Protecting the Rights of the Requested Person in Extradition Proceedings: An Argument for a Humanitarian Exception

Leslie Anderson
University of Michigan Law School

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INTRODUCTION

Traditionally, international relations have dominated extradition law and practice, with the rights of the requested person receiving very little consideration. Adhering to this primacy of international relations in extradition, federal courts in the United States have affirmed the limited nature of their inquiry in extradition proceedings on the grounds that the U.S. Constitution delegates foreign affairs powers to the executive and legislative branches. This judicial deference is reinforced by the language of 18 U.S.C. § 3184 which codifies the judiciary's role in the extradition hearing. Section 3184 does not provide for the committing magistrate to inquire into the legal processes and conditions of punishment awaiting the requested person should extradition obtain.

When requested persons have raised the issue of an anticipated violation of their rights by the requesting state, the courts have held the issue to lie outside their jurisdiction and to be a matter for executive decision. Therefore any consideration of the post-extradition treatment awaiting the requested person is theoretically undertaken by the State Department, the agency charged by Congress with the final decision to issue or deny an extradition warrant.

This article will first define the types of post-extradition treatment which requested persons have raised as requiring judicial attention. It will next survey judicial responses to these claims and then consider the scope of executive review. The article concludes that the courts have exaggerated the range of executive discretion to deny extradition. As extradition currently operates in the United States, there is the serious possibility that a

* Leslie Anderson is a member of the class of 1983, University of Michigan Law School.
bona fide claim of unfair treatment would not receive adequate consideration by either the judicial or executive branch.

**TYPES OF CLAIMS OF UNFAIR TREATMENT**

Extradition treaties themselves often include certain exceptions to the obligation of a signatory state to extradite based on the requested country's belief that under specified conditions extradition would lead to unfair treatment of the requested person by the requesting country. Where such provisions exist, either the courts or the executive branch can apply them to block extradition. For example treaties may provide that if the statute of limitations period has run in either the requesting or requested country for the offense charged, the individual need not be extradited. Treaties sometimes preclude extradition for capital offenses or require a pledge from the requesting country that the death penalty will not be used. In each of these examples the requested country has articulated in the treaty its right in certain circumstances to impose upon the requesting country its standards of fair procedure (in the case of statute of limitations) or humane punishment (in the case of the death penalty).

These treaty exceptions fail to exhaust all conceivable instances of unfair treatment which may await an extradited person. Requested persons in U.S. federal court proceedings have raised three types of unfair treatment claims that lie outside the limited exceptions provided for in the applicable extradition treaty. Requested persons have claimed the trial in the requesting state will be or was unfair, that the awaiting punishment will be excessive or cruel, and finally that the requesting country will be unable or does not intend to protect the requested person from assassination attempts. Thus far no federal court or magistrate has denied extradition based on one of these extra-treaty claims, which this article shall designate as claims to a "humanitarian exception" to extradition.

A functioning humanitarian exception would permit the courts to deny extradition when the requested person makes a convincing claim that the requesting country either will not afford the relator a fair trial, based on pre-extradition occurrences or on convincing evidence of likely post-extradition practice, or will impose fundamentally unfair or inhumane conditions of imprisonment. Because the humanitarian exception, if applied by the federal courts, would directly implicate another country's criminal justice system, its use would have to be restricted to the most egregious circumstances.
JUDICIAL RESPONSE TO HUMANITARIAN EXCEPTION CLAIMS

In the 1901 case of Neely v. Henkel the Supreme Court upheld against constitutional attack the precursor to Section 3184. An American citizen had charged that the statute violated the fifth amendment because it did not secure for the accused, when surrendered to the requesting country, all of the rights, privileges and immunities guaranteed to defendants in U.S. criminal proceedings. The Court rejected the challenge, holding that U.S. Constitutional provisions "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country."

Since Neely v. Henkel several requested persons have argued in habeas corpus proceedings that their extradition would leave them facing a criminal procedure or punishment inimical to U.S. constitutional or international law standards. The courts have continued to declare that such concerns are outside the jurisdiction of the committing magistrate and of the courts in habeas corpus proceedings. However, in a 1960 case, Gallina v. Fraser, the Second Circuit noted in dictum that, if faced with extreme circumstances it might reevaluate this policy. In Gallina the relator had been tried and convicted in absentia in Italy on armed robbery charges. If extradited he would have been sent directly to prison. The relator, an American citizen, argued that the trial in absentia violated his due process rights. The district court, echoing Neely, asserted that a U.S. court could not consider foreign procedural safeguards in an extradition hearing and found Gallina to be extraditable. The court of appeals affirmed but with the following reservation:

[W]e have discovered no case authorizing a federal court, in a habeas corpus proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await the relator upon extradition. . . . The authority that does exist points clearly to the proposition that the conditions under which a fugitive is to be surrendered to a foreign country are to be determined solely by the non-judicial branches of the government. . . . We can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require re-examination of the principle.

The court did not indicate any constitutional or statutory justification for a court or committing magistrate to consider humanitarian issues. Moreover, it did not find Gallina's trial in absentia to be antipathetic to its sense of decency because of the possibility that the State Department would condition extradition upon Italy's promise of a new trial as it had
done in the case of In re D'Amico. The State Department in fact did request a new trial upon extradition of Gallina.

Subsequent Second Circuit extradition cases have preserved the Gallina dictum, but in none has the court held that any deficiency of procedure awaiting the requested person shocked its sensibility sufficiently to deny an extradition. In a 1974 case, United States ex rel Bloomfield v. Gengler, relators claimed that Canada's criminal justice system violated their due process rights because it permitted an appellate court to reverse an acquittal and convict without a new trial. The Second Circuit rejected the claim, noting that relators had been permitted a full defense at the trial level and had then left Canada with notice of the appellate procedure. The court in dictum said that had relators been denied the opportunity to assert a defense at the trial level such claim might fall within the Gallina caveat.

In In re Sindona, a 1978 case, the accused, a former bank president charged with the crime of "fraudulent bankruptcy," claimed that Italian extremists had threatened his life and that Italy's government would be unable to provide him with adequate protection were he extradited. He also claimed that Italy would not afford him a fair trial. The district court for the Southern District of New York dismissed both these claims as properly addressed to the executive branch. The court reached these determinations with Gallina in mind:

I conclude that Sindona has not made even a threshold showing that he would be subjected to procedures in Italy which would be so violative of human rights as to prevent extradition.

The court also responded generally to Sindona's complaints about the threats to his life and the inability of Italy's embattled political system to provide him with proper security and a fair trial. The court wrote that "the Italian government is evidencing its intention and ability to keep the criminal justice system functioning in a proper manner even under the most difficult circumstances." The court noted that this faith in Italian institutions was consistent with articulated executive policy; the State Department had earlier sent a letter to all United States Attorneys' offices stating that the U.S. had normal diplomatic relations with Italy and that all extant treaties were fully in force. Thus while the district court preserved the Gallina dictum in that it did consider whether Sindona's claims to unfair treatment made a "threshold showing" that would require further judicial investigation, its rejection of those claims had a component of the traditional judicial deference to the executive insofar as it relied upon the State Department letter.

The Court of Appeals for the Second Circuit affirmed the district court's holding. It supported the specifics of the lower court's response to Sin-
Sindona’s claim to a humanitarian exception and also rejected Sindona’s argument that the Gallina dictum required the court to play an expanded role in extradition hearings when humanitarian claims were raised:

Sindona counters that our decision in Gallina v. Fraser requires the extraditing magistrate to consider whether the circumstances awaiting a fugitive upon extradition would be so egregious as to offend the court’s “sense of decency.” We find no such rule in Gallina. That decision denied habeas corpus on the strength of established authority holding that the federal courts may not “inquire into the procedures which await the relator upon extradition.” The fact that Gallina also added the caveat that some situations were imaginable in which a federal court might wish to reexamine the principle of exclusive executive discretion falls well short of a command to do so here. In any event, it is apparent that Judge Griesa [the committing judicial officer] thoroughly examined the affidavits and exhibits relevant to Sindona’s claim. If Gallina alone may not have required this much, it follows a fortiori that there was no obligation to hold an evidentiary hearing. 36

This passage cautions against reading Gallina too broadly. The court reminds us that the Gallina holding itself was consistent with established authority refusing to consider post-extradition treatment. The dictum merely suggests that under extreme circumstances a committing magistrate or a court in a habeas corpus proceeding may address a humanitarian exception claim. 37 Sindona indicates, however, that a magistrate or court has no obligation to address such a claim, and that the Gallina dictum has not changed the court’s role in extradition procedure in the Second Circuit. Other circuits have been even less willing to address the issue of relators’ rights. Both the Fifth Circuit and the District of Columbia Court of Appeals have reasoned that the foreign affairs aspect of extradition precludes any judicial inquiry into the humanitarian claims of the requested person.

Their view of their limited role is reinforced by a procedural consideration apparently ignored by the Gallina dictum: the limited review of the magistrate’s decision available to a requested person. Appeals are restricted to petitions for writs of habeas corpus. As suggested by one court, this review has traditionally been quite narrow: “Under existing law, such review includes only (1) whether the magistrate had jurisdiction, (2) whether the evidence showed a reasonable ground to believe the accused guilty and (3) whether the offense was a treaty offense.” 38 Yet, the same court indicated that issues not within the scope of habeas corpus proceedings might still entail a constitutional case or controversy. 39 Unfortunately the court did not elaborate on the nature of such constitutional cases or controversies, or discuss by whom they were to be entertained.

Against this background, in the 1980 Fifth Circuit opinion of Escobedo v.
United States, relator attempted to raise a humanitarian exception claim. The court held the issue of the claim's validity to lie outside its jurisdiction. The extradition of several American citizens had been requested by Mexico for the attempted kidnapping of the Cuban consul to Mexico. Relators claimed to fall within the political offense exception, and also attempted a defense on "humanitarian grounds," arguing that they would be tortured and possibly killed in a Mexican prison. The court found relators not to fall within the treaty-created political offense exception. As to the humanitarian exception, the court's response was to quote from Peroff v. Hylton: "the degree of risk to [Escobedo's] life from extradition is an issue that properly falls within the exclusive purview of the executive branch."

The District of Columbia Court of Appeals has also stated its powerlessness to consider post-surrender treatment in the 1972 case of Holmes v. Laird, whose facts might have been expected to excite more judicial soul-searching. Defendants were U.S. servicemen seeking a court injunction to prevent the military from surrendering them to West German authorities to face charges of attempted rape and related offenses. After U.S. military officials had decided not to prosecute them, a West German court, under a special NATO agreement, tried, convicted and sentenced the servicemen to three years in prison. After the trial the defendants left Germany without authorization and returned to the United States where they surrendered to military authorities. Defendants claimed that the German court had denied them certain procedural safeguards guaranteed by the NATO agreement. However, the U.S. court of appeals held that, even if the German trial had violated Germany's treaty obligations, the court nevertheless lacked the power to determine that such violations relieved the United States of its obligation to surrender the men, and that their surrender was constitutional.

The court based its holding on practical considerations as well as constitutional theory. The court argued that given both the allocation of the foreign affairs power to the executive and the doctrine of separation of powers, judicial inquiry into cases whose consequences affect international relations was inappropriate. The court held that Holmes was a case with sufficient international overtones to preclude judicial inquiry. The court also held that the judiciary cannot dictate executive noncompliance with a treaty by finding the other contracting party to be in violation of that treaty or of a principle of international law. Even if the soldiers' charges of German violations were meritorious, therefore, the court lacked the authority to hold the treaty void on that basis. More pragmatically, the court noted that all the elements of the crime had been committed in Germany and alluded to the difficulty and impropriety of a U.S. court's reviewing German judicial procedure.
While *Holmes* considered a procedure slightly different from the extradition process of 18 U.S.C. § 3184, its arguments against judicial intervention would seem to apply even more strongly to the extradition process, and therefore preclude judicial consideration of humanitarian exception claims. In *Holmes* the court was presented with specific violations of articulated treaty rights by the requesting state. With a humanitarian exception claim in an extradition proceeding, the court frequently is faced with little more than predictions of unfair treatment not violative of any specific treaty. Given this lack of a substantive treaty violation, judicial intervention is even less warranted when a humanitarian exception claim is raised in an extradition proceeding.

*Holmes* and *Escobedo*, and the dictum of *Gallina v. Fraser* delineate two very different views of the possible scope of a federal court's participation in extradition or extradition-like proceedings. *Holmes* and *Escobedo* view the court's role as perfunctory. Once the court identifies an important foreign affairs issue in the case, the doctrine of separation of powers controls and the court should defer to the executive. The *Gallina* approach, in contrast, recognizes the force of the separation of powers argument but does not view that principle as a total bar to the court's ability to consider claims raised by the requested person of violations of certain human rights. It views a bona fide claim to an egregious violation of basic rights as a competing factor that, if sufficiently shocking, could defeat the court's usual deference to the executive.

Even the Fifth Circuit and the District of Columbia Court of Appeals, which view the judiciary as prohibited from hearing a humanitarian exception claim, have shifted somewhat from *Neely v. Henkel*'s sweeping unconcern with the rights of people accused of committing "crimes . . . without the jurisdiction of the United States." 56 Modern federal courts that hold themselves unable to evaluate the merits of a relator's claim to unfair treatment or punishment do recognize the possibility of a bona fide humanitarian claim. They refer the consideration of that claim to the executive branch, in which they believe the discretion rests to bar extradition based on extra-treaty humanitarian considerations. 57 There are two problems with the courts' analyses. First, the Secretary of State has no procedural obligation to hear a humanitarian exception claim and second, the Secretary of State, feeling constrained by its treaty obligation, is not likely to exercise the discretion to deny extradition on extra-treaty grounds.
THE SCOPE OF EXECUTIVE REVIEW IN EXTRADITION PROCEDURES

After an extradition hearing, the magistrate issues an order either certifying or denying extradition. Review by petition for habeas corpus or an action for a declaratory judgment is available to the requested person, but the district and appellate courts must restrict their review to the same questions of fact that were determined by the magistrate.

If the courts have found the person to be extraditable, records of the hearing and any judicial review are sent to the State Department, which makes the final decision whether or not to extradite. The executive branch is not required to grant the requested person an administrative hearing, nor is there any provision for judicial review of the executive decision.

In 1977 Herbert J. Hansell, a State Department Legal Advisor, described to the Senate Foreign Relations Committee the protections afforded requested persons subject to the U.S. extradition process. Hansell stated that

The United States does not negotiate extradition treaties with nations which do not permit defendants a fair trial. The possibility of a fair trial, even though the standards cannot be expected to match ours in every detail, is always a factor taken into account in deciding whether to negotiate an extradition treaty. In addition, since these treaties may remain in force for many years, during which time the judicial system of the foreign country may change, certain procedural safeguards are built into our extradition treaties. Such treaties require that the state requesting extradition must produce evidence of the crime sufficient to persuade a United States court and the executive branch that the person whose extradition is requested would also be held for trial in the United States had the alleged crime been committed in this country.

Further our extradition treaties provide that extradition will not be granted if the person sought has already had a trial or is undergoing trial in the United States for the same act.

This State Department description of the safeguards built into the extradition process is noteworthy because treaty language is the only source cited as affording protection to the requested person against an unfair trial. No mention is made of the executive’s ability to reach an extra-treaty determination not to extradite based on “executive discretion.” The two protective principles mentioned by Hansell, the requirement of a probable cause finding and the refusal to extradite if the requested person has been prosecuted for the same offense by the United States, would not provide the sorts of protections offered by the humanitarian exception. Thus, despite
judicial conviction that the executive will consider extra-treaty humanitarian considerations when reviewing extradition requests, current State Department policy is still apparently in accord with a 1912 Department statement on the limited scope of executive discretion:

The discretion of the Secretary of State has in the practice of the Department been considered as limited in certain directions. . . . It has been customary for the secretary to confine himself to the facts of the case presented in the record which has been certified to him by the committing magistrate. . . . In the second place the discretion of the Secretary of State is limited by the International obligation under our extradition treaties to surrender fugitive criminals . . . , even . . . citizens of this country, who come fairly within the terms of such treaties. 65

At least one commentator 66 supports the argument that executive discretion in deciding whether or not to extradite must be exercised within the bounds of the particular extradition treaty. 18 U.S.C. § 3186, the provision authorizing the Secretary of State to surrender the fugitive, states that the Secretary "may order the person committed . . . to be delivered to any authorized agent of such foreign government." 67 This language was construed by a federal court in 1875 to give the Secretary the discretion not to surrender an accused whose extradition had been certified by a magistrate. 68 Treaty obligations to extradite, however, are generally absolute, 69 and therefore the Secretary's function may really be "one of conducting a de novo examination of the case to determine whether the requirements of the treaty have been met." 70 Between 1940 and 1961 the executive failed to extradite only twice following certification by the courts, and in both instances the treaty itself explicitly permitted the denial. 71

Jhirad v. Ferrandina 72 is a recent case in which the Secretary of State denied an extradition certified by the court on the grounds of differing treaty interpretation. Jhirad, former Advocate General of the Indian Navy, was accused of embezzling from a Naval Prize Fund in India, and the courts, after protracted litigation, found him to be extraditable. 73 Both the courts and the Secretary of State rejected Jhirad's contention that he would be subject to religious persecution. But the Secretary of State denied extradition on the grounds that the United States statute of limitations for the offense had run, which permitted extradition to be denied under Article 5 of the treaty. 74 The Court of Appeals had concluded that Jhirad's constructive flight from India denied him access to the statute of limitations defense; the Secretary of State concluded that the evidence of constructive flight "was simply too fragile to grant extradition." 75 Thus the Secretary of State differed with the courts over a legal conclusion based on the facts
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of the case and denied extradition on grounds equally available to the courts. Denial of the extradition was not an exercise of executive discretion but simply based on a differing treaty interpretation. Although there may actually have been humanitarian grounds for denying extradition, the State Department apparently felt constrained to search for a treaty violation to justify its denial.

Two historical examples further illustrate the limited scope—or at least the limited exercise—of executive discretion. First in 1933 the courts certified the extradition to Germany of a Jew charged with fraud. 76 The State Department, in a memorandum, wrote that the United States would not be justified in denying the extradition of the relator on the basis of an allegation of his projected inability to receive a fair trial. 77

Second, in 1940 a German national charged with embezzlement sought to avoid extradition to England on the grounds that, as England and Germany were at war, he would be interned if acquitted and also that his extradition would subject him to great danger from bombing raids. 78 “The Department took the position that since a proper case for extradition under the Treaty of 1931 between the United States and Great Britain had been made out, the United States was obligated to surrender Strakosch [the accused].” 79 The outcome of Strakosch’s extradition was that he was acquitted, interned and killed in a bombing raid. These cases indicate that the judiciary’s references to the existence of executive discretion to consider the protection of relators’ rights may be founded upon an inaccurate perception of the extent of that discretion.

It would, however, be misleading to suggest that the Secretary of State is not concerned with the plight of the requested person and will not exercise his influence, when appropriate, with requesting governments on a relator’s behalf. What this article questions is the executive’s power to deny an extradition on humanitarian principles, as various federal courts have suggested it can do. A footnote to Sindona v. Grant described the State Department’s procedure for considering a requested person’s claim of “political persecution” by the requesting state. The procedure, which had been articulated for the court in a letter from a State Department attorney, was

(1) to bring to the attention of the requesting state the alleged danger; (2) to request appropriate assurances from that state, and (3) to instruct our Embassy in the requesting state, in the event that the fugitive is surrendered, to follow the case and report to the Department of State. 80

This practice was exemplified when Venezuela requested the extradition of its former president, Jimenez, who claimed that he would not receive
a fair trial. The Venezuelan Ambassador to the U.S. wrote to then Secretary of State Rusk denying these charges:

I am sure also that Your Excellency is fully aware that my Government inflicts no harm on prisoners such as had been resorted to in my country prior to January 1958. 81

The letter also specifically promised “to protect the right of an accused to full and effective defense,” the right to counsel and to a speedy trial. 82

Following this diplomatic correspondence, the Secretary of State ordered Jimenez’s extradition. 83

Promises of a fair trial and decent prison treatment are more easily made than kept however. For example, in 1934 Austria extradited to Italy a smuggler accused of killing two customs officers, attaching the condition that he not be subjected to the death penalty. 84 The Italian criminal court refused to honor the promise of the executive branch, because

No limitation upon the application of the rule of law, even if derived from international relationships, can be taken into consideration by the judge unless it has been transmitted into a rule of municipal law. 85

Of course the particular concern expressed by the Italian court would not be raised by an executive promise to live up to existing procedural safeguards, as was the case in Jimenez. Nevertheless, the case does effectively demonstrate that the executive of the requesting country may be unable to enforce a good faith promise or, alternatively, could make a promise knowing that it would not be kept. For those cases in which relators’ claims to humanitarian considerations are greatest, it would be more appropriate for the executive to be able to deny extradition altogether.

CONCLUSION

In contrast to the recent expansion of rights of the accused in U.S. criminal law, rights of the requested person facing extradition from the United States have remained quite limited. The courts have held, with the Gallina dictum standing as the sole exception, that the doctrine of separation of powers limits their inquiry in an extradition hearing to certain factual determinations, as delineated by the particular extradition treaty in question and Section 3184. A claim to a humanitarian exception is reserved by the courts for the executive.

If executive discretion to deny extradition is limited to interpretation of extradition treaties, then the current extradition procedure does not pro-
vide an adequate opportunity for the requested person to raise a defense based on humanitarian grounds. There is no guarantee that there will be an executive hearing, no clear standard of executive review, and there is a limited range of humanitarian concerns that are expressed in extradition treaties themselves. Finally there is no assurance that the executive, in its concern to maintain foreign relations, will not sacrifice the interests of the individual in order to achieve national ends. 86 By referring humanitarian claims to the executive, federal courts recognize that certain rights do need protection. Executive discretion would appear to be an inadequate vehicle for the legitimate assertion of these rights.

Application of the humanitarian exception by federal courts in extradition proceedings would serve a useful function. The exception would block extraditions that, if carried out, would subject the requested person to trial or punishment that would shock the conscience of the court. Although recent humanitarian claims by relators may not have warranted application of the exception, 87 that does not invalidate the need for its incorporation into extradition procedure. One can easily conceive of an appropriately egregious factual setting: for example, an extradition request by a South American government deemed a strategic link in U.S. defense policy but whose prisons are notorious for their human rights violations. Surely it would be more consistent with national notions of justice for the United States to have an accepted principle by which to deny such an extradition.

Because the courts are the traditional protectors of individual rights in the United States and because the courts would be less subject to external political pressures in the rare instance in which the humanitarian exception would be applicable, the courts should be able to apply the humanitarian exception. 88 The Gallina dictum's standard of "shocking the sensibility of the court" seems an apt one to trigger the exception. Yet, Gallina does not state the basis of the court's expanded jurisdiction to determine the humanitarian exception. While the focus of this article has been to identify a need for rather than the implementation of the exception, the soundest route to judicial access to the exception would be to write the exception into the U.S. extradition statute or into extradition treaties themselves, as, for example, Sweden regularly does. 89

NOTES

1 See 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 323 (M. Bassiouni & V. Nanda ed. 1973).
2 See, e.g., Berenguer v. Vance, 473 F.Supp. 1195, 1199 (D.D.C. 1979) ("[w]hile the judiciary has been given a uniquely important role to play in the American extradition process, that role is limited to the making of a determination or probable cause. The ultimate decision to surrender the defendant lies with the executive branch, and any objection to the treatment of an extradited party must be made through diplomatic channels. The very fact that extradi-
tion is accomplished under treaty indicates that it is properly considered to be part of the foreign affairs responsibility of the President").

3 U.S. Const. art. I § 8, cl. 11; art. II, § 2.

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


7 See, e.g., Eain v. Wilkes, 641 F.2d 504, 513 (7th Cir. 1981).

8 See, e.g., Treaty on Extradition, Jan. 21, 1972, United States–Argentina, art. VII(c), 23 U.S.T. 3501, T.I.A.S. No. 7510.


10 See, Neely v. Henkel, 180 U.S. 109, 122 (1901) (accused, charged with embezzlement of public funds, argued that his U.S. due process rights would not be protected by a Cuban trial); United States ex rel. Bloomfield v. Gengler, 507 F.2d 925, 928 (2d Cir. 1974) (relators, accused of conspiracy to import hashish, charged that Canadian appellate procedure, which permits the prosecutor to appeal in a criminal case, and the appellate court to reverse without a new trial, violated due process rights); Gallina v. Fraser, 177 F.Supp. 856, 865 (D. Conn. 1959), aff'd 278 F.2d 77 (2d Cir. 1960), cert. denied, 364 U.S. 851 (1960) (relator, charged with armed robbery in Italy, argued that his trial and conviction in absentia violated his due process rights to face his accuser and conduct a defense); In re Normano, 7 F.Supp. 329, 330 (D. Mass. 1934) (relator, a Jew requested by Germany on fraud charges, argued that Germany would not afford a fair trial to a Jew).

11 Relators in Escobedo v. United States, 623 F.2d 1098, 1107 (5th Cir. 1980), charged with attempted kidnapping and murder of Cuban Consul to Mexico, argued they would be tortured in prison if surrendered to Mexico.

12 See, e.g., Sindona v. Grant, 619 F.2d 167, 174 (2d Cir. 1980) (political enemies in Italy had called for relator’s assassination).

13 Gallina v. Fraser, 278 F.2d at 78 (“we have discovered no case authorizing a federal court, in a habeas corpus proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await the relator upon extradition”). But cf. Colvin v. State, 25 Crim. L. Rep. (BNA) 2399 (June 21, 1979), where a claim that the requesting jurisdiction would not provide the accused with fair treatment succeeded in an interstate, rather than an international, setting. The Maryland court, concluding that a man
suspected of raping a juvenile was unlikely to receive a fair trial in the requesting state of Massachusetts, refused to certify his extradition. The Boston prosecutor had promised to add another ten years to the sentence if the accused sought to fight extradition. The Massachusetts court also failed to supply the Maryland court with a specific date for the alleged offense. Calling the prosecutor's behavior "monumental arrogance," the Maryland judge wrote:

This court finds as a fact that the petitioner faces prospective unconstitutional treatment if he is forced to return to Boston for trial. This court is "satisfied by substantial and competent evidence that the feeling against the petitioner and the attitude of the prosecuting and peace officers of the demanding state is such as to furnish reasonable grounds for the belief that he will not receive a fair and impartial trial."

A constitutional right to a fair trial in the requesting State has not been recognized in international extradition cases. See supra notes 10-12 and accompanying text.

14 The term "humanitarian grounds" is used in Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976), cert. denied, 429 U.S. 1062 (1977), and in Escobedo v. United States, 623 F.2d at 1107. Peroff, which held that it was the executive who had the discretion to deny an extradition on such grounds, added that they "exist only when it appears that, if extradited, the individual will be persecuted, not prosecuted, or subjected to grave injustice." Peroff, 542 F.2d at 1249. Escobedo similarly referred the consideration of relators' humanitarian claims to the executive.

15 A humanitarian exception would present special problems of admissibility of evidence and standards of proof, as the requested person making a claim to it would frequently be seeking to demonstrate that systematic unfair treatment of others suggests that he would likewise be treated unfairly. This issue is beyond the scope of this article. However, evidentiary problems did not stop the court from denying extradition in Colvin v. State. See supra note 13.

16 180 U.S. 109 (1901).
17 31 Stat. 656, c. 793 (June 6, 1900).
18 Neely v. Henkel, 180 U.S. at 122.
19 Id. at 122.
20 See supra notes 11-13 and accompanying text.
21 See supra note 5.
24 Gallina v. Fraser, 278 F.2d at 78-79 (citations omitted, emphasis added).
25 177 F.Supp. 648 (S.D.N.Y. 1959). D'Amico, like Gallina, had been tried and convicted in absentia. Counsel for Italy represented to the district court that he would be tried anew if extradited.

26 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1120 (1968).
27 507 F.2d 925 (2d Cir. 1974).
28 Id. at 928.
30 Id. at 694.
31 Id.
32 Id. at 695. Sindona had argued that his situation should be analogized to that of a refugee facing deportation. Any contracting state to the United Nations' Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, agrees not to return refugees to any state where life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion. Sindona, whose death had been called for by leftist demonstrations in Italy, argued he was being prosecuted at least partially on account of his political opinions. The district court rejected Sindona's refugee analogy,
however, because the U.N. Convention by its own terms does not apply to refugees who have committed a serious non-political offense prior to admission to the country of refuge.

33 In re Sindona, 450 F.Supp. at 695.
34 Id.
35 Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980). This is the most recent Second Circuit opinion citing Gallina in which the humanitarian exception was raised.
36 Id. at 175 (citations omitted).
37 Sindona v. Grant's restatement of the Gallina dictum, like the dictum itself, fails to state the source of the court's jurisdiction to decide a claim to a humanitarian exception. For a discussion of possible sources of jurisdiction, see Note, Foreign Trials in Absentia: Due Process Objections to Unconditional Extradition, 13 Stan. L. Rev. 370-378 (1961). The note argues that in order to deny extradition on due process grounds, the courts would have to find that the extradition itself, not the procedure awaiting the requested person, denied due process. The note concludes that judicial intervention to deny extradition should be available "when the alternatives have been exhausted." Id. at 372 n.11.
38 Wacker v. Bisson, 348 F.2d 602, 606 (5th Cir. 1965).
39 Id. at 606.
40 623 F.2d 1098 (5th Cir. 1980).
41 The political offense exception is commonly included in extradition treaties. Typically it provides that extradition will be denied "when the offense is regarded by the requested party as one of a political character or if the person sought proves that the request for his extradition has, in fact, been made with a view to trying or punishing him for an offense of a political character." Eain v. Wilkes, 641 F.2d at 508. To determine whether or not an otherwise extraditable crime falls within the political offense, the court must determine "that there was a violent political disturbance in the requesting country at the time of the alleged acts, and that the acts charged against the person whose extradition is sought were recognizably incidental to the disturbance." Eain v. Wilkes, 641 F.2d at 516.
42 Escobedo v. United States, 623 F.2d at 1107.
43 Id.
45 Escobedo v. United States, 623 F.2d at 1107 (citations omitted).
46 459 F.2d 1211 (D.C. Cir. 1972).
47 Id. at 1214.
49 Holmes v. Laird, 459 F.2d at 1214.
50 The servicemen argued that they were not granted a speedy trial, that they were denied the counsel of their choice, that their German lawyer provided ineffective counsel because of language difficulties, that they were denied the right to confront their accuser and another witness, and finally that they were not provided with a verbatim transcript needed to bring an appeal. 459 F.2d at 1214.
51 Id. at 1219-20.
52 Id. at 1215, citing Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) ("the controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when [a court] is adjudicating issues inevitably entangled in the conduct of our international relations"), and Mersiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952) ("and undeniably, matters initially and intricately interwoven with contemporaneous policies in regard to the
conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from indirect inquiry or interference”).

53 Holmes v. Laird, 859 F.2d at 1215-16.
54 Id. at 1219-22.
55 Id. at 1220.
56 180 U.S. at 122, Neely continues that the accused’s American citizenship does not give him “immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled.” Neely v. Henkel, 180 U.S. at 123.

57 See supra note 5.
59 The questions ordinarily determined by the initial hearer and reviewed by the court considering the petition for habeas corpus or a declaratory judgment are: (1) did the magistrate have jurisdiction? (2) did the evidence establish reasonable grounds to believe the accused guilty? and (3) was the offense a treaty offense? Brauch v. Raiche, 618 F.2d 843 (1st Cir. 1980).

61 See Peroff v. Hylton, 563 F.2d at 1102.
62 See Escobedo v. United States, 623 F.2d at 1105.
63 Administration Recommends Senate Approval of Genocide Convention, 76 DEP’T ST. BULL. 676, 679 (June 27, 1977).
64 Id.

65 Letter from Counselor of the Department of State Chandler P. Anderson to Secretary of State Knox, Feb. 5, 1912, reprinted in 6 M. WHITMAN, DIGEST OF INTERNATIONAL LAW 1027-1028 (1968). Anderson also states that the executive in review may find the proceedings irregular, may differ on the weight or sufficiency of the evidence with the committing magistrate, or may differ as to treaty construction. He concludes that “generally it seems that he [the Secretary of State] may refuse extradition on grounds of public policy bearing upon international relations.” Id. Anderson does not state whether or not this denial must fall within the limits of executive review he has detailed.

66 Note, Executive Discretion in Extradition, 62 COLUM. L. REV. 1313 (1962) [hereinafter cited as Note, Executive Discretion]:

Both the statute [18 U.S.C. §§ 3181, 3184, 3186 (1976)] and the courts are silent as to direct limits imposed on the secretary’s discretion to refuse surrender. Usually the treaty obligation to extradite is absolute . . . [T]he statute should probably be interpreted to grant the secretary only the limited discretion to differ from the courts in the matter of treaty interpretation.

Id. at 1315-16.
68 In re Stupp. 23 F. Cas. 296, 302 (C.C.S.D.N.Y. 1875) (No. 13,563). In Stupp the Secretary of State denied the extradition on the grounds that the treaty did not apply to an alleged offense that occurred outside the territory of the requesting country. In re Stupp, 23 F. Cas. 281, 295 (C.C.S.D.N.Y. 1873) (No. 13,562).

69 Note, Executive Discretion, supra note 66, at 1315.
70 Id. at 1328.
71 Id.
73 Id.
74 E. McDOWELL, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 114-16 (1976).
75 Id. at 115.
In re Normano, 7 F.Supp. 329 (D. Mass. 1934). "The attorneys for Normano urge as grounds for granting the petition the reports respecting the treatment accorded Jews under the present regime in Germany, of which it is argued this court may well take judicial notice. Such considerations ought not to influence the decision. Whatever may be the situation in Germany, the Extradition Treaty between that government and the United States is still in full force, and it is the duty of the court to uphold and respect it just as it is bound to uphold the laws and Constitution of the United States." Id. at 330-31.

Memorandum from Joseph R. Baker of the Legal Advisor's Office of the Department of State, April 4, 1933, reprinted in part in 4 G. Hackworth, Digest of International Law § 339 at 202 (1942). See also Note, Executive Discretion, supra note 66, at 1325. Fortunately, Normano ultimately was not extradited. In March, 1933, the State Department met with the German ambassador to the United States to ask that the extradition request be withdrawn. Germany refused, but Normano's July 3 Application for Discharge was granted because Germany had failed to deliver the extradition warrant to the marshall holding Normano within the statutory two month period. In re Normano, 7 F.Supp. at 330.


Id. at 888.

Sindona v. Grant, 619 F.2d 167, 174 n.10 (2d Cir. 1980); see generally, M. Whiteman, supra note 78, at 1051-53 (discusses conditions attached to surrender).


Id. at 366.

Id. at 364.

See S. Bedi, Extradition in International Law and Practice 195 (1966).

Id.

See Wise, Some Problems of Extradition, 15 Wayne L. Rev. 709, 722-23 (1969). The author criticizes the current extradition procedure in which questions of unfair treatment are held to be outside judicial consideration: "Such questions of justice are even less suitable for consideration by executive departments, which are commonly influenced by a fear of offending some fairly desppicable regimes." Id.

See supra notes 16-57, and accompanying text.

See I. Shearer, Extradition in International Law, 197 (1971). The author supports increased judicial participation in the extradition procedure generally. He writes that [w]hether the requested State chooses to deal with extradition matters entirely at the executive level, or to assign them exclusively or partly to its judicial organs, has so far not been a matter engaging international concern. It might conceivably become such a question however, as interest in advancing the rule of law and the protection of fundamental human rights continues to grow. For it seems to be beyond question that constitutionally impartial organs are better fitted to decide questions affecting individual liberties than the organs more closely geared to governmental policy.

Id.

Article 7 of Sweden's extradition statute is a broadly worded provision which prohibits any extradition which is likely to result in what amounts to the persecution of the requested person by the requesting state:

No person may be extradited who for reasons of race, membership of a certain community, religious or political opinions or otherwise on account of political circumstances runs the risk of being subjected in the foreign state to persecution which is directed against his life or liberty or which is otherwise of a severe nature, or who does not have any assurance there that he will not be sent to a state in which he runs such a risk.

Article 8 states that:

Extradition may not be granted if in a specific case it is found to be obviously incom-
compatible with the requirements of humane treatment, because of the youth, health, or any other personal circumstances of the person concerned, taking into account also the nature of the crime and the interests of the foreign state.

Articles 7 and 8 quoted in M. Whiteman, supra note 78, at 886-87.

Article 8 is written almost verbatim into the Extradition Treaty between the United States and Sweden; see Convention on Extradition, Oct. 24, 1961, United States–Sweden, art. V, no. 6, 14 U.S.T. 1845, T.I.A.S. 5496. Thus the United States does currently have humanitarian exceptions written into treaties to which it is a party, when it is the policy or law of the other country to require the exception.