never acted upon by the full Senate during the 98th Congress.
\textsuperscript{213} See S. Rep. 241, supra note 212, at 17. Section 3196 of the Foreign Relations Committee’s reported bill reads, in relevant part:

\texttt{\textit{a) Responsibility of the Secretary of State — If a person is found extraditable pursuant to section 3194, the Secretary of State, upon consideration of the provisions of the applicable treaty and this chapter ...}}

\texttt{\textit{3) may decline to order the surrender of the person if the Secretary determines that}}

\texttt{\textit{A) The foreign state is seeking extradition of the person for the purpose of}}

\texttt{\textit{prosecuting or punishing the person because of his political opinions, race, religion, or nationality; or}}

\texttt{\textit{B) The extradition of the person to the foreign state seeking his return would be}}

\texttt{\textit{incompatible with humanitarian considerations.}}

\textsuperscript{216} Id.
Clearly, this model represents a departure from recent cases such as Gallina\textsuperscript{217} and Burt,\textsuperscript{218} in which courts have carved out exceptions to the rule of non-inquiry and reserved the right to review questionable procedures and punishments in limited circumstances.\textsuperscript{219} Model One adherents view such judicial forays as encroachments upon the Executive's prerogative in foreign affairs.\textsuperscript{220}

Advocates of Model One perceive the protection of individual rights as inextricably tied to the conduct of U.S. foreign policy.\textsuperscript{221} They stress the adverse political consequences that might follow a decision to deny extradition on these grounds.\textsuperscript{222} Within this framework, an executed extradition treaty between the United States and another nation represents the judgment of the political branches that rendition of alleged fugitives to that country is appropriate.\textsuperscript{223} In recognition of the fact that many of these treaties were entered into years ago and that governments and political climates have changed dramatically,\textsuperscript{224} Model One supporters acknowledge that in certain circumstances extradition may be undesirable.\textsuperscript{225} Such a denial may be viewed, by the requesting nation, as an affront to its honor.\textsuperscript{226} A refusal to extradite on this basis involves a political decision that goes beyond treaty interpretation and is more akin to the consideration involved in treaty-making. Thus, in conformity with the separation of powers doctrine, such decisions should be entrusted to the political branches of government, not to the courts.\textsuperscript{227}

Under this formulation, the individual is best protected by the executive branch with its experience in foreign policy and knowledge of international conditions.\textsuperscript{228} The legislative language of Model One requires the Secretary of State to consult with the Department of State, and particularly with those

\textsuperscript{217} See supra text and accompanying notes 142–53.
\textsuperscript{218} See supra text and accompanying notes 166–81.
\textsuperscript{219} See supra text accompanying notes 142–81.
\textsuperscript{220} House Hearings II, supra note 9, at 94–95 (testimony of Lubet).
\textsuperscript{221} See id. at 95; H.R. Rep. 998, supra note 12, at 66.
\textsuperscript{222} H.R. Rep. 998, supra note 12, at 66.
\textsuperscript{223} See House Hearings II, supra note 9, at 96. In his testimony Professor Lubet asserted,
It is important to bear in mind that a foreign nation may only request extradition pursuant to a valid treaty. Thus, every extradition case necessarily will involve a treaty which has been negotiated and executed by the President and ratified by a two-thirds majority of the Senate.
In other words, a political decision already will have been made concerning the general appropriateness of extradition to the foreign state.
\textsuperscript{224} Id. at 154–55 (discussion between Lubet and Sen. Hughes).
\textsuperscript{225} Id.
\textsuperscript{226} Id. at 96, 154 (testimony, Lubet).
\textsuperscript{227} See id. at 154; House Hearings I, supra note 9, at 106–07 (discussion between Prof. M. Cherif Bassiouni and Sen. Hughes).
bureaus concerned with the protection of human rights,\textsuperscript{229} which have access to information on the subject of human rights. Presumably, the Secretary of State would then make an extradition decision balancing the interests of the individual against other national interests.\textsuperscript{230}

Considerations of foreign policy aside, Model One questions the ability of the courts, as an institution, to engage in the type of inquiry necessary to ascertain danger to an individual.\textsuperscript{231} Judicial activism would breed uncertain and inconsistent results, according to this Model, due to the difficulty of creating standards by which to judge the conduct of a requesting government.\textsuperscript{232} As a Model One supporter noted, "how does one prove that a foreign government is motivated by a desire for political vengeance, rather than a desire to punish a common criminal? Is the requesting government benign or cruel, honest or disingenuous, fair or repressive? These questions ultimately lie closer to opinion than to fact."\textsuperscript{233} Model One adherents fear that these subjective factors will lead to unpredictable outcomes; what may be antithetical to one court's sense of decency may be acceptable to another.\textsuperscript{234} Therefore, centralized decisionmaking in the Secretary of State, assuring a greater degree of uniformity, may be preferable.\textsuperscript{235}

B. Model Two: The "Rule of Restraint"

Model One would undoubtedly curtail the court's evolving role in the protection of individual rights within the extradition process.\textsuperscript{236} In recognition of this fact, some congressional reformers have proposed a second model of judicial involvement\textsuperscript{237} that would allow the court to retain its "implicit authority to make such inquiries in cases where the facts would 'shock the conscience' of the court."\textsuperscript{238} In its most recent form, this change would be accomplished by deleting from the statute any language suggesting that inquiries into questions related to humanitarian concerns are solely the concern of the Secretary of State.\textsuperscript{239}

\textsuperscript{229} See proposed § 3196(a) in S. Rep. 241, supra note 212, at 17.
\textsuperscript{230} House Hearings II, supra note 9, at 174-75.
\textsuperscript{231} See House Hearings II, supra note 9, at 88, 94-95 (testimony of Lubet); H.R. Rep. 998, supra note 12, at 66.
\textsuperscript{232} See House Hearings II, supra note 9, at 88, 94 (testimony of Lubet).
\textsuperscript{233} Id. at 95.
\textsuperscript{234} See House Hearings II, supra note 9, at 55 (testimony of Olsen).
\textsuperscript{235} Id. at 387 (testimony of Lubet); H.R. Rep. 998, supra note 25, at 66.
\textsuperscript{236} H.R. Rep. 998, supra note 12, at 4.
\textsuperscript{237} Id. Model Two is embodied in an amendment proposed by Rep. Charles Schumer and adopted by the House Judiciary Committee's Subcommittee on Crime. Id. at 4. This was subsequently replaced by an amendment proposed by Rep. Robert Kastenmeier which is discussed in part C. of this section. Id. See infra text accompanying notes 236-60.
\textsuperscript{239} Id. at 4. An alternative formulation of this approach has been suggested by Prof. Bassiouni. House
Though Model Two adherents acknowledge that inquiries in this area may be tinged by foreign policy considerations, they maintain that this does not preclude judicial involvement. They point out that courts currently hear requests for political asylum and cases brought under the Alien Tort Claims Statute, which also involve the conduct of foreign affairs. Indeed, Model Two supporters appear to be influenced by the fact that recent cases and international agreements such as the Protocol Relating to the Status of Refugees may actually require judicial attention in circumstances evidencing a clear threat of persecution.

Model Two disputes the claims of judicial incompetence and inconsistency raised by Model One. Legislative supporters of Model Two contend that limited judicial review has already served as an important safeguard for requested persons, and stress the courts' long history and experience adjudicating cases involving individual rights. The exact content of the "shock the conscience" test contemplated by this model is not fully defined. One commentator has proposed that courts might choose to ground their denial in existing international instruments binding upon the United States such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Inter-American Convention on Human Rights.

Hearings II, supra note 9, at 276–77. He recommended that the statute explicitly include language recognizing the power of the courts to conduct this limited review. He proposed the following provision:

Upon a prima facie showing by the requested person that he or she is likely to be subjected to cruel, inhuman or degrading treatment or punishment, extradition shall not be granted unless the requesting state shall present to the Secretary of State satisfactory assurances that such treatment or punishment shall not be imposed; or where a treaty between the United States and the requesting state for transfer of prisoners exists, that the extradition shall be conditional upon the return of the relator upon conviction for the execution of the sentence in the United States. The Secretary of State shall negotiate these conditions in accordance with Section 3196 and their terms shall be presented to the court and made part of the order. Only in the most egregious cases shall the court deny extradition. The Secretary of State may in any event exercise his discretion after a finding of extraditability by the court.

Id. at 277.

240 House Hearings II, supra note 9, at 276–77 (testimony of Bassiouni).
241 See, e.g., id. at 57 (testimony of Halperin); id. at 82 (testimony of Helton).
242 Banoff and Pyle, supra note 7, at 208–09.
243 House Hearings II, supra note 9, at 80 (testimony of Helton); 386 (testimony of Hon. Peter Palmero, Magistrate, S. Dist. Fla.).
244 See Refugee Protocol, supra note 193. See also House Hearings II, supra note 9, at 276 (testimony of Bassiouni).
245 See supra text accompanying notes 182–205.
246 Banoff and Pyle, supra note 7, at 207–09.
248 Banoff and Pyle, supra note 7, at 208–09.
249 House Hearings II, supra note 9, at 276 (testimony of Bassiouni).
Alternatively, a court might base its decision on constitutional limits to extradition arising from "particularly atrocious procedures or punishment" suggested by the *Burt* court.253 Adherents of Model Two envision that the court's limited review will intrude only slightly upon the Secretary of State's traditional discretionary authority.254 This model contemplates deference to executive recommendations that would be sought by the court during the hearing process.255 Judicial intervention would occur only in the most egregious cases256 and could be tempered by the use of conditional orders of extradition257 and prisoner transfer agreements.258

Finally, those favoring Model Two suggest that limited court review may actually assist the executive branch's conduct of foreign policy by providing the State Department with a judicial shield in controversial cases.259 In situations where a denial of extradition is desirable, yet might embarrass the government, the Secretary of State would have the benefit of a judicial determination in a politically sensitive case. Thus, the court's decision would be the target of foreign criticism, leaving the executive branch free to mend relations with the requesting country.260

C.  Model Three: The Affirmative Duty to Inquire

The most recent version of the House extradition proposal261 departs from current practice by imposing an affirmative duty upon the courts to examine

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253 *See supra* text accompanying notes 166–81.
254 *House Hearings II, supra* note 9, at 59 (testimony of Halperin) cf. id. at 85 (testimony of Helton).
255 *Id.* at 58–59 (testimony of Halperin).
256 *Id.* at 277. (testimony of Bassiouni).
257 *Id.* at 266.
258 *Id.*
259 *House Hearings II, supra* note 9, at 265–66 (testimony of Bassiouni). Compare similar reasoning used by Prof. Lubet to argue that the courts should continue to decide the political offense question. *Id.* at 143–44.
260 *Id.* at 265–66 (testimony of Bassiouni).
261 House Resolution 2643 was amended by the Judiciary Committee's Subcommittee on Crime to include a proposal formulated by Rep. Kastenmeier which imposes an affirmative duty on the courts to inquire into these matters. *H.R. Rep.* 998, *supra* note 12, at 5–6. The clean bill, as amended, was introduced and approved by the full Judiciary Committee as *H.R.* 3347. § 3194 of the amended bill provided, in relevant part:

(d)(2) The court shall not order a person extraditable after a hearing under this section if the court finds...

(D) the person has established by a preponderance of the evidence that such person-

(i) is being sought for prosecution or punishment because of such person's race, religion, sex, nationality, membership in a particular social group or political opinion; or

(ii) would, as a result of extradition, be subjected to fundamental unfairness.

(e)(1)(A) Upon motion made by the person sought to be extradited or the Attorney General, the United States district court may order the determination of any issue under subparagraph . . . (D) of subsection (d)(2) of this section by a judge of such court.
whether a request is politically motivated or whether the person, upon rendition, would be subject to persecution or fundamental unfairness. This third model of judicial action acknowledges the expertise of the Secretary of State in dealing with these cases. The model is also premised, however, on the notion that the courts, as impartial arbiters, have a significant part to play in ensuring that the extradition process is not used as a subterfuge to engage in human rights violations. Proponents of Model Three would place this initial determination in the hands of the courts to ensure that extradition denials based on humanitarian grounds will not be influenced by potential political repercussions. Thus, the individual can rely on an independent tribunal to safeguard his or her rights and, as in Model Two, the executive branch can claim the benefit of the judicial shield.

This model, in effect, establishes two new legal defenses to extradition that may be entertained by the court upon motion of the requested individual after an initial finding of extraditability. First, the court may consider whether the individual "is being sought for prosecution or punishment because of such person's race, religion, sex, nationality, membership in a particular social group or opinion." This inquiry mirrors that mandated by the Protocol Relating to the Status of Refugees, and is essentially the same as that undertaken by a court in deciding a request for political asylum under immigration law.

Even if the court finds that the person has not met the burden of proving that he or she faces a threat of persecution, the requested individual may raise a second defense based upon the fundamental unfairness of criminal procedures in the requesting country. The House Judiciary Committee reporting on the proposed legislation offered illustrations of the possible applications of this standard, suggesting that fundamental unfairness would result if an individual was denied:

(B) No issue under subparagraph ... (D) of subsection (d)(2) of this section shall be determined by the court and no evidence shall be received with respect to such issue-

(i) unless the person sought to be extradited gives notice at a reasonable time before the hearing under this section of the intention to raise such issue; and

(ii) unless and until the court determines the person sought is otherwise extraditable.

Id. at 52. The full Judiciary Committee passed this portion of the bill, as amended, by a vote of 16 to 15. H.R. REP. 998, supra note 12, at 65. Subsequently, the bill was favorably reported by the Foreign Affairs Committee but was not acted on by the 98th Congress before adjournment.

262 H.R. REP. 998, supra note 12, at 5.
263 Id. at 30–31.
264 See House Hearings II, supra note 9, at 58 (testimony of Halperin); Banoff and Pyle, supra note 7, at 209.
265 See House Hearings II, supra note 9, at 392 (testimony of Att'y. Abdeen M. Jabara).
266 Id. at 58 (testimony of Halperin).
267 See H.R. REP. 998, supra note 12, at 5–6, and relevant provisions of proposed bill at 52.
268 Id. at 52.
269 Id. at 5.
270 Id. at 52.
1) the right to an independent and impartial tribunal;
2) the right to be informed of the crimes charged;
3) the right to a conviction based upon individual responsibility;
4) the right to be present at trial;
5) the right to present a defense;
6) protection against ex post facto liability of penalty; or
7) protection against compulsory or tortured self-incrimination.  

Supporters of Model Three contend that modern political realities dictate a more active role for the courts in order to secure individual rights. First, they argue that the existence of an extradition treaty no longer ensures that a requesting nation will live up to its obligations of good faith, because the governments with whom these agreements were executed are sometimes no longer in power. The presumption of good faith may be inappropriate given a new regime or form of governance. Indeed, Model Three proponents point out that the United States currently has extradition agreements with countries that have been cited for widespread and recurring human rights abuses. Therefore, under this approach, courts would no longer accept the mere existence of a treaty as an indication of a country's integrity when evidence to the contrary exists.

Second, Model Three adherents believe that the political branches of government alone cannot be relied upon to adjust the extradition structure in the United States to protect requested individuals. The international political repercussions that might follow a decision to terminate an extradition treaty are seen as deterrents to action by the executive branch. Similarly, Model Three supporters cite political constraints to explain why executive discretionary power to deny extradition has rarely been used. Given these preoccupations with policy concerns, the executive branch cannot be expected to adequately protect individual rights within the extradition process. Under Model Three, court involvement would place humanitarian concerns above diplomatic considerations when the protection of individual rights is at stake, thus making extradition a "matter of law, not foreign policy."
Model Three does contemplate a continuing role for the executive branch, despite its emphasis on the advantages of independent judicial review. The proposed legislation actually mandates executive participation at the hearing stage by requiring the Secretary of State to furnish relevant information to the court. Practically, due deference would probably be accorded to the State Department's recommendations. Lastly, if the court certified an individual's extraditability, the ultimate decision to extradite would still lie within the Secretary's discretion.

VI. CONCLUSION: ASSESSING THE MODELS

In order to deal effectively with questions relating to the motivations behind an extradition request, and the procedures and punishment that await an individual upon rendition, any new statutory scheme must adequately respond to the twin concerns underlying the current extradition process. The appropriate model of judicial action must 1) recognize the legitimate use of extradition as a means of carrying out the Executive's constitutional responsibility to advance U.S. policy interests, while 2) ensuring that the return of a particular individual comports with the U.S. commitment to implement modern standards of international human rights.

Model One clearly recognizes the importance of extradition as a policy tool. Undoubtedly, the discretion vested in the Secretary of State allows the executive branch to take into account the various political ramifications presented by an extradition request. It provides the Executive with a discrete and flexible method by which to balance the threat to an individual against diplomatic considerations. However, Model One fails to take into account that over the past few decades, the courts have also played a part in this process by holding open the possibility of intervention in cases shocking to the conscience.

Indeed, the very flexibility and discreteness of executive review may be its major flaw. The lack of documentary evidence makes difficult the task of evaluating the Secretary of State's past performance in considering these types of

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282 H.R. REP. 998, supra note 12, at 63.
283 Id. at 52.
284 Id. at 55.
287 Executive Discretion, supra note 5, at 1313.
288 Id. at 1328.
claims. Requested individuals seeking to assert a defense based on humanitarian grounds have, under executive review, little information by which to assess the potential success of their claims. The secrecy that shrouds the process of executive review leaves open a very real possibility for unchallenged dismissal of a valid claim on grounds unrelated to humanitarian concerns.

Model Three eliminates this uncertainty by providing individuals with a public forum in which to present evidence relating to this type of claim. Imposing upon the courts an affirmative duty to review an individual's claim that extradition would result in persecution is consistent with U.S. obligations under the Protocol Relating to the Status of Refugees. The courts have already proven competence in addressing this issue in cases such as Nicosia and Sindona.

Model Three, however, may go too far in attempting to rectify the difficulties posed by Model One. The second type of inquiry mandated by Model Three, which requires courts to delve into the fundamental unfairness of a requesting state's criminal procedures, presents a special problem of its own. To expect another nation to assure a wide-ranging slate of procedural safeguards akin to our own constitutional guarantees, may go well beyond the commitment that nation entered into in signing an extradition treaty. If the United States seeks to ensure that specific procedural rights will be accorded to an individual upon return to a requesting nation, the political branches of government may undertake the task of amending existing treaties to provide such guarantees.

An additional difficulty inheres in the use of the term "fundamental unfairness." U.S. constitutional guarantees are not binding on foreign tribunals. Courts, in conducting a full scale review of a requesting nation's procedures, may apply U.S. constitutional standards extraterritorially.

For conflicting assessments of the Secretary of State's success in addressing issues relating to humanitarian concerns see House Hearings II, supra note 9, at 88 (statement of Lubet); H.R. Rep. 998, supra note 12, at 66; House Hearings I, supra note 8, at 145-46 (statement of O'Dempsey).

See Senate Hearings, supra note 65, at 101 (statement of Pyle); Executive Discretion, supra note 5, at 1315, 1328 n.116.

See House Hearings II, supra note 8, at 57-58 (testimony of Halperin).

See supra text accompanying notes 263-66.

See supra text accompanying notes 192-98, 243-45, 268-69.

See supra text accompanying notes 199-205.


See House Hearings I, supra note 9, at 67-68 (discussion between Falk and Sen. Hughes).

See supra text accompanying notes 134-37.

See Id.

Id.

House Hearings II, supra note 9, at 55 (testimony of Olsen). For a comparative study of differences that exist among criminal procedures in various nations, see generally Human Rights in Criminal Procedure: A Comparative Study, (J. Andrews ed. 1982). In his introductory essay, the editor observes:

[how are we to define what we mean by human rights in the context of criminal procedure? This is not an easy task. Until 1898 the accused in English law was not allowed to give evidence
most egregious cases should result in a court's denial of an extradition request on the grounds of fundamental unfairness. 301

In this sense, Model Two represents a fair compromise in viewing the criminal procedures of a requesting state. Courts have retained the authority to entertain evidence of clearly abusive proceedings but have declined to engage in a general condemnation of the system of a requesting state. 302 Thus, to resolve the problems posed by the fundamental unfairness language, Congress might choose to limit the court's review to instances of particularly abusive proceedings which shock the conscience of the court. 303 This type of review, in conjunction with the inquiry into potential threats of persecution proposed by Model Three, would offer an individual protection consonant with current U.S. human rights policy. Executive review could then complement this process by allowing the Secretary of State to refuse extradition where the procedures of a requesting state preclude a fair trial, or other humanitarian considerations weigh against extradition. This system would allow both the judiciary and the Executive to respond to concern for the individual while preserving flexibility in the conduct of foreign policy.

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on his own behalf. Now in England this would be regarded as one of the most fundamental of all rights, whereas in Germany and Belgium and indeed elsewhere in Europe the position is not so straightforward.

Id. at 9.

301 Id. at 276-77 (statement of Bassiouni).
302 See supra text accompanying notes 133-81.
303 See supra text accompanying notes 247-53.