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# Gill & (and) Sandhu v. Imundi: Due Process and Judicial Inquiry into Potential Mistreatment of Extraditees by Requesting Countries

Lauren Sara Wolfe

# *Gill & Sandhu v. Imundi*: Due Process and Judicial Inquiry into Potential Mistreatment of Extraditees by Requesting Countries

## I. INTRODUCTION

Extradition is the procedure whereby one nation requests another to surrender an individual who is accused or convicted of a criminal offense. The purpose of extradition is to bring the individual within the requesting country's boundaries in order to make a determination of guilt or innocence, or to impose punishment.[1] This practice has existed within the United States since the country's origin, and internationally since the first diplomatic agreement.[2] Over the past one hundred years, there has been a dramatic increase in the number of United States and international extradition cases. This increase is due to both technological advances in transportation and the rise in transnational crimes.[3] The case law that has developed out of this increase is both ambiguous and contradictory.[4] One possible explanation for this ambiguity is the limited United States legislation on the issue of extradition.[5] Additionally, most United States Supreme Court cases on extradition were decided during a period when "constitutional safeguards of the criminal procedure were undeveloped and meager, and due process meant something less than it does

1. The United States defined extradition to be "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory and within the territorial jurisdiction of the other which, being competent to try and punish him, demands the surrender." 18 U.S.C.A. § 3181 (1988).

2. COMM. ON THE JUDICIARY, REPORT ON THE EXTRADITION ACT OF 1984 TOGETHER WITH ADDITIONAL VIEWS, H.R. REP. NO. 998, 98th Cong., 2d Sess. 1 (1984) [hereinafter EXTRADITION ACT REPORT].

3. *Id.* at 2.

4. *See infra* text accompanying notes 210-226. After extensive work by both the House and Senate between 1981 and 1983, the Reagan administration refused to implement legislative reform and instead resolved to use treaty revision in solving the current problems. EXTRADITION ACT REPORT, *supra* note 2, at 2.

5. For a review of what arguably constitutes "piece meal legislation" on extradition, see 1 M.C. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 41-42 (1981). *See also* Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1442 (1988).

today."[6]

Existing United States case law on extradition does not comport with current notions of due process.[7] For example, extradition proceedings are not appealable by either party.[8] Therefore, "wrong" decisions cannot be reversed upon review by a higher court.[9] Consequently, the only recourse for the requesting country is to file subsequent complaints with different courts or magistrates, searching for a more favorable result.[10] Moreover, habeas corpus review is the only recourse for an individual facing an extradition order. Habeas corpus review does not determine the guilt or innocence of an individual; rather, it determines if a prisoner's liberty is being restrained in violation of due process.[11] Under current habeas corpus procedures, prisoners awaiting release or extradition may be subjected to endless litigation. This is due to the extraditing country's ability to reapply to other courts or magistrates for extradition. These procedures are clearly inconsistent with due process principles.

Second, and more important, United States courts violate due process when they refuse to inquire into the mistreatment that the requesting country may inflict upon an extraditee. This type of review is known as "judicial inquiry."[12] The issue of whether the extraditing country should engage in judicial inquiry has been the subject of vehement debate among United States courts and the United States Congress.[13] The House Committee on the Judiciary recently described judicial inquiry as an affirmative duty, upon motion by the individual, for the court to inquire into the possibility of any fundamental unfairness an extraditee may receive if he or she is returned to the extraditing country.[14] Specifically, under the proposed Extradition Act of 1984, a court performing judicial inquiry would consider whether there is a possibility that the extraditee would be denied the right to: (1) an independent and impartial tribunal; (2) a conviction based on individual responsibility; (3) the prohibition of ex post facto liability or penalty; (4) be present at trial; (5) a bar against compul-

6. Kester, *supra* note 5, at 1442.

7. U.S. CONST. amend. XIV, § 1; *see* Mathews v. Eldridge, 424 U.S. 319 (1976); *see also infra* text accompanying notes 227-242.

8. *In re* Mackin, 668 F.2d 122 (2d Cir. 1981).

9. *Id.*

10. Shapiro v. Ferrandina, 478 F.2d 894, 907 (2d Cir. 1973).

11. BLACK'S LAW DICTIONARY 638 (5th ed. 1979).

12. EXTRADITION ACT REPORT, *supra* note 2, at 6.

13. *Id.* at 1.

14. *Id.* at 6.

sory or tortured self-incrimination; or (6) present a defense.[15] However, United States courts have refused to conduct judicial inquiry into the possibility of unfair treatment by the requesting country. Rather, the courts simply have adopted the rule of "judicial non-inquiry," which is an affirmative decision by the courts *not* to inquire into the potential mistreatment of an extraditee.[16] Although the Secretary of State presumably conducts inquiry into such treatment, there is an inherent conflict of interest between the Executive's duty to accomplish foreign policy imperatives and simultaneously to maintain the fundamental protections of the Bill of Rights.[17] Consequently, many courts have considered imposing mandatory judicial inquiry as a means of alleviating this conflict.

The United States District Court for the Southern District of New York is the most recent court to consider whether judicial inquiry should be performed in extradition cases. In *Gill & Sandhu v. Imundi*,[18] the district court held that, as a habeas court,[19] it lacked the power to direct further inquiry into the possible mistreatment of extraditees.[20] The court reasoned that its ability to conduct such an inquiry was foreclosed by the Second Circuit's decision in *Ahmad v. Wigen*.[21] However, the *Gill & Sandhu* court did not address whether judicial non-inquiry violated the extraditee's right to due process of law.

This Note briefly examines the historical background of extradition law. It then considers *Gill & Sandhu* and the court's ultimate decision to forego judicial inquiry. This Note next discusses the current attitude of United States courts toward judicial inquiry. It also discusses Congress' proposed solutions to the current ambiguities surrounding judicial inquiry. Finally, this Note proposes that federal courts perform judicial inquiry into potential mistreatment of extraditees simultaneously with the initial extradition hearings.

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15. *Id.*

16. *Id.*

17. *See* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 534 (1980).

18. 747 F. Supp. 1028 (S.D.N.Y. 1990).

19. Habeas court refers to a federal court reviewing writs of habeas corpus. Such writs request the court to release the petitioner from unlawful imprisonment. BLACK'S LAW DICTIONARY 638 (5th ed. 1979).

20. *Gill & Sandhu*, 747 F. Supp. at 1049.

21. 910 F.2d 1063 (1990). The court in *Ahmad* held that it is beyond the scope of review of a habeas court to inquire into potential mistreatment of extraditees. *Id.* at 1066.

## II. HISTORICAL BACKGROUND

Both the United States Congress and the courts have considered the question of whether a court hearing an extradition case should conduct judicial inquiry. Yet, neither branch of government has required that a court conduct such an inquiry.[22]

The proposed Extradition Act of 1984[23] at one time included a clause that would have imposed an affirmative duty on courts to inquire into the potential unfairness that extraditees could experience upon their return to the requesting country.[24] That clause was stricken from the text of the law before the final version was proposed in 1984.[25] However, two "Additional Views"[26] were attached to the final version of the Act: one written by members of Congress favoring judicial inquiry and the other written by those opposing it.[27] By attaching these "Additional Views," Congress signaled that the issue of judicial inquiry was not completely closed.

The group favoring judicial inquiry argued that Congress should impose an affirmative duty on courts to inquire into subsequent treatment of extraditees.[28] This group claimed that the federal courts "may serve as a buffer for the Executive branch" by transferring the controversial issue into a nonpolitical branch of government.[29] The group further contended that "our country would be better off to have initial decisions" made by the courts, in order to insulate the executive branch from conflicting interests and to "further foreign relations rather than strain them."[30] This group feared that the present system

22. The federal statutory law which governs extradition is silent on the issue of judicial inquiry. *See* 18 U.S.C.A. § 3184 (1988).

23. EXTRADITION ACT REPORT, *supra* note 2. In 1981, several bills were introduced in both the Senate and the House. The bills were consolidated and modified by several different committees in an effort to perfect the Extradition Act of 1984. However, this final version was never passed.

24. *Id.* at 46-56. The proposed act read: "(2) The court shall not order the 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 . . . (ii) would as a result of extradition, be subjected to fundamental unfairness." *Id.* at 52.

25. *Id.*

26. *Id.* at 58-67. Two separately submitted reports called "Additional Views" accompanined the House Report.

27. *Id.* at 58, 65. The two attached sets of Additional Views primarily discussed the imposition of an affirmative duty on courts to inquire into subsequent treatment of extraditees in the requesting countries.

28. *Id.* at 58.

29. *Id.* at 63.

30. *Id.* at 64.

of non-inquiry pays too little attention to humanitarian factors and too much attention to political considerations.[31] As one commentator wrote, the "State Department has its own agenda, and protecting the rights of putative felons does not rank very high on it."[32]

Those opposing judicial inquiry reasoned that non-inquiry is a black letter rule.[33] They also argued that the courts do not engage in judicial inquiry because they lack the ability, resources, and time to assess the requesting countries' procedures.[34] They stated that if courts conducted judicial inquiry, it would "harm foreign relations."[35] It was preferable, they argued, for the courts to defer to the Secretary of State, who could "make an informed decision" while avoiding publicity.[36] Adherents of this view asserted that the Secretary of State would not pursue extradition requests on political motives.[37] With the lines of disagreement so clearly drawn, the Extradition Act of 1984 never passed.

Early United States Supreme Court cases did not require courts to inquire into the potential mistreatment of extraditees by requesting countries.[38] In *Glucksman v. Henkel*,[39] Justice Holmes stated that courts are "bound by the existence of an extradition treaty to assume that the trial will be fair."[40] In essence, Justice Holmes declared that courts cannot conduct judicial inquiry because when the United States enters into an extradition treaty with another country, both countries impliedly agree to act in a fundamentally fair manner. Therefore, if a requesting country presents enough reasonable evidence to allege that an individual is guilty, the country holding that individual[41] should surrender him or her in accordance with the

31. For a review of the traditional executive role in the extradition process, see Note, *Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual*, 9 B.C. INT'L & COMP. L. REV. 293, 293-300 (1986).

32. Kester, *supra* note 5, at 1485.

33. EXTRADITION ACT REPORT, *supra* note 2, at 65-66. Examination of the legislative history and current case law indicates that the issue is not entirely settled. *Id.*; *see also supra* text accompanying note 22.

34. EXTRADITION ACT REPORT, *supra* note 2, at 66.

35. *Id.*

36. *Id.*

37. *Id.*

38. *See* 18 U.S.C.A. § 3184 (1988) (pointing out earlier cases and their reluctance to mention the issue).

39. 221 U.S. 508 (1912).

40. *Id.* at 512. In *Glucksman*, the Court upheld the petitioner's extradition to Russia, even though the petitioner alleged that trial in the Soviet Union would be unfair. *Id.* at 508.

41. The country holding the extraditee during the proceedings is termed the "relating country" or "relator."

treaty provisions.[42]

In *Gallina v. Fraser*,[43] the Second Circuit Court of Appeals noted that it had "discovered no case authorizing a federal court, in a habeas corpus proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await the relator upon extradition."[44] After seemingly dismissing the notion of judicial inquiry,[45] the court stated that it could "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 principle" of judicial non-inquiry.[46] Subsequent courts have interpreted this language to preserve the courts' power to make inquiry into the mistreatment of extraditees in extreme circumstances.[47] Although several post-*Gallina* opinions have cited this dictum,[48] all of them have rejected judicial inquiry.[49]

In 1990, the United States District Court for the Southern District of New York in *Gill & Sandhu v. Imundi*[50] again considered whether a court should inquire into the treatment of an extradited individual in the requesting country. A discussion of the *Gill & Sandhu v. Imundi* case follows.

## III. STATEMENT OF THE CASE

### *A. Facts of* Gill & Sandhu[51]

In early 1987, the government of India requested the United

42. *Glucksman*, 221 U.S. at 512.

43. 278 F.2d 77 (2d Cir. 1960).

44. *Id.* at 78 (citing Holmes v. Jennison, 39 U.S. 540, 568 (1840); Grin v. Shine, 187 U.S. 181, 184 (1902); *Ex parte* La Mantia, 206 F. 330 (S.D.N.Y. 1913)).

45. In *Gallina*, the court found the defendant was not exposed to fundamental unfairness because he was represented by counsel at the trial (although the defendant was not present) and his alleged cohorts were present and also convicted. 278 F.2d at 77.

46. *Id.* at 79.

47. *See, e.g.*, Arnbjornsdottir-Mendler v. United States, 721 F.2d 679 (9th Cir. 1983); *In re* Sindona, 450 F. Supp. 672 (S.D.N.Y. 1978).

48. *See, e.g.*, Shapiro v. Ferrandina, 478 F.2d 901 (2d Cir. 1973); *In re* Burt, 737 F.2d 1485 (7th Cir. 1984).

49. Kester, *supra* note 5, at 1479-80. The Ninth Circuit also noted that "[t]his exception has yet to be employed in an extradition case." *Arnbjornsdottir-Mendler*, 721 F.2d at 683.

50. 747 F. Supp. 1028 (S.D.N.Y. 1990).

51. The case of Gill and Sandhu consists of several different published opinions. Both a magistrate and a judge worked on the various portions. *See In re* Singh, *In re* Gill, 123 F.R.D. 140 (D.N.J. 1988); *In re* Singh, *In re* Gill, 123 F.R.D. 127 (D.N.J. 1987); Gill v. Imundi, 715 F. Supp. 592 (S.D.N.Y. 1989); and Gill v. Imundi, 747 F. Supp. 1028 (S.D.N.Y. 1990).

States to extradite Ranjit Singh Gill and Sukhminder Singh Sandhu, claiming that the two were responsible for robberies and murders committed in the Punjab, in India.[52] The Indian government claimed that in early 1985, in the midst of the Punjab uprising, three armed men robbed the Punjab National Bank at Ahmedabad, India.[53] The Indian government alleged that Gill and Sandhu were accomplices in these crimes.[54] Subsequently, in July 1985, a member of the Indian Parliament, his wife, and a constituent were murdered.[55] Two police officers and an Indian Army General were shot and killed the following year.[56] On May 14, 1987, Gill and Sandhu were apprehended in New Jersey by United States officers.[57] The Indian government thereafter filed complaints in the United States seeking extradition of Gill and Sandhu pursuant to 18 U.S.C. section 3184.[58]

An extradition hearing was held before a United States magistrate to determine whether the United States should comply with India's extradition requests.[59] Gill and Sandhu argued that if the United States returned them to India, they would "face torture and/or murder upon their return to India" and would be unable to secure a fair trial.[60] They presented evidence showing that the Indian government had engaged in unabashed terrorism against the Sikhs[61] by

52. *Gill & Sandhu*, 747 F. Supp. at 1031.

53. *Id.* From 1984 to the present, a political "uprising" has been occurring in the Punjab, India. The uprising originated during the period of partition, when observers of the Sikh religion began articulating their demands for a separate state, Khalistan. *In re* Singh, 123 F.R.D. 108, 120 (D.N.J. 1987). For a general history of the period preceding and following partition, see L. COLLINS & D. LAPIERRE, FREEDOM AT MIDNIGHT (1975).

There are reports that in June of 1984, the Indian Army, Navy, Air Force, and paramilitary units launched an attack in the holy city of Amritsar. *In re Singh*, 123 F.R.D. at 120-21. Defendants contended that more than seventy political occurrences constituted an "uprising." *Id.* There are also reports that the entire Punjab state was placed under martial law, communication lines were cut, and Sikh villages surrounding Amritsar were attacked by the Indian forces. *Id.* Shortly after these occurrences, anti-Sikh riots erupted during which thousands of Sikhs were lynched, and Sikh homes and temples were attacked and burned. *Id.*

54. Gill and Sandhu, who are members of the Sikh religion, were fearful that they would be persecuted in India and would be prosecuted for these crimes, which they maintained they did not commit. For those reasons, they fled to the United States. *In re Singh, In re Gill*, 123 F.R.D. at 155 n.10.

55. *Gill & Sandhu*, 747 F. Supp. at 1031.

56. *Id.*

57. *Id.*

58. *Id.* 18 U.S.C.A. section 3184 codifies modern extradition law as written in 1882, which allowed extradition proceedings upon complaints made under oath when requested.

59. *In re Singh, In re Gill*, 123 F.R.D. at 108.

60. *Id.* at 127.

61. *Id.* at 128.

making arbitrary arrests, engaging in sadistic torture, and committing cold-blooded murders of young Sikh men.[62] Specifically, Gill and Sandhu submitted an affidavit of a former Indian Justice of the Haryana High Court, the Honorable Ajit Singh Bains, which described "systematic patterns of arbitrary torture of those in custody, the laying of false charges, and the summary execution of those in custody . . . staged by police."[63] Additionally, Amnesty International filed an amicus brief outlining similar human rights violations.[64]

Magistrate Ronald J. Hedges, however, found that he could not consider evidence of the mistreatment to which Gill and Sandhu could be subjected if returned to India.[65] He reasoned that section 3186 implicitly reserved judicial inquiry for the Secretary of State.[66] The magistrate noted that in *Quinn v. Robinson*,[67] the Ninth Circuit Court of Appeals stated that "it is clear that the Secretary of State has sole discretion . . . to refuse extradition on humanitarian grounds because of the procedures or treatment that await a surrendered fugitive."[68] Consequently, the magistrate refused to conduct judicial inquiry and ordered the extradition of Gill and Sandhu.[69] Gill and Sandhu subsequently petitioned for release and filed writs of habeas corpus in the United States District Court for the Southern District of New York.[70]

### *B. Reasoning of the Court*

On habeas review, the district court granted the writs of habeas corpus.[71] However, the court stayed their release pending an appeal by the Indian government.[72] In reaching his decision, Judge Robert J. Sweet considered four primary issues: (1) the scope of the district courts' review of extradition proceedings; (2) the fairness of the hearing procedures; (3) the probable cause determination; and (4) the pos-

62. *Id.* at 129.

63. *Id.*

64. *In re Singh, In re Gill*, 123 F.R.D. at 129.

65. *Id.* at 137.

66. *Id.* at 129-30.

67. 783 F.2d 776 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986).

68. *In re Singh, In re Gill*, 123 F.R.D. at 130 (citing Quinn v. Robinson, 783 F.2d 776, 789-90 (9th Cir. 1986)).

69. *Id.* at 140.

70. Gill & Sandhu v. Imundi, 747 F. Supp. 1028, 1036 (S.D.N.Y. 1990).

71. *Id.* at 1031.

72. *Id.* at 1046.

sible antipathetic treatment awaiting Gill and Sandhu in India.[73]

### 1. The Nature of Extradition Determination and the Scope of Review

The court announced that the nature of extradition determination and the scope of review by habeas courts in extradition cases is fairly narrow. According to Judge Sweet, it is not the court's role to determine the guilt or innocence of the accused, but rather to determine "whether there is competent evidence to support a reasonable belief that the defendant was guilty of crimes charged."[74] This process of review merely allows the extraditee to "test the legality of the extradition proceedings."[75] The process does not constitute a "rehearing of what the certification magistrate or judge already has decided."[76] In addition, the court stated that the ultimate decision to surrender the accused to the requesting country rests solely with the Secretary of State.[77]

### 2. The Fairness of Extradition Hearings

Gill and Sandhu argued that their extradition hearing was unfair because the magistrate: (1) limited the scope of discovery; (2) failed to make a determination of the credibility and the reliability of the evidence; and (3) treated the case in a biased and partial manner.[78]

First, Gill and Sandhu argued that their claim that India lacked probable cause to extradite was defeated because the magistrate permitted only limited discovery.[79] The court stated that "an accused has no confirmed right at an extradition proceeding to present evidence that contradicts the requesting party's case."[80] The court explained that although a magistrate has discretion to allow more extensive discovery, he or she is not under a duty to do so.[81] In fact, the court stated, a magistrate has lawful discretion to deny completely

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73. *Id.* at 1038-50.

74. *Id.* at 1038.

75. *Gill & Sandhu*, 747 F. Supp. at 1039 (quoting Wacker v. Bison, 348 F.2d 602, 606 (5th Cir. 1965)).

76. *Id.* (quoting Ahmad v. Wigen, 910 F.2d 1063, 1066 (2d Cir. 1990)).

77. *Id.* "[T]he Secretary of State is not bound to extradite even if the certificate is granted." United States v. Doherty, 786 F.2d 491, 499 n.10 (2d Cir. 1986).

78. *Gill & Sandhu*, 747 F. Supp. at 1039.

79. *Id.*

80. *Id.* at 1040.

81. *Id.*

a request for discovery.[82]

Second, Gill and Sandhu claimed that the magistrate failed to make a determination of the credibility and reliability of the evidence offered. Such a determination, the defendants argued, was essential to ensure the fairness of the hearing by exposing the fraudulent nature of the Indian government's affidavits.[83] The district court responded that although "a different magistrate may have conceived of the scope of its inquiry in broader terms . . . [failure to do so] in no way establishes that [this] Magistrate . . . abused his discretion."[84]

Finally, Gill and Sandhu argued that their extradition hearing was unfair because of the bias and partiality implicit in the magistrate's failure to vacate the proceedings upon an unopposed motion.[85] They also argued that requiring shackles and leg irons as security measures in response to manufactured threats additionally prejudiced them.[86] Despite these contentions, the court found that the costs of rehearing would outweigh any benefits,[87] and that the evidence was insufficient to show that the magistrate was biased.[88]

### 3. The Probable Cause Determination

The district court also reviewed the magistrate's determination of probable cause.[89] The court stated that although a reviewing court may not rehear the merits of an extradition hearing, it must determine whether the magistrate relied on "competent evidence sufficient to support the conclusion that a reasonable person would believe the petitioners [were] guilty."[90] However, a habeas court's discretion to challenge and reverse the magistrate's factual determination is limited. The court stated that a habeas court could not "superimpose its view of the record on that of the extradition magistrate."[91]

Nonetheless, the *Gill & Sandhu* court reversed the magistrate's

82. *Id.* at 1041.

83. *Gill & Sandhu*, 747 F. Supp. at 1041.

84. *Id.* The unopposed motion was made by the United States and Indian governments to vacate the magistrate's certifications. *Id.*

85. *Id.*

86. *Id.* at 1035. Both the magistrate and United States Attorney received typewritten threats during the course of the hearing. The Federal Bureau of Investigation later determined that the United States Attorney manufactured the threats and disciplined her. *Id.*

87. *Id.* at 1042.

88. *Gill & Sandhu*, 747 F. Supp. at 1042-43.

89. *Id.* at 1043.

90. *Id.*

91. *Id.*

determination of probable cause.[92] The court reached this conclusion following the Indian Supreme Court's ruling that Gill and Sandhu's confession, which the United States magistrate heavily relied on to establish the probable guilt of the two men, was "not voluntary . . . [and] was not true."[93] The court declared that this evidence was of "considerable, potential relevance."[94] The court noted that the statements found in the fraudulent affidavits of the Indian government would not have been admissible in an Indian court, so the United States magistrate should not have relied upon them in making his determination.[95] Thus, the district court reversed the magistrate's extradition order and held that the United States would not return Gill and Sandhu to India.[96] However, the court stayed their release pending reapplication by the Indian government.[97]

4. Judicial Inquiry into Anticipated Antipathetic Treatment

The district court also examined the issue of judicial inquiry into the potential mistreatment of Gill and Sandhu upon their return to India.[98] Gill and Sandhu presented evidence that the Indian government had previously fabricated charges against them.[99] In addition, Gill and Sandhu submitted evidence of deaths occurring during custodial holdings by the Indian police.[100] Amnesty International, in an amicus brief, provided evidence that the Indian government routinely used extensive torture and forced extraction of confessions.[101] Argu-

92. *Id.* at 1046.

93. *Gill & Sandhu*, 747 F. Supp. at 1043 (quoting ruling of Judge Ruikar, para. 320 at 384).

94. *Id.* at 1046.

95. *Id.* at 1046-47.

96. *Id.* at 1047.

97. *Id.*

98. *Gill & Sandhu*, 747 F. Supp. at 1048.

99. *Id.*

100. *Id.* These deaths, termed "false encounters," were said to be staged by police when they summarily executed suspects they believed to have been involved in terrorist acts. *Id.* In its opinion, the court quoted a Board of Immigration Appeals case that had reversed a prior deportation decision. The *Gill & Sandhu* court quoted *In re* Bhajan Singh, No. A29-521-788 (May 30, 1990), stating that it was "abundantly clear that at least on four of the five occasions when he was arrested, the applicant was placed under arrest based merely on his membership in the [All India Sikh Students Federation] . . . [and] that he underwent torture during his detentions . . . ." *Id.* n.22.

101. *See infra* text accompanying note 190. The documented reports include a method involving

> the use of a very thick pestle or wooden log which was placed on the nerves of the detainee's thighs. One or two persons would stand on the log and others would

ing that this evidence should influence the court's decision, Gill and Sandhu cited *Barr v. United States Department of Justice*,[102] in which the Second Circuit Court of Appeals stated that the federal courts could not allow themselves to be placed in the position of implicitly approving unconscionable conduct.[103]

The *Gill & Sandhu* court rejected this argument in favor of judicial inquiry. The court acknowledged that *Gallina v. Fraser*[104] opened the door for the use of judicial inquiry. However, the court stated that, although the Supreme Court and several circuit courts had discussed the possibility of employing judicial inquiry in extreme cases,[105] none had found facts sufficiently shocking to compel the court to invoke the doctrine.[106]

The *Gill & Sandhu* court pointed out that even courts favoring limited review of extradition hearings continue to hold that there may be some situations "in which a federal court might be called upon to look again at the general principle of exclusive executive discretion."[107] The district court found Gill and Sandhu's claims were, "at least facially, that 'imaginable situation.' "[108] The court further found that the strength of the defendants' evidence substantially warranted an evidentiary hearing and a re-examination of the rule of non-inquiry, as contemplated by the *Gallina* court."[109]

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rotate it thereby causing intense pressure on the nerves. The second common mode consisted of stretching apart the legs of the detainee to an unbearable extent.

Brief for Amicus Curiae Amnesty International U.S.A. in Support of Petitioner at 23, Gill v. Imundi, 747 F. Supp. 1028 (S.D.N.Y. 1990) (No. 88-1530) [hereinafter Amnesty International Brief] (citing *India: The Need to Review Cases Against 324 Sikhs*, AI Index: ASA 20/03/88, at 10 (Sept. 1988)). Other prisoners have suffered torture by having their legs stretched wide apart and chilies inserted into their anus. *Id.* at 24 (citing *India: A Review of Human Rights Violations*, AI Index: ASA 20/02/88, at 9 (Aug. 1988)).

102. 819 F.2d 25 (2d Cir. 1987).

103. *Id.* at 27 n.2.

104. 278 F.2d 77 (2d Cir. 1960) (habeas corpus proceeding challenging extradition, in which court held arrest conditions were properly not considered and in abstentia conviction did not require reversal of extradition order). In dicta, the court stated that it could imagine factual situations which would shock the court's conscience and require reexamination of the principle of judicial non-inquiry. *Id.* at 79.

105. *Gill & Sandhu*, 747 F. Supp. at 1048-49; *see also* Sindona v. Grant, 619 F.2d 167, 175 (2d Cir. 1980).

106. *Gill & Sandhu*, 747 F. Supp. at 1048-49.

107. *Id.* at 1049; *see, e.g.*, Rosado v. Civiletti 621 F.2d 1179, 1195 (2d Cir. 1980); United States *ex rel.* Bloomfield v. Gengler, 507 F.2d 925, 928 (2d Cir. 1974).

108. *Gill & Sandhu*, 747 F. Supp. at 1049.

109. *Id.* The court was persuaded by a 1990 decision of the Board of Immigration Appeals of the United States Department of Justice, which reversed a denial of political asylum to a 35 year old Sikh man who had actively followed the religious teachings of the All India Sikh

Nevertheless, the court concluded that it was unable to conduct such a reexamination[110] because it was "bound" to follow the Second Circuit Court of Appeals' holding in *Ahmad v. Wigen*[111] that "consideration of the procedures that will or may occur in the requesting country, is not within the purview of a habeas corpus judge."[112] As a result, the district court refused to conduct an evidentiary hearing on the issue of India's possible antipathetic treatment of Gill and Sandhu, and stated that those considerations should be left up to the extradition judge or magistrate.[113]

## IV. THE CURRENT TREND OF NON-INQUIRY

Since *Gallina v. Fraser*, many courts have discussed adopting a system of judicial inquiry without actually making such inquiry. In 1984, when the House Committee on the Judiciary proposed the Extradition Act of 1984,[114] it labeled the present state of the common law as a "rule of restraint."[115] The Committee's report stated that "[w]hile current statutes do not authorize the courts to examine either the motives of the requesting state or the likelihood of persecution of the person upon return, the courts have recognized their implicit authority to make such inquiries in cases where the facts would 'shock the conscience.' "[116] In *Gill & Sandhu*, the court was almost compelled to conduct judicial inquiry into human rights considerations.[117] However, the court was required to leave such inquiry to extradition judges or magistrates and accordingly refused to review such evidence on habeas corpus review.[118] Thus, despite the dicta in *Gallina v. Fraser* that judicial inquiry may be compelled, courts continue to apply

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Students Federation. The board stated that, "in light of the unequivocal evidence of record in this case, we would have found it surprising if the applicant had not in fact been subjected to arrest without charges, or tortured, so widespread does police lawlessness in the Punjab appear." *Id.* n.22.

110. *Id.* at 1049.

111. 910 F.2d 1063 (2d Cir. 1990).

112. *Gill & Sandhu*, 747 F. Supp. at 1050 (citing *Ahmad*, 910 F.2d at 1063, 1066).

113. *Id.* n.23.

114. *See supra* note 23 and accompanying text.

115. EXTRADITION ACT REPORT, *supra* note 2, at 30.

116. *Id.*

117. *Gill & Sandhu*, 747 F. Supp. at 1048. The court noted, "This substantial, chilling proffer from sources with at least surface credibility had convinced this court of the justification for further judicial inquiry lest 'we . . . blind ourselves to the foreseeable and probable results of the exercise of our jurisdiction.' " *Id.* (citing Ahmad v. Wigen, 726 F. Supp. 389, 410 (E.D.N.Y. 1989).

118. *Id.* at 1049-50.

the rule of judicial non-inquiry and leave the issue of subsequent treatment of extraditees to the Secretary of State and magistrates.[119]

### *A. Judicial Non-Inquiry*

The concept of judicial non-inquiry is, in some respects, justifiable. An extradition treaty primarily seeks to return accused criminals to the country in which their alleged criminal acts took place in order to stand trial and receive punishment before a tribunal of that jurisdiction.[120] Countries welcome this practice as an opportunity to remove undesirables and to obtain fugitives sought by their own justice systems.[121] Thus, the extradition process is based on reciprocity and mutual respect of sovereignty.[122] Imposing a duty on courts to inquire into the practice of other nations would unduly infringe upon this sovereignty and thereby circumvent the reciprocal cooperation that is essential to the extradition process.[123] Furthermore, courts must consider whether preserving reciprocity in the extradition system is outweighed by the speculative ability to effect changes in the human rights practices of other nations. Thus, courts may reasonably conclude that it is inappropriate to inquire into the practices of other nations' extradition hearings.[124]

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119. *Id.*

120. *See id.* In the "Additional Views" to the House Report on the proposed Extradition Act, the senators wrote, "[T]he growth of transnational crime has forced us to negotiate some bilateral extradition treaties with some countries *primarily* so that we can secure the return of our own fugitives." EXTRADITION ACT REPORT, *supra* note 2, at 62 (emphasis added).

In 1984, the House Committee on the Judiciary defined extradition as "the process by which one country may obtain the assistance of another country in securing the return of a person who has allegedly committed a crime, or who has yet to complete a criminal sentence, in the former country." *Id.* at 1.

121. States often deport aliens as undesirable or excludable under their immigration laws; sometimes the effect of deportation is to return the person to a state where he has been charged with a crime. It is generally held that failure to follow the procedures for extradition is not a defense available to the accused in a prosecution following deportation.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 475 (1986).

122. See Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989), in which Great Britain refused to extradite a German national, who allegedly committed two murders in the state of Virginia, because he would face the death penalty. *See infra* text accompanying notes 127-131.

123. However, in Rosado v. Civeletti, 621 F.2d 1179 (2d Cir.), *cert. denied*, 449 U.S. 856 (1980), the court stated that "although the Constitution cannot limit the power of a foreign sovereign to prescribe procedures for the trial and punishment of crimes committed within its territory, it does govern the manner in which the United States may join in the effort [through extradition]." *Id.* at 1195-96.

124. In Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972), the District of Columbia Court

Consistent with the rule of non-inquiry, the United States does not entertain complaints from other countries regarding the nature of its own criminal justice system. Therefore, the United States should not expect other countries to heed its views on the appropriate treatment of extraditees. The nature of modern extradition treaties supports this view. Historically, treaties between nations did not address possible conflicting practices.[125] However, recent revisions and amendments to such treaties have included articles that allow countries to refuse extradition under specified circumstances.[126]

For example, in *Soering v. United Kingdom*,[127] the European Court of Human Rights refused extradition of Jens Soering, a West German national, to the United States. The European court stated that since Soering was charged with capital murder, a Virginia state jury would have the authority to impose the death penalty.[128] Although the Virginia district attorney claimed that he would inform the trial judge of the United Kingdom's abhorrence of the death penalty and request that the death penalty not be imposed,[129] the European court found this assurance insufficient.[130] This conflict brought the two countries to an impasse. As a result, the United Kingdom refused to comply with the United States' extradition request.[131]

The United States' refusal to offer greater assurances to the Euro-

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of Appeals noted the difficulty and impropriety of a United States court reviewing another country's judicial procedure with regard to crimes committed in that other country.

125. For example, the treaty in force between the United States and India, which is the treaty that existed between the United States and Great Britain before India became independent, made no mention of what would happen if the countries disagreed on certain practices that might occur after the extradition was completed. Extradition Treaty, Dec. 22, 1931, United States-Great Britain, 47 Stat. 2122, T.S. No. 849 [hereinafter 1931 United States-Great Britain Treaty].

126. *See, e.g.*, Extradition Treaty, Jan. 21, 1977, United States-Great Britain, 28 U.S.T. 229, T.I.A.S. 8468. For example, some countries have the death penalty and others abhor it. Article 4 of the United States-Great Britain treaty allows a country to refuse to extradite a prisoner in the absence of sufficient assurances that the extraditee will not be put to death. *Id.* at 230.

127. 161 Eur. Ct. H.R. (ser. A) (1989). The case was decided by the European Court of Human Rights, which had jurisdiction over the case because the United Kingdom adhered to the European Convention on Human Rights.

128. *Id.* ¶ 40.

129. *Id.* ¶ 20. However, the Virginia district attorney felt an "ethical responsibility to request the death penalty due to the nature of the crime involved." Proprietary to the United Press International 1989 (France), July 7, 1989, Regional News. The "grisly crime" in *Soering* involved two graduate students who, as lovers, allegedly murdered the woman's parents in response to their refusal to accept Soering. *Soering*, 161 Eur. Ct. H.R. ¶ 13.

130. *Id.* ¶ 22.

131. *Id.*

pean court resulted in the United States' inability to try or punish Jens Soering within its jurisdiction. This unwillingness either to abolish the death penalty or guarantee that it will not be imposed has forced the United States to forgo other extraditions as well. The United States' position in *Soering*, that its extradition requests should not be denied on the basis of other nations' views of the death penalty, is consistent with the rule of non-inquiry, whereby United States courts should not refuse the extradition requests of other nations on similar bases.

The main purpose behind extradition is to ensure the speedy return of an accused criminal to the requesting country to face justice. If it is inappropriate to impose the views of another country regarding punishment when deciding to extradite, it logically follows that a system of non-inquiry into those practices should be preferred. Judge Sweet's refusal to conduct an inquiry in *Gill & Sandhu* is consistent with such a perspective.

### *B. Justification of Non-Inquiry*

Courts have used two methods to counteract any unfairness resulting from the refusal to invoke judicial inquiry: the double criminality doctrine[132] and the probable cause determination.

The double criminality doctrine prohibits extradition on any charge that would not constitute a serious crime in the laws of both the requesting state and the requested state.[133] This doctrine preserves the integrity of the bilateral nature of extradition treaties. It also benefits the extraditing country by not requiring it to extradite an accused for an act which it does not perceive as criminal. In addition, the double criminality doctrine limits the amount of resources spent by requesting nations by specifically defining extraditable crimes. The process reserves these resources for cases viewed as serious by both countries.

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132. Although not labeled as such in treaties, the double criminality doctrine requires that the conduct for which extradition is sought be criminal in both countries or states. Comment, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception*, 61 N.Y.U. L. REV. 654, 690 (1986). For example, the extradition treaty between the United States and Great Britain provides that: "[e]xtradition is also to be granted for participation in any of the aforesaid crimes or offenses, provided that such participation be punishable by the laws of both High Contracting Parties." 1931 United States-Great Britain Treaty, *supra* note 125. *See also* Kester, *supra* note 5, at 1459. As a standard provision in nearly every United States extradition treaty, the double criminality doctrine is a generally accepted maxim of international law. *Id.*

133. Comment, *supra* note 132, at 690.

The second safeguard built into the extradition process is the probable cause determination.[134] Under this requirement, the requesting country must show probable cause that the accused is guilty of the crime charged.[135] The United States Supreme Court has required the requesting country to show probable cause according to United States laws.[136] As a result, the accused is protected from prosecution for crimes in which sufficient evidence does not exist. This also reduces the possibility of unfair treatment of an innocent person. Arguably, this doctrine obviates the need for judicial inquiry by requiring that the requesting country have reasonable grounds to extradite. It has been argued that if the double criminality doctrine is invoked and it is shown that probable cause exists, then judicial inquiry is unnecessary.[137]

These two principles are not, however, unchallenged. One author criticizes the double criminality doctrine for lacking substance.[138] In addition, the Court of Appeals for the Ninth Circuit inconsistently applied the double criminality doctrine in two recent cases.[139] Likewise, the probable cause determination, often relied upon as a safeguard against unfair practices, has been criticized because extradition hearings often do not allow the accused to present any meaningful defense.[140] As Professor John G. Kester aptly stated, "[D]eficient as it is in criminal procedure safeguards, the extradition process has decidedly criminal consequences."[141]

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134. *See supra* text accompanying notes 89-97. "If on such hearing, [the extradition judge] deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention . . . a warrant may issue." EXTRADITION ACT REPORT, *supra* note 2, at 43.

135. *See* Kester, *supra* note 5, at 1469 (quoting Charlton v. Kelly 229 U.S. 447, 462 (1912)).

136. *See Ex parte* Bryant, 167 U.S. 104, 105 (1897) (appeal of circuit court's final order by habeas writ, where Court held that evidence clearly showed appellant was guilty and that it was ultimately up to the Secretary of State to make the final determination).

137. *See, e.g.*, Ahmad v. Wigen, 910 F.2d 1063, 1064 (2d Cir. 1990) (stating that the court did not "necessarily subscribe to the district court's dicta concerning the expanded role of habeas corpus in an extradition proceeding, which led to the district court's extensive exploration of Israel's system of justice").

138. Kester, *supra* note 5, at 1461. Kester writes that the principle "often does not mean much" due to its inconsistent application. *Id.*

139. *Id.* In Caplan v. Vokes, 649 F.2d 1336 (9th Cir. 1981), the Ninth Circuit reversed an extradition order because the district court had made a conclusory finding of sufficiency of charges. However, in Theron v. United States Marshal, 832 F.2d 492 (9th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988), the court upheld an extradition where the foreign criminal statute was much broader than its United States counterpart.

140. *See* Kester, *supra* note 5, at 1470.

141. *Id.* at 1446.

### *C. Problems with Non-Inquiry*

Although a system of judicial non-inquiry purports to uphold currently-held values in the United States[142] and to further safeguard the extradition process,[143] it can fail to protect extraditees from political persecution and fundamental unfairness upon their return to the requesting country.[144] The doctrine of judicial non-inquiry does not sufficiently secure "individualized justice for persons charged with political offenses as well as for potential victims of political persecution."[145] The political offense doctrine[146] is sometimes cited as a means of protecting individuals accused of political offenses from being persecuted unjustly for political beliefs and acts.[147] However, due to an increase in transnational crime that is not political in nature,[148] the doctrine is no longer a sufficient means of protecting all potential victims of torture and other mistreatment. Additionally, the refusal of courts to find certain acts "political" has resulted in the extradition of many individuals to countries where they may be persecuted by the requesting government.[149]

Proponents of judicial non-inquiry assert that "the Secretary [of State] never has directed extradition in the face of proof that the extraditee would be subjected to procedures or punishment antipathetic to a federal court's sense of decency," and that it is "difficult to conceive of a situation in which a Secretary of State would do so."[150] However, the United States rarely refuses to extradite, and has done so only in cases where a treaty expressly states the basis for refusal.[151]

Many scholars are convinced that the Secretary of State should not be making extradition decisions.[152] Some believe that the State

142. *See supra* notes 120-122 and accompanying text.

143. *See supra* text accompanying notes 132-135.

144. EXTRADITION ACT REPORT, *supra* note 2, at 59.

145. *Id.* at 58.

146. In the extradition context, a political offense is "a criminal act committed in the course of, or incidental to, a violent political disturbance such as war, rebellion, or revolution." *Id.* n.1. Under the political offense doctrine, "a requested state may deny a state's extradition request if it considers the crime to be a 'political offense.' " Comment, *supra* note 132, at 655.

147. EXTRADITION ACT REPORT, *supra* note 2, at 58.

148. The United States is currently facing a dramatic increase in international crime. *U.S. Authority on Foreign Shores*, L.A. Times, Jan. 16, 1990, at B6, col. 4.

149. *See, e.g.*, Eain v. Wilkes, 641 F.2d 504, 513 (7th Cir. 1981); Sindona v. Grant, 619 F.2d 167, 173 (2d Cir. 1980).

150. Ahmad v. Wigen, 910 F.2d 1063, 1067 (2d Cir. 1990).

151. M.C. BASSIOUNI, *supra* note 5 (quoting Hyde, *The Extradition Case of Samuel Insull*, 28 AM. J. INT'L L. 307 (1934)).

152. EXTRADITION ACT REPORT, *supra* note 2.

Department cannot be trusted to weigh the rights of individuals against the government's own agenda due to the obvious differing interests involved.[153] Indeed, federal courts may act as a buffer in these situations and thereby enable the executive branch to avoid such obviously conflicting interests.[154] An independent federal judiciary is better able to make initial decisions about potential persecution in other nations.[155]

## V. LEGISLATIVE PROPOSAL

The proposed Extradition Act of 1984 was an attempt by the House Committee on the Judiciary to bring "more order and fairness to the extradition process."[156] Current extradition law was drafted when due process rights were much more restricted than they are today.[157] In response to these concerns, the committee proposed many substantive changes to the extradition process. Most importantly, it attempted to eliminate the rule of judicial non-inquiry and to impose an affirmative duty upon the courts to deny extradition when the requesting country would persecute the individual or when extradition would subject the individual to "fundamental unfairness."[158]

The hearing of the House Subcommittee on Crime[159] focused more attention on this judicial inquiry issue than on any of the other issues contained in the proposed Act. The proposed Act provided that a court could not extradite if it found that the individual had established by a preponderance of the evidence that such individual

153. *See* Kester, *supra* note 5, at 1481 (citing *Reform of the Extradition Laws of the United States: Hearings on H.R. 2643 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 34, at 81, 88, 418 (1983)).

154. EXTRADITION ACT REPORT, *supra* note 2, at 63-64.

155. *Id.* at 64.

156. *Id.* at 2.

157. *See supra* text accompanying notes 6-7.

158. EXTRADITION ACT REPORT, *supra* note 2, at 63-64. In addition, the Act proposed that the Attorney General assume the role of the complainant in all extradition matters. *Id.* at 7. It also required countries to submit extradition requests only in federal courts. *Id.* The purpose of these provisions was to ensure uniformity in the filing process. The Act additionally proposed that arrest warrants be issued without knowledge of the accused's whereabouts in order to prevent long delays in filing. *Id.* It also established standards and procedures for the release of persons sought by requesting countries for extradition. *Id.* The Act also proposed "temporary extradition" to the United States for those imprisoned in the requested country. *Id.* Additionally, the proposed bill established a right to counsel for indigents and permitted appeal of the extradition hearing. *Id.* Finally, it codified the political offense doctrine, the dual criminality principle, and required that accused individuals be charged with a serious crime in order to be extradited. *Id.*

159. *Id.* at 30.

"would, as a result of extradition, be subjected to *fundamental unfairness*."[160] It also conferred discretion upon the Secretary of State to refuse to extradite an individual after a judge had ordered the extradition.[161]

The opposing sides on this issue argued for exclusive discretion by either the judicial or the executive branch. Proponents of judicial inquiry argued that "as impartial arbiters, [the courts] have an important role to play in the protection of human rights and in ensuring that the extradition process will not be used as a subterfuge for persecution and unfair treatment."[162] Conversely, those in favor of continued sole discretion in the Secretary of State argued that the decision to extradite is a "political one, [and] that the courts lack competence to review such a decision."[163] Furthermore, they argued, "the Secretary of State, unlike the courts, is able to avoid publicity in making this decision and simply does not pursue requests based on political motives."[164]

The proposed Act would have explicitly mandated judicial inquiry.[165] This would have been a preferable approach for several reasons. First, the discretion to extradite should not be left solely to the executive branch.[166] The executive branch has obvious conflicting interests in the area of foreign affairs.[167] It must adhere to its obligations as set forth in its extradition treaties with requesting nations. The Secretary of State considers retaliation by other countries for the United States' refusal to extradite. The Secretary is also subject to pressure to maintain positive relations with other countries, while remaining sensitive to the human rights of extraditees.[168] Because of these important political considerations, human rights considerations can easily be subsumed in the balancing process. Perhaps it is no coincidence that the Secretary of State has never refused an extradition request explicitly due to human rights concerns.[169]

160. *Id.* at 52 (emphasis added).

161. *Id.* at 55.

162. *Id.* at 31. *See also* Banoff & Pyle, *To Surrender Political Offenders: The Political Offense Exception to Extradition in the United States Law*, 16 N.Y.U. J. INT'L L. & POL. 169 (1984).

163. EXTRADITION ACT REPORT, *supra* note 2, at 30.

164. *Id.* at 66.

165. *Id.* at 52.

166. *Id.* at 62.

167. *Id.* at 64.

168. *Id.*

169. *See* Kester, *supra* note 5, at 1481.

In drafting the proposed Extradition Act of 1984, Congress sought to prevent the "arbitrary imposition of severe punishment," by imposing an affirmative duty to inquire into human rights considerations.[170] Proponents of inquiry argue that the Senate cannot adequately safeguard against abuse through the treaty process.[171] Opponents of inquiry argue that the United States would rarely run into such problems because it refuses to enter into extradition treaties with those countries that have fundamentally unfair practices.[172] However, this argument for non-inquiry lacks merit. The United States has extradition treaties in force with countries that routinely violate human rights, including India, Iraq, and Nicaragua.[173] The number of United States bilateral extradition treaties has increased due to the growth of transnational crime and the desire to obtain fugitives from justice.[174] Consequently, the United States has given less weight to considerations of human rights abuses by treaty nations. In fact, the State Department's own Human Rights Reports include accounts of various countries with which the United States has an extradition treaty in which the fundamental fairness issue is strongly implicated.[175] The reports include excerpts on Iraq subjecting its citizens to "arbitrary arrest on political or security grounds," and Haiti allowing beatings as a "traditional practice in Haitian jails."[176]

Presumably, the State Department does reserve the right to terminate treaties when fundamental fairness cannot be assured.[177] However, the United States has never done so.[178] In addition, the executive branch could refuse to extradite. However, such refusal represents an understandably tenuous response. Such an act by the government may give rise to unfavorable diplomatic repercussions,

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170. EXTRADITION ACT REPORT, *supra* note 2, at 61.

171. *Id.*

172. *Id.*

173. U.S. DEP'T OF STATE, PUB. NO. 9433, TREATIES IN FORCE 116, 171 (1989). The proponents of judicial inquiry have cited several examples of open extradition treaties between the United States and countries which have abhorrent practices, including Turkey, whose government "admitted that 15 persons in a government custody had died as a result of torture." EXTRADITION ACT REPORT, *supra* note 2, at 62. Additionally, "the United States extradition agreement with the Weimar Republic of Germany appears to have remained in force and effect through the pre-war Nazi years." *Id.*

174. EXTRADITION ACT REPORT, *supra* note 2, at 62.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*; *see* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 534 (1980).

and, in some instances, has led to retaliatory measures.[179] These unfortunate results may be minimized if the judiciary is allowed to act as a buffer.[180]

## VI. AMNESTY INTERNATIONAL PROPOSAL

The proposed alternatives to judicial non-inquiry seem to offer little chance of advancement of human rights and dignity. Toward this end, the human rights organization, Amnesty International,[181] submitted an amicus brief in *Gill & Sandhu*.[182] Amnesty International's brief called for the use of judicial inquiry and outlined human rights abuses in India, especially in the Punjab, where the alleged crimes of Gill and Sandhu took place.[183] The brief also documented the deficiency of procedural safeguards in India, specifically with respect to Sikh members like Gill and Sandhu.[184]

Amnesty International was particularly concerned with what it labeled "encounter killings."[185] Encounter killings are killings staged by police, resulting from an "encounter" in which the police were forced to fire in "self-defense," or where the person died because he or she "resisted arrest" or "tried to escape."[186] Amnesty International characterized these falsified reports as mere "covers" for deliberate executions of suspected criminals.[187] Encounter killings are most prevalent in the Punjab,[188] where Gill and Sandhu were to be extradited. Amnesty International found support for these allegations of abuse in the report of the Bains Committee[189] which reported that "Punjab law enforcers were 'ruthlessly indulging in apprehending in-

179. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 475 (1986).

180. EXTRADITION ACT REPORT, *supra* note 2, at 63.

181. "Amnesty International is an independent worldwide movement which works impartially for the release of all prisoners of conscience, defined as persons detained for their beliefs, color, sex, ethnic origin, language, or religion who have not used or advocated violence." Amnesty International Brief, *supra* note 101, at 1.

182. Gill & Sandhu v. Imundi, 747 F. Supp. 1028 (S.D.N.Y. 1990).

183. Amnesty International Brief, *supra* note 101, at 5.

184. "Nearly 3,000 unarmed Sikh civilians were killed following the assassination [of Prime Minister Indira Gandhi]. Since that time, and because of mounting reports of violence involving the Sikhs, paramilitary forces, the Central Reserve Policy Force and the Border Security Force were deployed in Punjab in March 1986." *Id.* at 7 n.5 (quoting *India: Execution of Satwant Singh and Kehar Singh,* NWS 11/02/89 (Jan. 12, 1989)).

185. *Id.* at 16.

186. *Id.* at 15-16.

187. *Id.* at 15.

188. *Id.* at 16.

189. *Id.* at 18.

nocent persons and killing some of them.' "[190] Amnesty International concluded that Gill and Sandhu "could suffer similar fates if extradited to India."[191]

Amnesty International raised additional concerns about the torture and mistreatment of prisoners detained in India.[192] Detainees and prisoners are commonly tortured in India, in violation of the International Covenant on Civil and Political Rights,[193] of which India is a member.[194] A 1977 police survey revealed 76,444 complaints of torture in Indian states.[195] Accounts of documented, widespread, and abhorrent practices clearly affected the court in *Gill & Sandhu*;[196] the court found the evidence put forth by Amnesty International to be "substantial" and "chilling."[197] This evidence convinced the court to conduct further judicial inquiry into the allegations in order to avoid "blinding" it to the "foreseeable and probable results" of exercising jurisdiction and possibly aiding India in the exercise of unconscionable conduct.[198] Although the brief did not advocate any specific procedural remedies, it did propose judicial inquiry into human rights concerns as a method of avoiding unjust extradition.[199] In spite of such convincing evidence, the rule of judicial non-inquiry in habeas proceedings prevented the *Gill & Sandhu* court from inquiring into the possible future treatment of the defendants.[200]

## VII. Recommendation: Judicial Inquiry in Extradition Hearings

Judicial inquiry should be instituted immediately to prevent further injustices to the due process rights of individuals in the extradition process.[201] Such inquiry can most appropriately occur during the

190. *Id.* (quoting *India: Sikh Detainees from the Punjab Held Since June 1984*, AI Index: ASA 20/11/86, at 7 (Dec. 1, 1986)).

191. *Id.* at 19.

192. *Id.*

193. 999 U.N.T.S. 171.

194. *See* Amnesty International Brief, *supra* note 101, at 19; *see also supra* text accompanying note 63.

195. Amnesty International Brief, *supra* note 101.

196. *Gill & Sandhu*, 747 F. Supp. at 1049.

197. *Id.* at 1048.

198. *Id.* (quoting Ahmad v. Wigen 726 F. Supp. 389, 410 (E.D.N.Y. 1989)).

199. Amnesty International Brief, *supra* note 101.

200. *Gill & Sandhu*, 747 F. Supp. at 1050.

201. *See* Bassiouni, *Extradition Reform Legislation in the United States: 1981-1983*, 17 Akron L. Rev. 495, 571 (1984). Bassiouni states that such an imposition "could easily rely on existing international instruments binding upon the United States," such as: the Universal

initial extradition proceeding before the extradition judge or magistrate.

### *A. The Extraditee's Potential Mistreatment as a Consideration in Extradition Hearings*

The potential mistreatment of an extraditee in the requesting country is a significant problem inherent in the extradition process. Many countries have expressed concern about extraditing individuals to countries that they consider to have abhorrent punishment practices.[202] Additionally, the principle aim of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[203] is "to strengthen the existing prohibition" of torture and other cruel, inhuman, or degrading treatment or punishment by supportive measures.[204] Although all agree that potential mistreatment must be considered, there is fervent disagreement as to which branch of government should conduct the inquiry.[205]

### *B. Inquiry into Potential Mistreatment by the Judicial Branch*

The judiciary is the most appropriate branch of government to engage in inquiries of abhorrent practices by requesting nations. Potential threats to a defendant's life or well-being present complex questions of human rights and equity which should be assessed by the courts. Federal judges are insulated from political pressure and publicity, which allows them to avoid making decisions based on outside forces such as foreign relations concerns. The judiciary's insulated position contrasts significantly with the Secretary of State who inherently faces constant political and foreign pressure. Such pressure may influence the Secretary to downplay the significance of potential human rights abuses.[206] Judges have the ability to impartially balance interests of the accused against those of the government. Furthermore, since the courts may not be parties to abusive practices, even when foreign relations of a sensitive nature are involved,[207] they are

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Declaration of Human Rights; the International Covenant of Civil and Political Rights; and others. *Id.*

202. *See supra* text accompanying notes 127-131.

203. G.A. Res. 46, 23 U.N. GAOR Supp. (No. 39) at 395, U.N. Doc. A/51 (1984).

204. *Id.*

205. Some believe the inquiry should be left up to the Secretary of State, while others contend that the judiciary should conduct the inquiry. EXTRADITION ACT REPORT, *supra* note 2, at 34.

206. *See supra* text accompanying notes 167-169.

207. *See supra* text accompanying note 103.

bound to ignore political concerns when the misconduct is extreme in nature. As the court in *Ahmad v. Wigen*[208] noted, "[T]he courts are not, and cannot be, a rubber stamp for the other branches of government in the exercise of extradition jurisdiction. They must, under article III of the Constitution, exercise their independent judgment in a case or controversy to determine the propriety of an individual's extradition."[209]

Although some courts have argued that potential extraditees do not possess constitutional rights,[210] other courts have disagreed. In *Mathews v. Eldridge*,[211] the United States Supreme Court held that due process requires the United States to afford a meaningful opportunity to be heard to all individuals who face deprivation of liberty or property.[212] In *Ahmad v. Wigen*,[213] the District Court for the Eastern District of New York heard the petitioner's due process claim pursuant to a writ of habeas corpus.[214] The government, on motion, sought a writ of mandamus to prevent the district court from hearing the claim.[215] The court denied the government's request, and stated that "due process of law requires fair procedures for aliens as for citizens . . . in civil as in criminal proceedings, before administrative bodies and in courts."[216] The court also stated that such an inquiry

> does not require us to impose details of [the United States] Constitution or procedural system on the requesting country's judicial system. It does entail an obligation not to extradite people who face procedures or treatment that "shocks the conscience" of jurists acting under the United States Constitution and within our current legal ethos.[217]

The court continued by stating that extradition may be refused if a country has "substantial grounds" for believing a person "would risk suffering other human rights violations."[218] After evaluating the petitioner's due process claim, the *Ahmad* court found extradition ap-

208. 726 F. Supp. 389 (E.D.N.Y. 1989).
209. *Id.* at 412.
210. *See* Kester *supra* note 5, at 1443-45.
211. 424 U.S. 319 (1976).
212. *Id.* at 333.
213. 726 F. Supp. 389 (E.D.N.Y. 1989).
214. *Id.*
215. *Id.* at 395.
216. *Id.* at 411-412.
217. *Id.*; Rosado v. Civiletti, 621 F.2d 1179, 1195-96 (2d Cir.), *cert. denied*, 449 U.S. 856 (1980); *see also* Neely v. Henkel, 180 U.S. 109, 122 (1901).
218. *Ahmad*, 726 F. Supp. at 411.

propriate because no due process right would be violated.[219] On appeal, the Second Circuit concluded that "the Government's conduct violated neither the constitution nor established principles of international law."[220] The district court's refusal to grant the government's writ of mandamus and its insistence on evaluating the due process claim supports the assertion that due process claims are appropriately heard in the extradition context.

The Seventh Circuit Court of Appeals established this proposition in *In re Burt*.[221] The court held that the "petitioner's due process claim could properly be considered in habeas corpus review of [the] extradition proceeding . . . ."[222] According to the court, habeas corpus review of extradition proceedings includes the consideration of procedural defects as well as abhorrent substantive conduct in requesting countries.[223] Additionally, the court may address the extent to which the United States would be assisting the requesting country in such conduct by participating in the extradition.[224] Finally, the court recognized that other exceptional constitutional limitations on extradition orders may exist due to "particularly atrocious procedures or punishments employed by the foreign jurisdiction."[225] Therefore, to prove the "atrocious" acts of other sovereigns, the accuseds must be given a "meaningful opportunity to be heard."[226]

### 1. Due Process Requirements in the Context of an Extradition Hearing

*Mathews v. Eldridge* enunciated several factors that courts must balance in determining whether an individual has been afforded due process in any given case.[227] These factors include: (1) private interests affected by official action; (2) risk of erroneous deprivation of interests; (3) probable value, if any, of additional or substitute

219. *Id.* at 420. Persuasive in this finding was evidence that Israel, the requesting country, had never before refused due process to an extraditee. Evidence also suggested that the petitioner's current profile would no longer invite pressure from police. Most persuasive, however, was the Israeli assurance to the United States that if the petitioner was extradited, he would "not be subjected to torture or other inhumane and degrading treatment." *Id.* at 417.

220. *Ahmad*, 910 F.2d at 1065.

221. 737 F.2d 1477 (7th Cir. 1984).

222. *Id.*

223. *Id.*

224. *Id.* at 1484.

225. *Id.* at 1487.

226. *Mathews*, 424 U.S. at 333.

227. *Id.* at 335.

procedural safeguards; and (4) governmental interest, including the burden of imposing additional or substitutional safeguards.[228]

Applying the first *Mathews* factor, Gill and Sandhu clearly have strong private interests in being heard on the potential mistreatment that awaits them upon their return to India. Their interests concern life, limb, and protection from persecution and torture. If Gill and Sandhu are extradited to India, they may become victims of false encounters, torture, and abhorrent treatment.[229]

Second, *Mathews* directs consideration of the risk of erroneous deprivations of the interests as a result of the government's procedures.[230] The current extradition procedures create a high risk that an individual's liberty interests will be erroneously deprived. The abbreviated nature of an extradition hearing increases that risk.[231] Magistrates have unfettered discretion to deny any and all discovery requests.[232] The lack of clear standards to guide the decision whether or not to extradite contributes to possibly arbitrary and capricious results. Moreover, when discovery is permitted, it is usually severely limited.[233] Most courts currently refuse to consider any documentation of possible mistreatment by the requesting country.[234] In *Gill & Sandhu*, the court refused to consider extensive documentation by Amnesty International of past atrocities of the Indian government, as well as evidence of potential persecution and torture faced by Gill and Sandhu.[235] Additionally, evidence of previously fabricated criminal charges against Gill and Sandhu was dismissed without consideration.[236] This limited procedure clearly threatens to deprive Gill and Sandhu of their liberty interests.

The third *Mathews* factor to consider in the due process balance is the availability of additional or substitute procedural safeguards.[237] The most obvious safeguard which may be afforded to extraditees is judicial inquiry into possible antipathetic treatment by the requesting country. The addition of this safeguard to the current extradition

228. *Id.*
229. *See supra* text accompanying notes 185-191.
230. *Mathews*, 424 U.S. at 335.
231. *See* Kester, *supra* note 5, at 1443-45.
232. *Gill & Sandhu*, 747 F. Supp. at 1040. *See also supra* text accompanying notes 79-82.
233. *See, e.g., In re* Sindona, 450 F. Supp. 678 (S.D.N.Y. 1978). "An accused person's right to produce evidence at an extradition hearing is limited." *Id.*
234. *See supra* text accompanying notes 114-119.
235. *Gill & Sandhu*, 747 F. Supp. at 1050.
236. *Id.* at 1049-50.
237. *Mathews*, 424 U.S. at 335.

process would be of great value. If such inquiry reveals practices which violate the fifth amendment's due process standards, a magistrate should deny extradition. In all extradition proceedings where the issue is raised, the court should conduct such an inquiry and document its findings in its assessment of whether or not the individual should be secured for extradition.

Finally, when weighing the *Mathews* factors, the court must consider the government's interest.[238] The fiscal and administrative burdens of imposing a duty of inquiry on courts is minimal. Procedural inquiries into other countries' treatment and punishment practices are commonly used in other areas of law. For example, in deportation cases, courts consider the country of origin and its practices when deciding whether to deport aliens or grant political asylum.[239] In deportation hearings, the court places the burden of proof on the refugee to prove that the refugee's life or freedom would be threatened if deported.[240] Alternatively, to avoid deportation, the refugee can prove that it is more likely than not that he or she will be subjected to persecution in the country.[241] A similar system could easily be employed by the courts in extradition hearings, as similar considerations are factored into extradition hearings. For example, the *Gill & Sandhu* court received documentation of potential persecution and torture submitted by Gill and Sandhu, Amnesty International, and the Bains Commission. These documents could have been utilized in performing judicial inquiry.[242] Therefore, the standards already available and utilized by courts in deportation cases, in addition to the information routinely submitted, make the impact on the government minimal.

### *C. Judicial Inquiry Before the Extradition Judge or Magistrate*

Extradition judges or magistrates should take the initiative at the initial hearings to establish a system of judicial inquiry into potential mistreatment.[243] This would require no legislative action.[244] The initial extradition hearing is the most appropriate forum for making such a determination. The evidence is presented there in both written and testimonial form. The extradition judge or magistrate has the

238. *Id.*
239. INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1986).
240. *Id.*
241. *Id.*
242. *Gill & Sandhu*, 747 F.2d at 1048.
243. *See id.*
244. *See supra* text accompanying notes 114-116.

best resources by which to make an informed decision about the possible mistreatment of an accused. Unlike the habeas court, which is limited to review of the lower court's findings and not permitted to analyze new arguments, the original extradition court has immediate access to such information.

### *D. Post-Judicial Inquiry: What Happens if the Requesting Country's Practices "Shock the Conscience?"*

A final concern arises if courts adopt a system of judicial inquiry. In cases where the court inquires and finds that the requesting country imposes abhorrent procedures or punishments, it must then decide what to do with the individual. Arguably, the United States should conduct the prosecution,[245] rather than surrender the person to such an oppressive or arbitrary system. However, this alternative raises additional problems. First, since the crime for which extradition is sought occurred in the requesting country, the requesting country has better access to the evidence and witnesses necessary for a fair trial. In fact, trial in the United States would disadvantage the defense due to its limited resources by which to attain evidence or witnesses abroad. Moreover, a crime in the requesting country might not be considered a crime in the United States. Therefore, trial in the United States is not a viable solution.

One way to avoid the inherent problems associated with trial in the United States is to extradite the individual to the requesting country upon adequate assurances from the requesting government that it will adhere to minimum standards of due process. If necessary, a monitor can be sent to ensure that the requesting country adheres to the standards to which it agreed by treaty or international law. However, it is possible that the requesting country will refuse to provide adequate assurances to the United States.[246] In those cases, presumably a small number, the United States will have to release the individual or secure as fair a trial as possible in the United States.

## VII. CONCLUSION

Extradition procedures in United States courts must accord ac-

245. M.C. BASSIOUNI, *supra* note 5, at 531.

246. The United States has likewise failed to provide adequate assurances in certain cases. *E.g., Soering*, 161 Eur. Ct. H.R. ¶ 22 (European Court of Human Rights refused an extradition request by the United States because of insufficient assurances that the death penalty would not be imposed).

cused individuals due process of law before depriving them of their liberty interests. The current rule of judicial non-inquiry compromises extraditees' due process rights by denying them a meaningful opportunity to be heard. Some courts defer to the Secretary of State, believing that such inquiry is a political question or that such a deferral alleviates the need for judicial inquiry. Still others claim that no inquiry is necessary because the United States would not enter into treaties with governments that abuse human rights.

Proponents of judicial inquiry argue that these assertions are fallacious. The Secretary of State does not adequately consider humanistic factors, and rarely refuses extradition requests for any reason.[247] Furthermore, the decision to extradite, when presented to the Secretary of State, is primarily based on political considerations. These considerations include: a presumption that the United States is obligated to extradite under the treaty; the United States' desire for reciprocity in extraditions; fear of retaliation if the United States refuses to extradite; and the negative impact of a refusal to extradite on other aspects of foreign relations. At the bottom of this list, if at all, is a concern for the liberty interests of the accused.

Judicial inquiry will protect the due process rights of the accused. The procedures that due process requires are established by balancing the factors set forth by the Supreme Court in *Mathews v. Eldridge*.[248] A great liberty interest is at stake in extradition proceedings. In addition, little burden is imposed on the government by compelling a system of judicial inquiry. The potential for retaliation against the United States is limited because the decision will have been made by an independent judiciary applying principled maxims of constitutional law.

For judicial inquiry to be effective, courts must allow broad discovery and hear evidence from bodies like Amnesty International. These independent reports, often overlooked by the executive branch, contain the most current and relevant information on the human rights records of nations. In this way, United States courts can abstain from any indirect role in the perpetuation of inhumane actions by foreign governments. Moreover, the courts' adoption of broad judicial inquiry into foreign practices will be an affirmative step by the

247. *See supra* text accompanying note 151.
248. 424 U.S. 319 (1976).

judiciary toward bringing United States jurisprudence in line with internationally accepted norms of human rights.

*Lauren Sara Wolfe**

* This Note is dedicated to my brother, Daniel Wolfe, for his support, encouragement, and inspiration.