Extradition Controversies: How Enthusiastic Prosecutions Can Lead to International Incidents

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INTRODUCTION

The well-publicized Ira Einhorn story and other recent extradition cases highlight how the United States' ("U.S.") zeal to bring U.S. murder suspects to justice in America has collided with issues of human rights and state sovereignty.\(^1\) In some instances the attempts at extradition have escalated into international confrontations.\(^2\) In the Einhorn case, on December 4, 1997, a French Appeals Court denied extradition to the U.S. of Ira Einhorn, a famous "hippie" guru and convicted murderer.\(^3\) The outrage felt in the U.S. after the French Court's decision is symptomatic of the escalating frustration that U.S. law enforcement officials and politicians have faced in the last two decades as high visibility international murder prosecutions have run into delays or have been defeated by foreign courts' refusals to extradite the suspects back to the U.S.\(^4\) The Appeals Court's decision caused one of Einhorn's French attorneys to gloat, "The United States has learned today to its distress that it still has lessons to learn from old Europe in matters of human rights."\(^5\)

The combination of complicated extradition and human rights principles and the unique facts of the murder cases has resulted in heated disputes between the U.S. and countries which have traditionally been

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1 See Michael Shea, Expanding Judicial Scrutiny of Human Rights in Extraditing Cases After Soering, 17 YALE J. INT'L L. 85, 104 (1992); Sharon Williams, Extradition and the Death Penalty Except in in Canada: Resolving the Ng and Kindler Cases, 13 LOY. L.A. INT'L & COMP. L.J. 799, 800-01 (1991); Steven Levy, Getting Away With it, NEWSWEEK, Dec. 15, 1997. References to an extradition "case" mean the entire chain of events leading to the controversy. When referring to a specific legal case, the cite to the court reporter will follow unless the reference is based on another author's analysis of the case. In such cases, the cite to the author's law review note or article will follow.

2 See David M. Kennedy et al., The Extradition of Mohammed Hamadei, 31 HARV. INT'L L.J. 5, 6 (1990); Gregory Kane, Israel Should Rethink Extradition Refusal, BALT. SUN, Oct. 12, 1997, at 1B.

3 See Levy, supra note 1.

4 See Shea, supra note 1; Williams, supra note 1; Levy, supra note 1.

5 Fred Hiatt, No, We're Not Gloat​ing, WASH. POST, Dec. 28, 1997, at C07.
staunch U.S. allies. The extreme facts of the murder cases have caused the U.S. to react angrily, and even, on occasion, to explicitly pressure the other country to return the suspects. For instance, Ira Einhorn was convicted in the U.S. of bludgeoning his girlfriend to death and then hiding her body in a steamer trunk in his apartment for eighteen months. Einhorn was arrested in 1979 for the murder, but he fled the U.S. on the eve of his trial, which led to a sixteen-year, five-country manhunt by the Philadelphia District Attorney’s Office before French authorities ultimately captured Einhorn in Champagne-Mouton, France. The French Appeals Court that heard the case freed Einhorn, allowing him to resume his life in a quaint village in France.

Another such incident occurred after the 1985 hijacking of a TWA flight en route to Rome from Athens. The hijackers killed a U.S. Navy diver in front of television cameras and severely beat a number of American citizens. German officials managed to capture one of the suspects, Mohammed Hamadei, in Frankfurt, years after the incident and the U.S. immediately requested his extradition. In response, a group of kidnappers believed to be affiliated with the terrorist group Hezbollah kidnapped two German nationals in Beirut and demanded that the German government release Hamadei in exchange for the hostages. Germany was faced with the unenviable prospect of choosing among three outcomes: deeply offending the U.S., bowing to international terrorists, or letting two of its citizens die.

A more recent extradition controversy involved a suspected murderer who fled to Israel and claimed dual citizenship, hoping that Israel would refuse to extradite him under an Israeli non-extradition of nationals law. The suspect, Samuel Sheinbein, is suspected of killing, dismembering and then burning an acquaintance in Maryland. When Israel delayed the requested extradition to consider the

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6 See Kennedy, supra note 2; Levy, supra note 1.
8 See Levy, supra note 1, at 58.
10 See Levy, supra note 1, at 58–59.
11 See Kennedy, supra note 2, at 5.
12 See id. at 8.
13 See id. at 5.
14 See id. at 6.
15 See id. at 10.
16 See Kane, supra note 2, at 1B.
17 See id.
case, the Chairman of the U.S. House of Representatives Appropriations Committee threatened to link the continuance of U.S. aid to Israel on Sheinbein's return.\(^\text{18}\)

In 1997, the same year as the Sheinbein incident, another American murder suspect tried to use a dual citizenship argument to stave off extradition from France.\(^\text{19}\) A California psychologist named James Nivette allegedly shot his girlfriend to death and then abandoned the couple's 18-month old toddler on the way to the airport as he fled the scene.\(^\text{20}\) Nivette was arrested without a struggle in the French town of Munster, but U.S. authorities feared that a prosecution in the U.S. was in doubt because France, like Israel, typically does not extradite its own citizens.\(^\text{21}\)

Part I of this note provides an overview of extradition law. This section also analyzes how exceptions and safeguards have been created to make the practice fundamentally fairer for the suspect. Part II of this note considers how a recent expansion of international human rights litigation has affected the U.S.'s efforts to extradite murder suspects. This section also analyzes possible future implications that international human rights will have on extradition requests by the U.S. Part III explores possible alternate means the U.S. can use to obtain suspects from other countries. Part IV of this note recounts recent cases where delays in high visibility international murder prosecutions have caused international incidents. This note concludes that, given the recent complications that state sovereignty and international human rights have presented for American law enforcement officials, the U.S. will increasingly turn to informal rendition in the future to gain jurisdiction over murder suspects.

I. An Overview of Extradition Law

The most straightforward definition of extradition is "a process by which one country surrenders, for purposes of trial or punishment, individuals accused of crimes committed outside its borders to the nation in which the alleged crimes were committed or where the act has produced detrimental effects."\(^\text{22}\) In order for the U.S. to prosecute

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\(^{18}\) See Jerusalem Rethinks US Extradition Refusal, supra note 7, at 014.

\(^{19}\) See Mareva Brown & Nigel Hatton, Hunt For Fugitive Ends, SACRAMENTO BEE, Nov. 21, 1997, at A1.

\(^{20}\) See id.

\(^{21}\) See id.

\(^{22}\) Barbara Banoff, To Surrender Political Offenders: The Political Offense Exception In United States
a defendant, a court must have both jurisdiction over the subject matter and jurisdiction over the person. Therefore, before the U.S. requests extradition from another country, the appropriate authorities must determine whether the conduct was committed within the territory of the U.S., or whether the conduct, even though committed outside of U.S. borders, produced detrimental effects within the U.S. After subject matter jurisdiction has been established, the prosecutors try to establish personal jurisdiction over the suspect by successful extradition back to a U.S. court. Although it might make sense for countries to return fugitives to the prosecuting country to face justice, international law imposes no legal obligation upon a country to extradite an individual. Theoretically, each state has the right to grant immunity from prosecution to a fugitive as long as that person is within the state’s territorial jurisdiction. However, most states voluntarily accept a limitation on their sovereignty because they recognize the importance of international cooperation in prosecuting serious crimes. Over the years, the willingness of countries to accept limitations on their state sovereignty has stemmed from four purposes which provide the theoretical foundation for international extradition: (1) to obtain reciprocal return of fugitive offenders; (2) to facilitate the punishment of wrongful conduct, and thereby promote justice; (3) to avoid harboring within their borders those who may commit offenses similar to those which they are accused of committing in another jurisdiction; and (4) to avoid international tensions caused by one country’s refusal to return a particularly sought-after accused offender.

The U.S., like most common law countries, will neither ask nor allow the extradition of a fugitive without a treaty which imposes an obligation on the parties to surrender the fugitive. As of 1997, the U.S. had negotiated and ratified over one hundred bilateral treaties with other countries, but had not enacted a substantive U.S. law. The only U.S.


23 See Sicalides, supra note 22, at 1291.
24 See id.
25 See id.
26 See id.
27 See id.
28 See Sicalides, supra note 22, at 1291.
29 See Banoff, supra note 22, at 173-74.
30 See Sicalides, supra note 22, at 1292.
31 See Banoff, supra note 22, at 175.
federal law on extradition, 18 U.S.C. § 3184, deals primarily with procedure, leaving the substantive rights of individuals facing extradition up to the various bilateral treaties.\textsuperscript{32} In general, the U.S. treaties are based on the theory of reciprocity.\textsuperscript{33} Under that theory, the United States and the other signatory country grant an extradition request only in exchange for the extradition or promise of future extradition of an individual it seeks from the requesting country.\textsuperscript{34}

A. Requirements of Extradition Law

In most common law jurisdictions, including the U.S., a formal extradition request must be presented to the executive branch.\textsuperscript{35} The executive remains the ultimate authority to extradite, although the judiciary branch certifies that the crimes charged fall under the applicable treaties' provisions.\textsuperscript{36} In practice, the U.S. Secretary of State renders the final decision to extradite the suspect after a reviewing court certifies that sufficient evidence exists linking the accused to the crime.\textsuperscript{37}

One of the reasons why U.S. officials react so strongly when another country's judiciary refuses extradition due to perceived human rights violations is because U.S. courts typically have refused to inquire into the possibility of unfair treatment by a requesting country.\textsuperscript{38} Under the U.S.'s conception of international extradition, allowing a court to inquire into the practices of other countries would impermissibly infringe on principles of state sovereignty and reciprocity.\textsuperscript{39} Regardless of whether the requested country is a civil or common law country, the principle of extraterritoriality is the most basic limitation on extradition.\textsuperscript{40} The principle of extraterritoriality concerns the right of nations to control activity within their borders.\textsuperscript{41} The respect for the territorial

\textsuperscript{32} See id.
\textsuperscript{34} See id. at 1649–50.
\textsuperscript{35} See id. at 1650.
\textsuperscript{36} See id.
\textsuperscript{37} See id. at 1650–51.
\textsuperscript{39} See id. at 1021.
\textsuperscript{40} See Rebane, supra note 33, at 1646.
\textsuperscript{41} See id.
sovereignty of other nations has always been a basic tenet of international law and serves as the foundation for the various requirements of extradition law.42

Extradition law mandates that a number of requirements be met by the official request, or the requested country is under no obligation to turn over the suspect.43 In both civil and common law countries the requirements of extradition demand that the alleged crime must constitute an extraditable offense.44 The applicable treaty generally contains a list of offenses which were considered extraditable at the time the treaty was signed.45 The treaty usually either specifies that the list is exhaustive, or establishes a degree of punishment for which an offense becomes extraditable.46 The rationales for listing possible extraditable offenses are "first, to avoid extradition for minor offenses, and second, to prevent the embarrassment of both nations if the requested state should decline surrender of the fugitive because the conduct does not constitute criminal conduct in that state."47

Another requirement of extradition is that the offense at issue be a double criminality crime.48 The double criminality doctrine mandates that conduct is not extraditable unless it is a crime under the laws of both the requested and the requesting state.49 The basic premise of double criminality is that nations are equal in their powers of self-determination and are guaranteed the right to forbid a requesting country from punishing a fugitive for conduct not considered a crime under the laws of the requested state.50 Despite the strong undertones of state sovereignty in the theory of double criminality, the alleged offense does not have to bear the same name or criminal definition in both countries.51 For instance, in one case involving double criminality, the Canadian government granted extradition to the U.S. of a woman

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42 See id.
44 See id. at 1295.
45 See id.
46 See id. Extradition treaties usually contain a list of specific crimes for which extradition will be granted, a clause covering the extradition of nationals, a clause pertaining to various rights safeguards, and a political offense exception. See Rebane, supra note 33, at 1650.
47 See Sicalides, supra note 22, at 1295.
48 See Rebane, supra note 33, at 1652.
49 See Sicalides, supra note 22, at 1296.
50 See id. at 1297.
51 See id. at 1299.
whose act constituted murder under California law but only amounted to manslaughter under Canadian law.\textsuperscript{52}

The speciality doctrine provides another limitation on extraditable offenses.\textsuperscript{53} The requirement of speciality prevents the extraditing country from prosecuting an individual for offenses other than those for which the extradition was sought.\textsuperscript{54} International law scholars have identified five rationales for the speciality principle: (1) the requested state could have refused extradition for an offense other than that upon which the request was based; (2) the requested nation’s surrender of the fugitive provides the requesting state with the \textit{in personam} jurisdiction required; (3) the prosecution or punishment by the requesting country would be impossible without the requested country’s surrender of the person; (4) use of the requested state’s processes to effectuate the surrender of an individual for an offense other than those present in the extradition request would constitute an abuse of a formal process; and (5) the requested nation relies upon the representations of the requesting nation in using its process.\textsuperscript{55}

\textbf{B. Exceptions to Extradition Requests}

A requesting country may fulfill all of the requirements of an extradition request, yet extradition will still be denied if the request falls under one of the exceptions to extradition.\textsuperscript{56} The most complicated exception to extradition is the political offense doctrine.\textsuperscript{57} The political offense exception has three underlying purposes: (1) to recognize the legitimacy of political dissent; (2) to guarantee the rights of the accused; and (3) to protect the interests of both the requesting and the asylum nations.\textsuperscript{58} The U.S. and all of the signatories of its treaties will not extradite a person accused of certain political offenses.\textsuperscript{59} However, none of the treaties define “political offense,” and courts have been left to fill in the blanks.\textsuperscript{60} In general, the courts of the U.S. and Europe

\textsuperscript{52} See In re United States & Smith [1984] 15 C.C.C.3d 16 (Can.).

\textsuperscript{53} See Rebane, \textit{supra} note 33, at 1652–53.

\textsuperscript{54} See \textit{id.} at 1652.

\textsuperscript{55} See Sicalides, \textit{supra} note 22, at 1299–1300.

\textsuperscript{56} See \textit{id.} at 1300. The applicable exceptions are the political offense exceptions and the death penalty exception. \textit{See id.}

\textsuperscript{57} See \textit{id.}

\textsuperscript{58} See Rebane, \textit{supra} note 33, at 1653.

\textsuperscript{59} Banoff, \textit{supra} note 22, at 177–78.

\textsuperscript{60} See Sicalides, \textit{supra} note 22, at 1301.
have divided the political offense doctrine into two categories: pure political crimes and relative political crimes.61

A pure political crime is subversive toward a particular government but does not directly damage property or people.62 Such crimes usually involve treason, espionage, and sedition.63 These types of crimes have almost exclusively been left out of extradition treaties.64

Relative political crimes involve the commission of a common crime in connection with a political act or event.65 The definition of a relative political crime has presented courts with numerous difficulties because the judges must determine whether the crime is a political crime or a non-political crime if the offense is enumerated in the treaty.66 The muddled attempts to define a political offense exception to extradition stem from differing attitudes toward the underlying conduct of the political crime and concerns about the fairness of the judicial process in the requesting country.67

Another exception to U.S. extradition requests that has been raised with greater frequency in the last two decades is the death penalty exception.68 In any extradition request, the laws of the requested state are controlling; if the requested state has prohibited the death penalty, it has the right to refuse or to condition the surrender of the suspect.69 Typically, in a case where a suspect is charged with a capital crime the requested state will seek sufficient assurances that the state or the U.S. government will not seek the death penalty.70 Most countries hold the view that it is improper to ask a state to use its legal system to facilitate an extradition which may result in a practice which is repugnant to its values, laws and public policy.71

61 See Banoff, supra note 22, at 178.
62 See id.
63 See id.
64 See id.
65 See id.
66 See Banoff, supra note 22, at 178.
67 See id. at 179. The labor of recounting the numerous attempts at defining a relative political act is outside of the scope of this note, but it suffices to say that the efforts have been "a hodgepodge collection of principles often dictated by political events and changing circumstances." Id.
68 See Sicalides, supra note 22, at 1303.
69 See id.
70 See id. For instance, the U.S.'s extradition treaties with Great Britian, Canada, and Israel provide that the requested party has the right to seek sufficient assurances that the death penalty will not be carried out in the particular case. Id.
71 See id.
II. An Injection of International Human Rights

Three recent cases involving U.S. extradition requests for suspects charged with capital crimes underscore the tensions involved when the United States requests extradition from countries that prohibit the death penalty. A global trend toward abolition of the death penalty and a rise in recognition of international human rights have tremendously complicated extradition law. The cases of Soering, United States v. Kindler and United States v. Ng exemplify the effects of these trends.

A. The Soering Case

One of the most famous cases of international extradition law involved a West German national named Jens Soering who murdered his girlfriend's parents in Virginia on March 30, 1985. Soering met with his girlfriend's parents in their home in Boonsboro, Virginia, to discuss the couple's relationship. An argument ensued and Soering attacked the parents with a knife, slit their throats, and fled to Great Britain with his girlfriend. After Soering was arrested in Great Britain for cheque fraud, a grand jury in Virginia indicted him for capital murder based on his admission of guilt and evidence of premeditation.

Great Britain has banned the death penalty for all but certain offenses, and this is reflected in the U.S.-Great Britain treaty which states:

If the offense for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting party gives assurances satisfactory to the requested party that the death penalty will not be carried out.

Concurrent with the U.S. request, West Germany filed an extradition request citing non-capital murder charges. When Virginia requested

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73 See Williams, supra note 1, at 800-08.
75 See Shea, supra note 1, at 104.
76 See id.
77 See Roecks, supra note 72, at 198.
78 Id. at 234 n.58.
79 See id. at 199.
Soering’s extradition, the British Secretary of State requested that the death penalty not be imposed in the case. The Virginia County Attorney certified that his office would make a representation of Great Britain’s request to the judge during sentencing, and Britain’s Secretary of State signed off on the extradition request. The House of Lords later upheld the Secretary of State’s decision.

Soering responded by appealing the decision to the European Commission on Human Rights ("ECHR"). Soering made three arguments before the ECHR: (1) extradition would expose him to the death row phenomenon, that is, prolonged uncertainty during the appeals process combined with severe conditions of confinement amounting to inhuman or degrading treatment; (2) extradition would violate the guarantees of a fair trial contained in the European Convention on Human Rights; and (3) extradition by Great Britain would violate Article 3 of the European Convention on Human Rights. The ECHR unanimously held that there would be a violation of Article 3 of the European Convention on Human Rights if Great Britain effectuated the extradition. The ECHR based its holding on the following circumstances particular to Soering’s case: (1) Soering’s age and mental condition; (2) if extradited, Soering would spend six to eight years in post-sentence detention in harsh conditions which would cause mental anguish; and (3) the legitimate purposes of extradition could be achieved by other means (the German extradition requests). The ECHR denied that its holding gave extraterritorial effect to the European Convention by stating that the decision established Convention obligations only on Great Britain, which was a party to the Convention.

The actual effect of the ECHR’s decision on Soering’s case was not substantial because the British Foreign Secretary ultimately extradited the suspect after receiving “concrete” assurances that Virginia would not seek the death penalty. However, the ECHR’s decision presented the prospect that European courts could abandon the principle of

80 See id. at 198.
81 See id. at 198–99.
82 See Williams, supra note 1, at 813.
85 See Williams, supra note 1, at 814; Soering, 161 Eur. Ct. H.R. (ser. A) at 85.
86 See Williams, supra note 1, at 814; Soering, 161 Eur. Ct. H.R. (ser. A) at 35.
87 See Shea, supra note 1, at 107.
88 See id. at 112.
non-inquiry and conduct their own examinations of the human rights record of requesting states. The decision also validated the practice of courts in civil law countries undertaking meaningful review of the requesting countries’ extradition petitions and possibly expanding the review to include the requesting countries’ human rights practices.

B. The Kindler and Ng Cases

In 1991, the Canadian Supreme Court was faced with extradition requests from the U.S. for two suspects wanted for capital crimes. The two cases were reminiscent of Soering because Canada had abolished the death penalty in 1976. In addition, Canada’s 1976 treaty with the U.S. provided that:

When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for the offense, extradition may be refused unless the requesting State provides such assurances as the requesting State considers sufficient that the death penalty will not be imposed, or, if imposed, shall not be executed.

In 1983, the state of Pennsylvania sentenced John Kindler to death for first degree murder, criminal conspiracy, and kidnapping. However, Kindler escaped from custody in 1984 and successfully evaded capture until he crossed the Canadian border in 1985. The same year, the state of California charged Charles Ng with twelve counts of murder, two counts of conspiracy to commit murder, three counts of kidnapping, and one count of burglary; Ng also escaped and was finally apprehended in Canada. The Canadian government extradited both men without seeking any assurances from the U.S. government that the death penalty would not be implemented. The Soering decision

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89 See id. at 111.
90 See Rebane, supra note 33, at 1651.
92 See Williams, supra note 1, at 819.
93 See Shea, supra note 1, at 138 n.164.
94 See Williams, supra note 1, at 799–800; Commonwealth of Pennsylvania v. Kindler, 639 F.2d 1, 2 (1993).
95 See Williams, supra note 1, at 800.
96 See id.
97 See Shea, supra note 1, at 115.
was not controlling on the Kindler and Ng cases because Canada is not a member of the European Convention and therefore, Soering had only persuasive value on the Canadian Supreme Court. However, human rights became an important aspect of the Court’s decisions because, with the abolition of the death penalty in Canada, the Canadian Supreme Court had to decide whether the Canadian Charter of Rights and Freedoms, which forbade certain types of punishment, could be given extraterritorial effect.

In both cases, the Canadian Supreme Court held that it was neither a violation of the Canadian Charter of Rights and Freedoms nor a violation of Canada’s international obligations to send Kindler and Ng back to the U.S. Both Kindler and Ng appealed the decisions to the United Nations Human Rights Committee (“UNHRC”), but Kindler was extradited back to the U.S. before his case was heard. Nevertheless, in Kindler’s case, the UNHRC distinguished the facts from Soering and held that Canada did not breach any human rights principles by releasing Kindler without obtaining assurances. The UNHRC first decided that prolonged judicial proceedings and prolonged periods of detention under a death row atmosphere are not *per se* violations of prohibitions against cruel and unusual punishment or inhuman and degrading treatment. The UNHRC noted that the facts and circumstances of each case must be taken into account before any determination can be reached. In distinguishing Kindler from Soering, the UNHRC pointed out that the age and mental state of the offenders differed. Another deciding factor was that Kindler had not introduced evidence concerning possible inhumane conditions in Pennsylvania’s prisons. The UNHRC also stated that the case would have come out differently if Canada had decided arbitrarily or summarily to send Kindler to the U.S.

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98 See Williams, *supra* note 1, at 808.
99 See *id.* at 817–18.
100 See Roecks, *supra* note 72, at 208–13; Kindler v. Canada (Minister of Justice) 2 S.C.R. 779 (1991); Re Ng Extradition, 2 S.C.R. 858 (1991) (Can.).
102 See Roecks, *supra* note 72, at 210.
103 See *id.* at 210–11.
104 See *id.* at 211.
105 See *id*.
106 See *id*.
107 See *id.* at 212; *Kindler*, 14 Hum. Rts. L.J. 22 at 314.
Interestingly, the UNHRC reached the opposite conclusion in the Ng case. The UNHRC distinguished Ng from Kindler by remarking that Ng was extradited pending a trial, and that California's sole means of execution was cyanide asphyxiation, as opposed to lethal injection as it was in Pennsylvania. The UNHRC decided that when imposing capital punishment, the execution must be "carried out in such a way as to cause the least possible mental and physical suffering." There was uncontested evidence presented during the hearing that death by cyanide asphyxiation may cause prolonged suffering and agony, and take as long as ten minutes to work.

C. Possible Future Implications of Human Rights on U.S. Extradition Requests

The combination of a global trend to abolish the death penalty and growing obligations on requested states to assess the requesting state's penal system after the Soering line of cases will continue to frustrate U.S. interests in uncomplicated extraditions. International law scholars have identified two aspects of the death penalty as areas especially likely to cause human rights litigation after a U.S. extradition request for a capital crime: the death row phenomenon and alleged racially disparate sentencing practices in the U.S. In the Soering case, the ECHR concluded that the death row phenomenon violated the European Convention. The court decided that Soering would have to wait six to eight years for his execution, subject to the mental suffering of death row. There is no reason to believe that the process of death penalty litigation will be accelerated in the future, so the death row phenomenon will likely continue to play a role in extradition requests to European nations. In addition, there seems to be enough proof of disparate sentencing practices in the U.S. to raise a potentially successful equal protection claim relying on international human rights.

110 See Roecks, supra note 72, at 214.
111 See id. at 230.
112 See id. at 220–29.
114 See Roecks, supra note 72, at 198–200
115 See id.
116 See id. at 220–23.
A handful of studies conducted in the early 1990s came to the conclusion that the capital sentencing practices in the U.S. are racially discriminatory against African Americans.\textsuperscript{117} For instance, a study of the sentencing practices under the federal "drug kingpin law" revealed that, of those cases in which the death penalty was sought, 78% of the defendants were African American, even though approximately 75% of all capital and non-capital drug traffickers were white.\textsuperscript{118} In addition, a study found that African Americans who murdered caucasians were sentenced to death at twenty-two times the rate of African Americans who killed African Americans.\textsuperscript{119} Given these studies, and given the fact that the UNHRC often relies on statistics to make decisions, it is probable that the UNHRC or another international body will decide that to extradite an African American to the U.S. for capital murder will offend equal protection principles.\textsuperscript{120}

The prospect of having a foreign court assess and pass judgment on its penal system is especially galling for the U.S. because of the American judicial conception of non-inquiry.\textsuperscript{121} U.S. courts have traditionally decided that it is inappropriate to inquire into the nature of other countries' procedures during extradition hearings.\textsuperscript{122} For instance, in \textit{Holmes v. Laird} the District of Columbia Court of Appeals noted the "impropriety" of assessing and reviewing other countries' procedures with regard to crimes committed in that country.\textsuperscript{123} Perhaps the American indignation after the \textit{Einhorn} decision can be explained by the frustration of watching foreign courts pass judgment on our constitutional rights, which we hold to be the most liberal in the world. Nonetheless, the doctrine developed through the \textit{Soering} line of cases, which authorized a fact specific inquiry of the U.S. legal system, will continue to lend an air of unpredictability to U.S. requests for extradition of murderers.\textsuperscript{124} To say the least, a fact-specific review of U.S. extradition requests will severely encumber the U.S. law enforcement objectives of swift and uncomplicated extraditions of murderers.\textsuperscript{125}

\textsuperscript{117} See id. at 223–24.
\textsuperscript{118} See id. at 223.
\textsuperscript{119} See Roecks, \textit{supra} note 72, at 224.
\textsuperscript{120} See id. at 228–31.
\textsuperscript{121} See Wolfe, \textit{supra} note 38, at 1022.
\textsuperscript{122} See id.
\textsuperscript{123} See id. at 1039 n.124; Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972).
\textsuperscript{124} See Roecks, \textit{supra} note 72, at 231–32.
\textsuperscript{125} See id.
III. Possible Alternative Means the U.S. Can Use to Obtain Suspects from Other Countries

If the requested country refuses to extradite the fugitive, or the U.S. foresees a possible problem, there are still a number of options other than the formal extradition process. These alternative means are referred to as irregular rendition, and fall into three categories. The first is the abduction of an individual by agents of the requesting country. The second is the informal surrender of an individual by the requested country to the requesting country without formal or legal process. The informal surrender of an individual by the requested country can and has involved abduction of the suspect by agents of the requested country in cooperation with the requesting country. The last category of informal rendition is when the requested country uses its immigration laws to turn over the suspect to the requesting country.

The latter two categories of informal rendition usually involve a measure of cooperation between U.S. law enforcement agents and those of the requested country. For example, if the requested government has a policy of refusing to extradite its own citizens, or the U.S. government feels that the requested state will protect the offender or allow him to escape, U.S. officials will try to work out an informal surrender of the suspect between the respective law enforcement agencies, either in the foreign country or on U.S. soil. Although the kidnapping and unsupervised police coordination employed in informal rendition have the potential for abuses of human rights, surprisingly, U.S. courts have generally not inquired into potential mistreatment of informal extraditees by U.S. or foreign officials.

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127 See Rebane, supra note 33, at 1656.
128 See id.
129 See id.
130 See id. at 1656–57.
131 See id.
133 See id.
134 See id. at 478–79.
A. The Ker-Frisbie Doctrine

In Ker v. Illinois, the U.S. Supreme Court was presented with a case involving the legality of an extraterritorial abduction. The defendant, while living in Peru, was indicted by the state of Illinois for embezzlement and larceny. The governor of Illinois requested that the U.S. State Department issue a warrant for Ker's return, pursuant to the extradition treaty between the U.S. and Peru. The U.S. government issued the warrant and authorized an agent to serve the warrant on the Peruvian government and receive the suspect in return. But, instead of following the agreement, the agent forcibly abducted the defendant and placed him aboard a ship bound for the U.S. Illinois subsequently tried and convicted the defendant.

On appeal, the U.S. Supreme Court held that the defendant's forcible abduction was not a sufficient reason for him not to answer when brought within the jurisdiction of the Court, which had the right to try him for such an offense. In other words, forcible abduction does not deprive a court of personal jurisdiction over the defendant. This basic rule was later upheld in Frisbie v. Collins, where the defendant contended that his forcible abduction from Illinois to Michigan to stand trial violated his due process rights under the Fourteenth Amendment. The Supreme Court held that:

[T]he power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction. Due process of law is satisfied when one present is convicted of a crime after having been apprised of the charges against him, and after a fair trial in accordance with constitutional procedural safeguards.

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136 See McAlister, supra note 132, at 477; Ker, 119 U.S. at 437.
137 See McAlister, supra note 132, at 477; Ker, 119 U.S. at 438.
138 See McAlister, supra note 132, at 477.
139 See id.
140 See id. at 477–78.
141 See id. at 478; Ker, 119 U.S. at 444.
142 See McAlister, supra note 132, at 478.
143 See id; Frisbie v. Collins, 342 U.S. 519, 519 (1952).
144 Frisbie, 342 U.S. at 522; McAlister, supra note 132, at 478–79.
Over the years, the *Ker-Frisbie* doctrine has blossomed into a general rule that U.S. courts will impose virtually no restrictions on how U.S. officials obtain custody over fugitives.145 However, some district courts have been willing to apply narrow exceptions to the *Ker-Frisbie* doctrine based on a violation of the applicable extradition treaty or a violation of the defendant’s due process rights.146

The most famous example of an exception based on a treaty violation, is the case of *Alvarez-Machain*, which involved a unique set of facts.147 In February 1985, a U.S. Drug Enforcement Agency ("DEA") agent named Kiki Camarena was kidnapped, tortured, and murdered in Guadalajara, Mexico.148 Camerena had been investigating a multimillion dollar drug smuggling syndicate in nearby Jalisco, Mexico.149 On March 5, 1985, Mexican officials discovered the bodies of Camerena and a Mexican pilot who had aided in the investigation on the side of a secluded road in the Mexican countryside.150 The hands and feet of both bodies were securely bound, and an autopsy revealed that Camerena had been brutally beaten in the face and skull with a blunt object.151 Camerena suffered multiple jaw and skull fractures and, in addition, his rectal cavity had been violated by a foreign object.152 A massive five year investigation was launched which ultimately led to the indictment of twenty-two suspects for the abduction, torture, and murder of Camerena.153

One of the indictees was Dr. Alvarez-Machain, a gynecologist, whom the DEA suspected of assisting in Camerena’s murder by keeping him alive during the torture in an effort to obtain more information.154 In December 1989, through a paid informant, DEA agents began a series of negotiations with officials from the Mexican Federal Judicial Police ("MFJP") for the informal surrender of Alvarez-Machain.155 It was later reported that the MFJP told Agent Berrellez, the DEA representative, that the Mexican Attorney General had granted his full support to the

145 See Nadelmann, *supra* note 126, at 859.
146 See McAlister, *supra* note 132, at 481.
148 See id. at 766.
149 See McAlister, *supra* note 132, at 489.
150 See id. at 490.
151 See id.
152 See id.
153 See Siegel, *supra* note 147, at 769-70.
154 See id. at 770.
155 See McAlister, *supra* note 132, at 496.
informal surrender, but that the Mexican government preferred to keep the arrangements secret in an effort to avoid any public reaction.\textsuperscript{156} In order to facilitate the deal, Agent Berrellez told the MFJP that his authorization came from the Los Angeles division of the DEA and from the Deputy Director in Washington D.C.\textsuperscript{157} Agent Berrellez later testified that the DEA approved the abduction and that he believed the office of the U.S. Attorney General had been involved in the plans as well.\textsuperscript{158} The negotiations culminated in a deal that required the DEA to pay the Mexican officials a $50,000 reward, plus cover the expenses of transporting Alvarez-Machain to the U.S.\textsuperscript{159} On April 2, 1990, Alvarez-Machain was abducted from his office in Guadalajara by a group of men and transported by car to Leon, Mexico.\textsuperscript{160} Alvarez-Machain claimed that during the abduction he was hit in the stomach and shocked through the soles of his shoes by an electric shock apparatus.\textsuperscript{161} In addition, he complained that he was injected with a substance that made him feel light-headed.\textsuperscript{162} A small plane transported Alvarez-Machain from Leon to El Paso, Texas, where DEA agents were waiting for him at the airport.\textsuperscript{163}

The Mexican government responded to the abduction by presenting a series of diplomatic notes to the U.S. State Department which requested a detailed report on U.S. participation in the scheme and charged that the abduction violated the U.S.-Mexico extradition treaty.\textsuperscript{164} The Mexican government also demanded both that Alvarez-Machain be returned and that the agents in charge of the abduction stand trial in Mexico for their crimes.\textsuperscript{165}

Alvarez-Machain filed a motion in district court arguing that the court lacked personal jurisdiction over him because he was forcibly abducted in violation of his due process rights, and because the abduction violated the extradition treaty between the U.S. and Mexico.\textsuperscript{166} The

\textsuperscript{156} See id. at 497.
\textsuperscript{157} See Siegel, supra note 147, at 771.
\textsuperscript{158} See id.
\textsuperscript{159} See id.
\textsuperscript{160} See id.
\textsuperscript{161} See id.
\textsuperscript{162} See Siegel, supra note 147, at 771.
\textsuperscript{163} See id.
\textsuperscript{164} See id. at 772.
\textsuperscript{165} See id.
court relied on the *Ker-Frisbie* line of cases and rejected Alvarez-Machain’s due process attack on the court’s personal jurisdiction over him.\(^{167}\) However, the court did find that the U.S. violated the mutual extradition treaty because the suspect had been abducted from Mexican territory and because Mexico protested the abduction.\(^{168}\) The court decided that the diplomatic notes served on the U.S. State Department constituted an official protest by the Mexican government, and that the protest was sufficient to grant Alvarez-Machain derivative standing to invoke Mexico’s rights under the treaty.\(^{169}\) The court reasoned that the U.S. was responsible for the abduction since the men who carried it out were paid U.S. agents, and therefore the abduction constituted a violation of the extradition treaty.\(^{170}\) The district court ordered the immediate repatriation of Alvarez-Machain back to Mexico.\(^{171}\)

The Ninth Circuit upheld the district court’s finding, but the U.S. Supreme Court granted certiorari to hear the case.\(^{172}\) The Court held, in an opinion written by Chief Justice Rehnquist, that the extradition treaty did not explicitly forbid a unilateral abduction and that neither the language nor the history of the treaty supported an implied prohibition on acquiring jurisdiction outside of its terms.\(^{173}\) After finding that the kidnapping did not violate the terms of the treaty, the court applied the *Ker-Frisbie* doctrine and overruled the lower court’s decision by holding that Alvarez-Machain could stand trial in the U.S.\(^{174}\)

A case providing a possible exception to the *Ker-Frisbie* doctrine was *United States v. Toscanino*, which involved the kidnapping of a suspect from Uruguay.\(^{175}\) A Uruguayan police officer, alleged to be working for the U.S. government, abducted the suspect from Uruguay and brought him to Brazil.\(^{176}\) The suspect claimed that police tortured him in Brazil for seventeen days with at least “tacit approval” from U.S. agents.\(^{177}\) Brazilian authorities sent the suspect to New York where he was tried.

\(^{167}\) See McAlister, *supra* note 132, at 498; *Caro-Quintero*, 745 F. Supp. at 604–06.
\(^{168}\) See McAlister, *supra* note 132, at 498; *Caro-Quintero*, 745 F. Supp. at 609.
\(^{169}\) See McAlister, *supra* note 132, at 498; *Caro-Quintero*, 745 F. Supp. at 608–09.
\(^{170}\) See McAlister, *supra* note 132, at 498; *Caro-Quintero*, 745 F. Supp. at 609.
\(^{171}\) See McAlister, *supra* note 132, at 499.
\(^{174}\) See *Alvarez-Machain*, 508 U.S. at 668–70.
\(^{175}\) See *500 F.2d* 267, 267 (2d Cir. 1974); McAlister, *supra* note 132 at 482.
\(^{176}\) See McAlister, *supra* note 132, at 482.
\(^{177}\) See *id.*
and convicted on drug charges.\textsuperscript{178} The suspect’s appeal eventually made its way to the Second Circuit, where the court examined whether or not a federal court could assume jurisdiction over a suspect who was illegally and forcibly abducted by U.S. government agents.\textsuperscript{179}

The Second Circuit began by questioning the validity of the Ker-Frisbie doctrine after the Supreme Court decisions in criminal due process cases such as \textit{Rochin v. California} and \textit{Mapp v. Ohio}.\textsuperscript{180} The court found that the Ker-Frisbie doctrine could no longer bar judicial inquiry into how the defendant was brought before the court.\textsuperscript{181} Not surprisingly, once the court examined the type of government conduct in the case, it found that there had been a due process violation.\textsuperscript{182} The opinion stated, “[w]e view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it had been required as the result of the government’s deliberate, unnecessary, and unreasonable invasion of the accused’s constitutional rights.”\textsuperscript{183} The court’s decision to deny jurisdiction over Toscanino seemed to give future extradited defendants a plausible argument to deny a court’s personal jurisdiction over them, if they could prove deliberate, reprehensible government conduct in their abduction.

In summary, under the exceptions to the Ker-Frisbie doctrine, a defendant who was abducted and forcibly brought to the U.S. could argue that the kidnapping violated either the extradition treaty or his due process rights.\textsuperscript{184} It is unclear how much legal weight a court will grant either the district court’s or the Ninth Circuit’s decision in \textit{Alvarez-Machain} after the Supreme Court’s ultimate decision in the case.\textsuperscript{185} Given the majority’s opinion, it seems that a defendant will have to locate a provision in the applicable extradition treaty which forbids bilateral or unilateral abduction before a favorable return will be granted on an argument which relies on a violation to rescind personal jurisdiction.\textsuperscript{186} As for a due process argument, international law scholars have labeled the Toscanino decision an “anomaly to the United

\begin{itemize}
\item \textsuperscript{178} See id.
\item \textsuperscript{179} See id; Toscanino, 500 F.2d at 271.
\item \textsuperscript{180} See McAlister, \textit{supra} note 132, at 482–83; Toscanino, 500 F.2d at 275; Rochin \textit{v. California}, 342 U.S. 165 (1952); Mapp \textit{v. Ohio}, 367 U.S. 643 (1961).
\item \textsuperscript{181} See McAlister, \textit{supra} note 132, at 482–83; Toscanino, 500 F.2d at 275.
\item \textsuperscript{182} See McAlister, \textit{supra} note 132, at 482–83.
\item \textsuperscript{183} Id.
\item \textsuperscript{184} See id. at 479–84.
\item \textsuperscript{185} See id. at 498–500.
\item \textsuperscript{186} See id.
\end{itemize}
States judiciary’s otherwise uniform application of the *Ker-Frisbie* doctrine."\(^{187}\) Not one single U.S. court has subsequently used the *Toscanino* test and concluded that the government’s action was so outrageous as to eviscerate jurisdiction.\(^{188}\) Because of the U.S. judiciary’s refusal to disavow the *Ker-Frisbie* doctrine, U.S. law enforcement officials have increasingly turned to abduction as a viable alternative to traditional extradition.\(^{189}\) If formal extradition is not achievable because of a human rights conflict, or because the requested country refuses to extradite its nationals, it would seem that the only obstacles to abduction for the U.S. are the foreign relations implications.\(^{190}\)

B. *Current Cases and Controversies Involving United States Extradition Requests*

1. Ira Einhorn

The case which epitomizes the U.S.’s recent frustration with international extradition is that of Ira Einhorn.\(^{191}\) Einhorn was a well-known “hippie” leader in Philadelphia during the 1960s, who managed to garner enough mainstream support to run for Mayor of Philadelphia.\(^{192}\) What the citizens of Philadelphia did not know was that Einhorn had a history of domineering and sometimes violent relationships with his girlfriends.\(^{193}\) During the 1960s, there were two episodes in which Einhorn attacked women who had rejected him.\(^{194}\) In one incident he hit a woman over the head with a Coke bottle, and in the other instance he strangled a woman until she fell unconscious.\(^{195}\) He even wrote in his journal after the Coke bottle assault, “violence always marks the end of a relationship.”\(^{196}\)

These violent episodes were unknown to Holly Maddux when she moved into Einhorn’s apartment in 1972.\(^{197}\) Over the next five years, however, Maddux personally witnessed Einhorn’s dark side, and by

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\(^{187}\) McAlister, *supra* note 132, at 484.

\(^{188}\) See *id*.

\(^{189}\) See *id.* at 485.

\(^{190}\) See *id.* at 484–86; see also *supra* text accompanying note 188.


\(^{192}\) See Levy, *supra* note 1, at 59.

\(^{193}\) See *id*.

\(^{194}\) See *id*.

\(^{195}\) See *id*.

\(^{196}\) *Id*.

\(^{197}\) See Levy, *supra* note 1, at 59.
1977 she had decided to leave him permanently. Einhorn received the news of the breakup by phone at his apartment and threatened to throw all of her belongings into the street. Maddux reportedly raced over to Einhorn’s apartment soon after the phone call. The two of them were seen at a movie together the next evening, and that was the last time anybody saw Holly Maddux alive. A Drexel University student who lived below Einhorn was later interviewed by police and recalled hearing a blood curdling scream and heavy banging one night during that Fall of 1977. A few nights after the movie, two teenage girls confessed to police that Einhorn had asked them to help him dump a heavy trunk into the Schuykill River. Over the next few months, Einhorn spent a semester at the Kennedy School of Government in Cambridge, Massachusetts. During this time the neighbors living below Einhorn’s apartment back in Philadelphia complained to police about a putrid smell and leaking fluid coming from Einhorn’s apartment. During this period, Einhorn refused to let the janitor or his landlord into a padlocked closet next to his bed. On March 28, 1979, Philadelphia homicide detectives entered the apartment while Einhorn was present, pried open the closet with a crowbar, and sprang the lock of a steamer trunk they found inside. Maddux’s mummified body, shrunken to 37 pounds since her disappearance in 1977, was quickly discovered. Maddux’s skull had been fractured in at least six places by trauma from a blunt object.

Einhorn first tried to claim that Maddux’s body was planted in his closet by the KGB in an effort to discredit him. When he realized that this defense was not going to be successful, Einhorn began to make plans to flee the country. A ridiculously low bail of $40,000, of which he only had to put up $4,000 in cash, allowed him to flee to

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198 See Lopez, supra note 9, at 48.
199 See id.
200 See id; Levy, supra note 1, at 59.
201 See Levy, supra note 1, at 59.
202 See Lopez, supra note 9, at 48.
203 See Levy, supra note 1, at 59.
204 See id.
205 See id.
206 See Lopez, supra note 9, at 48.
207 See id.
208 See id.
209 See id.
210 See Levy, supra note 1, at 59.
211 See id.
Ireland in 1981. He took the name of Ben Moore and disappeared for a number of years.

Shortly after Einhorn’s flight, Richard DiBenedetto, the assistant D.A. in Philadelphia in charge of fugitives and extraditions, began a manhunt for Einhorn which eventually stretched across five countries and consumed the better part of sixteen years. DiBenedetto relied heavily on volumes from Einhorn’s diaries, which revealed a sadistic side to Einhorn that few of his followers would have believed. The diaries contained the following phrases: “sadism sounds nice—run it over your tongue—contemplate with joy the pains of others. To beat a woman—what joy.”

The closest international law enforcement officials came to catching Einhorn during his sixteen year odyssey was in Ireland, when a Trinity College professor familiar with the story confronted Einhorn in the Trinity cafeteria. Einhorn insisted his name was Ben Moore and by the time Irish police arrived, Einhorn had disappeared once again. During those sixteen years, Maddux’s father committed suicide and her mother died from natural causes. Maddux’s sister remarked that Holly’s murder “ruined their life [sic]. And they died thinking Ira beat them.”

In 1993, Philadelphia D.A. Lynne Abraham decided to try Einhorn in absentia because she feared that any available witnesses would vanish by the time he could be brought back to the U.S. The legislature had just passed a law which allowed trials in absentia and the jury took just two hours to convict Einhorn. Subsequent to the conviction, the Philadelphia D.A.’s office continued to search for Einhorn. In 1997, a former backer of Einhorn called DiBenedetto with information that a woman named Anika Flodin would lead authorities to Einhorn. Using international law enforcement resources, DiBenedetto was able

212 See id.
213 See id.
214 See Lopez, supra note 9, at 48.
215 See id.
216 Id.
217 See id.
218 See id.
219 See Lopez, supra note 9, at 48.
220 Id.
221 See id.
222 See id.
223 See id.
224 See Lopez, supra note 9, at 48.
to find Flodin's social security number.225 The tip paid off when Flodin applied for a French driver's license using a Mallon, France address.226 On June 13, 1997, Einhorn was arrested without a fight at the Mallon, France farmhouse which he shared with his new wife, Anika Flodin.227

Dominique Tricaud, a flamboyant French attorney, was hired by Einhorn to represent him in the extradition proceedings. Tricaud claimed that he had never lost an extradition hearing before he took Einhorn's case.228 Tricaud decided to build his defense of Einhorn around the Philadelphia D.A.'s decision to try the suspect in absentia in 1993.229 He told Time that "the French will not send a man back to a barbaric country where he was tried without being present to defend himself."230

The legal argument which Tricaud made before the French Appeals Court was simple, if not entirely true.231 He argued that trying Einhorn in absentia offended principles of the European Convention on Human Rights and, more importantly, French legal principles, which guarantee a new trial after capture for a suspect convicted in absentia.232 Tricaud's imagination came into play when he warned the French judges that if Einhorn was extradited he would be put to death, with no chance to defend himself.233 (Einhorn had been sentenced to life in prison, not the death penalty.) Many of the U.S. press in the courtroom felt that the underlying purpose of the argument made to the judges was to send a message to the "barbarians across the Atlantic."234 In the face of the Tricaud assault, the French Prosecutor, Jeanne Pierre Defose du Rau, calmly told the Justices that the trial in absentia should not affect the extradition request made by the U.S.235 Einhorn's lawyers responded by remarking that America imposes the death penalty on mental defectives and children.236 The French Court of Appeals did not explain its decision, which was to free Einhorn, but it is

225 See id.
226 See id.
227 See id.
228 See id.
229 See Levy, supra note 1, at 60.
230 Lopez, supra note 9, at 48.
231 See id.
232 See id.
233 See id.
234 See Levy, supra note 1, at 60.
235 See id.
236 See id.
plausible that the justices may have bought into Tricaud's "send a message to America" appellate strategy. 237

American outrage after the verdict was not tempered by a French judge's decision to place Einhorn under investigation for breaking immigration laws. 238 American reporters, following Einhorn as he leisurely shopped at an outdoor market, composed headlines for their articles such as "U.S. MURDERER RESUMES LIFE." 239 Newsweek insinuated that the "prickliness" often displayed by French waiters may have manifested itself through the patriotic invocations of human rights ideals that probably prompted the decision. 240 Joel Rosen, the D.A. who actually tried Einhorn in absentia, may have summed up American sentiment best when he remarked that it was infuriating that a foreign court would deny the U.S. custody of "an American citizen who killed another American citizen on American soil." 241 The case was appealed, but the Philadelphia D.A.'s office was not optimistic about the outcome. 242

Instead of relying on French justice, the Pennsylvania legislature promptly passed an amendment in January of 1997 which allows for new trials under certain conditions for people sentenced in absentia. 243 French authorities re-arrested Einhorn in September of 1997, and the U.S. made a second request that he be extradited. 244 At the extradition hearing in Bordeaux, Einhorn's attorneys argued that the Pennsylvania legislature could not undo the outcome of a court trial by legislatively granting a new trial. 245 The French prosecutor who represented the U.S. government countered by arguing that even if the law is potentially invalid, the French judges are not competent to verify the legality or constitutionality of an American law and therefore Einhorn must be extradited. 246 The French Appeals court agreed to extradite Einhorn, but on the conditions that he be tried again in Philadelphia, and that the death penalty could not be applied if he is convicted. 247

238 See U.S. Murderer Resumes Life, supra note 191, at A31.
239 See id.
240 See Levy, supra note 1, at 58.
241 Id. at 59.
242 See id. at 61.
244 See id.
245 See Martha T. Moore, French Twist Foils Bringing Killer To justice, USA TODAY, Dec. 1, 1998, at 13A.
246 See id.
However, the court allowed Einhorn to remain at liberty pending further court action, raising the possibility of another flight from justice.248 One of his lawyers, Dominique Delthil, refused to guarantee that Einhorn would stay in France but remarked that Einhorn has no intention of leaving the area.249

Despite Einhorn’s liberty, Holly Maddux’s sister rejoiced in the decision, saying, “He is about to come face to face with the consequences of his actions.”250 Delthil has plans to appeal the case to France’s highest court, the Court of Cessation; if the decision is upheld, he will request a review by the government of Prime Minister Lionel Jospin.251 According to Delthil, it will be another two years before the fate of Ira Einhorn is finally decided.252

2. James Dewayne Nivette

Also in 1997, France and the United States were involved in another murder extradition.253 Authorities in Folsom, California wanted James DeWayne Nivette for the murder of Gina Barnett, his live-in girlfriend.254 He fled the United States to an apartment his family owned in Munster, France.255

Nivette had lived with Barnett and their eighteen month old son for a number of years in a condominium in Folsom, California.256 Two months before the murder, Barnett decided to leave Nivette and move into the home of a new boyfriend.257 During this period, she took out a restraining order against Nivette, who had a history of battering his wives and girlfriends dating back to 1988.258

After Barnett moved out, Nivette threatened either to take custody of their son or to cut off financial support. Nivette and Barnett finally signed an agreement stating that Nivette would continue coverage for their son on Nivette’s life and medical insurance policies, and in return

248 See id.
249 See id.
250 Id.
251 See id.
252 See Swardson, supra note 247.
253 See Brown & Hatton, supra note 19, at A1.
254 See id.
255 See id.
256 See id.
257 See id.
258 See Brown, supra note 19, at A1. Nivette was a psychologist who, according to the state board of psychology, allegedly had sex with some of his patients. See id.
Barnett would drop the restraining order.259 Before receiving the restraining order against Nivette, Barnett had told police that she feared that he would shoot her.260 The restraining order was dismissed by a court on November 10, 1997; police allege that six days later Nivette shot Barnett thirteen times as she tried to flee his condominium.261

The couple’s son was found sobbing and dressed only in his pajamas in a Bay Area industrial park near the San Francisco airport.262 Apparently, Nivette had abandoned the toddler in his haste to flee the country.263 After finding Nivette’s car parked at the San Francisco airport, the FBI launched an international investigation and discovered from one of Nivette’s acquaintances that his family owned a flat in Munster, France.264 On November 21, 1997, French police arrested Nivette after a neighbor reported that she had seen him in his flat.265 The Nivette extradition request by the Sacramento County prosecutors was complicated by two issues which Nivette raised: (1) Nivette claimed French citizenship because his father was born in France (the French will not extradite a national) and (2) France will not extradite a prisoner to a country where the person will face the death penalty.266

The Sacramento prosecutors responded to Nivette’s arguments by filing a backup request to have him tried in France on the California charges and by promising not to seek the death penalty in the case.267 Lee Brown, a deputy D.A. in Sacramento, remarked that his office never intended to seek the death penalty because Nivette’s case lacked the special circumstances (e.g., the use of poison, kidnapping or torture) needed to justify a request for the death penalty.268 Nevertheless, the Sacramento D.A.’s office sent a formal assurance to French authorities that the death penalty would not be imposed even if later evidence pointed to special circumstances in the case.269

259 See id.
261 See Brown & Hatton, supra note 19, at A1.
262 See id.
263 See id.
264 See id.
265 See id.
267 See id.
269 See Podger, supra note 260, at B1.
On January 29, 1997, the French Appeals Court at Colmar, France, ordered the extradition of Nivette to Sacramento. Despite the Appeals Court victory, the case was far from over. Nivette's attorney, Dominique Bergmann, filed an appeal charging that Nivette will face life imprisonment without possibility of parole, which is not condoned in France. Bergmann also threatened to file an appeal to the ECHR if his argument was rejected in France. Deputy D.A. Brown countered the appeal by arguing that the maximum sentence Nivette faced was thirty-five years to life in prison, with the possibility of parole after twenty-eight to thirty years. In June of 1998, the French Supreme Court upheld the lower court's decision that Nivette should be extradited back to California. True to his word, Bergmann filed a claim with the ECHR that Nivette's extradition would violate his human rights since France does not allow the death penalty. Bergmann is purportedly concerned that if the District Attorney were to leave office for any reason, her successor would not be bound by the agreement not to seek the death penalty. As of December of 1998, the timetable for a possible hearing was unknown.

3. Mohammed Hamadei

A 1985 extradition request for a well known Middle Eastern terrorist emphasized the international political implications of zealous U.S. law enforcement efforts to bring criminals to justice. On June 14, 1985, TWA flight 847, en route from Rome to Athens, was hijacked by Arab terrorists and forced to fly to Beirut airport. During the hijacking, the terrorists shot and killed U.S. Navy diver Robert Stethem and severely beat a number of the other American passengers. A total of thirty-nine passengers were held hostage for seventeen days before the terrorists were able to escape to Beirut. On January 13, 1987, one of

271 See id.
272 See id.
273 See Podger, supra note 260, at B1.
275 See id.
276 See id.
277 See id.
278 See Kennedy et al., supra note 2, at 5.
279 See id.
280 See id. at 8.
281 See id. at 5.
the accused hijackers, Mohammed Hamadei, was arrested at the Frankfurt, West Germany airport carrying a fake passport and a suitcase stocked with liquid explosives.282 The U.S. had previously indicted Hamadei and three other men in the District Court for the District of Columbia for hijacking and, within hours of the arrest, had formally requested his extradition to the U.S.283

The Reagan administration had a special interest in bringing Hamadei to justice in the U.S. because it had made antiterrorism a cornerstone of its foreign policy, strenuously arguing that terrorists should be caught, tried and sentenced like common criminals.284 The theory behind the antiterrorism stance was that the international community should cooperate to bring terrorists to justice; to successfully extradite Hamadei to the U.S. would back those words with action.285 By working in cooperation with West Germany, the Reagan administration would project a united antiterrorist front to the rest of the world.286 As a U.S. Attorney explained, "We had this horrible crime, we had terrific evidence, we had an overreaching American interest. . . . We were ready."287 By making an example of Hamadei, the U.S. hoped to drive other European countries to action.288 Prior to the hijacking, the Reagan Administration felt that many European countries wanted to avoid, instead of defy, terrorist threats.289

Lying beneath the international cooperative aspects of the expected extradition was a more selfish reason for wanting to try Hamadei in a U.S. court: Washington viewed the hijacking as a direct attack on the U.S.290 Not only was a U.S. Navy diver killed, but the airline was American, American passengers were separated from travelers from other countries and beaten, and the terrorists seemed to have targeted American military personnel.291 Witnesses later testified that the hijackers planned to kill all of the American servicemen they could find.292

282 See id.
283 See Kennedy et al., supra note 2, at 5.
284 See id.
285 See id. at 5–6.
286 See id. at 6.
287 Id.
288 See Kennedy et al., supra note 2, at 6.
289 See id.
290 See id. at 8.
291 See id.
292 See id.
At first Germany seemed as eager as the U.S. to have Hamadei tried in America; officials in the German Justice Ministry urged Washington to file an extradition request as soon as possible.293 The U.S. was willing to waive the possibility of giving Hamadei the death penalty and Stephen Trott, the Associate Attorney General, signed off on the assurance.294 In reality, there was no other choice short of abduction.295 German law forbade extradition of a suspect who faced the death penalty and the U.S.-West German extradition treaty reflected that policy.296

The process took an abrupt turn four days after Hamadei’s capture, when two West German citizens were kidnapped in Beirut.297 The kidnappers demanded that the West German government refuse the U.S. extradition request and release Hamadei in exchange for the release of the captives.298 The German government attempted to determine whether there would be a substantial chance of preserving the lives of the hostages without appearing to give in to the demands of the terrorists if the extradition were refused.299 The Germans seized on to a principle articulated in the U.S.-West German treaty called aut dedere aut indicare or “either extradite or try.”300 By trying Hamadei in a West German court, the West German government felt that it could refrain from offending the U.S., while not appearing to bend completely to the wishes of the terrorists.301 West German Government lawyers also feared that a West German court might find that Hamadei’s crime constituted a political act for the purposes of the extradition treaty; if so, they would not even have had the option of extradition under the political exception rule of extradition treaties.302

The U.S. obviously favored a hard line approach against the demands of the terrorists, because the Reagan administration advocated

293 See Kennedy et al., supra note 2, at 9.
294 See id. “That was a hard pill to swallow,” remarked Trott, but “I signed off because I figured we’d even be willing to give away the death penalty to get this guy.” Id.
295 See id.
296 See Kennedy et al., supra note 2, at 9.
297 See id.
298 See id.
299 See id. at 10.
300 See id. The Germans believed that “if, through adjudication before a German court, we could also obtain the objective of nothing happening to the hostages, this would be a route that we could follow without our principles being infringed in any way.” Id.
301 See Kennedy et al., supra note 2, at 10.
302 See id. at 22.
nonsubmission to any demands made by hostage takers. The official U.S. position was that the administration sympathized with West Germany's position, and would understand if they chose not to extradite Hamadei. The U.S. Government's acceptance of West Germany's decision was made easier because the U.S. believed that West Germany's action was legal under the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, to which both countries were parties. The Convention required each contracting State to take such measures as were necessary to establish its jurisdiction over the relevant offense when the alleged offender was present in its territory and when it did not extradite him to another State which had jurisdiction over the case. As an epilogue to the case, Hamadei was sentenced to life in prison by a division of the Landgericht Frankfurt Court in 1990.

4. Benjamin Sheinbein

The Sheinbein case is slightly different from the other cases outlined in this note because the U.S. blatantly used political and monetary pressure against the requested country, instead of relying heavily on legal arguments in order to gain the extradition of the suspect. Benjamin Sheinbein was suspected of killing, dismembering, and then burning an acquaintance of his on September 19, 1997, in Silver Spring, Maryland. The badly burned torso of Alfredo Enrique Tello, minus his arms and legs, was found wrapped in a garbage bag in the garage of a vacant house in Silver Spring. Police speculated that Sheinbein, Tello, and a third youth named Aaron Needle had an immature relationship filled with racial epithets and brawling that may have escalated into the murder. Sheinbein and Needle were longtime friends and schoolmates who often used drugs together; Tello began to associate with them during the summer of 1997.

303 See id.
304 See id.
305 See id. at 31–32.
306 See Kennedy et al., supra note 2, at 31–32.
307 See id. at 20–21.
309 See id.
310 See id.
311 See id.
Before Sheinbein and Needle were indicted for Tello’s murder, Sheinbein fled the country for Israel.\textsuperscript{312} Needle is currently being held without bail in the county jail in Rockville, Maryland.\textsuperscript{313}

Under Israeli law, its citizens cannot be extradited for any crime.\textsuperscript{314} Although Sheinbein claims to be an Israeli citizen, one reason why the Sheinbein case has raised the ire of important members of Congress is because his Israeli citizenship argument is superficial at best.\textsuperscript{315} Sheinbein, born in the U.S., claims that he is an Israeli citizen because his father was born in pre-state Palestine in 1944 and left Israel in 1950.\textsuperscript{316} Interestingly, when Sheinbein’s father was seeking U.S. citizenship, he wrote “stateless” on the form asking for his family’s citizenship.\textsuperscript{317} In addition, his father never registered himself or Sheinbein as an Israeli citizen at the Israeli consulate as required by Israeli law.\textsuperscript{318}

When, after receiving the official request, Israel balked at immediately extraditing Sheinbein, U.S. newspapers and politicians vented their frustration publicly by lambasting Israel.\textsuperscript{319} Israeli Prime minister Benjamin Netanyahu wrote U.S. Secretary of State Madeleine Albright stating that if it became evident that Sheinbein could not be extradited, then Israel would try him for the murder.\textsuperscript{320} In response, a Baltimore newspaper chided Sheinbein for suddenly developing an interest in his Israeli heritage and lashed out at Israel for refusing to extradite the suspect.\textsuperscript{321} Of more importance to Israel, Robert Livingston, Chairman of the U.S. House of Representatives Appropriations Committee, called Israel’s action an outrage and threatened to link the continu-

\textsuperscript{312} See id.
\textsuperscript{313} See Vogel, supra note 308, at B05.
\textsuperscript{314} See Israel Receives Request to Extradite Teen, \textit{The Daily Rec.} (Baltimore, Md.), Nov. 1, 1997, at 21.
\textsuperscript{316} See id.
\textsuperscript{317} See id.
\textsuperscript{318} See id.
\textsuperscript{319} See Hillel Kuttler, \textit{US rep: Congress Angry With Israel Over Extradition Refusal}, \textit{Jerusalem Post}, Oct. 10, 1997, at 19; Kane, supra note 2, at 1B.
\textsuperscript{320} See Kuttler, supra note 319, at 1B.
\textsuperscript{321} See Kane, supra note 2, at 1B.
ance of the annual three billion dollars in American aid to Israel on Sheinbein’s extradition.\textsuperscript{322}

On December 6, 1997, Israel’s Attorney General asked the court hearing the Sheinbein case to extradite the suspect to the U.S.\textsuperscript{323} The Israeli Attorney General was “widely attacked” in Israel for having developed a sensitivity to American political pressure and basing his opinion on the need to placate American public opinion.\textsuperscript{324} The actual extradition hearing began on February 22, 1998, before a three judge panel in Jerusalem.\textsuperscript{325} On September 6, 1998, Israeli Judge Moshe Ravid ruled that Sheinbein should be extradited to the U.S. to stand trial for the murder.\textsuperscript{326} Judge Ravid partially accepted Sheinbein’s citizenship claim but found that under Israeli extradition law, an Israeli citizen is defined as someone who has the status of an Israeli citizen and who has a connection to the country.\textsuperscript{327} Technically, the ruling meant that Sheinbein qualified as an Israeli citizen but had no right to remain in the country because he had not maintained close ties to Israel.\textsuperscript{328} Israeli legal scholars have called the ruling revolutionary, citing the fact that it creates a new legal definition of Israeli citizenship by adding another element of linkage to the country in order for someone to claim immunity from extradition.\textsuperscript{329}

Sheinbein’s attorneys brought the appeal before the Israeli Supreme Court on November 15, 1998, arguing that there is only one grade of Israeli citizenship, and that the law states clearly that Israeli citizens cannot be extradited.\textsuperscript{330} Given the “revolutionary” reasoning of the lower court it was not surprising that the Israeli Supreme Court overturned the decision and blocked the extradition of Sheinbein.\textsuperscript{331} The majority opinion stated that, “no further affinity with Israel is required.

\textit{Id.}

\textsuperscript{322} See Jerusalem Rethinks US Extradition Refusal, supra note 7, at 014.

\textsuperscript{323} See Dana Harman, Israel AG Asks Court to Extradite Sheinbein, 

\textsuperscript{324} See Allan Shapiro, A Case of More than Disquieting Criticism, 

\textsuperscript{325} See Katherine Shaver, Prosecutor to Go to Israel for Sheinbein Hearings, 

\textsuperscript{326} See Israeli Judge Backs Extradition of U.S. Teen-ager, 

\textsuperscript{327} See id.

\textsuperscript{328} See id.

\textsuperscript{329} See Israeli Judge Says US Teen Can Be Extradited, 

\textsuperscript{330} See Sheinbein Appeal Cites “Concept of Citizen,” 

\textsuperscript{331} See Israel Blocks Sheinbein Extradition, 
for the appellant to be considered an Israeli citizen." The Israeli government moved swiftly in an attempt to soften the blow to the United States. Prime Minister Benjamin Netanyahu's spokesman, Aviv Bushinsky, offered, "We . . . are confident that the United States, as an enlightened country of law, will accept the Israeli Supreme Court's decision." Israeli Justice Ministry officials added that Sheinbein would be indicted in Israel on the same charges, and in the mean time, remain in detention. The U.S. embassy in Tel Aviv has refused comment on the decision.

CONCLUSION

The rash of extradition controversies in recent years involving high profile murder cases seems to have caused escalating frustration for American law enforcement officials and politicians. The resentment that comes with watching a foreign court deny the U.S. the chance to try an American citizen for killing another American citizen on American soil, as in the Einhorn case, may cause the U.S. to increasingly seek abduction or informal surrender of the suspect as viable alternatives to formal extradition. If the U.S. judiciary continues to uniformly apply the Ker-Frisbie doctrine, the only restraint on law enforcement officials will be the possible foreign policy implications of ignoring other countries' territorial sovereignty. Another possible alternative to formal extradition is for the U.S. to apply pressure on the requested country in an effort to influence the country's executive branch or judiciary. In the Sheinbein case, U.S. politicians were not above blatantly threatening Israel with severe cuts in aid if the case was not decided in a satisfactory manner.

With the global trend toward abolition of the death penalty and the growing acceptance of international human rights, the U.S. can continue to expect collisions with other countries' territorial sovereignty as it pursues murderers around the world. After Soering and its progeny, it has become apparent that human rights courts are willing to engage in fact-specific, substantive reviews of the U.S. penal system. Fact-specific inquiries by the courts lend an air of unpredictability to

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332 See id.
333 See id.
334 Id.
335 See id.
336 See Israel Blocks Sheinbein Extradition, supra note 331.
the outcomes of the cases, which will only add to the tension which always surrounds an extradition request for a murderer. The question will become whether or not the U.S. is willing to risk the foreign policy implications of abducting or arranging deals with other countries to insure a murder trial in the U.S.

Matthew W. Henning