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# Due Process Methodology and Prisoner Exchange Treaties: Confronting an Uncertain Calculus

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In late 1976 and early 1977, the United States signed treaties, first with Mexico[1] and then with Canada,[2] providing for the mutual execution of penal sentences. Under the treaties, citizens of one state convicted of crimes in another may consent to be returned to their own countries to serve out their sentences.[3] A returned prisoner be-

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1. Treaty on the Execution of Penal Sentences, Nov. 25, 1976, United States-Mexico, T.I.A.S. No. 8718, *reprinted in* TREATY WITH MEXICO ON THE EXECUTION OF PENAL SENTENCES, S. EXEC. DOC. D, 95th Cong., 1st Sess. (1977) [hereinafter cited as Mexican Treaty]. The Mexican treaty was submitted to the Senate on February 15, 1977, 123 CONG. REC. 2763 (1977) (remarks of Sen. Byrd), and ratification was advised by the Senate on July 21, 1977, 123 CONG. REC. 512, 553 (daily ed. July 21, 1977).

2. Treaty on the Execution of Penal Sentences, Mar. 2, 1977, United States-Canada, *reprinted in* TREATY WITH CANADA ON THE EXECUTION OF PENAL SENTENCES, S. EXEC. DOC. H, 95th Cong., 1st Sess. (1977) [hereinafter cited as Canadian Treaty]. The Senate Committee on Foreign Relations reported favorably on each treaty and recommended that the Senate give its advice and consent. *See* S. EXEC. REP. No. 10, 95th Cong., 1st Sess. 1 (1977). Ratification was advised by the Senate on July 21, 1977. 123 CONG. REC. 512, 215-18, 12, 268-69 (daily ed. July 19, 1977).

3. A prisoner is eligible for return only if both governments agree that he should be returned. *See* Canadian Treaty, *supra* note 2, art. III, paras. 3 & 4; Mexican Treaty, *supra* note 1, art. IV, paras. 2 & 3. In addition, no prisoner is eligible for transfer unless he was convicted of an offense "which would also be generally punishable as a crime in the Receiving State." Canadian Treaty, *supra* note 2, art. II, para. a; Mexican Treaty, *supra* note 1, art. II, para. 1. The Mexican treaty excludes prisoners held for political, immigration, and military offenses, *see* Mexican Treaty, *supra* note 1, art. II, para. 4, while the Canadian treaty excludes prisoners held for immigration and military offenses, but makes no mention of political prisoners, *see* Canadian Treaty, *supra* note 2, art. II, para. c. Under both treaties, transfer will not be approved during the pendency of an appeal or collateral attack on a prisoner's conviction or sentence or prior to the expiration of the time period in which an appeal is allowed. *See* Canadian Treaty, *supra* note 2, art. II, para. e; Mexican Treaty, *supra* note 1, art. II, para. 6.

The Mexican treaty also bars transfer of prisoners who are domiciliaries of the transferring state, *id.* art. II, para. 3; the Canadian treaty makes no mention of such a status. Both treaties exclude from transfer prisoners having less than six months to serve when the processing of their transfer commences. *See* Canadian Treaty, *supra* note 2, art. II, para. d; Mexican Treaty, *supra* note 1, art. II, para. 5.

The Mexican treaty is quite hazy concerning the method of transfer. For instance, although it suggests that the prisoner must initiate the transfer through petition, *see*

comes eligible for parole or other reduction in the term of his confinement according to the laws of the receiving state.[4] The courts of that state, however, are precluded from entertaining any proceeding "intended to challenge, set aside, or otherwise modify convictions or sentences handed down in the Sending State."[5] Despite interpretive problems,[6] these provisions were quite plainly intended to prevent a

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*id.*, art. II, para. 5, the Mexican treaty also suggests that every transfer is to be "commenced by the Authority of the Transferring State," *id.* art. IV, para. 1, while at the same time stating that "[n]othing in this Treaty shall prevent an offender from submitting a request to the Transferring State for consideration of his transfer," *id.* The Canadian treaty, on the other hand, requires the prisoner to initiate the transfer through application. *See* Canadian Treaty, *supra* note 2, art. II, para. d. In unequivocal language the Canadian treaty requires that "[e]very transfer under this Treaty shall be commenced by a written application submitted by the Offender to the authority of the sending State." *Id.* art. III, para. 3.

Transferred prisoners become the responsibility of the federal government in the receiving state. Nevertheless, any state within the transferring country may allow some of the prisoners it holds in custody to be transferred. *See id.* art. III, para. 5; Mexican Treaty, *supra* note 1, art. IV, para. 5.

Special provisions relating to parole, *see* Canadian Treaty, *supra* note 2, art. IV, para. 1; Mexican Treaty, *supra* note 1, art. V, para. 2, youthful offenders, *see* Canadian Treaty, *supra* note 2, art. IV, para. 2; Mexican Treaty, *supra* note 1, art. VIII, paras. 1 & 3, and the mentally infirm, *see id.* art. VIII, para. 2, are also contained in one or both treaties.

4. *See* Canadian Treaty, *supra* note 2, art. IV, para. 1; Mexican Treaty, *supra* note 1, art. V, para. 2. When a prisoner has been transferred, the original sentence carries over to the receiving state, with deductions for good behavior in prison, labor, and pretrial confinement. *See* Canadian Treaty, *supra* note 2, art. III, para. 8; Mexican Treaty, *supra* note 1, art. IV, para. 7. The power to grant pardon or amnesty remains with the transferring state. *See* Canadian Treaty, *supra* note 2, art. IV, para. 1 (speaks only to the power to pardon); Mexican Treaty, *supra* note 1, art. V, para. 2. With these exceptions, the rules and practices of the receiving state determine the manner of execution of the sentence.

5. Canadian Treaty, *supra* note 2, art. V. This provision and its Mexican counterpart, Mexican Treaty, *supra* note 1, art. VI, raise the question whether the treaty provisions can bar judicial review in the United States of convictions or sentences handed down in the foreign nation. Arguments have been made in several cases that availability of some form of judicial review is required by the structure of the Constitution. *See, e.g.*, Oestereich v. Selective Serv. Bd., 393 U.S. 233, 243 n.6 (1968)(Harlan, J., concurring); Eisentrager v. Forrestal, 174 F.2d 961, 966 (D.C. Cir. 1949), *rev'd on other grounds sub nom.* Johnson v. Eisentrager, 339 U.S. 763 (1950). Legal scholars also have spoken positively on the subject. *See, e.g.*, Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372 (1953). An argument can also be made that judicial review is a due process requirement. *See* Crowell v. Benson, 285 U.S. 22, 87 (1932)(Brandeis, J., dissenting). *See generally* note 7 *infra*.

6. The Mexican treaty states, "The Transferring State shall have exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify or set aside *sentences* handed down by its courts." Mexican Treaty, *supra* note 1, art. VI (emphasis added).

The Canadian treaty states, "The Receiving State shall have no jurisdiction over

returned prisoner from attacking, whether by habeas corpus or otherwise, his continued imprisonment in the United States if the attack would call his foreign conviction into question.[7]

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any proceedings, regardless of their form, intended to challenge, set aside, or otherwise modify *convictions or sentences* handed down in the Sending State." Canadian Treaty, *supra* note 2, art. V (emphasis added).

Apparently, no difference in interpretation or meaning was intended by the difference in wording. The reason for excluding the word "convictions" from the Mexican treaty is that there is no Mexican equivalent for the term "convictions or sentence." *See Penal Treaties with Mexico and Canada: Hearings Before the Senate Comm. on Foreign Relations,* 95th Cong., 1st Sess. 48 (1977) [hereinafter cited as *Senate Hearings*] (statement of Herbert J. Hansell, Legal Adviser, U.S. Dep't of State).

7. Arguably, an attack on the prisoners' continued incarceration by the United States is not a direct attack on their Mexican or Canadian convictions or sentences as such, since for purposes of Mexican or Canadian law the convictions and sentences would remain inviolate. The treaties state that the returned prisoners' "civil rights in the Receiving State" are not to be prejudiced to any greater extent than such rights are ordinarily harmed by conviction in the receiving state. Canadian Treaty, *supra* note 2, art. IV, para. 6 (speaks of not creating any "additional disability"); Mexican Treaty, *supra* note 1, art. V, para. 6. These provisions could be interpreted to allow a returned prisoner to attack his underlying conviction on due process grounds, since otherwise his "civil rights" in the United States might be thought to be "prejudiced."

That construction, however, is strained. It leaves the provision in the Mexican treaty bereft of any purpose beyond the limited one of preserving the transferred prisoner's right of collateral attack in Mexico and is belied by use of the words "exclusive jurisdiction" in that treaty. *Id.* art. VI. It would render the parallel provision in the Canadian treaty meaningless, since that treaty says, "the Receiving State shall have no jurisdiction." Canadian Treaty, *supra* note 2, art. V. Such a construction would also render pointless the specific provisions in both treaties that anticipate that prisoners might challenge their convictions or sentences in the sending state. Thus the treaties bar transfer of any prisoner during the pendency of appeal or collateral attack or prior to the expiration of any time period open for *appeals. See id.* art. II, para. e; Mexican Treaty, *supra* note 1, art. II, para. 6. It appears, therefore, that the essential purpose of article VI of the Mexican treaty and article V of the Canadian treaty was to prohibit the courts of one state from scrutinizing the judgments of the other.

The provisions protecting a returned prisoner's "civil rights" or barring any "additional disability" have a purpose quite consistent with this conclusion. They were apparently intended to ensure that, except for length of sentence, the returned prisoners would suffer no civil disabilities because of the foreign conviction greater than the disabilities normal to a conviction in the United States. For example, if under Canadian or Mexican law, conviction would carry with it a loss of the right to vote or the right to certain social welfare benefits, but conviction in the United States would not be attended by such consequences, the provision would appear to secure to the returned prisoner the same treatment as he would have received had he been convicted under American law.

It should be noted, in addition, that the implementing legislation, 28 U.S.C.A. § 2256(1) (West Supp. 1978), adds to the jurisdictional statutes relating to habeas corpus language that is essentially the same as article VI of the Mexican treaty. This presumably would confirm the interpretation of the treaty noted above.

Finally, Congress has made no attempt to modify any other provision of title 28 of the United States Code pertaining to the jurisdiction of the federal district courts. Since the language added to the habeas corpus jurisdiction statutes is the same as that

The Canadian treaty appears genuinely intended to aid prisoner rehabilitation, parolee supervision, and law enforcement cooperation between the two countries.[8] The Mexican treaty, however, is principally a response to both popular and congressional concern with allegations that Americans in Mexican jails were subject to intolerable living conditions, acts of brutality, and extortion by prison officials and fellow prisoners.[9] More significantly, congressional and State Department investigations indicate that some Mexican convictions

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contained in the treaty—the sending country has "exclusive jurisdiction"—that addition was presumably thought sufficient to foreclose resort to any other jurisdictional grant. While the thought is perhaps novel—Congress has not very often sought to foreclose habeas while leaving other jurisdictional grants untouched—it is arguable that other jurisdictional grants, if otherwise applicable, still remain open, with the courts free to compel release of the prisoner through a mandatory injunction. This would certainly subvert the fair intendment of the treaty.

8. There have been no allegations whatsoever either in congressional hearings or the media that Canada has treated Americans imprisoned in Canada in any manner comparable to the alleged mistreatment by Mexico of Americans imprisoned in that country. *See* notes 9 & 12 *infra*. With regard to the purpose of the Canadian treaty, the Senate Committee on Foreign Relations stated,

> The purposes of these treaties are: the social rehabilitation of prisoners held in foreign jails; improvement in the relationships between the United States and Mexico and Canada due to the removal of strain caused by the incarceration of the nationals of the States in the jails of another; and, *in the case of Canada,* the improved supervision of foreign nationals on parole.
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> [The Canadian] Treaty, unlike the one with Mexico, did not come about as a result of drug enforcement efforts, adverse prison conditions or publicity. The Canadian authorities originated the idea in order to promote rehabilitation of parolees.

S. EXEC. REP. No. 10, 95th Cong., 1st Sess. 1, 3 (1977)(emphasis added).

9. The following description of the Mexican prison system is a good example:

> Mexican prisons operate on a "faena system." The Mexican Government supplies prisoners with the barest necessities for only a marginal standard of living. Prisoners must purchase food if they are to have an adequate, not to mention well-balanced, diet. Necessary clothing must be purchased, and even cells—for those who wish to avoid unsanitary, overcrowded cell assignments—cost a modest $1,000.
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> Mexican prisons depend upon prisoners to run individual cell blocks. These "mayors" notoriously take full advantage of their authority to extract large sums of money from prisoners. The prisoner's only alternative to this kind of pay-off system necessitates putting up with harassment, beatings, robbery, and deprivation.
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> Both the faena system and the mayoral system impose considerable hardship on American prisoners and their families. . . . To guards, Mexican prison authorities, and other Mexican prisoners, American citizens represent "walking cash registers" . . . who must buy everything from toilet paper to a good night's sleep. Unfortunately, the hardship extends beyond the prisoners, themselves, to family and friends in the United States who must provide large amounts of survival money.

*Senate Hearings, supra* note 6, at 7-8 (statement of Rep. Stark).

may have been obtained in open violation of both Mexican law[10] and American constitutional standards.[11] Confessions obtained by torture, confessions contained in Spanish language documents that were misrepresented to the prisoners, the lack or inadequacy of counsel, and the absence of a speedy trial are among the principal allegations.[12]

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10. *See, e.g.*, CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS art. 20, § VIII (Mex.), *translated in* J. WHELESS, COMPENDIUM OF THE LAW OF MEXICO 9 (2d ed. rev. 1938): "He shall be tried within four months in case of crimes the maximum penalty for which does not exceed two years imprisonment; and within one year if the maximum penalty exceeds that time."

11. Well before the treaties were even contemplated, Congress became concerned with both the manner in which Mexican convictions were obtained and the treatment of American citizens imprisoned in Mexican jails. *See generally U.S. Citizens Imprisoned in Mexico: Hearings Before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations* (pts. I-III), 94th Cong., 1st & 2d Sess. (1975-1976) [hereinafter cited as *House Hearings*].

12. As of January 1, 1975, the State Department reports that 515 U.S. citizens currently are incarcerated in prisons throughout Mexico. . . . [W]e have collected information on 159 of these cases . . . . Of [these] cases there are: 60 cases of alleged self-incrimination in which the individuals were either not informed of their rights against this, or told specifically that they "had no rights"; 61 cases in which individuals who were forced to sign confessions in Spanish specifically state that they did so without benefit of an interpreter; 96 cases in which individuals allege that physical torture was used to coerce a confession; and 80 cases in which individuals allege that they were held "incommunicado" and denied access to the U.S. Embassy.

. . . .

Individuals state that they were denied access to the U.S. Embassy and/or legal representation for periods extending beyond 72 hours, in 46 cases; 23 cases in which individuals were incarcerated for over 1 year before receiving a sentence; 19 cases in which individuals state that their court procedures were held without an interpreter; 21 cases in which individuals allege that they were denied access to information pertinent to their defense; 17 cases in which individuals state that they did not receive a list of public defenders by the Mexican Federal Police; 18 cases in which the arrestees state that they were not informed of the nature and cause of the charges against them; 33 cases in which individuals allege that their property was confiscated and they did not receive a receipt; 50 cases in which individuals specifically state that they had been physically abused during their incarceration in the prisons; and 68 cases in which individuals complain of extortion by attorneys for amounts ranging from $1,000 to over $25,000.

*Id.* (pt. I) at 5 (remarks of Rep. Stark).

One particularly notorious prison has been reformed. The commandant was removed from office and the chief of guards imprisoned on charges of corrupt practices. Also, a new acting director was appointed with specific directions to eliminate abuses. *See id.* (pt. III) at 5. As of June 1, 1976, there were 603 American citizens who were prisoners in Mexico, and 490 of them were being held in drug-related cases. Of the 490, approximately 200 had already been convicted, and the remainder were awaiting the start or completion of their trials. *See id.* (pt. III) at 23. According to an earlier estimate, approximately one-half of the drug-related cases pertained to trafficking in

Against this background the treaties pose two broad constitutional questions. First, assuming that the foreign conviction was obtained in a manner that would have violated the United States Constitution if trial had taken place in this country, does the requirement that returned prisoners serve out their foreign sentences in American jails violate the due process clause of the fifth amendment? Second, can American courts be foreclosed constitutionally from judging that question?

In the first part of the Article we examine the jurisdictional question. Because, under our analysis, the juridictional and due process questions tend to converge, however, we also outline the course of our due process inquiry with special attention to its jurisprudential underpinnings. In the second part of the Article we undertake to assay the urgency and weight of the due process claims that the returned prisoners will doubtless raise, and in the third part we review the countervailing interests. Finally, in the fourth part, we undertake to resolve this conflict, concluding with a return to the critical issue that is common to both the jurisdictional and due process questions: the conflict between the interests of those prisoners who have been returned to the United States and those who remain in foreign prisons.

## I. JURISDICTION AND THE MODE OF DUE PROCESS ANALYSIS

### A. Closure of the Courts

Turning initially to the jurisdictional question, we start with the general assumption that so long as the conditions specified in the suspension clause[13] are unmet, some court—state or federal—must be open to pass upon the constitutionality of a federal prisoner's incarceration.[14] Under this assumption, Congress' power to define, and

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marijuana and another twenty percent involved trafficking in cocaine. *See id.* (pt. I) at 17.

13. The suspension clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2.

14. This conclusion rests on the very respectable opinion that, from usage at least, the Constitution requires that there be some court with habeas jurisdiction over federal prisoners if the conditions for suspension are unmet. *See, e.g.*, Eisentrager v. Forrestal, 174 F.2d 961 (D.C. Cir. 1949) (holding that Congress is under an obligation to rest habeas jurisdiction in at least one federal court), *rev'd on other grounds sub nom.* Johnson v. Eisentrager, 339 U.S. 763 (1950); Hart, *supra* note 5, at 1372. *See also* Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) (judicial review required as part of the notion of "due process"). If this conclusion were not sound, our problem would largely disappear. All that would remain is the question whether the treaty is a self-executing suspension or whether legislation is necessary.

The argument that there must be some court open to hear the prisoners' com-

hence to withdraw cases from, the jurisdiction of the lower federal courts and its power to exclude the state courts from jurisdiction in otherwise proper cases[15] may not be used to foreclose totally judicial

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plaints is supported not only by the history and usage of the writ of habeas corpus, but also by the structure of the Constitution. Historically, the underlying philosophy of limited government played a significant role in the framers' decision to protect habeas corpus against "suspension" by the Congress. This decision and its rationale strongly suggest that the framers believed that some court would remain open for federal prisoners through the use of habeas corpus. *See, e.g., Developments in the Law—Federal Habeas Corpus,* 83 HARV. L. REV. 1038, 1263-74 (1970). If not, arbitrary federal imprisonment and the notion of limited government would collide head-on. For divergent views of the historic role of federal habeas corpus, see Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 HARV. L. REV. 441 (1963); Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism,* 7 UTAH L. REV. 423 (1961); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. CHI. L. REV. 142, 170-71 (1970); Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices,* 73 HARV. L. REV. 84 (1959); Oaks, *Legal History in the High Court—Habeas Corpus,* 64 MICH. L. REV. 451 (1966); Reitz, *Federal Habeas Corpus: Import of an Abortive State Proceeding,* 74 HARV. L. REV. 1315 (1961). For an intriguing comparison of the Warren and Burger Courts' response to reforms in criminal procedure through an analysis of their habeas corpus decisions, see Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court,* 86 YALE L.J. 1035 (1977).

In addition, use of the writ has made a guarantee of access to some habeas review for federal prisoners seem rather modest. At common law, habeas corpus lay only to attack the "jurisdiction" of the sentencing court. *See, e.g.,* Herrick v. Smith, 67 Mass. (1 Gray) 1, 49 (1854) ("But where it appears on the face of the proceedings, that the magistrate had no jurisdiction, the proceedings are wholly void, the commitment is without authority, and the party committed is entitled to be discharged from his imprisonment without reversal of the judgment."). But the term "jurisdiction" has proven to be very elastic. *See, e.g.,* Sunal v. Lange, 332 U.S. 174 (1947) (implying that any constitutional error is cognizable in habeas corpus); Johnson v. Zerbst, 304 U.S. 458 (1938) (federal conviction of a defendant who was denied right to counsel exceeded jurisdiction of the court); *Ex parte* Siebold, 100 U.S. 371 (1879) (dictum) (a federal conviction under an unconstitutional statute is void for want of jurisdiction); *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873) (federal detention under a second sentence for the same crime void as beyond the jurisdiction of the court).

The expansion of fourteenth amendment due process requirements magnified the importance of the writ. The application to the states of selected provisions of the Bill of Rights—the right to counsel, the right to be free from unreasonable searches and seizures, and the privilege against self-incrimination—occurred during a period in which the kinds of illegalities that habeas corpus would remedy were expanding. As a result, the writ now serves as a means by which the federal judiciary supervises state court interpretation of the Constitution. *Compare* Fay v. Noia, 372 U.S. 391 (1963), *with* Wainwright v. Sykes, 433 U.S. 72 (1977).

For a view that both the structure of the Constitution and the supremacy clause require some access to judicial review, see Note, *Constitutional Problem in the Execution of Penal Sentences: The Mexican-American Prisoner Transfer Treaty,* 90 HARV. L. REV. 1500, 1511-17 (1977).

15. That power rests, of course, on article III of the Constitution, which provides that "the judicial power of the United States shall be vested . . . in such inferior courts as Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

scrutiny. Although not a direct or literal emanation of the suspension clause,[16] this assumption certainly finds support in its injunction.[17] More directly, the assumption is rooted in an historical tradition buttressed by cases suggesting that Congress' power may not be exercised to deprive a person of life, liberty, or property without due process of law.[18] Further, the assumption gains support from those cases in which the courts, presuming that Congress did not intend to deprive a person of his constitutional rights and relying upon the separability of a provision denying jurisdiction, turned first to an ascertainment of whether a deprivation had, in fact, occurred before judging the validity of the purported closure.[19] Finally, if the Mexican and Canadian treaties cannot escape the strictures of this assumption, they cannot escape by a construction that leaves state courts open to hear the returned prisoners' claims.[20]

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16. Given the fact that Congress possesses the power to establish federal courts, it is simply wrong to contend that the suspension clause by itself either confers jurisdiction on federal courts or limits congressional power to curtail such jurisdiction. *See Ex parte* Bollman, 8 U.S. (4 Cranch) 74, 94 (1807) (Marshall, C.J.) ("[T]he power to award the writ by any of the courts of the United States, must be given by written law."). In *Bollman,* Chief Justice Marshall emphasized that the writ would have been unavailable in federal court if jurisdiction to issue it had not been granted to the federal courts by Congress. *Id.* at 95; *accord,* Shirakura v. Royal, 89 F. Supp. 713, 714-15 (D.D.C. 1949). *But see* Eisentrager v. Forrestal, 174 F.2d 961, 965-66 (D.C. Cir. 1949), *rev'd on other grounds sub. nom.* Johnson v. Eisentrager, 339 U.S. 763 (1950). *See generally* Swain v. Pressley, 430 U.S. 372 (1977); McNally v. Hill, 293 U.S. 131, 135 (1934); Palmore v. Superior Court, 515 F.2d 1294, 1301-04 (D.C. Cir. 1975) (en banc), *vacated and remanded,* 426 U.S. 932 (1976) (acknowledging that the limit of congressional control over federal jurisdiction in regard to the suspension clause is an unresolved issue but refusing to determine its boundaries).

17. *See, e.g.,* Hart, *supra* note 5, at 1397-98.

18. *See* Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948) (Congress' power over jurisdiction held subject to the limitations of due process). *Compare* United States v. Klein, 80 U.S. (13 Wall.) 128 (1872), *with Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869). *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 315-16, 322-24 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

19. *See* Seese v. Bethlehem Steel Co., 168 F.2d 58, 65 (4th Cir. 1948) ("Whether the denial of jurisdiction would be valid if the provision striking down the claims were invalid is a question which does not arise."); *cf.* Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948) ("[R]egardless of whether [the jurisdictional provision] had an independent end in itself, if one of its effects would be to deprive the appellants of property without due process or just compensation, it would be invalid.") (footnote omitted).

20. If the language of the treaties suffices to foreclose federal court review, *see* note 7 *supra,* it presumably also covers the state courts. According to testimony before the Senate Foreign Relations Committee, however, the treaties were not intended to be self-executing. *See Senate Hearings, supra* note 6, at 50 (statement of Peter Flaherty, Deputy Attorney General, U.S. Dep't of Justice). In addition, Congress acted contrary to its usual practice when intending to foreclose the exercise of jurisdiction by the state courts by making no reference whatsoever to state courts in the imple-

Having struck this ominous note, we hasten to emphasize our reason for doing so. We do not imply that the proscription on total closure warrants the conclusion, without further analysis, that the Mexican and Canadian treaties are invalid. It serves only to warn that such a conclusion may result. Categorical expressions aside, the general proscription is not the end, but the beginning of analysis.

One much discussed possibility is that the returned prisoners, by consenting to their return, may be deemed to have waived either the right to their liberty or, at least, the right to seek judicial vindication of that liberty.[21] Since there are numerous situations in which a criminal defendant can waive federal habeas corpus review of alleged constitutional defects in his conviction or sentence,[22] provided he does

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menting legislation. *See* 28 U.S.C.A. § 2256 (West Supp. 1978). In other words, neither the treaty nor the legislation appears explicitly to preclude a returned prisoner from petitioning a state court with jurisdiction in habeas corpus. In general, the better view is that, with the federal courts closed to habeas, the state courts may, notwithstanding Tarble's Case, 80 U.S. (13 Wall.) 397 (1872), issue the writ on behalf of a federal prisoner, *see generally* HART & WECHSLER, *supra* note 18, at 428. The fact that such an exercise of jurisdiction would be contrary to the intent of a treaty may, under the reasoning of *Tarble's Case,* warrant a different result. In all events, any attempt at the exercise of such jurisdiction would seem foreclosed by Zschernig v. Miller, 389 U.S. 429 (1968).

21. *See Senate Hearings, supra* note 6, at 31-32 (statement of John L. Hill, Attorney General, State of Texas); *id.* at 49 (statement of Herbert J. Hansell, Legal Adviser, U.S. Dep't of State); Note, *supra* note 14, at 1523-27.

22. A valid guilty plea may, under proper circumstances, cut off a defendant's right to federal habeas review. *See* Tollett v. Henderson, 411 U.S. 258 (1973); Brady v. United States, 379 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970). *But see* Lefkowitz v. Newsome, 420 U.S. 283 (1975); Blackledge v. Perry, 417 U.S. 21 (1974); Robinson v. Neil, 409 U.S. 505 (1973). It has even been suggested that a conviction based upon a valid guilty plea to a charge under a statute punishing conduct later found to be constitutionally protected should bar collateral relief. *See* Ellis v. Dyson, 421 U.S. 426 (1975) (Powell, J., dissenting). In all of these cases, however, there is a great deal of confusion as to which claims survive a guilty plea and which do not. *See generally* Alschuler, *The Supreme Court, The Defense Attorney, and the Guilty Plea,* 47 U. COLO. L. REV. 1, 34-37 (1975). *But see* Stone v. Powell, 428 U.S. 465 (1976).

Some other constitutional and statutory claims also may be waived. *See, e.g.,* Faretta v. California, 422 U.S. 806 (1975) (waiver of right to assistance of counsel). For example, an accused who elects to take the stand in his own criminal trial in effect waives the fifth amendment privilege against self-incrimination as to matters his testimony reveals. *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969). When he voluntarily and intelligently pleads guilty to criminal charges he waives the right to a trial by jury or judge in which the prosecution has the burden of proof and in which he is entitled to confront adverse witnesses and produce witnesses in his own behalf. *See id.* Nevertheless, the lack of jurisdiction in a court may not be waived, *see, e.g.,* Blackledge v. Perry, 417 U.S. 21, 30-31 (1974); United States v. Spada, 331 F.2d 995, 996 (2d Cir.), *cert. denied,* 379 U.S. 865 (1964), nor may a challenge to the voluntariness of a waiver, *see* Waley v. Johnston, 316 U.S. 101, 104 (1942) ("And if his plea was so coerced as to deprive it of validity to support the conviction, the coercion likewise deprived it of validity as a waiver of his right to assail the conviction."). *See generally*

so "voluntarily, without coercion,"[23] two questions arise: does the prisoners' consent fit the American law concept of waiver, and can it be viewed as voluntary?

With respect to at least some prisoners, it is far from certain that their consents, even if tantamount to "waivers," will be construed as voluntary.[24] And this problem is not alleviated by the procedural

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Cover & Aleinikoff, *supra* note 14; Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis,* 55 TEX. L. REV. 193 (1977).

23. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Application of the waiver standard to guilty pleas meant that such pleas must be both freely entered into and "knowing intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970). *Brady* adopted the test set forth by Judge Tuttle of the Fifth Circuit Court of Appeals:

> "[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)."

*Id.* at 755 (quoting Shelton v. United States, 246 F.2d 571, 572 (5th Cir. 1957), *rev'd on other grounds,* 356 U.S. 26 (1958)).

Brady v. United States, 397 U.S. 742 (1970), McMann v. Richardson, 397 U.S. 759 (1970), and Parker v. North Carolina, 397 U.S. 790 (1970), sometimes referred to as the "Brady Trilogy," have been cited as establishing that for most purposes a voluntary guilty plea entered upon advice of counsel operates as a "break in the chain of events" that cuts off a criminal defendant's right to raise through federal habeas "independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Tollett v. Henderson, 411 U.S. 258, 267 (1973); *see* note 22 *supra.* For the view that these cases dilute the waiver standard for judging guilty pleas, see Alschuler, *supra* note 22.

In a similar vein, the Court appears to have diluted the waiver standard enunciated in Fay v. Noia, 372 U.S. 391 (1963). *See* Wainwright v. Sykes, 433 U.S. 72 (1977); Francis v. Henderson, 425 U.S. 536 (1976); Estelle v. Williams, 425 U.S. 501 (1976); Rosenberg, *Jettisoning* Fay v. Noia: *Procedural Defaults by Reasonably Incompetent Counsel,* 62 MINN. L. REV. 341 (1978). As noted by Justice Brennan, however, the Court has never disagreed with the major principle of *Noia*: "[I]n considering a petition for the writ of habeas corpus, federal courts possess the *power* to look beyond a state procedural forfeiture in order to entertain the contention that a defendant's constitutional rights have been abridged." Wainwright v. Sykes, 433 U.S. 72, 100 n.2 (1977) (dissenting opinion) (emphasis in original).

24. In Fay v. Noia, 372 U.S. 391 (1963), the defendant failed to appeal his allegedly unconstitutional state conviction, fearing that upon a successful appeal he would be retried and possibly sentenced to death. In the context of this "grisly choice," the Court thought that his decision was not a waiver that would foreclose federal habeas review. Although the *Noia* Court did not set guidelines on how to distinguish strategic waivers from "grisly choices," subsequent lower court cases have elaborated the concept of "grisly choice." *See, e.g.,* Whitus v. Balcum, 333 F.2d 496 (5th Cir. 1964).

In United States v. Jackson, 390 U.S. 570 (1968), the Court held that a provision in the Federal Kidnapping Act, 18 U.S.C. § 1201(a) (1966), *as amended,* 18 U.S.C. § 1201(a) (1976), under which only a jury could impose the death penalty, had an imper-

safeguards with which the effectuating statute surrounds the granting of consent.[25] Far more serious, however, is the problem of fitting the prisoners' consent into the basic concept of waiver as known to our law. In cases dealing with a waiver of the right to federal habeas review, the criminal defendant has always had a genuine choice: to stand upon his constitutional rights or to relinquish those rights and gain some other benefit, such as a tactical litigation advantage or the avoidance of the expense and public notoriety of trial.[26] This *quid pro quo* is critical; so long as waiver, in our law, means the conscious relinquishment of a right, there must be a right to be relinquished. There must, in other words, be an actual choice between the right and some other status or condition devoid of the right. Were this not so, we would abandon the requirement of voluntariness. If state of mind—the absence of voluntariness—can affect the validity of a waiver, it must be because a waiver involves the making of a choice that could be impaired by coercion. Yet, in the case of the treaties, no such choice exists. There is no possibility that, by forgoing the opportunity to return to the United States in return for relinquishing his constitutional rights, a prisoner could thereby secure those rights.

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missible chilling effect on the defendant's "Fifth Amendment right not to plead guilty" and his "Sixth Amendment right to demand a jury trial." 390 U.S. at 581. Thus, his waiver of those rights was not voluntary. This decision was followed by Brady v. United States, 397 U.S. 742 (1970), where under the same statutory provision, the defendant first pleaded not guilty and then changed his plea upon learning that his coconspirator had also pleaded guilty and would testify against him. *See id.* at 743. After *Jackson* was decided, Brady challenged his conviction on the ground that the death penalty provision of the Act was the decisive consideration that caused him to plead guilty and waive his constitutional right to trial. *See id.* at 744-45. The Act, in short, had had precisely the chilling effect, or, as he put it, "coercive effect," that the Court in *Jackson* had predicted. This argument was rejected by the Court, which emphasized that, in *Jackson*, the reference to a "chilling effect" had been distinguished from a "coercive effect." The existence of the latter was, the Court said, to be gleaned from all the circumstances of the case. *See id.* at 749. In Brady's situation, the coconspirator's plea and the attendant strengthening of the prosecutor's case was viewed as the overriding inducement for the plea. *See id.* at 756. That, in turn, was the kind of inducement that normally and properly undergirds guilty pleas.

Under the authority of these cases, it can be argued that some of the Mexican and Canadian prisoners face such a "grisly" alternative that the benefits of removal to the United States work a subtle form of coercion rendering the required relinquishment of their rights something less than voluntary. If viewed in this way *Brady* may be distinguishable. In the prisoners' cases, unlike *Brady*, there are no factors other than the governmental demand that created the "grisly choice"—the treaty—to explain the waiver. Moreover, *Brady*'s rejection of the implications of *Jackson* was precipitated largely by the doubts those implications would have cast on all plea bargaining, a fear that obviously does not exist in the prisoners' cases.

For discussions of waiver, see Cover & Aleinikoff, *supra* note 14; Dix, *supra* note 22.

25. *See* 18 U.S.C.A. §§ 4108-4109 (West Supp. 1978).

26. *See* cases cited notes 22-24 *supra*.

If he refuses to return to the United States because he does not wish to relinquish his constitutional rights, he must remain in the foreign jail wholly bereft of any rights upon which to insist. Stated another way, the government, as a condition to returning a prisoner, insists that he consent to forgo his constitutional rights. Perhaps this demand is entirely proper. If so, the prisoner cannot repudiate the condition once he is returned to the United States and is in a position to assert his rights. But it would deprive words of all meaning to rest the validity of that condition on the fiction that the prisoner deliberately chose to forgo his rights when, in fact, had he chosen not to do so, he still would have had no rights. The prisoner's consent only means that he prefers to stay in an American rather than a foreign jail; in other words, that removal is not against his will.[27] Such consent cannot validate the prisoner's condition. That is a wholly separate matter requiring a judgment whether, in light of the importance assigned the constitutional rights of which the prisoner is deprived by the condition, it is proper for our government to exact such a price in return for its largesse. In short, the problem is, if anything, a question of unconstitutional conditions, and not a problem that can be resolved by resort to the concept of waiver.

If this is true, we would seem to confront a basic question regarding the proper characterization of our problem. Can we simply recharacterize the treaty provisions as a condition of the grant of a governmental benefit and then, by finding that condition valid, avoid the historical proscription on the total closure of the American courts? Is this resort to characterization legitimate, or is it a mere sleight-of-hand to avoid a basic constitutional precept? The legitimacy of using characterization to move a problem from one legal rubric to another turns, we suggest, on whether the new rubric allows for a more holistic view of the matter—whether it enhances our ability to see the problem in all of the ways that it actually impinges on social policy, constitutional values, and juridical principles. By this test, our recharacterization is entirely legitimate.

Initially, the question of unconstitutional conditions calls to mind cases dealing with executive pardons and the closely related matter of parole. The long-established power of the President to commute a death sentence into a lesser penalty[28] is nothing other than the conferral of the benefit of a pardon on condition that the

27. Some prisoners may prefer not to be transferred. For example, the absence of forced labor and the opportunities for conjugal visits, *see House Hearings* (pt. III), *supra* note 11, at 21, may be strong enough incentives for some prisoners to wish to remain in Mexican prisons. The Canadian prison system is not open to the same charges of abuse as the Mexican prison system.

28. U.S. CONST. art. II, § 2, cl. 1.

prisoner serve the alternative sentence specified.[29] Parole, which has its historical origins in the pardoning power of the executive,[30] likewise constitutes the conferral of a benefit that is almost invariably attended by conditions. Although it is often said that neither a parole nor a pardon can be granted subject to conditions that "otherwise offend the Constitution,"[31] the lower courts have held that not every condition that infringes in some way upon the full and free exercise of a constitutional right is invalid.[32] Unfortunately, however, none of these cases permits us to draw ready parallels to our situation. It is doubtful, for example, that the President could commute a sentence on condition that the prisoner forgo his right to challenge by habeas corpus the validity of the very conviction or sentence to which the commutation relates. Indeed, the Supreme Court in *Schick v. Reed*[33] issued an inconclusive, but nevertheless notable, warning that any benefit conditioned upon the total relinquishment of the "privilege" of habeas corpus might encounter a far more categorical objection than any of the partial infringements with which the courts had dealt thus far.[34] And consistent with the object of seeking the widest possible perspective on our problem, this conclusion is bolstered by the basic precept that some court must remain open to a federal prisoner.

Yet the fact remains that in all of the pardon and parole cases the courts were willing to tolerate some conditional impairment of a prisoner's constitutional rights; although a prisoner is not wholly be-

29. *See* Schick v. Reed, 419 U.S. 256 (1974); *Ex parte* Wells, 59 U.S. (18 How.) 307 (1855). *See generally* Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

30. *See* C. NEWMAN, SOURCEBOOK ON PROBATION, PAROLE AND PARDONS 3-37 (3d ed. 1968)

31. Schick v. Reed, 419 U.S. 256, 266 (1974). *See generally* Morrissey v. Brewer, 408 U.S. 471 (1972).

32. *See, e.g.*, Berrigan v. Sigler, 499 F.2d 514 (D.C. Cir. 1974) (parole board's prohibition on travel to Hanoi upheld against an alleged infringement of the constitutional right to travel); Bricker v. Michigan Parole Bd., 405 F. Supp. 1340 (E.D. Mich. 1975) (requirement that a parolee not work for specified firms upheld against first amendment attack); Hoffa v. Saxbe, 378 F. Supp. 1221 (D.D.C. 1974) (pardon conditioned upon an agreement not to participate in union management until 1980 upheld against a claimed infringement on first amendment right of association). *But see* Hyland v. Procunier, 311 F. Supp. 749 (N.D. Cal. 1970) (requirement of parole officer approval before parolee could give public speech held invalid prior restraint on first amendment rights).

33. 419 U.S. 256 (1974).

34. Chief Justice Burger recalled that prerevolutionary English practice had changed as needed "to avoid [the] abuse and misuse" of the pardon power and that Parliament had prohibited the issuance of pardons for anyone who transported a prisoner overseas to evade the Habeas Corpus Act. This prohibition, the Chief Justice explained, was imposed "because to allow such pardons would drain the Great Writ of its vitality." *Id.* at 260.

reft of rights he is not like other citizens.[35] This distinction is a fair invitation for us to consider the special factual context surrounding the returned prisoners under the Canadian and Mexican treaties.

In all of the conditional pardon and parole cases, as in decisions dealing with efforts by Congress to bar the lower federal courts from entertaining constitutional challenges to certain legislative acts, the object that the government sought to achieve was at odds with the interests of the individuals whose rights were allegedly infringed. This conflict engaged the whole protective thrust of the Bill of Rights.

The conflict under the prisoner exchange treaties, however, may be different. The record establishes that the provisions in the treaties foreclosing judicial review and presumably also the continued imprisonment requirement were insisted upon by the foreign governments.[36] An American refusal to accept these conditions would have frustrated all efforts to obtain the return of the prisoners. From this it must be assumed that the failure of the American courts to honor these provisions very likely would jeopardize the return of any prisoners who are abroad at the time of the decision. Thus, while American governmental acquiescence in these provisions doubtless served several governmental interests,[37] it was also necessary to serve the interests of the prisoners. So long as the prisoners remained abroad, acquiescence in the conditions exacted by the foreign governments in return for their cooperation produced no conflict between the interests of the prisoners and those of the American government. If any conflict now exists, it is between the interests of those prisoners who have already taken advantage of the treaty and the interests of both the prisoners who remain abroad and the United States government. By challenging their continued imprisonment, the returned prisoners will espouse not only their own, but also certain societal interests. To vindicate the interests of those who have returned, however, would be to ensure the continued suffering of those who remain abroad, many of whom have been deprived of the same rights that the courts are being asked to vindicate.

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35. *See* cases cited note 32 *supra.*

36. *See Senate Hearings, supra* note 6, at 46 (statement of Herbert J. Hansell, Legal Adviser, U.S. Dep't of State). If there is any doubt on this point, the case against the treaty becomes much stronger. In this regard, it must be recognized that a grant of complete freedom to our returned prisoners would have been a blow to our drug enforcement program and have caused political embarrassment in other ways. *See, e.g., House Hearings* (pt. I), *supra* note 11, at 6-8. Plainly, the government would be loath to see some of the returned prisoners released, especially those with suspected ties to organized crime. One of the reasons for making returnees eligible for parole was to permit the government to deal with the cases selectively. Thus, some further showing may be required by the courts to establish to their satisfaction our government's passive part in formulating these provisions.

37. *See* note 36 *supra.*

Perhaps this difference is decisive. Surely it is arguable that our problem is not whether the treaties violate the rule that prohibits attaching unconstitutional conditions to governmental benefits, but rather whether it is appropriate to fashion a new and quite different rule forbidding the United States government from aiding its citizens abroad if the price exacted by a foreign power is a relinquishment of the citizens' rights. In the same vein, we arguably are dealing with a very different question from that around which the historical proscription on closing all courts to habeas review may have developed. If this be so, we cannot treat either the rule against closure of the courts or the rule against unconstitutional conditions as controlling without a great deal more investigation. We cannot automatically assume that the obligation of the courts to uphold the constitutional rights of American citizens disables the government from aiding its citizens abroad, especially if that disability would leave those citizens to suffer, bereft of all rights.

On the other hand, we cannot, simply by observing the harsh consequences of these rules in our context, assume that they no longer are determinative. Eventually, the treaty is likely to be challenged and a court will have before it a prisoner whose rights it could vindicate. The fact that the prisoner before the court will be there only by virtue of the treaty does not necessarily dispose of his claim. It would be anomalous indeed if our system could imprison people solely on the strength of foreign proceedings, without any regard for the fairness of the proceedings, merely because it was expedient to do so and the prisoners themselves preferred to be imprisoned here rather than abroad. Certainly the court is still charged with guarding the interest of the whole of American society in the preservation of our system of basic rights. The central question, in sum, is not an easy one. It does not fit neatly within any established body of juridical principles. It subtly slips away from principles that might otherwise be thought controlling and evokes an unsettling choice among constitutional rights and humanitarian and governmental interests. It forces us to think carefully about the nature and extent of society's interest in the integrity of its institutions and values and of our commitment to the individual and his liberties. Moreover, the Supreme Court generally has not refused to redress constitutional deprivations merely to avoid visiting hardships upon others similarly situated.[38] But this propensity has met a contrary tendency in the foreign relations context. The Court has refused to redress rights when such redress would threaten greater hardship to others who

38. *Cf.* Goss v. Lopez, 419 U.S. 565 (1975) (granting hearing to students facing temporary suspension, despite effect on discretionary authority of school authorities); Goldberg v. Kelly, 397 U.S. 254 (1970) (granting hearing prior to termination of welfare benefits, despite effect on administration of HEW regulations).

have suffered like deprivations but who could not bring themselves within the jurisdiction of American courts.[39] These competing tendencies thus add another dimension to the search for an answer to our problem.

In the end, we conclude that the treaty provisions foreclosing a returned prisoner from challenging his foreign conviction are constitutionally valid. We do so without great conviction, relying in no small part upon institutional considerations.[40] At this juncture, however, the point of paramount interest is the convergence of our two basic questions. The question upon which the validity of the court closure provision turns is also the question that will determine whether the continued sentence provision comports with the due process clause.

As already observed, it is probable that the continued sentence provision, no less than the court closure requirement, was part of the price exacted by the Mexican and Canadian governments for the release of Americans imprisoned in their countries.[41] If so, failure to comply with either would likely jeopardize the return of those who remain abroad. As the bulk of this Article will demonstrate, there will be many cases in which the continued sentence requirement can be validated without resolving the difficult choice between the rights of prisoners who have returned and the interests of those who remain abroad. But in a limited number of critical cases, where defects in a returned prisoner's foreign trial create unacceptable doubts about his guilt, continued incarceration in an American jail would, we conclude, violate the due process clause. In such cases, therefore, the question becomes whether that unique element that pits the values represented by those who have returned against the values represented by those who remain abroad changes this conclusion. It is the same question that confronts us on the court closure provisions. It engages the same choice among constitutional rights and humanitarian and other governmental interests. It requires that we think again and to the same extent about the nation's interest in preserving the integrity of its institutions and values and its commitment to the individual. And, in all of this, the analysis does not change according to whether the courts purport to address only the jurisdictional question or speak to the merits of the continued sentence requirement as well. To say that the courts may be barred from hearing a prisoner's constitutional claim is to conclude that no constitutional right is being impaired. To say that his continued imprisonment would violate due process is to conclude that the courts must be open to redress the violation.

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

40. *See* text at p. 756 *infra*.

41. *See* note 36 *supra* and accompanying text.

This is not to suggest, however, that the court closure provisions serve no useful purpose under our analysis. In any case where the habeas corpus petition of a returned prisoner puts the question of his guilt in issue, a court, upon a motion to dismiss, may be able to avoid all inquiry into whether continued imprisonment would violate due process. It could assume, without deciding, that a violation might occur and proceed only to decide the jurisdictional question. An affirmative answer would warrant dismissal of the prisoner's petition. The important point, however, is that by predicating its judgment on jurisdictional grounds, the court would avoid violating the treaty. Neither the Mexican nor the Canadian treaty purports, even if it could, to deprive American courts of jurisdiction to pass upon the validity of the jurisdiction closure provisions. And since the treaties are not self-executing, the implementing legislation would seem to place this point beyond doubt.[42] Moreover, a judgment on jurisdictional grounds would largely avoid the embarrassments to our foreign relations that might attend a judgment on the merits. Nevertheless, we could draw some comfort from a judgment upholding the court closure provisions. It would mean, according to our analysis, that the continued incarceration of the prisoner would not result in a denial of his constitutional rights. Conversely, if the unique circumstances surrounding these treaties do not suffice to validate the court closure provisions, then, according to our analysis, all the elements necessary to find a due process deprivation will exist. It would remain only for the court to try the factual question of whether the requisite degree of doubt about the prisoner's guilt exists.[43]

## B. The Course and Mode of Due Process Inquiry

As already noted, our inquiry into the constitutionality of the continued sentence provisions proceeds through two levels. At the first level, we ignore the unique circumstance that surrounds the treaties and simply ask whether the continued sentence provision might offend the due process clause. We draw a distinction between cases where the finding of a prisoner's guilt is in question and cases where guilt is not in doubt but the foreign court followed other practices that would offend the Constitution had the trial been conducted

42. Article VI of the Mexican treaty and article V of the Canadian treaty, *see* text accompanying note 5 *supra*, literally purport only to foreclose the courts of receiving states from exercising jurisdiction on the merits of a challenge to a foreign conviction or sentence.

43. In adding a new section to the jurisdictional statutes on habeas corpus, Congress saw fit only to replicate the language of the treaty articles, which speaks only to the exercise of jurisdiction on the merits. *See* 28 U.S.C.A. § 2256 (West Supp. 1978); note 42 *supra*.

in this country. Although a few of these latter cases are troublesome, we basically conclude that only where guilt is in doubt does the continued incarceration of a prisoner sufficiently threaten a violation of due process to warrant moving to the second level of analysis, where the unique circumstance surrounding the treaties becomes determinative. In arriving at these conclusions, we openly engage in a weighing of the conflicting values and interests in the various categories of cases. This is, of course, hardly a novel procedure. Far more interesting are the justification for the weighing and the development of a structure to guide and discipline that process. Weighing contending interests, as a mode of constitutional inquiry, has its critics. To most, it is an open invitation for judgments reflective of nothing more than the subjective biases of judges.[44] Our discussion, in short, must start with an inquiry into methodology.

In the end we shall argue that our method is inescapable, that it is the only mode of analysis adequate to the intellectual demands of our subject.[45] But before attempting to demonstrate this point, it is useful to recall the Supreme Court's reminder that the broad generalities of the Bill of Rights, especially the due process clause, constitute the basic framework for a society committed to an "ordered liberty."[46] To say that both order and liberty contribute to the meaning of due process implies that in discerning that meaning one will encounter both conflicting interests and a certain tension between the values called to the aid of those interests. If one abjures ad hoc resolutions and resorts to historical principles of some generality, the interpretive task inevitably requires close attention to the social context out of which a particular dispute arises. In sum, one is clearly

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44. This was precisely the point arrived at in a determination under the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-262 (1970), in Seese v. Bethlehem Steel Co., 168 F.2d 58 (4th Cir. 1948), but we do so without resort to a somewhat strained rule of construction.

45. *See* Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159; Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245. *See generally* J. FRANK, LAW AND THE MODERN MIND (1930); Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decision of Judges*, 17 ILL. L. REV. 96 (1922); Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930).

The critics, of course, rarely deny entirely the need for an occasional "weighing-up of social values," especially in the "open-textured" areas of the law. The criticism is rather that such a process belongs only to the "areas of indeterminance" where the results of a prior weighing fail to supply an answer. Their protest is, therefore, against a too ready propensity to see legal issues in terms of conflicting values which must continuously be reconciled. *See* H.L.A. HART, THE CONCEPT OF LAW 121-32 (1961). This analysis, we suggest, rests upon a basic analytic flaw. *See* note 70 *infra*.

46. *See* Rochin v. California, 342 U.S. 165, 169 (1952); Palko v. Connecticut, 302 U.S. 319, 325 (1937).

forewarned by the nature of the due process clause itself that the interpretive task involves a weighing of conflicting values and interests as they emerge from their particular context. Later, we shall seek to place this analytic mode within the larger tradition of the common law and shall argue that it does not offend our ideas of a society governed by principle—a society under law.[47] We shall also deal with the alleged dangers of judicial subjectivity. For the present, however, we turn to the conflicting elements of the problem.

Under the general heading of the claim, or as we define it, the "principle," of order, lie a number of specific interests. These are the government's interest in ameliorating the suffering of its citizens and facilitating prisoner rehabilitation, its interest in curtailing the drug traffic, its interest in assuring the humane treatment of American citizens, thereby reducing one irritant in our relations with Mexico in particular,[48] and its interest in testing and perfecting treaties of this kind as a general device for protecting Americans who travel abroad. Quite apart from the more specific humanitarian and other values that lend urgency to these objectives, they are all supported by the more general value assigned to effective governance: the assumption of a democratic society that, absent official corruption, society as a whole will gain from the successful pursuit of any goal set by its elected representatives.

When the Mexican treaty is placed in a broader political context, these governmental objectives assume an urgency that no mere catalogue can adequately convey. Mexico is our nearest Latin American neighbor. It is the developing nation with which the United States has historically had its closest ties. Mexico's population growth rate is one of the highest in the world.[49] The tensions generated by this growth, exacerbated by the historical social and economic cleavages within Mexican society and by Mexico's proximity to the affluence of the United States and the resulting efforts of many poor Mexicans to enter this country, render the matter of maintaining good relations with Mexico one of the most delicate and difficult problems confront-

47. In a rather eloquent variation on a theme by Justice Holmes, Justice Frankfurter noted that as the "very antithesis of a Procrustean rule," judicial enforcement of the due process clause was one of the most striking manifestations of how "the whole law" " 'depends upon differences of degree . . . as soon as it is civilized.' " Irvine v. California, 347 U.S. 128, 143 (1954) (Frankfurter, J., dissenting) (quoting LeRoy Fibre Co. v. Chicago, M. & St. P. Ry., 232 U.S. 340, 354 (1914) (Holmes, J., concurring)). To this Frankfurter added, again quoting Holmes, "Between the differences of degree which that inherently undefinable concept entails 'and the simple universality of the rules of the Twelve Tables, or the Leges Barbarorum, there lies the culture of two thousand years.' " *Id.*

48. *See Senate Hearings, supra* note 6, at 55-56 (statement of Peter Benzinger, Administrator, Drug Enforcement Administration, U.S. Dep't of Justice).

49. *See Survey of Mexico*, THE ECONOMIST, April 22, 1978, at 75.

ing contemporary American diplomacy. Elimination of the irritant to that relationship engendered by these prisoner cases and their association with our drug control program is a task of no small importance, as urgent perhaps as any like effort anywhere else in the world.

Further bolstering these concerns are two sets of internationally determined interests. The first of these is reflected in the jurisdiction-selecting precepts of international law, which the Supreme Court has recognized in several decisions upholding the validity of extradition and Status of Forces agreements[50]—agreements which are, in many respects, similar to the Mexican and Canadian treaties.[51] These precepts seek to promote a mutually beneficial intercourse between otherwise diverse, independent, and often jealous nations. They accord to each nation a large measure of freedom to define what acts within its territory are criminal and to prescribe the modes for prosecuting and punishing those who engage in such acts.[52] They impose on the judicial institutions of all other nations a duty to accord a large measure of respect to the judgments of courts within the nation where the acts were committed. As the Supreme Court has made clear, they establish that the Constitution can indeed have a different impact when a foreign, rather than domestic, proceeding is the focal point of a challenge in an American court.[53] As a corollary, they also tend to legitimize both the sensibilities and any consequent retaliation that a foreign government might exhibit if an American court refused to respect its judgments in cases where it had jurisdiction.

In addition to these jurisdictional principles, there is the even more commanding precept that all nations, in order to promote a more viable international order and secure good relations with other states, should fulfill their solemn international agreements.[54] No American court can lose sight of the fact that a judgment invalidating either the Canadian or Mexican treaty will compel the United States to breach its international obligations, thereby violating international law.

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50. *See* Wilson v. Girard, 354 U.S. 524 (1957); Neely v. Henkel, 180 U.S. 109 (1901).

51. *Compare* Mexican Treaty, *supra* note 1, *and* Canadian Treaty, *supra* note 2, *with* Status of Forces Agreement, July 9, 1966, United States-Republic of Korea, art. XXII, para. (7)(b), 17 U.S.T. 1677, 1697, T.I.A.S. No. 6127 ("sympathetic consideration" to be given to United States request for custody of United States citizens convicted by Korean court). *See also* Note, *supra* note 14, at 1501 n.12.

52. *See, e.g.*, Wilson v. Girard, 354 U.S. 524, 529 (1957) ("A Sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly consents to surrender its jurisdiction.").

53. *See* Wilson v. Girard, 354 U.S. 524 (1957); Neely v. Henkel, 180 U.S. 109 (1901).

54. *See generally Senate Hearings, supra* note 6, at 47 (statement of Herbert J. Hansell, Legal Adviser, U.S. Dep't of State).

Although the interests so far enumerated seem to establish a strong case for validating the Mexican and Canadian treaties, these interests standing alone yield an inaccurate picture of the problem. One must consider the Constitution, which embodies a concern that surely stands near the apex in our hierarchy of political values: our abhorrence of any official deprivation of human liberty carried out through procedures that are not fundamentally fair or decent, even if the deprivation serves an otherwise proper public purpose. This abhorrence supplies the core of the case against the treaties. But to describe that core is not enough; there still remains the task of placing it within a total perspective on our problem.

First, it must be remembered that the Constitution not only protects individuals caught in the toils of official action, but also warns all officials that any attempt to use power arbitrarily, however well-intentioned or humane the goal, may not succeed. There is, in other words, an essential prophylactic constitution. And yet the integrity of that constitution—the credibility of its warning—is plainly dependent upon the vigor with which constitutional values are enforced in particular cases. Each case forms part of a pattern, and it is the pattern that defines how and to what extent that case will affect the content of the prophylactic constitution. There is, in short, an inextricable relationship between each returned prisoner's case and the larger societal concern for the values at issue in any one case.

This relationship underscores a rudimentary point that some commentators seem to have forgotten. While it is true that the Constitution speaks to American but not foreign officials, it does not necessarily follow that the Constitution is inapplicable because a foreign rather than an American court deprived the prisoners of their liberty in the first instance. But for the decision of an American court to uphold the treaty and the decision of the executive to carry it out, the returned prisoner would go free. At a technical level, the American government is implicated in an act of deprivation even though that deprivation was initiated by foreign authority. At a less technical level, it would surely be anomalous if "fairness and decency" in a foreign proceeding were a matter of constitutional indifference when American officials imprisoned an American citizen solely on the strength of that proceeding.[55]

Second, it is necessary to define more carefully the precise humanitarian interests at stake at this level of the analysis. Here we are

55. Perhaps we then would face a situation similar to that below:

> "For instance now," [the Queen] went on . . . "there's the King's Messenger. He's in prison now, being punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all."
>
> "Suppose he never commits the crime?" said Alice.
>
> "That would be all the better, wouldn't it." The Queen said . . . .

C. DODGSON, THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE, in THE COMPLETE WORKS OF LEWIS CARROLL 226-27 (Modern Library ed. 1936).

not concerned with effects on those prisoners who remain abroad; that is an appropriate matter for consideration only at the second level of analysis. Moreover, the decisions upon which we must rely for guidance typically involve situations where a continuous conflict exists between the government and the individual.[56] They do not address the unique problem of the individual who, having left a class whose interests the government seeks to serve, asserts a constitutional claim injurious to those who remain in that class. To assay accurately the lesson of these cases, therefore, we must exclude at this point all concern for the other prisoners. This also means that, at this level of analysis, the humanitarian objects of the government, though not trivial, become far less weighty. Yet those objects are not without some effect. The returned prisoner is in a position to advance his constitutional claim only because he has been the beneficiary of a humanitarian measure for which his continued imprisonment was the price paid. But it is constitutional rights with which we are concerned. It is doubtful that we could ever justify depriving a person of his rights merely because his insistence upon those rights appears to be an act of ingratitude. At most, the prisoner's exploitation of this humanitarian effort serves to ameliorate somewhat the threat that denial of his constitutional claim might otherwise pose to the integrity of our values and institutions.

Third, even if under decisions of the Supreme Court,[57] we must assign a high order of urgency to the interests served by respecting the Mexican and Canadian claims to primary jurisdiction in these prisoner cases, this is not quite the whole of the matter. The jurisdiction-selecting precepts of international law to which the Court has made reference do not supply a wholly accurate lens through which to view the international community's perspective on our problem.

Under emerging international norms, a nation with a claim to primary jurisdiction is not wholly free to do as it sees fit in the administration of criminal justice within its territory. Both Mexico and Canada have pledged themselves, under the United Nations Charter, to promote respect for human rights and fundamental freedoms.[58] Mexico signed a similar pledge in the Charter of the Organization of American States,[59] and it also adhered to the American Declaration

56. *See* Parts II & III *infra*.

57. *See* Wilson v. Girard, 354 U.S. 524 (1957); Neely v. Henkel, 180 U.S. 109 (1901).

58. The United Nations Charter provides that among the purposes of the United Nations, "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" is of paramount importance. U.N. CHARTER art. 1, para. 3.

59. Apr. 30, 1948, [1951] 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3.

of the Rights and Duties of Man, which calls for securing to all persons certain fundamental procedural rights.[60] Although no official charge has been advanced against Mexico or Canada under these several documents, or any of the prescribed remedial procedures invoked, they can hardly be ignored. Surely, upon a showing of probable violation, an American court must take these principles into account if it is also being asked to honor the more traditional jurisdictional precepts of international law.

In addition, the claim to primary jurisdiction must not obscure yet another set of internationally determined principles of no less ancient lineage. It has long been axiomatic that no nation's courts are required by international comity or law to recognize, much less execute, foreign judgments abhorrent to their own fundamental principles.[61] This rule is, of course, riddled with ambiguity and the potential for abuse. We need not, however, engage the subtle question of its proper scope. The salient point is that, notwithstanding the apparent services to good international order that the traditional jurisdictional rules might be thought to advance, the international community itself has long recognized the need for some, and perhaps considerable, national autonomy or freedom.[62] The international community has acknowledged that nations perforce will not compromise too far with what they consider fundamental. Presumably, it has also acknowledged that to ask for such compromise would only undermine the orderliness that the jurisdictional precepts seek to promote. Whatever the rationale, it is abundantly plain that, but for the treaties, the American courts would stand foursquare upon a venerable international tradition in subjecting Mexican and Canadian judgments to constitutional scrutiny. The treaties doubtless change the situation; they endow the jurisdictional rules with more significance than they might otherwise merit.[63] Yet it also seems plain that those rules are not a complete or categorical expression of what the international community might expect of the United States.

In sum, our problem is one of many dimensions. To ignore any

60. *See* U.S. DEP'T OF STATE PUB. NO. 3263, NINTH INTERNATIONAL CONFERENCE OF AMERICAN STATES 260-65 (1948).

61. *See* Hilton v. Guyot, 159 U.S. 113 (1895); Banco Minero v. Ross, 106 Tex. 522, 172 S.W. 711 (1915); *cf.* Loucks v. Standard Oil Co., 224 N.Y. 99, 106, 120 N.E. 198, 200 (1918) ("A tort committed in one state creates a right of action that may be sued upon in another unless public policy forbids.").

62. *See generally* J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 29-43 (5th ed. Boston 1857) (1st ed. Boston 1834); Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087 (1956); Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9 (1966).

63. *Cf.* Wilson v. Girard, 354 U.S. 524 (1957) (jurisdictional question over American soldier arguably acting "in performance of official duty").

of these dimensions is, as with any other human problem, to invite irrationality. All must be accommodated, however difficult that may be. Thus, the Constitution is engaged, and the rules governing the international community do not, according to their own terms, claim to foreclose application of the Constitution. Yet to say that a foreign judgment is not invariably entitled to respect does not prescribe the respect to which it is entitled. Certainly it does not define the measure of respect warranted by the substantial number of interests that the exercise of such respect would serve.

In order to take that measure, we must, because we deal with constitutional values, begin by recognizing that too great a compromise of those values can tear at the fabric of our society. We must also acknowledge that, in assessing the magnitude of any proposed compromise, each individual case will become a part of the pattern that defines the content of the Constitution as bulwark protecting us all. Yet we must also acknowledge that some cases do not present that potential, that situations can have a uniqueness that insulates compromise from endangering the social fabric. Also, we must know that without compromise we may risk an even greater threat to our freedom. Our abhorrence of arbitrary power is not a sentiment of constant intensity separate from the natural fears and sensibilities that a particular case may evoke. To endow that abhorrence with a categorical quality that brooks no compromise, when to do so also threatens great national objects, is to construct a fragile regime indeed. At the point where compromise is trivial when measured against the objects that it would serve, a refusal to compromise can discredit the underlying value itself. The preservation of liberty is, in sum, a very delicate thing, since it must at times threaten our need for order. Precisely because it is delicate, it calls for an intellectual exercise in balancing. It serves no purpose to deny this. To hide it under the pretense that there is a categorical quality to the commands of the due process clause denigrates what should be celebrated. It misleads not only our judges, but also ourselves into thinking that wise judging is only a matter of technical mastery when, on the contrary, it is a high art that calls for a subtle mixture of broad vision and pragmatic good sense.

### C. The Discipline of Judicial Balancing

To speak of wise judging as an art requiring vision and good sense is to speak of a highly personal, if not subjective, undertaking. It also serves to introduce the singular and continuously fascinating problem of assuring that our judicial system not only exhibits a humane and dynamic quality—a quality of cultural and moral perceptiveness—but also that it is reasonably predictable, protected against personal caprice, and capable of drawing to its judgments the author-

ity of established ways and traditional values. Plainly, this is not the place to explore much of this problem. Nevertheless, in light of the criticisms of our suggested mode of analysis,[64] we must affirm our conviction that it is not only compatible with such a system but an inextricable part of that system.

In a broad sense it is both useful and, properly understood, accurate to say that, at its best, the working of our system is rooted in both the reasoned use of principles and certain traditional emanations from the separation of powers doctrine. If this is so, it is also useful to begin this discussion with the taxonomy of a principle: to think of a principle as exhibiting several characteristics. In simple descriptive terms, a principle is a statement that identifies the judicial outcome to be associated with a specified set of facts. Working within this definition, as part of its implicit content, however, is a normative dimension derived from a subtle interplay of consequences and values. Consequences speak to the concrete case that arguably falls within the specified factual setting. A concern for consequences compels inquiry as to who and what would gain and who and what would suffer if the specified outcome were actually applied, and for how many and how long the perceived consequences would persist. This is the empirical element that bears on the normative. But plainly this is not enough. There also are values—the ethical factors derived from our whole culture and especially our history—that fix the normative weight or urgency of assuring or avoiding the perceived consequences of a specified outcome. Stated another way, principles have a normative dimension derived from values. But those values do not exist in abstraction. They speak with greater or lesser insistence only as the consequences of applying the principle are appraised. Consequences, in turn, are normatively neutral until informed by some ethical postulate.

All of this leads to a further characteristic of a principle. As a purely descriptive statement, a principle comes to the concrete case only as a possible determinant of the result; it is a statement of tendency, not sufficiency.[65] Only as it is seen in its application to the particulars of a case can one conclude that it should control. But if all principles are only statements of tendency and must await particularization, then to conclude that a stated principle should control also involves a prior conclusion, whether articulated or not, that no established contrary principle, or no contrary principle that might be devised given the concrete implications of established principles, speaks with greater normative weight or urgency. To ignore the more compelling contrary principle or to refuse to devise a new,

64. *See* note 45 *supra.*

65. *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY 26 (1977).

more urgent principle is, in effect, to decide without regard to principle. At the heart of the reasoned use of principles, in other words, lies the intellectual task of balancing. Inextricably involved in that process is an identification and comparison of the affected interests in a given case. Interests, both private and collective, as defined by existing social policies[66] are the essential terms of reference for identifying what is a loss and what is a gain and who and what stands to gain or lose. They are the essential tools for ascertaining consequences.

Against this background we move to the next facet of the process. No judge is entirely free to assay a balance anew each time he is asked. He must start from established principles embodied in authoritative materials.[67] He is constrained to move from that point to his case according to the traditional and oft-explored process of analogical reasoning that is the common law method.[68] Although others have explored this process in ways to which we cannot add,[69] we need only observe—and this becomes critical to our use of the cases—that at the heart of that form of reasoning is, again, the balancing of which we speak. Stated another way, how does the judge know that a prior case involves a problem close enough to his own to warrant emulation of the prior solution, unless he looks to the different consequences that the prior solution would yield and assays whether those differences, weighed against the contrary principles available or that might be devised, warrant following the prior solution?

This process is transparent when there is a cognizable choice to be made between competing lines of authority. But the situation in which there is competing authority differs only in degree from what might be termed the wholly "provided-for case."[70] How can such a

66. Social policies are a complex phenomenon. Descriptively, they consist of statements of desired outcomes associated with particular situations. As pure description, however, they are normatively neutral. Their normative content is dependent upon some underlying ethical postulate or value that may be more or less clearly expressed by the policymaker, whether legislative, executive, or judicial. This means that when a case thought to engage a particular social policy is decided, the policy functions in the nature of a principle. In this respect, it breeds confusion to suggest that principles derive only from courts and constitutions and not through the political process. On the other hand, social policies also function in our design in a more modest way. They represent one device for identifying the interests at stake in a case, thereby playing a critical analytic role in the ascertainment of the consequences of contending principles.

67. We include at this point all authoritative statements of principles, whether constitutional, legislative, judicial, or, within its areas of competence, executive. *See* note 66 *supra*.

68. *See, e.g.*, E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948); Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930).

69. *See, e.g.*, B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); K. LLEWELLYN, THE COMMON LAW TRADITION (1960).

70. We have reversed H.L.A. Hart's phrase "the unprovided-for-case." *See gen-*

designation be applied to a case without first ascertaining whether variant facts warrant variant results according to a new "weighing-up" of contending principles? Possibly, of course, the factual variants may be so modest and irrelevant that we intuitively know that the prior decision controls without elaborating upon the balance.[71] Possi-

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*erally* H.L.A. HART, *supra* note 45, at 121-32. Hart uses this category in acknowledging that there may be occasions when a case falls within an "area of indeterminance" where a new "weighing-up of social values" becomes necessary. This, he suggests, is most likely to occur in the "open-textured" areas of the law. The point, however, is that to Hart this is a highly exceptional phenomenon; law is principally rules, which invite no such decisional mode. *See* note 71 *infra*. Hart's concept is a protest against a too ready propensity to see legal questions in terms of conflicting principles that must be continuously reconciled. This we view as a fundamental flaw. How does one know whether any case is or is not within an area of indeterminance? For example, in our case, the prisoners argue that their case is well within established constitutional principles. An American court, having the opportunity to free a prisoner, cannot, they assert, deliberately decide to imprison him on the strength of a conviction obtained without adherence to the basic safeguards of the Constitution.

The question, therefore, is by what license we suggest that our case may be the exception: that the prisoner's principle is not sufficient for our decision but supplies only some, and not all, of the elements we must consider. The answer begins with the observation that the conviction was issued by a foreign court in a case over which that court, according to the rules of the international community, had jurisdiction. For this and other reasons, we can anticipate that there will be adverse consequences for the United States and other American citizens imprisoned abroad if our courts refuse to honor the foreign conviction. But this is mere observation and does not explain why these observations temper the prisoner's principle. To that end, we must recall that the United States lives within a community that, under certain circumstances, can only be preserved if we apply our basic values differentially when they impact upon other nations. To suggest that this fact moves our case out from established principle into an area of indeterminance means that we have already weighed the United States' stake in the international community against the values on which the prisoner's principle is based and found that stake sufficient to bar any automatic application of the prisoner's principle. The very task of deciding whether we should reach a new weighing-up of social values involves, in other words, a weighing-up of the same values. The process is inevitable and continuous. It goes to the very heart of legal reasoning and cannot be confined but only disciplined.

71. This is the only instance when one can talk about law as rules and define a rule, distinct from a principle, as a statement of outcomes that, without more, is required to be followed in any case that falls within its specified facts. *See* R. DWORKIN, *supra* note 65, at 26; H.L.A. HART, *supra* note 45, at 121-32. If by definition a rule is not a mere statement of tendency, but of sufficiency that commands a result, then by definition there can be no such thing as a rule until one has decided that the rule applies. But how does one reach that conclusion, especially if there is a contending statement or interpretation, without the balancing of which we speak? To engage in such balancing is to affirm that there is no rule, but only a statement of tendency. Thus, to talk of rules as distinct from principles is, strictly speaking, meaningless. In pragmatic terms, however, one can think of a case as being governed by a rule, as a statement of sufficiency, where intuitively the factual variants are so trivial or irrelevant that it becomes efficient not to consider the balance. Plainly, this encompasses a rather modest category of legal problems.

bly we can then speak of the wholly "provided-for case." But such a mode of speech is a convention that only brings a certain efficiency to the system; it should not be allowed to obscure the process itself.

At this point, of course, we encounter the subtle question of how far constitutional adjudication is to be removed, if at all, from the constraints of *stare decisis*,[72] assuming one could locate within the

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72. Here we need only reference the views of Justice Douglas stated in his Cardozo lecture before the Association of the Bar of the City of New York:

> I do not suggest that *stare decisis* is so fragile a thing as to bow before every wind. The law is not properly susceptible to whim or caprice. It must have the sturdy qualities of every framework that is designed for substantial structures. Moreover, it must have uniformity when applied to the daily affairs of men.
>
> Uniformity and continuity in law are necessary to many activities. If they are not present, the integrity of contracts, wills, conveyances and securities is impaired. . . . And there will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon . . . .
>
> It is easy, however, to overemphasize *stare decisis* as a principle in the lives of men. Even for the experts law is only a prediction of what judges will do under a given set of facts—a prediction that makes rules of law and decisions not logical deductions but functions of human behavior . . . .
>
> The place of *stare decisis* in constitutional law is even more tenuous. A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it. So he comes to formulate his own views, rejecting some earlier ones as false and embracing others. He cannot do otherwise unless he lets men long dead and unaware of the problems of the age in which he lives do his thinking for him.
>
> This reexamination of precedent in constitutional law is a personal matter for each judge who comes along. When only one new judge is appointed during a short period, the unsettling effect in constitutional law may not be great. But when a majority of a Court is suddenly reconstituted, there is likely to be substantial unsettlement. There will be unsettlement until the new judges have taken their positions on constitutional doctrine. During that time—which may extend a decade or more—constitutional law will be in flux. That is the necessary consequence of our system and to my mind a healthy one. The alternative is to let the Constitution freeze in the pattern which one generation gave it. But the Constitution was designed for the vicissitudes of time. It must never become a code which carries the overtones of one period that may be hostile to another.
>
> So far as constitutional law is concerned *stare decisis* must give way before the dynamic component of history. Once it does, the cycle starts again.

Douglas, *Stare Decisis*, 4 RECORD 152, 152-54 (1949) (citations and footnotes omitted).

There is, of course, something appealing in all of this. There is a vision of the dynamic quality of our Constitution, a document "designed for the vicissitudes of time." It also may be thought to ring true as evidenced by our tendency to anticipate major changes in doctrine with each major reconstitution in the personnel of the Supreme Court and by our propensity to think in terms of the "Warren Court" or the "Burger Court." But in the end, if somehow Justice Douglas speaks true, we would

traditions of the common law some norm for the practice of that doctrine.[73] We need not, however, address that question. We have a wealth of judicial precedent instructive at the initial level of our analysis. Our use of those precedents lies well within the bounds of a traditional, even rigorous, adherence to their teachings. At the same

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not celebrate his truth. In addressing our immediate problem we stay clear of attempting to predict what the courts will do, not because that is uninteresting, but rather because we are concerned with what the courts ought to do. In formulating that answer there is much in Justice Douglas' conception of constitutional litigation that is quite disturbing. At bottom he seems to say that a judge must give his fundamental loyalty to his own, wholly personal, set of doctrinal convictions, in the formulation of which history teaches no more than that which he personally finds persuasive. Also, he trivializes *stare decisis*; it serves only to lend predictability to private relationships and avoid judicial caprice. That he gives as examples of where *stare decisis* serves a purpose only the law dealing with private relationships ignores the whole legitimizing function of precedent in constitutional decisionmaking. Moreover, *stare decisis* serves not merely the negative function of guarding against personal caprice. It seems affirmatively to secure to constitutional decisionmaking the larger truth, learned at great expense, that generally more wisdom lies in the cumulative experience of a people than in the partial visions of one man, however well-endowed intellectually or morally he might be. History weighs upon a judge far more insistently than is indicated by his own appraisal of its wisdom. In sum, our view of the matter comes much closer to the spirit of Justice Frankfurter's dissent in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943):

> One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic . . . .
>
> As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard.

*Accord,* Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting). If we cannot always have great judges, surely we cannot ignore great judging in articulating the mode by which judgments should be made.

73. We must her acknowledge Professor Wechsler's well-noted appeal for "neutral principles" in constitutional adjudication as essentially another line of attack upon the use of the common law method in constitutional litigation. *See* H. WECHSLER, *Toward Neutral Principles of Constitutional Law,* in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3 (1961). It is, however, an attack that comes from a direction diametrically opposed to that of Justice Douglas. *See* note 72 *supra.* While explicitly an objection to intruding the ad hoc modes of political decisionmaking into the principled processes of the Court, Professor Wechsler ends up, we suggest, rejecting the intrusion of much of the common law tradition as well. Wechsler's objection is echoed in Justice Black's insistence that the case-by-case method of common law adjudication—Justice Holmes' emphasis on experience rather than logic—poses an unwarranted danger of intruding personal discretion into constitutional decisionmaking. *See* Linkletter v. Walker, 381 U.S. 618, 642 (1965) (Black, J., dissenting). For a fuller development of this view and a broader analysis of Professor Wechsler's essay, see Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science,* 20 STAN. L. REV. 169 (1968).

time, and within those traditional boundaries, the definitive purport of a precedent cannot be gleaned from a narrow comparison of particular factual elements devoid of reference to historical context. Those boundaries not only permit but insist that we draw upon a total sense of the balance struck by the court in dealing with the prior case, that we attempt to capture the actual perception of consequences and felt intensity of values. And when we come to formulating the lessons of that experience for our problem, we do not, indeed cannot, ignore what refinement of perception and reordering of values time may have wrought.[74]

This point introduces yet another constraint upon our judicial system: the tradition that the judge should provide an adequate rationalization or explanation for his results. This tradition is not always carried out with facility, but it works as a constraint upon the rational processes of the decisionmaker, especially since it is used in evaluating his work. Moreover, depending upon its persuasiveness, it has much to do with lending authoritativeness to the results.[75] With wide variations in the skill of the decisionmaker and the perceived need, the process of rationalization begins with a particularization of the factual elements and the resulting mix of consequences and values that explain established principles in the context of decided cases. It includes a like particularization of the case at hand, structured in the nature of an experiment according to the differences that application of the established principles, as explained, would yield if applied. Of most importance, the process includes an articulation of the reasons for the choice made. This is the point where vision and good sense must work. But it is also the point where vision and good sense are largely judged by the persuasiveness of the stated reasons for the choice.[76] Therein lies the basis for a major indictment

74. *See generally* K. LLEWELLYN, *On the Current Recapture of the Grand Tradition*, in JURISPRUDENCE 215 (1962).

75. *See generally*, K. LLEWELLYN, *supra* note 69.

76. Within this general requirement, and as a particularly important application of it, some of the cases that we review illustrate the special problem of assessing whether any particular governmental action is sufficiently important to the service of a governmental interest to warrant measuring the consequences of invalidating that action by reference to the consequences of frustrating the government's asserted interest. The interests can be readily identified and the consequences of frustrating those interests can be assayed in the manner to which we have alluded.

Before reaching that point, however, there is the question whether the particular action is an essential means toward achieving the asserted end, or interest. While broadly this problem is one of rational efficacy, means and ends are not always readily separable. Means blend into ends in a way that suggests a continuum, any point on which is to be fixed through the interaction of a number of judgmental elements. Initially there is an intrinsic element. Assuming no alternatives, what is the incremental impact of a particular act in securing attainment of the larger end; how "essential" is it? Next, what is that incremental value when compared with the practicable and

of those positivists who, by emphasizing the place of rules in the law,[77] minimize the element of judicial choice. Their theory tends to excuse, and even to praise, the purely conclusional form of appellate opinion writing that serves only to undermine the respect and authoritativeness of the court.[78]

Finally, as the case to be decided moves away from either the relatively certain parameters of established principles or such new principles as can be grounded on a readily discernible value consensus in the society, a further constraint on the judicial system may be found in certain institutional considerations emanating from the separation of powers doctrine. Again we cannot undertake to canvass the whole subtle matter of judicial restraint, but, as we move into the second level of our analysis, it is important to acknowledge that in constitutional litigation, where the choice before a court has already been assayed by the political departments of government, there may come a point when the choice must stand and receive judicial blessing. The point is not always easily discernible and can rarely be explained by reference to vague notions of judicial deference. Generally, however, the point where the political choice must remain the definitive choice should be determined by the degree of uncertainty that the judiciary, in candor, would have to concede attaches to its own choice. This in turn depends upon two factors. First, the judge must ascertain the apparent distance of the case from a body of extant legal principles, measured by the balancing mode. The greater the distance, the more value-neutral the political decision and the more uncertain the projected judicial choice. But value neutrality is not enough. It is also necessary to consider the complex social, politi-

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lawful alternatives that are available? There is also a concern for certainty. The less certain a court's perception of the margin of a particular act's "essentiality," the more nearly its decision must be treated as engaging the larger objectives of that act directly. Finally, judgment will be affected by the inherent momentousness of those objectives. The larger the interests at stake in the policies the government is said to be pursuing, the more certain a court must be about these marginal assessments.

77. *See* note 71 *supra.*

78. As a vivid, but unhappy, illustration of this point, one need only review the efforts of the Florida appellate courts in dealing with the state's Administrative Procedure Act, enacted in 1974. *See* FLA. STAT. §§ 120.52-.73 (1975). The courts' opinions suffer from a lack of clarity and guidance and the consequent loss of authoritativeness. *See* Department of Revenue v. Amrep Corp., 358 So. 2d 1343 (Fla. 1978); Hill v. School Bd., 351 So. 2d 732 (Fla. Dist. Ct. App. 1977); Department of Transp. v. Morehouse, 350 So. 2d 529 (Fla. Dist. Ct. App. 1977); Department of Health & Rehabilitative Serv. v. Artis, 345 So. 2d 1109 (Fla. Dist. Ct. App. 1977); Department of Administration v. Stevens, 344 So. 2d 290 (Fla. Dist. Ct. App. 1976). The point is even more vividly illustrated if one then contrasts the few opinions where there is a serious effort at rational and careful explanation of the choices made. *See, e.g.,* School Bd. v. Mitchell, 346 So. 2d 562 (Fla. Dist. Ct. App. 1977); State *ex rel.* Dep't of Gen. Serv. v. Willis, 344 So. 2d 580 (Fla. Dist. Ct. App. 1977).

cal, and economic realities that determine the consequences of any decision, political or judicial. In this context, uncertainty may be measured by the degree to which those realities will not yield to any stable or tested body of predictive theory. Once again, the greater the uncertainty, the stronger the case for allowing the political choice to stand.

Against this all too brief structural design of the judicial system, one must turn to the criticism that a balancing mode too often invites decisions based upon nothing more than the subjective biases of judges.[79] The charge is many-faceted. If, as we have suggested, a balancing process is essential to rationality in the sense of a decision based upon the whole view of a problem, the charge is tantamount to saying that rationality can only be purchased at the expense of principle. This, we argue, is patently untrue. Balancing is at the heart of the reasoned use of principle, and thus the charge is actually directed at other targets.

One can readily acknowledge that a particular judge may, under the guise of weighing the interests at stake in a case, ignore the lessons of established principles or fail to explain adequately his refusal to follow those lessons. But if this is an unwarranted intrusion of subjective judicial bias into a case, it is not the fault of the mode of decision. It is simply an unprincipled decision. Likewise, subjectivity in a judge may stem from a failure to undertake the painstaking yet essential task of deriving guidance from prior judicial experience in ways that extend beyond finding a rule sufficient to the case: a failure to find guidance in principles. Again, this is not an indictment of judicial balancing but only a charge that the judge, by failing to practice his art skillfully, has produced an unprincipled decision. Finally, the charge may serve only to mask more subtle propensities. Particularly with reference to constitutional litigation, it may stem from a disagreement with the result because that result fails to conform to some purported categorical command of the Bill of Rights. If, however, we are correct in suggesting that weighing is essential to rationality and a basic attribute of our system, one is very likely to find that the search for such a categorical reference, coupled with the denial of efficacy of our mode, only disguises a *sub silentio* weighing or an a priori determination by which one set of values or another has already been treated as controlling.[80]

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79. *See* note 45 *supra.*

80. Professor Epstein's examination of the 1973 abortion decisions illustrates the ease with which the critics can disavow, and even attack, the balancing of interests in constitutional litigation precisely as they proceed to use the same method. *See* Epstein, *supra* note 45. After a telling demonstration that in its balancing of the interests of the mother, the unborn child, and the state, the Supreme Court could evoke no princi-

In the end, of course, subjectivity is not the issue. The strength of our system lies in its insistence upon subjective qualities that are the wherewithal of bias: ethical and cultural perceptiveness, humaneness, a willingness to innovate, to assure a dynamic quality to our law, and, in the reasoned use of principles, a capacity to discern the whole sense of what has gone before. In sum, the problem lies not with judicial exercise of subjective bias but with a refusal to call upon bias only when and as the constraints of the system permit.

## II. THE PRISONERS' CLAIMS

### A. THE ESSENTIAL BENCHMARKS

Working at the initial level of our due process analysis, and in accord with our balancing mode, we turn to a development of the benchmarks that cause us to distinguish between cases where a returned prisoner's guilt is in doubt and cases exhibiting other defects. It is this categorization that, when weighed against the governmental interests[81] involved in the prisoner exchange treaties, serves radically to narrow the area of constitutional doubt.[82]

We start with an instructive series of foreign arrest cases in the

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ples—no "adequate definition of a person"—or perceived value consensus—no "theory of life"—to support the conclusions it reached, the author concludes that Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), are symptomatic of the "analytic poverty possible in constitutional litigation." His conclusion is that "we must criticize . . . the entire method of constitutional interpretation that allows the Supreme Court in the name of Due Process both to define and balance interests on the major social and political issues of our time." Epstein, *supra* note 45, at 185.

As an alternative, Professor Epstein suggests that once the Court has "labored to insure that the political process will be as open and fair as the inexact act of government will permit," *id.*, it can properly refuse to intrude upon legislative judgments. He avers that the state laws in question were not "monuments to the ignorance of man." *Id.* They were only "uneasy but reasonable responses to most troublesome questions." *Id.*

How extraordinary! How does the author know that the state laws in question were not "monuments to the ignorance of man"? The answer, if one traces his argument, is clear. He carefully, and with telling effect, examines the interests of the mother, the unborn child, and the state and finds no compelling reason to say that any one outweighs the others. What standards or criteria does he employ in reaching these conclusions? He finds an absence of any judicial experience or clearly identifiable social value consensus to support one set of competing interests or another. In so doing, he engages in the very social weigh-up that he otherwise decries. Nor does he offer the wherewithal for avoiding the balancing of interests. He succeeds only in delineating standards to govern that process—standards discoverable only by the process itself. In the end, of course, he confesses the analytic folly of his own criticism by resorting to a wholly separate disciplinary principle: the need for a sensibility to the limited province of courts in the larger scheme of governance—the principle of judicial restraint.

81. *See* Part III *infra.*

82. *See* Part IV *infra.*

Second Circuit. In *United States v. Toscanino,*[83] it was held that the narcotics conviction of a defendant fairly tried upon a regular grand jury indictment would be overturned if he could prove that he had been kidnapped by American narcotics agents and Uruguayan officials acting as paid agents of the United States, that he had been held and tortured for about three weeks, and that he had been forcibly returned to the United States where he was arrested. In his opinion, Judge Mansfield acknowledged that the court was departing from the *Ker-Frisbie* rule,[84] under which a valid conviction would not be overturned under the due process clause merely because the defendant was brought within the jurisdiction of an American court by illegal means.[85] He nevertheless purported to find in the decisions since *Frisbie v. Collins*[86] a heightened sensitivity to the rights of the accused and a concern for the integrity of our institutions that warranted some mitigation of that rule.[87] The judge first quoted Justice Frankfurter's assertion in *Rochin v. California*[88] that the courts had an inescapable duty to " ' "exercise . . . judgment upon the whole course of the proceedings" ' " to ascertain their conformity with our basic " ' "canons of decency and fairness." ' "[89] Having thus defined the scope of judicial scrutiny, he invoked Justice Brandeis' dissent in *Olmstead v. United States*:[90] pretrial exercises of arbitrary power

83. 500 F.2d 267 (2d Cir. 1974).

84. *See* Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886).

85. If the *Toscanino* decision was a departure from what was perceived as the broad rule of Ker v. Illinois, 119 U.S. 436 (1886), it was arguably very much in keeping with the underlying mode and sensibilities of that decision. In *Ker,* the Court did, in fact, acknowledge that the manner of arrest outside the jurisdiction of the trial court could engage the due process clause. *See id.* at 440. The defendant had been regularly indicted by a grand jury, a warrant had been issued for his arrest, and a request for his extradition from Peru had been issued. *See id.* at 440-41. This was wholly different, the Court carefully pointed out, from the case of an arrest without warrant or other finding of probable cause by a proper officer. *See id.* at 440. In the latter case, the due process question would be far more difficult. As it was, the kidnapping in *Ker* was brought about because the effort at extradition had been frustrated; the Court viewed the kidnapping as a "mere irregularity," which, when weighed against the fact that the defendant had been fairly tried, was not a sufficient ground for overturning his conviction. *See id.* Unfortunately, this careful approach was totally ignored in Frisbie v. Collins, 342 U.S. 519 (1952), where the challenge to the arrest was summarily dismissed on the authority of *Ker.*

86. 342 U.S. 519 (1952).

87. In support of this proposition, Judge Mansfield discussed the purported "constitutional revolution" in criminal procedure that had expanded the interpretation of the concept of due process. *See* 500 F.2d at 272-73.

88. 342 U.S. 165 (1952).

89. 500 F.2d at 273 (quoting Rochin v. California, 342 U.S. 165, 169 (1952) (quoting Malinski v. New York, 324 U.S. 401, 416-17 (1944) (separate opinion of Frankfurter, J.))).

90. 277 U.S. 438 (1928).

might indeed require aborting the results of an otherwise unexceptional proceeding " 'in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination.' "[91] In light of these principles, the arrest in *Toscanino,* which was not only brutal but violative both of our treaties and of international law, could not be allowed to stand.[92]

There are two basic differences between *Toscanino* and the returned prisoners' case. The first difference tends to undercut any direct reliance the prisoners might place on the *Toscanino* decision; the second suggests that the decision's broader principles may have an even greater impact on the prisoners' case than they had on the actual situation in *Toscanino.* The interplay of these differences brings our problem into focus.

In *Toscanino,* American as well as foreign officials were directly involved in the actions that offended the Constitution. In the case of a returned prisoner, however, we must assume that American officials are only indirectly implicated through the requirement that they execute a judgment that rests upon a defect in a foreign proceeding. This difference is decidedly of some moment; the question is how much? In answering, it would seem that if fairness and decency in the whole course of the proceedings can, under appropriate circumstances, be essential to preserving respect for law, then we are working upon a continuum where no fixed line can be drawn between illegal acts of foreign and American officials. The concern for American justice may be more attenuated if foreign officials alone have acted illegally. But if the interest at stake is the integrity of the American courts and the values upon which our whole system of government is predicated, then the test must be whether there is, in fact, a complicity by the American system in the illegal foreign actions sufficient to pose a threat to that interest and whether the threat suffices to warrant some remedial response.[93]

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91. 500 F.2d at 274 (quoting Olmstead v. United States, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting)).

92. Although the Second Circuit has not been alone in its sensitivity to these principles, other courts have not been as willing to go beyond the *Ker-Frisbie* rule. Before *Toscanino,* for example, the Ninth Circuit was unwilling to find that official behavior in the course of an arrest was sufficiently "shocking" to warrant a departure from *Ker-Frisbie. See* United States v. Cotten, 471 F.2d 744, 747-49 (9th Cir.), *cert. denied,* 411 U.S. 931 (1973). The Tenth Circuit noted that the application of such principles would require overruling *Ker* and *Frisbie,* a step it, of course, lacked power to take. *See* Hobson v. Crouse, 332 F.2d 561 (10th Cir. 1964). Likewise, the Fifth Circuit considered the application of *Toscanino* but, after making a distinction on the facts of the case, applied the *Ker-Frisbie* rule. *See* United States v. Herrera, 504 F.2d 859, 860 (5th Cir. 1974).

93. There are, of course, cases that take a contrary position. For example, in

With this test in mind, we turn to the second difference. In *Toscanino,* the foreign arrest, though brutal, was followed by a trial before an American court that conformed to the Constitution in all respects. Certainly, there was no suggestion that the acts of brutality incident to the prisoner's arrest cast doubt upon the fairness or reliability of his American trial and the determination of his guilt. This suggests that in applying the broader principle of *Toscanino,* we must recognize that the threat to the basic integrity of the American legal system is far greater in our case than in *Toscanino.* If reliance upon a foreign arrest to bring a person into this country for a fair trial can, because of the brutality attendant to the arrest, pose a threat to our system, total, unquestioned reliance by our system upon a defective foreign proceeding as the basis for denying a person his liberty without a trial can hardly pose anything less.

We can legitimately push the analysis even further. If, in the absence of extraordinary brutality and direct American participation, it is generally thought that the integrity of our system is not sufficiently threatened by the illegality of a foreign arrest to warrant overturning a fair American trial, that judgment must depend heavily upon society's interest in assuring that those fairly found guilty are punished.[94] It reflects a belief that a failure to punish those fairly tried may impair the integrity of the courts as readily as undue complicity in pretrial illegalities. It is a judgment reinforced by the fact that foreign officials are unlikely to be deterred from future abuses by the remonstrances of an American court. Where, however, there has been no American trial and the question of guilt remains uncertain, the foregoing considerations do not apply. In the absence of such considerations it cannot be argued that the integrity of our system will be assured by the mere absence of direct American participation in the foreign proceedings.

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Wentz v. United States, 244 F.2d 172 (9th Cir. 1957), the court answered the argument that the defendant's arrest by Mexican police and subsequent transfer to American authorities for trial was a denial of due process:

> No illegal act of a United States officer is related by [defendant]. In the affidavit no action of officers of the United States begins before the defendant is brought to them in the United States. Therefore, the charge, if true, must be that the defendant was denied "due process" in Mexico by Mexicans. If true, that is no legal concern of an American court.

*Id.* at 176.

It is true that the Constitution does not operate directly upon foreign officials. But in light of the cases here discussed, the statement in *Wentz* may have little value beyond its immediate factual context. It has no force whatsoever where there is an attempt in an American trial to use a confession obtained by foreign officials, with or without American participation or inducement, in violation of the fifth amendment. *See* notes 98-99 *infra* and accompanying text.

94. *See, e.g.,* Friendly, *supra* note 14.

This was indirectly confirmed in *United States* ex rel. *Lujan v. Gengler*,[95] the Second Circuit's next encounter with a foreign arrest of a foreign national on a charge similar to that in *Toscanino*. In *Lujan*, American officials had not directly participated in the arrest. It was not that fact, however, that led the court to deny a habeas petition after conviction, but rather the absence of any "cruel, inhuman and outrageous"[96] treatment of the kind alleged in *Toscanino*. Also relevant was the fact that neither Bolivia nor Argentina had protested the illegal activity as had Uruguay in Toscanino's case.[97]

More persuasive than *Lujan*, however, are decisions prohibiting the use of a coerced confession obtained by foreign officials with or without American participation or inducement.[98] Because the fifth

95. 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975). In *Lujan*, the Second Circuit was confronted with the foreign arrest of a foreign national who was under indictment by a federal grand jury in a narcotics case. The defendant had been lured from Argentina to Bolivia, where he was arrested by Bolivian police in the pay of the United States and not acting under the direction of their superiors in the enforcement of Bolivian law. Accompanied by American agents, the defendant was returned to New York, where he was formally arrested, tried, and convicted. Upon a petition for writ of habeas corpus, the Second Circuit upheld Lujan's American conviction, refusing to follow *Toscanino*. *See id.*

96. *Id.* at 65.

97. *See id.* at 67-68. Unlike Lujan, Toscanino alleged that "the Uruguayan government . . . had no prior knowledge of the kidnapping nor did it consent thereto and had indeed condemned this kind of apprehension as alien to its laws." United States v. Toscanino, 500 F.2d 267, 270 (1974).

98. Decisions involving the use in an American trial of evidence obtained by foreign officials in violation of the fourth amendment also show an erosion of the idea that foreign official acts are of no legal concern to an American court. We start with Birdsell v. United States, 346 F.2d 775 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965), where the Fifth Circuit declined to bring within the fourth amendment's exclusionary rule a conviction based upon evidence that foreign officials, acting upon information received from American agents, had seized in an allegedly unconstitutional manner. Because the American agents had not sufficiently participated in the seizure, the court thought that overturning the conviction would not serve the exclusionary rule's deterrent purposes. Nevertheless, Judge Friendly, sitting by designation, added the following note to his opinion:

> We do not mean to say that in a case where federal officials had induced foreign police to engage in conduct that shocked the conscience, a federal court, in the exercise of its supervisory powers over the administration of federal justice, might not refuse to allow the prosecution to enjoy the fruits of such action.

*Id.* at 782 n.10.

Since *Birdsell*, Judge Friendly's reservation has been echoed in one form or another by nearly all of the circuits that have considered the problem. *See* United States v. Marzano, 537 F.2d 257, 272 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); United States v. Cotroni, 527 F.2d 708, 711-12 (2d Cir. 1975); Stonehill v. United States, 405 F.2d 738, 743-46 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969); *cf.* Brennan v. University of Kan., 451 F.2d 1287, 1290 (10th Cir. 1971) (civil case).

Arguably, Judge Friendly's noted exception was designed only to deter American

amendment itself expressly forecloses the use of such a confession, it is sometimes said that the offense against the amendment occurs not when the foreign official coerces the confession but when the prosecutor uses it.[99] But such literalism hardly captures the true sense of the rule established in these cases. Certainly the rule reflects humanitarian concerns. For our immediate purposes, however, the rule reflects principally a concern for the reliability of any statement obtained by coercion. It is concerned with preserving the integrity of our judicial system and would plainly occupy its present place in our law, even without express recognition, under the aegis of the due process clause. Accordingly, the principal distinction between an illegal foreign arrest and a foreign coerced confession is that, in the latter, the interests of the accused and society coincide more completely; there is no countervailing concern that those fairly found guilty will go free. Judged by this consideration, if the question of the returned prisoner's guilt remains in doubt, his continued imprisonment would be governed by the coerced confession cases rather than those involving illegal arrests.

At this point, we hasten to acknowledge that nothing we have said thus far suggests that cases of doubtful guilt are the only cases that may, under the broader lesson of *Toscanino,* pose a threat to the integrity of our system. Certainly, we are not yet prepared to dismiss all other possible defects in the foreign proceedings. There remains for consideration the other side of our due process equation—the governmental claims—which must be assayed, whether guilt is in doubt or not, before we can reach any constitutional conclusion. Nevertheless, even at this stage it seems plain that where there is a substantial question regarding the guilt of a returned prisoner, the weight or urgency of his challenge to the Mexican or Canadian treaty will exceed the urgency of any other likely challenge. It is this point

officials from precipitating foreign encroachments upon fourth amendment values. But that seems improbable. If American officials participate directly in the illegal acts, the exclusionary rule applies without resort to Judge Friendly's exception. Yet, in the absence of direct American participation in the illegal search and seizure it is difficult to see how American officials might sufficiently control the foreign police, so as to achieve the deterrent purpose. It would be anomalous if the exception were intended to deter American officials from ever requesting the assistance of foreign police. And if deterrence is the purpose, why limit it only to evidence obtained in a particularly "shocking" manner? The exception, in other words, appears rooted in a broader normative concern for the integrity of the American system of justice. The requirement that there be an American inducement to the foreign action serves only as an added measure of American complicity in the foreign proceedings made necessary because the case involves an otherwise properly convicted felon.

99. *See* Bram v. United States, 168 U.S. 532 (1897); United States v. Welch, 455 F.2d 211 (2d Cir. 1972); Brulay v. United States, 383 F.2d 345 (9th Cir.), *cert. denied,* 389 U.S. 986 (1967).

that leads us to the Second Circuit's latest encounter with the problem of foreign arrests, *United States v. Lira.*[100]

As background to *Lira,* it should be noted that shortly after *Lujan,* the Supreme Court handed down its decision in *Gerstein v. Pugh,*[101] which cited *Ker v. Illinois*[102] and *Frisbie v. Collins*[103] as authority for refusing to invalidate a conviction where the pretrial detention was unconstitutional.[104] *Gerstein* appeared to breathe new life into the *Ker-Frisbie* rule and may even have signaled some disapproval of the doubts concerning that rule that Judge Mansfield had expressed in *Toscanino.*[105]

In *Lira,* the Second Circuit was once again asked to review the arrest abroad of a foreign national indicted for narcotics violations by a federal grand jury. The arrest was made in Chile by Chilean police acting at the request of American agents. Uncontradicted testimony established that the defendant had been held by the Chilean police for over three weeks and that he had been beaten and tortured in an attempt to force disclosure of information about other participants in his alleged narcotics smuggling ring.[106] In response to this testimony, the Government merely disavowed any direct participation by American agents in the actions of the Chilean officials.[107] It admitted, however, that its agents knew of the defendant's whereabouts and accompanied him on the flight back to New York.[108]

Writing for two members of the panel, Judge Mansfield affirmed the district court's denial of habeas corpus. Missing from his opinion was any reference to either the problem of preserving judicial integrity or the principles described by Justice Brandeis.[109] The rule in *Toscanino,* Judge Mansfield said, was not rooted in any of these larger concerns; it was, like the fourth amendment exclusionary rule, merely a device to deter police misconduct.[110] As a result, *Toscanino* applied only where American officials were directly involved in the acts of brutality or where foreign officials were acting as agents of the United States.[111]

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100. 515 F.2d 68 (2d Cir.), *cert. denied,* 423 U.S. 847 (1975).
101. 420 U.S. 103 (1975).
102. 119 U.S. 259 (1886).
103. 342 U.S. 519 (1952).
104. *See* Gerstein v. Pugh, 420 U.S. 103, 119 (1975).
105. *See generally* notes 84-92 *supra* and accompanying text.
106. *See* 515 F.2d at 69.
107. *See id.* at 70.
108. *See id.*
109. *Compare* United States v. Toscanino, 500 F.2d 267, 274 (2d Cir. 1974), *with* United States v. Lira, 515 F.2d 68 (2d Cir.), *cert. denied,* 423 U.S. 847 (1975).
110. *See* 515 F.2d at 71.
111. *See id.*

Although *Gerstein v. Pugh*[112] obviously had an impact upon the *Lira* court, it is far from clear that the questions regarding the need for a probable cause determination, at issue in *Gerstein,* even remotely engaged the basic values at stake in *Toscanino* and *Lira.*[113] Be that as it may, it cannot be doubted that *Lira* seriously eroded the fuller implications of *Toscanino.* The key question is whether this erosion extends beyond the problem of foreign arrests to foreign convictions. In other words, does it suggest that there no longer is a due process problem if our system uses a foreign conviction as the basis for imprisoning persons within the United States so long as no American official participated directly in obtaining that conviction? Only if *Lira* is read this broadly does it undermine the lessons thus far drawn from *Toscanino, Lujan,* and the coerced confession cases. If read this broadly, however, *Lira* appears to run counter to a number of decisions in the Second Circuit itself. For example, acting under the Second Circuit's mandate,[114] the federal district courts in New

112. 420 U.S. 103 (1975).

113. In *Gerstein,* the Court held that the state of Florida had violated the fourteenth amendment by permitting persons arrested upon a charge by information or pursuant to a police officer's on-the-scene determination, but without a warrant, to be held in custody for extended periods without a probable cause determination by an independent magistrate. *See id.* at 114. The Court also observed that it was not retreating "from the established rule that illegal arrest or detention does not void a subsequent conviction." *Id.* at 119 (citing Frisbie v. Collins, 342 U.S. 519 (1952), and Ker v. Illinois, 119 U.S. 436 (1886)). Although a detained prisoner had, the Court said, a constitutional right to "challenge the probable cause for [his] confinement," *id.,* a conviction was not to be vacated because he had been detained without such a determination, *id.*

In the abstract, this holding appears to breathe new life into the *Ker-Frisbie* rule. Viewed in context, however, it hardly mandates confinement of *Toscanino* to acts of American officials alone. In affirming the right to a predetention probable cause hearing, Justice Powell, writing for the majority in *Gerstein,* fully recognized the subtlety of the balance he was striking. The right was a practical solution to the problem of safeguarding citizens "from rash and unreasonable interferences with privacy and from unfounded charges of crime" on the one hand and the need to "give fair leeway for enforcing the law in the community's protection" on the other. *Id.* at 112 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1946)). The key requirement in this practical balance was that " 'those inferences [of probable cause] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' " *Id.* at 113 (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)). Nothing here or elsewhere in the opinion suggests that the Court, in upholding convictions following a detention without such a probable cause determination, perceived that in the matter of warrantless arrests it confronted a threat to the basic integrity of American justice comparable to the secret abductions, beatings, tortures, and druggings that were alleged in *Toscanino* and *Lira.* Indeed, to find a mandate for such a retreat in *Gerstein v. Pugh,* and then to base that retreat on the *Ker-Frisbie* rule, would appear to work a revolution in due process analysis far greater than any change that might have marked the progress of the law from *Ker* to *Toscanino.*

114. *See* United States *ex rel.* Dennis v. Murphy, 265 F.2d 57 (2d Cir. 1959).

York have at least twice struck down the state's use of Canadian convictions under the New York multiple offender statute.[115] In each instance, the federal court carefully scrutinized the record of the Canadian proceedings and concluded that, because the accused's lack of counsel cast doubt on the finding of guilt, the state courts' attempted use of those proceedings was a violation of due process.[116] Of similar import is *Republic of Iraq v. First National City Bank*,[117] where the Second Circuit refused to recognize even the civil consequences of a foreign decree that it characterized as a bill of attainder.[118] A broad interpretation of *Lira* would also be difficult to square with the Second Circuit's expressed reservation against extraditing an accused in situations where it was shown that the accused "would be subject to procedures or punishment . . . antipathetic to a . . . court's sense of decency."[119] Finally, there would seem to be something anomalous in an American court's setting aside the United States Constitution in order to execute a foreign judgment that neither international law nor comity requires it to execute. In short, it is sensible and even necessary to read *Lira* in a much more restricted fashion.

It seems fair to suggest that, in relying upon the exclusionary rule cases and emphasizing their attendant deterrence rationale[120] as

115. N.Y. PENAL LAW § 1941 (McKinney 1967); *see* United States *ex rel.* Foreman v. Fay, 184 F. Supp. 535 (S.D.N.Y. 1960); United States *ex rel.* Dennis v. Murphy, 184 F. Supp. 384 (N.D.N.Y. 1959).

116. It is true that the cases arising under the multiple-offender statute are distinguishable from the prisoner exchange situation. Whereas New York sought to impose additional punishment on those already convicted of violating its laws, the United States, under the Canadian and Mexican treaties, seeks to improve the conditions under which the prisoners must serve out their foreign sentences. Nevertheless, in the latter case, the United States is continuing to deprive the prisoners of their liberties. Its purpose in doing so is relevant only as a possible justification for the deprivation, not for denying that the deprivation, if predicated upon a foreign conviction without due process of law, raises a threshold constitutional claim.

117. 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

118. *Cf.* Cooley v. Weinberger, 518 F.2d 1151, 1155 (10th Cir. 1975) (concluding that the quality of a foreign criminal proceeding was a relevant factor when the foreign conviction was the basis for a denial of Social Security benefits to an American citizen). In *Cooley*, a widow was denied survivor's benefits under the Social Security Act because she had been convicted in Iran of murdering her husband. Although the Tenth Circuit apparently accepted her contention that if the deprivation of due process in the Iranian proceedings was shocking her conviction should not be recognized by the United States, it nevertheless denied her claim. The court sustained the findings of the administrative law judge before whom she had fully aired her indictments of the Iranian system and who had found against her on each of the charges, concluding that the record "reveal[ed] a criminal process in Iran similar to that in the United States." *Id.*

119. Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960), *quoted in* United States *ex rel.* Bloomfield v. Gengler, 507 F.2d 925, 928 (2d Cir. 1974).

120. There are two competing views regarding the purpose of the fourth amend-

grounds for distinguishing *Toscanino,* Judge Mansfield was moved to his decision in significant part by the fact that a contrary decision would allow a guilty felon to go unpunished.[121] In light of this possi-

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ment exclusionary rule. Some view it as merely one of deterrence, while others ascribe to the rule a more normative design. Much latter day judicial and scholarly commentary has emphasized the rule's deterrent purposes, almost to the exclusion of all others. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 347-48 (1974); Alderman v. United States, 394 U.S. 165, 174-75 (1969); Oaks, *supra* note 14. The rule is only seen as deterring police and prosecutors from offending the fourth amendment's guarantee of privacy. In no small part, increasing doubts about the efficacy of the rule in attaining this purpose has led to attacks on the rule itself.

The earlier view, which seems to be achieving a renewed but, for want of an adequate theoretical foundation, uncertain expression, was that the rule secured the integrity of both the fourth amendment and the judiciary. Quite apart from whether exclusion deterred police misconduct, it was said that the idea of the police and prosecutors using illegally seized evidence rendered the fourth amendment meaningless, a provision without value that "might as well be stricken from the Constitution." Weeks v. United States, 232 U.S. 383, 393 (1914). More insistently, use of such evidence at trial aligned the courts not merely with a "manifest neglect" but with "an open defiance of the . . . Constitution." *Id.* at 394. Thus, the exclusionary rule was necessary to "preserve the judicial process from contamination." Olmstead v. United States, 277 U.S. 438, 484-85 (1928) (Brandeis, J., dissenting); *accord*, Mapp v. Ohio, 367 U.S. 643 (1961); Rochin v. California, 342 U.S. 165 (1952).

In spite of the tendency in more recent decisions to downplay the rule's normative dimension, we suggest that the normative purpose remains a brooding omnipresence awaiting only the proper factual setting in which to reassert a controlling place in the judicial mind. Writing for the Court in Stone v. Powell, 428 U.S. 465 (1976), Justice Powell stated that habeas review of state court decisions regarding the fourth amendment's exclusionary rule was unlikely to enhance the rule's principal purpose, deterrence. *See id.* at 493-95. This argument, however, was carefully prefaced by the observation that the "imperative of judicial integrity" remained an important justification for the rule—one with which the courts "must ever be concerned." *Id.* at 485. The Justice also noted with approval Judge Friendly's suggestion that the rule be confined to cases of "flagrant" disregard of fourth amendment values. *See id.* at 490 n.29 (citing H. FRIENDLY, BENCHMARKS 260-62 (1967)). He emphasized that, in the case before him, the police obviously had made a good faith effort to comply with the fourth amendment; two state courts and one federal court had approved the police conduct before a federal appellate court reversed. In such circumstances, a concern for judicial integrity was obviously misplaced. There was no indication whatsoever that police intrusions of the sort encountered in *Rochin, Mapp,* or *Weeks* would encounter a complacent court. For a discussion of the use in an American trial of evidence obtained by foreign officials in violation of the fourth amendment, see note 98 *supra.*

121. Judge Mansfield's effort to draw a parallel between the rule in *Toscanino* and the exclusionary rule is telling. The linkage, as he saw it, was in their common purpose to deter the police from acting illegally. *See* United States v. Lira, 515 F.2d 68, 71 (2d Cir.), *cert. denied,* 423 U.S. 847 (1975). Yet, it seems clear that the historical shift from a normative to a deterrence rationale for the exclusionary rule was largely dictated by, and given expression in, cases where guilt was not seriously in doubt. In such instances it was strained to speak of preserving the fundamental integrity of the judicial system. Where, however, the violation of a defendant's fourth amendment rights also serves to cast doubt upon his guilt, the deterrence rationale would presumably tend to give way to the more fundamental, normative concerns. *See* note 120 *supra.*

bility, it is difficult to suggest that absent a reasonable assurance of guilt the judge would have set aside the *Toscanino* principle as applied to foreign judicial actions merely because no American officer had directly participated in the offending foreign proceedings. Drawing a distinction between cases where guilt is reasonably certain and those where it is not also squares with decisions in which American courts have permitted the use of foreign confessions obtained without benefit of *Miranda* warnings[122] when it was clear that the confessions were not coerced and decisions that refused to apply the fourth amendment's exclusionary rule to foreign searches and seizures in nonflagrant cases.[123]

This distinction also finds support from Judge Oakes, who concurred in the result reached by Judge Mansfield in *Lira,* but who tendered a sharp rejoinder to Judge Mansfield's theory of the case.[124] Judge Oakes began by expressing concern lest the courts forget "Mr. Justice Brandeis' ringing [*Olmstead*] phrases."[125] With those values in mind, Judge Oakes made clear his refusal to draw an impermeable line between acts of foreign and American officials. Noting that he had sat on both the *Toscanino* and *Lujan* panels, he concurred in the result reached in *Lira* only because he thought that the case fell, "just barely," on the *Lujan* rather than the *Toscanino* side of the due process continuum,[126] with the absence of objection by Chile removing any possible taint of participation by the courts of the United States in a violation of international law. But the closeness of the case in Judge Oakes' mind was underscored by his suggestion that, constitutional necessities aside, the court might eventually be required to exercise its supervisory power in foreign arrest cases.[127] The judge explained, "To my mind the Government in the laudable interest of stopping the international drug traffic is by these repeated abductions inviting exercise of that supervisory power in the interests of the greater good of preserving respect for law."[128]

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In the absence of a reasonable assurance of guilt, therefore, it is probable that, even after *Lira,* the underlying values expressed in *Toscanino* and Judge Oakes' *Lira* concurrence, *see* notes 124-28 *infra* and accompanying text, stand as the determining factor.

122. *See* United States v. Welch, 455 F.2d 211, 213 (2d Cir. 1972).

123. *See* United States v. Controni, 527 F.2d 708 (2d Cir. 1975); Brulay v. United States, 383 F.2d 345 (9th Cir.), *cert. denied,* 389 U.S. 986 (1967); Birdsell v. United States, 346 F.2d 775 (5th Cir.), *cert. denied,* 382 U.S. 963 (1965).

124. *See* United States v. Lira, 515 F.2d 68, 72 (2d Cir.) (Oakes, J., concurring), *cert. denied,* 423 U.S. 847 (1975).

125. *Id.* Judge Oakes also felt bound to observe, however, that only a few weeks before, in Gerstein v. Pugh, 420 U.S. 103 (1975), the Supreme Court had revitalized the *Ker-Frisbie* rule. *See* 515 F.2d at 72.

126. *See* 515 F.2d at 72.

127. *See id.* at 73 (citing McNabb v. United States, 318 U.S. 332 (1942), and Mallory v. United States, 354 U.S. 449 (1957)).

128. *Id.*

Judge Oakes spoke perceptively to that balance upon which the preservation of respect for our criminal legal processes ultimately depends: the balance between fairness, decency, and humaneness, on the one hand, and effectiveness in controlling antisocial behavior, on the other. No less perceptively, the judge acknowledged that the nature of the offense charged—the social and human costs implicit in its perpetration—has a place in that calculus. Most perceptive of all, however, was his forthright admission that the course of official conduct in these foreign arrest cases posed a problem for American justice. Surely a problem exists when American drug enforcement agents bribe foreign police officials to arrest fugitives, often by means violative of not only American but also foreign law and with full knowledge of those officials' propensity for brutality. The problem is only compounded when American prosecutors and courts stand as unprotesting beneficiaries of an arrest offensive to all our standards of decency. At the very least, such actions sufficiently implicate the American system in the acts of the foreign officials to pose a close case, answerable, if at all, only because the defendant is given a fair American trial and found guilty of a crime of major social import. If this answer suffices, the imprisonment of a person in an American jail based solely upon a foreign sentence bespeaks a complicity in the foreign proceedings of a wholly different magnitude when the returned prisoner's foreign conviction gives no reasonable assurance of guilt.

Finally, we offer a caveat to our suggestion that cases of doubtful guilt are those in which the weight or urgency of the challenge to the treaties will exceed any other challenges likely to be encountered. We cannot ignore the possibility of a foreign conviction based upon a coerced but totally reliable confession. If protecting the guilt-finding mechanism is the sole reason for the coerced confession rule, any foreign confession, however inhumanely coerced, would be accepted so long as its reliability could be demonstrated. But so long as *Rochin v. California*[129] remains good law, we have not come this far in our zeal to punish the guilty.[130] One must hope that we will continue to be

129. 342 U.S. 165 (1952).

130. *Rochin* stands for the proposition that, at some point, the sheer force and brutality of an official's action will be so abhorrent to our notions of justice that no matter how reliable the result, the practice will not be tolerated. In *Rochin,* the police suspected the defendant of narcotics violations and, without a warrant, broke into his room. Rochin seized certain capsules and swallowed them. The police then jumped on him, but, failing to retrieve the capsules, took him to a hospital where a doctor, under police direction, pumped his stomach. The evidence produced was clearly reliable; there was no danger of an erroneous conviction. The Court was so repulsed, however, that it excluded the evidence because it was obtained by "conduct that shocks the conscience." *Id.* at 172.

cognizant of history and remember that the compulsion of self-incriminating testimony is among the most ancient and abhorrent devices of the tyrant.[131] Nor can we wholly escape tyranny merely because a foreign rather than an American official applied the coercion. Nevertheless, it would seem that the threat to the integrity of our institutions and values is relatively weak where guilt is not in doubt. We are not imprisoning the innocent; our system is not using the confession for its own prosecutorial purposes; and no American official has participated in the coercion.

### B. International Jurisdictional Principles

Thus far we have invoked principles bearing upon the scope of the Constitution that fall comfortably within a traditional principle of international comity: the precept that no nation's courts are required to recognize or execute foreign judgments that offend their fundamental principles. We now move to the question of whether, insofar as the jurisdiction-selecting principles of international law tend to limit that freedom, their embodiment in the treaties affects the constitutional principles thus far adduced, compelling us to strike a new and different balance. More specifically, we turn to cases dealing with constitutional challenges to extradition and prisoner transfers under the Status of Forces Agreements.[132] These are the decisions factually closest to our problem. On the surface, they may be thought to assign a certain preemptive force to the jurisdictional precepts of international law. In the end, we argue that this is too superficial—that the cases actually underscore the acuteness of the constitu-

131. *See generally* Miranda v. Arizona, 384 U.S. 436, 458-59 (1966); Culombe v. Connecticut, 367 U.S. 568, 581 (1961); J. Bentham, Rationale of Judicial Evidence (London 1827); 8 J. Wigmore, Evidence in Trials at Common Law § 2251 (3d ed. 1940) ("[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby.").

132. The purpose of the Status of Forces Agreements, insofar as they pertain to our discussion, is to provide for the exercise of criminal jurisdiction over American servicemen and their dependents stationed in a foreign country. Typically, the agreements confirm the "primary jurisdiction" of the host country but prescribe a series of procedural safeguards that the foreign country agrees to extend to American servicemen when it attempts to exercise that jurisdiction. *See* note 185 *infra*. The agreements also make provision for the possible relinquishment by the foreign country of its right to try servicemen in favor of an exercise of criminal jurisdiction by the United States. Finally, the agreements commit the United States to turn servicemen over for trial or sentencing whenever the foreign country retains its claim of primary right to try them. The United States currently has some 25 such agreements in force. *See* S. Rep. No. 1434, 91st Cong., 2d Sess. 8-9 (1970). *See generally* J. Snee & A. Pye, Status of Forces Agreements and Criminal Jurisdiction (1957); Norton, *United States Obligations Under Status of Forces Agreements: A New Method of Extradition?*, 5 Ga. J. Int'l & Comp. L. 1 (1975).

tional problem posed by the Mexican and Canadian treaties. Such a reading is possible, however, only if careful attention is first paid to the implicit methodology of the decisions.

The seminal decision on extradition is *Neely v. Henkel,*[133] where the Supreme Court upheld the proposed extradition of an American citizen to Cuba pursuant to a special statute[134] authorizing the extradition of fugitives whenever "any foreign country or territory . . . is occupied by or under the control of the United States."[135] Cuba was, at the time, such a foreign territory.[136] In rejecting the argument that the proposed transfer was unconstitutional because the petitioner would not receive in Cuba all the safeguards, especially the right to due process of law, to which he would be entitled if tried in the United States, the Court stressed the traditional jurisdictional principles of international law. The petitioner's United States citizenship did not confer upon him "an 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 ha[d] violated."[137]

Yet this hardly sufficed. By turning him over to Cuban authorities, it was the United States that proposed to subject the accused to a potential loss of liberty by means that violated the guarantees of the Bill of Rights. Apparently sensitive to this, the Court followed its jurisdictional discussion by observing that the accused was not totally without protection. An American court had to determine that there was probable cause to believe him guilty of the offense charged.[138] In addition, the authorizing statute required that the American authorities in control of Cuba "secure" to the accused "a fair and impartial trial."[139] The latter requirement did not necessarily imply "a trial according to the mode prescribed by this country for crimes committed against its laws, but [only] a trial according to the modes established in the country where the crime was committed, provided such trial be had without discrimination against the accused because of his American citizenship."[140]

Of course, this could mean that the jurisdictional principles were a wholly sufficient answer to the defendant's constitutional claim,

133. 180 U.S. 109 (1901).

134. Act of June 6, 1900, ch. 793, 31 Stat. 656 (current version at 18 U.S.C. §§ 3184-3185 (1976)).

135. *Id.*

136. *See* 180 U.S. at 120.

137. *Id.* at 123.

138. *See id.* at 112, 123.

139. Act of June 6, 1900, ch. 793, 31 Stat. 656 (current version at 18 U.S.C. § 3185 (1976)).

140. 180 U.S. at 123.

and the Court's discussion of the probable cause and fair trial requirements[141] were intended to suggest only that a decision based on jurisdictional principles would not yield results offensive to justice. On the other hand, the Court seemed to sense that jurisdictional principles were not a wholly satisfactory response to the defendant's arguments. It seemed to think that, at some threshold level, the Constitution was engaged. Certainly its references to the protections of a probable cause determination and the obligations of the executive to secure a fair trial[142] lend credence to this inference. Those references speak to the question of why extradition would not offend the Constitution—a question that requires no answer if the Constitution does not apply. The fact that the Court interpreted the statutory fair trial requirement in very narrow terms—a trial according to foreign modes without discrimination against American defendants—does not necessarily change this. It only shows how far the jurisdictional principles may have influenced the Court in determining what process was due. It suggests, in other words, that jurisdictional principles were an element in what nevertheless remained a question of constitutional interpretation. This reading appears to be underscored by the way in which all of the discussion of jurisdictional principles, probable cause, and fair trials led up to what the Court plainly thought was the final answer to the defendant's claim. That answer, although ambiguous, is not without a certain suggestive quality:

> In the judgment of Congress these provisions were deemed adequate to the ends of justice in cases of persons committing crimes in a foreign country or territory . . . "under the control of the United States," and subsequently fleeing to this country. We cannot adjudge that Congress in this matter has abused its discretion, nor decline to enforce obedience to its will . . . .[143]

It is not difficult to read the *Neely* opinion as addressing, in somewhat embryonic form, a number of separable elements of a due process analysis. First, it addressed the question of whether the due process clause was engaged in any manner. Having answered that question affirmatively, the opinion can be read as turning next to the question of how much process was due. At this level one can observe the Court weighing the dangers of working an injustice against the fact that the defendant's constitutional claims might impinge both upon the jurisdictional rights of a foreign sovereign and upon the government's ability to conclude extradition arrangements with other countries. It then concluded that because the defendant was guaranteed a probable cause determination by an American court and would

141. *See id.* at 112, 123.
142. *See id.* at 123.
143. *Id.*

be subject to the normal modes of trial in Cuba constrained by the statutory injunction to the executive, there was no compelling reason to fear that the defendant would become the victim of injustice. Confronted then with this kind of question one can also read the opinion as simply acknowledging that the judiciary had no overriding reason to overturn the political department's choice. What is missing, unfortunately, is a more explicit statement of the analytic mode employed, the elements of the analysis, and the weights assigned those elements.[144]

If this is a fair construction of *Neely*, it is vastly different from the prisoners' cases. *Neely* involved the extradition of an American for trial by a foreign judicial system that generally followed fair procedures and whose judgments ultimately were subject to United States' control. In our case, we are principally concerned with the execution of a particular judgment of a wholly independent foreign court where there is no reasonable assurance of guilt. With this distinction in mind, it would be unwarranted to suggest that the jurisdictional principles evoked by the *Neely* court work any major inroad upon the constitutional principles thus far tendered. At most, *Neely* serves to warn that we cannot wholly ignore the jurisdictional sensitivities of a foreign sovereign in our due process equation. This warning receives more specific content in the cases dealing with Status of Forces Agreements.

Perhaps because of the absence of an adequately articulated methodology in *Neely,* progress in fashioning a sufficient mode of analysis seemed to suffer a setback when it came to passing upon the constitutionality of prisoner transfers under the Status of Forces Agreements. The case of *Wilson v. Girard*[145] sets the pattern. The lower court rejected a serviceman's contention that the Constitution barred his transfer to Japan because he would not receive a fair trial by American standards.[146] It did, however, enjoin the transfer on the ground that American servicemen generally had a constitutional right to be tried by American authorities for acts committed in the performance of their duties.[147] In a short, per curiam opinion the Supreme Court reversed, completely ignoring the petitioner's fair trial argument and speaking only of his right to be tried by American authorities.[148] The Court reasoned that since, prior to the Status of

144. For the leading statement of the balancing mode in determining how much process is due, see Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

145. 354 U.S. 524 (1957).

146. *See* Girard v. Wilson, 152 F. Supp. 21, 25 (D.D.C.), *aff'd in part, rev'd in part,* 354 U.S. 524 (1957).

147. *See id.* at 26-27.

148. *See* Wilson v. Girard, 354 U.S. 524 (1957).

Forces Agreement, Japan had "exclusive jurisdiction to punish offenses against its law committed within its borders,"[149] a transfer, as contemplated by that agreement, represented no more than a recognition of Japan's preagreement rights under international law.[150] Accordingly, the transfer was subject to no constitutional prohibition but was simply a matter for determination by the executive and legislative branches.[151]

The Court's use of jurisdictional principles in *Girard* is obvious; the difficulty with the case lies in determining the scope that should be attributed to that approach. It suffices here to say only that the Court's silence on the "fair trial" issue does not necessarily imply that it viewed jurisdictional principles as a sufficient answer to that question.[152] Since *Girard,* the lower federal courts have straddled the fence between strict concern for the quality of foreign justice and apparent disregard of that dimension under the traditional principles of international law.[153] Only in *Holmes v. Laird*[154] did a court appear to focus exclusively upon the latter.

The *Holmes* opinion was carefully crafted. It refused to find *Girard* controlling, looking instead to *Neely v. Henkel.*[155] Ironically, because it was carefully written, it supplied the wherewithal for demonstrating the carelessness in its use of *Neely. Holmes* concerned two

149. *Id.* at 529.

150. *See id.*

151. *See id.* at 530.

152. Literally, jurisdictional principles were not employed in response to the petitioner's "fair trial" argument. Also, since that argument was couched in most intemperate language and encompassed virtually any agreement pursuant to which an American might be surrendered for trial to a foreign system, it is difficult to say that the Court, by its silence, was wholly indifferent to the fairness of trials accorded our servicemen abroad. On the other hand, the district court's explicit answer to the "fair trial" argument might have merited some reflections on the adequacy of the Status of Forces Agreement safeguards under the due process clause. Also, the obvious implications of petitioner's argument for our system of military alliances, the care taken by Congress in insisting upon fair trial guarantees, and the example of deference to such congressional scrutiny in *Neely,* all combined to supply the ingredients for a very persuasive argument validating those guarantees as a proper measure of the "process due" American servicemen charged with committing crimes abroad. Silence in this context, therefore, may be thought to leave an impression that, in light of the existence of those guarantees, Japan's claim of primary jurisdiction was seen in *Girard* as the determinative answer to the petitioner's claim. For reasons we will later discuss, however, this possibility engages other more substantial difficulties and therefore should be rejected.

153. *See, e.g.,* Williams v. Rogers, 449 F.2d 513 (8th Cir. 1971), *cert. denied,* 405 U.S. 926 (1972); United States *ex rel.* Stone v. Robinson, 431 F.2d 548 (3d Cir. 1970); May v. Wilson, 153 F. Supp. 688 (D.D.C. 1956). *But see* Smallwood v. Clifford, 286 F. Supp. 97 (D.D.C. 1968), *vacated as moot,* No. 22053 (D.C. Cir. May 14, 1969).

154. 459 F.2d 1211 (D.C. Cir.), *cert. denied,* 409 U.S. 869 (1972).

155. 180 U.S. 109 (1901).

servicemen who challenged the Army's attempt to return them to Germany for imprisonment after conviction in a German trial allegedly characterized by a lengthy catalogue of procedural infirmities. Rather than test the sufficiency of the servicemen's charges, some of which were quite suspect,[156] the district court invoked the political question doctrine and sustained a government motion to dismiss.[157] The Circuit Court of Appeals for the District of Columbia affirmed the dismissal but apparently rejected the lower court's use of the political question doctrine, addressing itself instead to the service-

156. The servicemen alleged that the German court had denied them a speedy trial, the aid of counsel of their choice, effective representation by court-appointed counsel, the right to confront their accusers, and the opportunity for a fair appeal. *See* 459 F.2d at 1214. But some of the petitioners' pleadings themselves raise questions regarding the sufficiency of their charges against the German system. This is so even if the German proceedings are judged by standards applicable to an American trial. Judged by any lesser standard, the charges are totally suspect.

For example, the servicemen's allegation that they were denied a speedy trial "because they were charged in July, 1970, but were not tried until the following December," *id.*, is not, on its face, sufficient to constitute a denial of the right to speedy trial under the United States Constitution, since the sixth amendment does not specify the period of delay that is tolerable, and the Supreme Court has held that the constitutional limit depends entirely on the facts of the particular case. *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 521-22 (1972) (upholding the conviction of a defendant who was not brought to trial for murder until more than five years after his arrest). *But see* Uviller, Barker v. Wingo: *Speedy Trial Gets a Fast Shuffle*, 72 COLUM. L. REV. 1376 (1972). The Court has developed a list of factors—length of the delay, reason for the delay, defendant's assertion of his sixth amendment right, and prejudice to defendant—that must be analyzed and balanced in each case before any decision concerning whether the right to a speedy trial has been denied can be made. *See* 407 U.S. at 530.

Furthermore, it is not at all clear that the servicemen were denied the right to counsel of their choice under the United States Constitution merely because their request for an American civilian attorney was denied. Although the Constitution requires that counsel be available in all cases in which imprisonment might occur, *see* Argersinger v. Hamlin, 407 U.S. 25 (1972), defendants do not have an unqualified right to select their own counsel in place of competent assigned counsel, *see, e.g.*, Drumgo v. Superior Court, 8 Cal. 3d 930, 506 P.2d 1007, 106 Cal. Rptr. 631 (1973). Also, there was no allegation that the servicemen were able to retain competent counsel but had been denied that privilege.

It is also important to note that because the German criminal system is inquisitorial, the role of counsel is quite different and less vital than in the American system. Moreover, recent Supreme Court cases have suggested that the presence of counsel need not be a necessary requirement for a fair trial. *See, e.g.*, Middendorf v. Henry, 425 U.S. 25 (1976) (no right to counsel under sixth amendment in a summary court-martial because it is not a criminal prosecution under the meaning of the amendment); Faretta v. California, 422 U.S. 806 (1975) (a state criminal defendant may voluntarily and intelligently waive his right to counsel under sixth amendment). Finally, there is no indication that the German system is any less capable than the American criminal system in the search for truth and justice. *See generally* J. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY (1977).

157. 459 F.2d at 1214-15.

men's principal contention.[158] The servicemen were not, the court noted, claiming any constitutional exemption from German jurisdiction; they were simply making an argument parallel to that of the returned prisoners in our case, namely that "the turnover of an American citizen for service of a sentence imposed in culmination of an unfair foreign trial is a governmental involvement which the Constitution does not tolerate."[159] The answer to this argument, the court held, was not in *Wilson v. Girard*,[160] but in *Neely v. Henkel*.[161] As characterized in *Holmes*, the lesson of *Neely* was that "a surrender of an American citizen required by treaty for purposes of a foreign criminal proceeding is unimpaired by an absence in the foreign judicial system of safeguards in all respects equivalent to those constitutionally enjoined upon American trials."[162]

Two points are noteworthy. First, the *Holmes* court carefully read *Girard* as dealing only with the constitutional authority of the government to subject servicemen to foreign trials,[163] not as answering the "fair trial" argument. Second, the court's reliance upon *Neely* suggests that the foreign jurisdictional sensitivities apparent in *Neely* may cut into our constitutional conclusions far more sharply than that case seemed to warrant standing alone. The *Holmes* court was, however, very punctilious in observing that *Neely* rejected only the idea that a foreign trial must exhibit the full "equivalent" of American safeguards.[164] But surely if *Neely* held only that a full equivalence was not demanded, and if it did so under circumstances of some American control over the foreign proceedings, it left open the possi-

158. After taking note of the political question doctrine, the circuit court acknowledged that even on issues arising under the Nation's treaties, the courts may still "have a legitimate and useful function to perform." *Id.* at 1215. Rather than decide whether the instant case was or was not within the doctrine's ambit, the court moved directly to the basic jurisdictional ideas in *Girard*:

> "A sovereign nation . . . has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." . . .
>
> Thus, had appellants been present in West Germany as militarily-unattached civilians, an exercise of West German criminal jurisdiction over them would indubitably have been appropriate. It seems equally clear that, absent some countervailing international agreement, such an exertion remained unaffected by their status as American soldiers stationed there.

*Id.* at 1216 (quoting Wilson v. Girard, 354 U.S. 524, 529 (1957)). It is not entirely clear whether *Girard* was being used to reinforce application of the political question doctrine or as an independent ground of decision.

159. *Id.* at 1217 (footnote omitted).

160. 354 U.S. 524 (1957).

161. 180 U.S. 109 (1901).

162. 459 F.2d at 1219.

163. *See id.* at 1217-18.

164. *See id.* at 1219.

bility that some equivalence was essential where no American control was possible. The *Holmes* court, in other words, might properly have paused before using *Neely* in so conclusionary a fashion. And if this is so, one cannot say with confidence how far *Holmes* extended *Neely*'s concern for the jurisdictional sensitivities of a foreign sovereign. The extension cannot be denied, but the legitimate boundaries of that extension remain obscured. All we can do is turn the question around. If *Toscanino, Lujan,* and the coerced confession cases reflect certain basic values of American society, the question is whether the Status of Forces decisions signal some significant abandonment of those values or whether they can be read to accommodate them. That they can and must be read to accommodate these values seems clear.

With regard to *Wilson v. Girard,*[165] the accommodation is spelled out in *Holmes*; *Girard*'s use of international jurisdictional principles should not be extended to the "fair trial" question. If anything must be read into *Girard*'s silence on this point, it is that, given the district court's assessment of the Japanese system, the interests undergirding the serviceman's charge simply were not sufficiently weighty to warrant impairing the integrity of the Status of Forces Agreements. Such a reading means that *Girard* is of limited value to those who seek to sustain the Mexican and Canadian treaties. In cases from Mexico especially, the foreign proceedings will be notable chiefly by their contrast to the essential fairness of the Japanese system. Moreover, neither the Mexican nor Canadian treaty is undergirded by a countervailing governmental interest comparable to that at stake in *Girard.*[166]

Since one cannot know with confidence how far *Holmes* must be read as extending *Neely,* one is forced to assay its purport through use of the *Neely* balancing methodology. As such, *Holmes* can readily be seen as resting upon a *sub silentio* conviction that the interest served by the North Atlantic Treaty Organization (NATO) agreements[167] outweighed the claim of justice reflected in uncertain and somewhat attenuated charges against the German proceedings. To accept this interpretation is to admit that *Holmes* may be of considerable importance in the prisoners' cases. The treaties are not the product of governmental interests comparable to those at stake in the NATO agreements, and attacks on the Mexican treaty, in particular, will be accompanied by charges that raise a problem of justice far more urgent than anything that confronted the *Holmes* court. If the

165. 354 U.S. 524 (1957).

166. *See* text accompanying notes 268-76 *infra.*

167. *See* Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, [1953] 4 U.S.T. 1792, T.I.A.S. No. 2846.

prospect of an American court transferring American citizens for imprisonment abroad constituted complicity in the foreign proceedings sufficient to warrant due process scrutiny, the prospect of the American government carrying out the imprisonment itself could scarcely represent less.[168]

In broader terms, the Status of Forces decisions offer an important analytic lesson. Insofar as the jurisdictional principles of international law underlie the treaty commitments, they do indeed enter into our due process equation. But they do not enter *proprio vigore* as an emanation of the international community. Nor do they negate the traditional practice of comity that permits American courts to ignore acts of another sovereign when to respect those acts would violate fundamental values of American society. Rather, they serve only to add weight and urgency to the government's political interest in upholding these treaties. They lend credence to the government's foreign policy concerns by warning of, and legitimizing, any retaliatory measures that Mexico or Canada might take in response to judicial invalidation of the treaties. This point emerges in what is perhaps the most intriguing of all the Status of Forces cases, *Smallwood v. Clifford.*[169]

After commencement of Smallwood's Korean trial, the federal habeas court was presented with a contention that the "fair trial" guarantees in the Korean Status of Forces Agreement[170] were inadequate to assure the minimum protections guaranteed by the Constitution.[171] The court responded in a variety of ways. First, it stated, "[P]etitioner asserts several unsubstantiated shortcomings allegedly inherent in Korean courts. The numerous provisions of the Status of Forces Agreement pertaining to the protection of the rights of the accused are ignored by petitioner."[172] Having called the charges unsubstantiated, the court fell back upon the adequacy of the Status of Forces Agreement guarantees. It buttressed this approach by invoking the jurisdictional perspective and citing *Girard*:

> Furthermore, the petitioner fails to point out to the satisfaction of this court by what authority the United States may dictate to a sovereign nation the procedure to be followed by that nation in the exercise of its primary jurisdiction over alleged violators of its crimi-

168. Indeed, this is the lesson of the New York multiple offender cases, *see* notes 115-16 *supra,* and decisions such as Cooley v. Weinberger, 518 F.2d 1151 (10th Cir. 1975).

169. 286 F. Supp. 97 (D.D.C. 1968), *vacated as moot,* No. 22053 (D.C. Cir. May 14, 1969).

170. July 9, 1966, United States—Republic of Korea, 17 U.S.T. 1677, T.I.A.S. No. 6127.

171. 286 F. Supp. at 99.

172. *Id.* at 101.

> nal laws. Under international law, the United States is without authority to infringe upon that jurisdiction.[173]

Finally, the court evoked a more comprehensive view of the whole matter, treating the petitioner's contention as fatal to all of the Status of Forces Agreements:

> Realistically, the question resolves itself into a balancing of the national interest justifying the stationing of troops abroad against the possibility of any deprivation of constitutionally protected rights at the hands of foreign local law which does not conform to American standards. It is the determination of this court that the national interest outweighs any other considerations. To argue that under the applicable rule of international law, visiting forces retain jurisdiction is to close one's eyes to the historical fact that this matter is no longer left up to the implications of law but is carefully expressed in agreements which are explicit qualifications of consent to station visiting forces.[174]

One could scarcely imagine a more varied congeries of ideas, the existence of which bespeaks the court's sensitivity to the possible inadequacies of the jurisdictional perspective. The reason for this sensitivity was not hard to discern. The Korean legal proceedings unquestionably included a number of suspect practices. Of special concern was the use of a 900-page investigative report, which concluded that the petitioner was guilty of the crime charged but relied upon hearsay, conclusional, and opinion testimony of witnesses.[175] Untranslated, the report was put into evidence and would be treated as conclusive proof of the prosecutor's charge unless the defendant was able to meet the burden of rebuttal.[176]

Perhaps upon closer scrutiny this procedure was sufficiently safeguarded in actual use to meet some basic standard of fairness, which, although falling short of what we might tolerate in an American trial, nevertheless sufficed as the "process due" in this special context. But this was far from clear. American authorities had already dismissed the same charges against Private Smallwood because of a total lack of evidence,[177] and the Korean trial was being held in a climate of very hostile public opinion.[178] These factors, combined with suspect procedures in the Korean trial, thus evoked a genuine concern for justice that could not be dismissed simply by reference to the general princi-

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173. *Id.*

174. *Id.* at 101-02.

175. *See* Halloran, *G.I. Seeks to Bar Trial by Koreans*, Washington Post, Apr. 28, 1968, § A, at 26, col. 1.

176. *See id.*

177. *See* Smallwood v. Clifford, 286 F. Supp. 97, 99 (D.D.C. 1968), *vacated as moot*, No. 22053 (D.C. Cir. May 14, 1969).

178. *See* Comment, *Due Process Challenge to the Korean Status of Forces Agreement*, 57 GEO. L.J. 1097, 1100 (1969).

ples of international criminal jurisdiction. Moreover, the court in *Smallwood* could scarcely ignore the shortcomings of those principles themselves. The case exhibited a truly transnational aspect[179] for which the traditional practice of comity was possibly more appropriate.[180] And it was doubtful that the American courts would have granted comity to any Korean judgment if the petitioner's allegations had been proven.[181] In sum, the jurisdictional precepts of international law could not, in spite of the agreement with Korea, undercut the force of constitutional values bolstered by the traditional practice of international comity.

The court recognized all of this and addressed the issue in terms of the broader due process equation: the potential imprisonment of an American citizen without a fair trial versus the potentially adverse effect of intervention by an American court on the nation's system of foreign military alliances. In purporting to resolve this conflict the court adopted an impeccable methodology; it utilized the only mode adequate to the problem, weighing one interest against the other. But then the questions arise: why was there no evidentiary hearing to determine whether the petitioner would, in fact, have been denied a fair trial, and what consequences would the court's intervention actually have entailed for military policy? The court's answer was that the task of choosing had passed from the judicial to the political departments. In the end, this might have been the right answer.[182] Yet there is much to suggest that the court was too hasty in its assessment of the military implications of the case and that it ignored a basic structural attribute of the very due process methodology it purported to follow.

The policy of acknowledging Korean criminal jurisdiction over American servicemen was tied to the maintenance of our military alliances. One might even agree that maintenance of those alliances was a purpose that outweighed justice for Private Smallwood. There remained, however, the question of rational efficacy.[183] Was the transfer of Private Smallwood, in particular, necessary to avoid frustrating the larger objective? Was it rationally related to that objective? Ques-

179. The very existence of the Status of Forces Agreements speaks eloquently to the proposition that in broader terms the behavior of Americans abroad engages the interests and concerns of not just the country in which they happen to be, but the United States as well. It is conceptually inadequate to speak as though the foreign government alone had a legitimate interest in crimes committed by American citizens within its territory.

180. *See* text accompanying notes 61-63 *supra.*

181. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113 (1895); text accompanying notes 61-63 *supra.*

182. *See* text accompanying notes 183-87 *infra.*

183. *See* note 76 *supra.*

tions on this point abound, illustrating the level of particularity required by our mode of analysis in order to resolve such difficult problems.

For example, by insisting upon "fair trial" guarantees in our Status of Forces Agreements, Congress already had correctly judged that the United States could press for the recognition of substantial rights without prejudicing its military objectives.[184] This suggests that diplomacy was not wholly impotent to contain the temporary perturbations that judicial intervention might have engendered. Without a careful appraisal, however, the court in *Smallwood* had no basis for determining whether and with what certainty the possibility for such nondisruptive judicial action existed.

In fact, if Korea had violated the fair trial guarantees of the applicable Status of Forces Agreement,[185] it is far from clear that an American judicial pronouncement upon that point would have threatened our capacity to maintain troops in Korea. Yet, without a careful appraisal, such a discriminating judgment was impossible. Finally, the *Smallwood* court made no attempt to determine whether the Korean procedures were unique to that country or were practiced in other allied nations. Yet, without such a determination, its assumption that a judgment for Private Smallwood would have had a general disabling effect upon our nation's alliances was highly suspect.[186]

In sum, *Smallwood* confirms that the jurisdictional precepts of international law cannot undercut the basic values of the Constitu-

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184. *See* 99 CONG. REC. 8780 (1953); S. EXEC. REP. No. 1, 83rd Cong., 1st Sess. (1953).

185. The Korean Status of Forces Agreement provides,

> Whenever a member of the United States armed forces or civilian component or a dependent is prosecuted under the jurisdiction of the Republic of Korea he shall be entitled:
>
> (a) to a prompt and speedy trial;
>
> (b) to be informed, in advance of trial, of the specific charge or charges made against him;
>
> . . . .
>
> (d) to have compulsory process for obtaining witnesses in his favor, if they are within jurisdiction of the Republic of Korea;
>
> (e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in the Republic of Korea;
>
> (f) if he considers it necessary, to have the services of a competent interpreter; and
>
> (g) to communicate with a representative of the Government of the United States and to have such a representative present at his trial.

Status of Forces Agreement, July 9, 1966, United States—Republic of Korea, art XXII, para. 9, 17 U.S.T. 1677, 1698, T.I.A.S. No. 6127.

186. If the failure to turn Private Smallwood over to Korean authorities would have had other political consequences, they should have been made explicit and judged on their own merits, not concealed under a blanket concern for our entire system of military alliances.

tion, except as they may reinforce the larger public interest reflected in the nation's foreign policies. At the same time, *Smallwood* also illustrates the need to define carefully each of the elements in the due process equation. It illustrates the need to identify as precisely as possible the nature and extent of the offense against constitutional values and to decide, with discrimination, how essential a tolerance of that offense may be to the achievement of some larger governmental objective.[187]

## III. THE GOVERNMENTAL CLAIM

### A. INTRODUCTION

From the cases already reviewed, there emerges a pattern of relevant interests and attendant measures of importance to guide the courts in weighing the returned prisoners' constitutional claims. The same is true for the interests on the other side of the due process equation. The courts, of course, are not unfamiliar with requests for the vindication of private constitutional and other legal rights that impinge upon the nation's foreign policy and security interests. In dealing with such requests, they frequently strike a certain note of judicial caution, even of restraint, which, whether explicit or not, may be thought to signal a search for balance. In the circumstances animating this caution, in the mode and extent of its exercise, and in the proffered explanations of it, are to be found standards that are instructive for our problem.

We begin with cases in which the courts have, under the aegis of the political question doctrine, abstained from deciding the merits of a controversy in the way courts normally decide such matters. We turn, in other words, to cases in which that doctrine appears as an "ordinance of extraordinary judicial abstention."[188] In so doing, how-

187. For a further discussion of the nuances of this methodology, see Section I(B) *supra*; Part IV *infra*.

188. The phrase is that used by Professor Henkin. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 215 (1972). Professor Henkin has suggested that there may be "no doctrine requiring abstention from judicial review of 'political questions' " in the sense of questions upon which "the courts forego their unique and paramount function of judicial review." Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 600 (1976). According to Henkin, the cases in which the concept is used fall into five different categories. *See id.* at 622-23. For our immediate purpose, the most interesting of these are cases in which the courts felt "bound to accept decisions by the political branches within their constitutional authority" or refused to "find limitations or prohibitions on the powers of the political branches where the constitution does not prescribe any." *Id.* at 622.

Plainly Professor Henkin has rendered a singular service in insisting that we must get rid of a certain confusion in the use of the phrase "political question." There are clearly cases in which the phrase appears but in which the court concludes that what the political departments did was constitutional or otherwise legal—that it was within

ever, we emphasize that the problem of the returned prisoners is not

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the boundaries set by the law for the exercise of choice by those departments. In such cases one can speak of the question as being "committed to the political departments" only in a very limited sense. The question—the right or the wrong of the action taken—is committed to the political departments only because the act does not offend any constitutional or other legal principle and this only because a court has first decided, according to the mode by which courts decide such things, that this is so. In this sense, to say that the issue is committed to the political departments is not very interesting. Certainly, it does not exhaust the possibilities for such a commitment. There still may be cases where the right or the wrong of the action in legal or constitutional terms, rather than in nonlegal terms, is committed to the political departments rather than to the courts. This is the form of the commitment that must be found if the political question doctrine—as an ordinance of extraordinary abstention—is to exist. It is this form of commitment that Professor Henkin professes not to find.

This is not, of course, the place to review Professor Henkin's treatment of the cases. But we would register a note of skepticism, largely because Professor Henkin works at the level of characterization and it may be doubted that the matter can be settled at that level. Initially, one must keep in mind that a court's refusal to judge the right or wrong of an action on nonlegal grounds and its refusal to judge on constitutional or other legal grounds (*i.e.*, a true political question) are both refusals rooted in a constitutional conception of the judicial power. Courts abstain in the first because the question by its nature is not susceptible of judicial resolution (it is not a question relating to the boundaries of political power) and in the second because as an institution the judiciary lacks constitutional power to decide, although the question by its nature is susceptible of judicial resolution. In such a setting, involving a very subtle set of distinctions within the single constitutional concept of justiciability, one can readily find reasons to characterize any given case one way or the other. Moreover, if one relies upon what the courts themselves say about the matters, characterization becomes a particularly clumsy tool. It is quite possible to find a court affirming that the right or wrong of a question is committed to the political departments without saying which is right or wrong—legal or nonlegal. In this ambiguous state of affairs, one must look beyond characterization to modality.

One must start with a definition of what courts do when they decide, a design of the decisional process. If one observes political factors being considered and weighed according to the mode by which courts, in our view of the matter, must weigh these factors in deciding any question, then plainly they are not asserting any lack of constitutional power to decide. Reference in this context to a "political question" is likely to signal only an appreciation of the political consequences of a decision and a propensity to see those consequences as very weighty. Likewise, references to matters "committed to the political departments" tend to signal reliance upon some of the institutional considerations that we have already mentioned as part of the controlling decisional mode. Where, however, no such mode is at work where one would otherwise expect to see it, such references by a court may very well signal a genuine refusal to decide what it could otherwise decide. Such a refusal would in any sense of the word constitute an act of extraordinary judicial abstention. The line of inquiry must then focus upon the factors that, in the particular context of the case, led to the refusal. While we cannot here canvass the cases, even those reviewed by Professor Henkin, we refer briefly to Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829), *discussed at* notes 193-95 *infra* and accompanying text, and Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839), *discussed at* notes 196-97 *infra* and accompanying text, which although excluded from Professor Henkin's essay, presumably because they involved nonconstitutional challenges to political actions, were included in the sweeping conclusion of his book. In those cases it cannot be doubted that the Court refused to judge the merits of a question it might have judged. A contrary view would imply that neither the

in any strict sense governed by these decisions.[189] Political context enters our problem not as a ground for abstaining but as an integral part of the very constitutional decision the courts will be called on to make. Nevertheless, among the more persistent elements entering into the determination of the classic political question is a sense of the largeness or momentousness of the subject—a concern for the enormity of the consequences that might attend a judicial intrusion.[190] In the dimensions used to gauge this element, we find one set of highly suggestive benchmarks for assaying the weight of the interests undergirding the treaties with Mexico and Canada.

In the first place, there are few truths of which lawyers need a more constant reminder than the fact that if "no good society can be unprincipled . . . no viable society can be principle-ridden."[191] There is, in a complex democracy, a place for governance based exclusively upon compromise, expediency, and the political will where reasoned principles—the law—must not intrude. The line marking out this special province is, in no small part, the line at issue in that search for an "ordered liberty" of which the due process clause is perhaps the most active instrument. There are, of course, institutional considerations that set a political question apart from a due process inquiry. But in the sense of momentousness—the concern for the largeness of subject—they find a common element that speaks to the claims of order over liberty in precisely the same fashion as it speaks to the claims of the political will over reasoned principles.

One must remember, however, that this sense of momentousness is expressive of the law's outer limit. The law cannot retreat too early. Ours remains a society in which most acts of governance are subordinated to reasoned principles. No less so, our society remains committed to the individual liberties embodied in the Bill of Rights: liberties

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language of a treaty nor customary international law can ever supply a rule of decision for an American court. The Court, in other words, refused to judge a question that was, by its nature, susceptible to the judicial power. And if this is so, the Court's refusal to judge was, in any sense that is useful, a response to a constitutional ordinance of extraordinary judicial abstention. *See also* Swan, *Act of State at Bay: A Plea on Behalf of the Elusive Doctrine,* 1976 DUKE L.J. 807, 835-70.

189. This is not to suggest that the political question doctrine could not apply. Clearly, the prisoners' due process claims involve questions that courts normally decide. *See* note 188 *supra.* But, from the cases discussed, we would submit that it is impossible to establish in the case of these treaties the dimension of political momentousness necessary for the political question doctrine to apply. There are also other institutional considerations rendering that doctrine inapplicable. *See* Swan, *supra* note 188, at 858. These latter make clear that the mere fact that the political momentousness of a case warrants upholding the government in a due process weighing does not automatically also mean that the case poses a political question.

190. *See generally* Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues,* 75 HARV. L. REV. 40, 75 (1961).

191. A. BICKEL, THE LEAST DANGEROUS BRANCH 64 (1962).

that cannot yield to national exigency—to the claims of order—too cheaply. With this understanding, a characterization of the subjects that, because of their attendant sense of largeness, belong exclusively to the political realm supplies an important benchmark for assaying the weight of the government's interests in any due process analysis. And on this score, in at least three major lines of decisions, the political question cases touch upon subjects whose largeness exceeds anything exhibited by the governmental interest in our prisoner exchange treaties.

It will also be apparent from these cases that as the private claims seeking judicial vindication become more compelling, evoking increasingly weighty precepts of our democratic order, the line between law and the political will becomes increasingly difficult to draw. If the political will is to prevail, it must be accompanied by a correspondingly heightened sense of momentousness. Thus, if under the tutelage of the political question cases we start by doubting whether the government's interest is momentous enough to prevail over some of the returned prisoners' claims, that doubt matures to a virtual certainty when we observe the greater urgency of the prisoners' constitutional claims compared with the interests at stake in the political question cases.

Finally, a wider survey of decisions involving private constitutional challenges to the foreign policy or national security interests of the government, when undertaken with careful regard for the basic structural principles of our methodology, will serve to replicate the lessons of the political question cases. Viewed from an historical perspective, these decisions are a powerful reminder that we must not temporize with the high standards suggested by the political question decisions, however wise or humanitarian the treaties might appear at the moment.

Overall, the instruction of these cases appears clear: neither foreign policy nor national security is a talisman whose engagement invariably signals the retreat of the courts or the law. Keeping in mind that we are still working at the initial level of the analysis, the contrary seems obvious. When constitutional values as weighty as those potentially involved in some of the prisoners' cases are at issue, any retreat would require a showing that the affected national interest was much more insistent and far-reaching than anything likely to be at stake in the Mexican and Canadian treaties. This means that, especially with regard to the Mexican treaty, the constitutional question is likely to turn upon the unique circumstance that pits one returned prisoner against all those who remain abroad.[192] The diffi-

192. *See* Section IV(B) *infra.*

culty of that question—the true dimensions of the case—can only be fully appreciated, however, if the strength of the constitutional case against the Mexican treaty is first recognized.

### B. The Political Question Cases

The seminal decision in the initial line of political question cases is *Foster v. Neilson,*[193] where Chief Justice Marshall refused in a quiet title action to determine whether West Florida was included in the 1803 Louisiana Purchase.[194] It would have been unthinkable, the Chief Justice made plain, for the Court to risk effectively invalidating all of the political departments' acts of governance over a significant area of the United States for the period 1803-1819.[195]

*Neilson* was followed in *Williams v. Suffolk Insurance Co.,*[196] where the Court was asked to judge a foreign sovereign's claim to foreign territory under international law,[197] and in *Jones v. United States,*[198] where the question was whether one of the Guano Islands was, as the executive and Congress had claimed, territory "appertaining to the United States" for purposes of criminal jurisdiction.[199] These three decisions—*Neilson, Suffolk,* and *Jones*—were relied upon by the Court in *Oetjen v. Central Leather Co.*[200] and *Pearcy v. Stranahan*[201] as establishing that the question of when a party was to be recognized by the United States as de jure or de facto the government of a foreign territory was a question of policy belonging

193. 27 U.S. (2 Pet.) 253 (1829).

194. *See id.* at 299.

195. Before invoking the political question doctrine, the Chief Justice was careful to point out that the area in question had long been claimed by the United States; the President and Congress had authorized its occupation; and it had been used to form the Alabama Territory in 1817, and Alabama had been admitted to the Union in 1819. *Id.* at 299-300, 307-08. *But see* Dickinson, *The Law of Nations as National Law: "Political Questions,"* 104 U. Pa. L. Rev. 451, 454 (1956).

196. 38 U.S. (13 Pet.) 415 (1839).

197. The dimensions of the controversy and the Court's sensitivity to those dimensions are readily apparent. The Court was asked to decide whether the government of Buenos Ayres had a valid international law claim to sovereignty over the Falkland Islands. The executive had denied that claim in the context of a quarrel over seal hunting rights that culminated in the Navy's expulsion of Buenos Ayrean officials from the islands. *See id.* at 419. In holding that the executive's determination was conclusive, the Court said that otherwise one department might consider a "foreign island or country . . . at peace with the United States; whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise, and so destructive of national character." *Id.* at 420.

198. 137 U.S. 202 (1890).

199. *See id.* at 204.

200. 246 U.S. 297 (1918).

201. 205 U.S. 257 (1907).

exclusively to the executive.[202]

A related line of cases began with *Doe v. Braden*,[203] which held that the courts lacked authority to inquire into a foreign official's treatymaking power.[204] That holding has found more contemporary applications in *Terlinden v. Ames*,[205] which involved the authority of the German Empire to carry out a treaty between Prussia and the United States, and *Clark v. Allen*,[206] which dealt with the capacity of Germany to carry out a treaty on inheritance rights during the allied occupation.

These lines of decision exhibit a common theme that lends a momentousness to the political and foreign policy interests at issue that the prisoners' cases could hardly equal. In each, the Court was asked to decide whom the United States was to consider sovereign in a community of sovereign states, or to what people or territory the attributes of sovereignty were to be accorded, or what credence the United States was to give to those who asserted a right to exercise

202. In earlier decisions such as Rose v. Himely, 8 U.S. (4 Cranch) 241 (1808), and Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246 (1818), the Court decided that the question of recognition, de facto or de jure, was a question "addressed to sovereigns not to courts." 8 U.S. (4 Cranch) at 272 (Marshall, C.J.). In those decisions, however, the Court appeared to suggest that the question was governed by principles of international law. Not until the *Pearcy* and *Oetgen* cases did the Court separate the issue from international law, treating it as a matter for policy alone. The latter approach accords with that taken by at least one legal adviser to the State Department. *See* Memorandum from Green Hackworth, Legal Adviser, U.S. Department of State, to Cordell Hull, U.S. Secretary of State (Jan. 29, 1944) ("Russia v. Poland"), *reprinted in* 2 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 5-6 (U.S. Dep't of State Pub. No. 7553, 1963).

203. 57 U.S. (16 How.) 635 (1853).

204. *See id.* at 657-58.

205. 184 U.S. 270 (1902).

206. 331 U.S. 503 (1947). In *Clark*, a 1923 treaty with Germany relating to inheritance rights was upheld against a claim that it was terminated by Germany's defeat and the subsequent Allied occupation. Relying *inter alia* upon *Terlinden*, Justice Douglas characterized the claim as a "political question" answered by the absence of any showing that the political departments considered Germany's collapse inconsistent with the maintenance and enforcement of the treaty. *See id.* at 514. Justice Douglas was quite prepared to treat the problem as one involving the termination of a treaty by reason of supervening war; to this end he quoted at length from Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185 (Cardozo, J.), *cert. denied*, 254 U.S. 643 (1920), and also cited Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven, 21 U.S. (8 Wheat.) 464 (1823). But unlike the cases he cited, Justice Douglas' opinion undertook no independent inquiry into the compatibility of the treaty provisions with the interests of the nation either at war or under the succeeding occupational regime. He declared himself prepared to consider the treaty terminated *only if* the executive or Congress had "formulated a national policy quite inconsistent with the enforcement of a treaty in whole or in part." 331 U.S. at 508-09. In light of this, it would seem preferable to read the case as dealing with the capacity or status of the treaty partner to carry out its obligations, along the lines of *Braden* and *Terlinden*, rather than as strictly a termination by war case.

sovereign authority. Decisions on these issues establish the basic framework and set the controlling climate for all the discrete acts of policy that the government might later choose to pursue. They are questions central to the very existence of policy and the ability of the political departments to give expression to the national interest. Viewed broadly, they are all encompassed within the recognition power and as such transcend any particular policy objective of the kind underlying the Mexican and Canadian treaties.

Admittedly, these cases standing alone demonstrate only a sufficient, not a necessary, standard. Yet, in all of them there was something of a search for balance, and in all of them the balance was very different from that likely to be encountered in any of the prisoners' cases. In none were the private interests seeking judicial vindication undergirded by clear and compelling principles, and certainly none reached constitutional dimensions.[207] Thus, even if the cases cannot be read as fixing a necessary standard in all instances, they become highly suggestive of such a standard when the gravity of the issues the Court was asked to decide are compared with the weight of the constitutional claims likely to be encountered in some of the prisoners' cases.

This tendency to search for balance, and its consequent elevation of the sufficient standard in the recognition cases to that of a necessary standard in our problem, becomes even more apparent when we turn to certain war powers cases. There the challenge to the government's actions reached constitutional dimensions. The Court was asked to decide whether the nation was at war or not for purposes of determining the constitutionality of a purported exercise of the war powers during the period between the end of fighting and the formal peace. In every case where an adverse judicial decision might have impaired the government's ability to determine the basic legal framework for the nation's postwar international relationships, the political department's determination was held to be decisive.[208] When a re-

207. In cases like *Neilson* and *Suffolk*, the proffered legal rights had long and consistently been denied by the political departments and were highly debatable at best. In *Jones*, the issue was essentially one of statutory interpretation. Decisions regarding the constitutional authority of a foreign official (*Doe v. Braden*) or a successor government (*Terlinden*) or regarding the effect of the war and allied occupation upon Germany's status as a sovereign (*Clark v. Allen*), were laced with difficulties for an American court.

208. *See* Ludecke v. Watkins, 335 U.S. 160 (1948) (deportation of an enemy alien); Commercial Trust Co. v. Miller, 262 U.S. 51 (1923) (seizure of "enemy alien" property). In *Ludecke*, Justice Frankfurter held that the Court was bound to concede to Congress the power to grant, and to the President the power to exercise, a deportation authority until the state of war had been terminated, and that "whatever the mode that termination [was] a political act." 335 U.S. at 168-69. According to Justice Frankfurter, a contrary holding would suggest that the unconditional surrender and

quested decision pertained only to discrete acts of policy, however, that bore peripherally, if at all, upon that framework, the Court exhibited no reluctance to make its own determination.[209] This was so even though decisions against the government could have impaired its ability to act effectively during the uncertain period following the end of hostilities.[210]

This necessarily brings us to the recent cases involving the war in Southeast Asia. One can observe in these cases a direct correlation between the urgency of constitutional principles seeking judicial vindication and the requisite momentousness of the subject. On one side of the equation, the private interests asserted were undergirded by a fundamental, structural postulate of our democracy: the decision as to war or peace ultimately belongs to Congress, not the executive. On the other side, the practical intent of virtually all of these challenges was at least to embarrass the executive, if not actually to terminate its ability to carry on a major war. In this dimension, the subject—the potential impact of judicial intrusion upon the conduct of policy—was, if anything, even more momentous than that confronting the Court in the recognition cases.

The result of increasing the stakes on both sides of the equation was, as could perhaps be expected, a series of increasingly agonizing decisions. The earliest cases dismissed as political questions all issues bearing upon the departmental allocation of the power to wage war.[211] As the intensity of concern with the executive's assumption of power increased, however, all of the circuit courts reviewing the issue asserted their authority to decide, on the basis of the nature and extent of the hostilities, whether some form of congressional authorization was constitutionally required. They all answered the question as ap-

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disintegration of the Nazi regime had "left Germany without a government capable of negotiating a treaty of peace." *Id.* at 170. This was a clear echo of the *Doe v. Braden* principle as elaborated in *Terlinden v. Ames* and *Clark v. Allen.*

209. *See* Woods v. Cloyd Miller Co., 333 U.S. 138 (1948) (postwar rent controls); Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111 (1947) (postwar reorganization of the wartime price control agencies); Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146 (1919) (continuance of wartime prohibition).

210. This distinction is also supported by the fact that when asked to decide whether a condition of war in the international legal sense exists between this nation and any foreign power, as in the case of a prize of war, the Court has uniformly followed the latest utterance of the political departments, whether in the form of declarations, treaties, joint resolutions, or other competent acts. *See* Herrera v. United States, 222 U.S. 558 (1912); Ribas y Hijo v. United States, 194 U.S. 315 (1904); The Buena Ventura, 175 U.S. 384 (1899); The Brig Amy Warwick (Prize Cases), 67 U.S. (2 Black) 635, 688-92 (1862).

211. *See* Mora v. McNamara, 387 F.2d 862 (D.C. Cir.), *cert. denied,* 389 U.S. 934 (1967); Luftig v. McNamara, 373 F.2d 665 (D.C. Cir.), *cert. denied,* 387 U.S. 945 (1967); Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd mem.,* 411 U.S. 911 (1973).

plied to Southeast Asia affirmatively.[212] Yet, each of the circuits refused to take any action that might embarrass the executive's conduct of the war, dismissing all complaints under one or another of the *Baker v. Carr*[213] political question criteria.[214]

Whatever uncertainties may exist in the fuller interpretation of these decisions,[215] it is enough to observe how, under the press of a

212. *See* Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971); Berk v. Laird, 429 F.2d 302 (2d Cir. 1970).

213. 369 U.S. 186 (1962). In full, *Baker v. Carr* suggested the following tests for a political question:

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

*Id.* at 217.

214. The First and Second Circuits found sufficient authorization in the Tonkin Gulf Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964) (repealed 1971), and other congressional acts, saying that the form of the authorization and any further question as to the actual intent of those measures posed political questions. *See* Massachusetts v. Laird, 451 F.2d 26, 33-34 (1st Cir. 1971); Orlando v. Laird, 443 F.2d 1039, 1041-43 (2d Cir.), *cert. denied,* 404 U.S. 869 (1971). After the Tonkin Gulf Resolution was repealed, the Second Circuit found that the President and Congress were winding down the war and declared that the method and means chosen for doing so were political questions. *See* DaCosta v. Laird, 448 F.2d 1368 (2d Cir. 1971), *cert. denied,* 405 U.S. 979 (1972). The charges that additional congressional authorizations were necessary before the President could mine the harbors of North Vietnam, *see* DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973), or mount the Cambodian incursion, *see* Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied,* 416 U.S. 936 (1974), were characterized as challenges to tactical decisions that could not be assessed by any judicially manageable standard. Even the District of Columbia Circuit, while asserting its power to decide that none of the proffered congressional authorizations showed an intent to sanction the continued level of hostilities, made its escape, in Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973). In *Mitchell* the court found that the defendants, all officials of the Nixon administration, were committed by policy to ending the war. This the President could do as Commander-in-Chief without congressional warrant. How and at what speed it was accomplished was a question upon which a court would not substitute its judgment for the President's, absent a clear showing of bad faith. *Id.* at 616.

215. These decisions can, of course, be read as affirming the power of the judiciary to decide the question of war or peace, if that decision is for peace and is merely consequent to deciding the issue of the executive's constitutional competence to prosecute a war. Thus read, they may be thought to find support in the *Prize Cases,* where the Court did purport to determine the scope of the presidential power as Commander-in-Chief. *See* The Brig Amy Warwick (Prize Cases), 67 U.S. (2 Black) 635 (1862). On the other hand, apart from uniformly refusing to embarrass the conduct of the war, the courts affirmed their power to decide on the necessity of a congressional authoriza-

large and insistent constitutional principle, the courts moved, albeit fitfully, to recognize that the claim of law might prevail over what is possibly the most momentous of all political questions, that of peace or war. For our purposes, it seems fair to suggest that continued incarceration, at least of the returned prisoners whose guilt has not been reasonably established, would present an offense against constitutional values only slightly, if at all, less insistent than the values at stake in the Southeast Asia cases. If this is so, then the governmental interests served by our treaties should exhibit no less an urgency than the governmental objective at issue in those cases. But however innovative as a cooperative device in international law enforcement, and however useful as a means of improving relations with other countries, the Mexican and Canadian treaties simply do not engage national purposes of such a magnitude. From a broader perspective, when the dimensions of the public objects dealt with in the Southeast Asia and the recognition cases are considered, one may argue that these cases engaged the kind of issues that go to the very capacity of the nation to exist, or at least to function as an independent sovereign in the international community.[216] As such, they were not in opposition to, but reflected a necessary condition for, the preservation of liberty. Certainly, the Mexican and Canadian treaties can make no such claim.

### C. A Wider Survey

If we venture a wider survey of decisions involving private constitutional challenges to the foreign policy or national security interests of the government, we can replicate to a remarkable extent the lessons drawn from the political question cases.

*Reid v. Covert*[217] is the point of departure. Decided within a month of *Wilson v. Girard*,[218] it puts *Girard* and the other Status of

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tion only insofar as they were assured of finding just such an authorization, or finding that the decision for peace had been made and the President was merely carrying out that decision. Certainly, they avoided any inquiry that might have shown that there was no authorization or that the President was not ending the war. In view of this, they can also be interpreted as asserting a judicial power to act only where there is evidence that the authority for war has been explicitly withheld from the executive, that is, where there is a direct conflict between the political departments. *See* Atlee v. Laird, 347 F. Supp. 689, 694 (E.D. Pa. 1972), *aff'd mem.*, 411 U.S. 911 (1973). *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (where the President had taken action on a claim of plenary power, the Court attributed significance to the prior, express refusal of Congress to authorize the action).

216. For an intriguing discussion of the political question doctrine as limited to cases where the Court is being asked to undermine the existence of the very authority from whence it derives its own powers, see Weston, *Political Question*, 38 HARV. L. REV. 296 (1925).

217. 354 U.S. 1 (1957), *rev'g on rehearing* 351 U.S. 487 (1956).

218. 354 U.S. 524 (1957), *discussed at* notes 145-51 *supra* and accompanying text.

Forces cases in a very instructive light. In *Reid,* the Supreme Court invalidated the provisions of certain executive agreements with Great Britain and Japan under which the civilian dependents of military personnel accused of committing capital offenses abroad were to be tried by courts-martial. Although the plurality opinion by Justice Black dealt with the question in more or less categorical terms,[219] the dissenting opinion[220] and the opinions of Justices Frankfurter and Harlan, concurring in the result,[221] engaged in a thorough weighing of the competing interests in the case.[222]

To Justices Frankfurter and Harlan, the government's interest in maintaining military discipline, including discipline over dependents who were viewed by the host government as an integral part of our military establishment, could not be gainsaid.[223] On the other hand, a denial of court-martial jurisdiction in such cases would not, they thought, leave the government powerless to serve those ends. Congress still could provide for civilian trials in the United States, or the dependents could, like other American civilians, be tried by foreign courts. With these alternatives available, any added value of a court-martial as a deterrent against lawless behavior by military dependents was not sufficient to override the importance of a grand jury indictment and a jury trial in a capital case where those procedural safeguards were peculiarly significant.[224] To the dissent, the importance of subjecting military dependents abroad to military discipline and the practical difficulties attending any alternative mode of trial meant that the provisions in question reflected the "least possible power adequate to the ends proposed."[225]

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219. *See* 354 U.S. at 21, 39-40. Chief Justice Warren and Justices Douglas and Brennan joined Justice Black in the plurality opinion.

220. Justice Clark wrote a dissent in which Justice Burton joined. *Id.* at 78.

221. Justice Whittaker took no part in the consideration or decision of the case. *Id.* at 41.

222. There was, on the one hand, the petitioners' interest in being tried by a jury upon an indictment by a grand jury and in a forum free of executive control, all as provided for in article III and the fifth and sixth amendments and denied to them in a court-martial. The government, on the other hand, asserted that the use of courts-martial in such cases was essential to the maintenance of military discipline and to good relations with our allies. Provisions for the use of such courts, it argued, represented a proper exercise by Congress of its power to "make rules for the Government and Regulation of the land and naval forces" as supplemented by the necessary and proper clause. *Id.* at 20. Thus joined, the issue was, in Justice Harlan's words, "one of judgment, not of compulsion," analogous "to the issue of what process is 'due' a defendant in the particular circumstances of a particular case." *Id.* at 75 (concurring opinion).

223. *Id.* at 47, 71-72.

224. *Id.* at 47-48, 77-78.

225. *Id.* at 86-88.

Two points are important here. The agreements in *Reid* ultimately were designed to ensure that the United States would have continuing access to military bases in Britain and Japan. In this regard, they were linked to the larger matter of American cold war strategy. In this context, all of the Justices who followed our basic due process mode conceded that the broader governmental interest standing alone sufficed to override the petitioners' constitutional claims. Their disagreement was solely over the necessity of impairing those rights in order to achieve that purpose. All of these Justices agreed, in other words, that a basic structural element of their constitutional inquiry was the need to differentiate between a decision that would totally frustrate a governmental objective and a decision that only forced the government to search for other, albeit less effective or practicable, means of achieving its purpose.

It is this means-ends element in the structure of our basic methodology[226] that places *Girard* into much sharper focus. In both *Reid* and *Girard*, the ultimate governmental objective was the same: assuring continued United States access to foreign bases as part of a global military strategy. But the particular governmental acts being judged in the two cases were very different when viewed in terms of their "essentiality" to this larger purpose.

On the only issue addressed in the *Girard* opinion, the Court was asked to hold that no American serviceman could ever be subject to a foreign trial for an offense committed in the performance of his duties. In dealing with this question, the Court could hardly ignore that a decision favoring the servicemen could prejudice the nation's entire system of foreign bases. This was underscored by the strength of Japan's interest in asserting its jurisdiction and the fact that its interest was sanctioned by the traditional jurisdictional precepts of international law. In light of this recognition and the momentousness of the objectives at issue, the Court in *Girard* was virtually compelled to cast its choice, not in terms of the particular means selected by the government to achieve its objectives, but in terms of those objectives themselves. This is a far cry from the situation in *Reid* where the availability of alternative forums immediately cast doubt upon the "essentiality" of the courts-martial as a means of subjecting military dependents to the discipline of the criminal law.

Seen in this light, the Court's refusal in *Girard* to impose a constitutional limitation upon the exercise of foreign jurisdiction over American servicemen cannot be read to imply a lack of constitutional concern for the fairness of a foreign trial. As the lower court opinion makes clear, there were numerous possibilities for scrutinizing the essential fairness of those trials without threatening either the basic

226. *See* note 76 *supra*.

policy or the larger purpose of the Status of Forces Agreements.[227] This also means that the choice in *Girard* was, on both sides of the due process equation, a far cry from the choice likely to arise in the returned prisoners' cases. On the governmental side, *Girard* dealt with purposes only slightly less momentous than those in the political question decisions and far exceeding anything underlying the Mexican and Canadian treaties. On the private side, the servicemen's claim to immunity from all foreign jurisdiction could hardly be said to invoke the fundamental concern for justice likely to attend some of the prisoners' claims.

If the Court was dealing with "personal rights" under the Constitution in *Reid* and *Girard,* comparable dimensions emerge in cases dealing with due process challenges to the deprivation of "property rights." *United States v. Pink*[228] and *Sardino v. Federal Reserve Bank*[229] are illustrative. In *Pink,* a deprivation of property worked by the Litvinov Assignments[230] was upheld because, *inter alia,* those assignments were seen as essential to the settlement of claims that had long stood as a major barrier to recognition of the government of the Soviet Union.[231] As Justice Frankfurter asserted in his concurrence, recognition was not "an exercise in abstract symbolism," but the "assertion of national power towards safeguarding and promoting our interests and those of civilization."[232] The latter is a plain reference to the rising dangers of Hitlerian Germany and the perceived urgency of a Soviet-American accommodation. In *Sardino,* Judge Friendly held that the freezing of Cuban assets under the Cuban Assets Control Regulations[233] was a "deprivation" of property within the contemplation of the due process clause, but that it was not such a deprivation as was proscribed by that clause.[234] While the United States was not formally at war with Cuba, the Judge said, it was "only in a technical sense . . . at peace," and the "founders could not have meant to tie one of the nation's hands behind its back by

227. *See* Girard v. Wilson, 152 F. Supp. 21, 24 (D.D.C.), *aff'd in part, rev'd in part,* 354 U.S. 524 (1957).

228. 315 U.S. 203 (1941).

229. 361 F.2d 106 (2d Cir.), *cert. denied,* 385 U.S. 898 (1966).

230. By the Litvinov Assignments, the Soviet government assigned to the United States all assets located in this country to which the Soviet Union laid claim under its various nationalization decrees. The assigned assets were to be used to pay American claims against the recently recognized Soviet government. The agreement is set forth in an exchange of letters between Maxim Litvinov, Soviet Commissar for Foreign Affairs, and President Franklin Roosevelt. *See* U.S. DEP'T OF STATE, PUB. No. 3663, 2 FOREIGN RELATIONS OF THE UNITED STATES: 1933, at 812-14 (1949).

231. 315 U.S. at 229-30.

232. *Id.* at 241.

233. 31 C.F.R. § 515.201 (1977).

234. *See* 361 F.2d at 111.

requiring it to treat as a friend a country which has launched a campaign of subversion throughout the Western Hemisphere."[235] Since the returned prisoners' cases will present no such weighty governmental interest but, in some instances, will present private constitutional claims of equal if not greater urgency, *Pink* and *Sardino* stand as persuasive precedent for upholding the returned prisoner's due process claims.[236]

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235. *Id.* at 112.

236. The question of when and under what circumstances the government may confiscate private property without running afoul of the taking or due process clauses of the fifth amendment is a vast and complicated subject lying well beyond the scope of this Article. Nevertheless, even a sketchy outline suggests that confiscation—as distinct from police power and wartime regulation—has been permitted only in connection with the conduct of a war or some other pressing national exigency. This history, in other words, lends credence to the lessons of *Pink* and *Sardino*.

As early as Ware v. Hylton, 2 U.S. (3 Dall.) 199 (1796), and again in Brown v. United States, 12 U.S. (8 Cranch) 110 (1814), the power of the government to confiscate all alien enemy property located in this country at the outbreak of war was plainly recognized. On the other hand, while such property was frequently sequestered for the duration of hostilities, *see* 6 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 576 (U.S. Dep't of State Pub. No. 1961, 1943), outright confiscation appears to have been very limited, except in the case of a prize, until World War I. In *Brown*, Chief Justice Marshall called it a "harsh right," not one that "modern international usage would sanction." 12 U.S. (8 Cranch) at 123. *See also* Techt v. Hughes, 229 N.Y. 222, 224-25, 128 N.E. 185, 192 (Cardozo, J.), *cert. denied*, 254 U.S. 643 (1920); Brochard, *Treatment of Enemy Private Property in the United States Before the World War*, 22 AM. J. INT'L L. 636 (1928). After the passage of the Trading with the Enemy Act, ch. 106, 40 Stat. 411 (1917) (current version at 12 U.S.C. § 95a, 50 U.S.C. app. §§ 1-39 (1970)), however, not only were alien enemy assets seized, but the Court had little difficulty giving constitutional sanction to the postwar disposal of those assets for such public purposes as the government saw fit. *See* Guessefeldt v. McGrath, 342 U.S. 308, 314 (1952) (whether the refusal to return seized property was "simply to secure claims of American citizens against Germany or was regarded as the rightful withholding of spoils of war" was of little consequence); United States v. Chemical Foundation, Inc., 272 U.S. 1 (1926).

This power reached its furthest extent with the 1941 amendments to the Trading with the Enemy Act, *see* Act of Dec. 18, 1941, ch. 593, § 301, 55 Stat. 839, *amending* 12 U.S.C. § 95 (1940) (current version at 12 U.S.C. § 95a (1970)), which authorized the seizure of property nominally in the hands of "friendly" aliens but "tainted" by enemy control during any "period of national emergency" and not just formal war. The Act was upheld in Silesian-American Corp. v. Clark, 332 U.S. 469 (1947), as a proper exercise of the war power because that power, the Court thought, permitted any "reasonable preparation for the storm of war" and because it was reasonably designed to forestall the removal of "earnings or wealth out of this country to territory where it may more likely be used to assist the enemy than if it remains in the hands of this government." *Id.* at 476. But the Court made clear that the government would have to compensate fully the friendly alien for the assets seized, if he could prove the absence of enemy control. *See id.* at 480. *Silesian-American* thus provided the basic underpinnings for upholding the Cuban Assets Control Regulations, 31 C.F.R. § 515.201 (1977). *See* Sardino v. Federal Reserve Bank, 361 F.2d 106, 112 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966).

Necessarily, the problem for the Court became much more acute when it moved

Finally, to show how widely the magnitudinal standards and the structural concern with rational efficacy cut across the foreign policy and national security cases, we turn to the Japanese internment decisions.[237] As unseemly examples of judicial capitulation to popular excitement, these decisions also serve to remind us of how adherence to such standards is utterly critical to the integrity of our democratic institutions.

The first case in this series was *Hirabayashi v. United States,*[238] where the Supreme Court upheld a conviction for the violation of a military curfew applicable only to Japanese citizens and American citizens of Japanese origin.[239] The curfew was challenged as a discriminatory act violative of the due process clause of the fifth amendment.

Forgoing, for the moment, the wisdom of hindsight and viewing the situation as of the time of the government's action, a reasonably limited curfew per se would seem to have been a wholly unexceptionable, even essential, military expedient. One can hardly doubt that the wartime prevention of sabotage and espionage to which such a measure was addressed would readily have overridden any temporary impairment of such constitutional liberties as it might have infringed.[240] This, of course, was no answer to the charge of discrimina-

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to wartime confiscations of nonenemy property. The very measure of the difficulty is seen in the Court's use of a highly formalistic distinction between a permitted wartime regulation and an impermissible, outright taking. *See* United States v. Central Eureka Mining, 357 U.S. 155, 182 (1958) (Harlan, J., dissenting); United States v. Caltex, 344 U.S. 149 (1952).

Finally, peacetime assertions of the confiscatory power, not bottomed upon police power regulations, have made very little headway save under circumstances of the gravest exigency. For example, in Norman v. Baltimore & O.R.R., 294 U.S. 240 (1935), the Court upheld Congress' abrogation of "gold clauses" in all local governmental and private obligations as an incidence of Congress' power to "coin money" and "regulate the value thereof," U.S. CONST. art. I, § 8, cl. 5, emphasizing that a denial of that power would work a profound "dislocation of the domestic economy." 294 U.S. at 315. Debtors, the Court pointed out, would "under [the] gold clauses . . . be required to pay one dollar and sixty-nine cents in currency while respectively receiving their taxes, rates, charges and prices on the basis of one dollar of that currency." *Id.* at 315-16. In Perry v. United States, 294 U.S. 330 (1935), however, the Court was presented with the abrogation of such clauses in the federal government's own obligations. In response, it said that abrogation would be "not the practice of economy, but an act of repudiation," which was constitutionally impermissible. *Id.* at 353. Nevertheless, moved by the disastrous consequences that full payment would have had on efforts to balance the federal budget, the Court denied to the bondholders damages measured by the change in currency value against which the clause was intended to secure. *See* A. NUSSBAUM, MONEY IN THE LAW 364 (1950); Swan, *supra* note 188, at 888.

237. *See generally* Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945); Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

238. 320 U.S. 81 (1943). *See also* Yasui v. United States, 320 U.S. 115 (1943).

239. *See* 320 U.S. at 105.

240. *See id.* at 112-13 (Murphy, J., concurring).

tion. Yet a unanimous Court found that the experience with Japanese saboteurs at Pearl Harbor, the Japanese system of dual citizenship, the traditional ties maintained by many Japanese Americans to their ancestral home and customs, and the need for rapid action that made it impossible to distinguish between loyal and disloyal Japanese, sufficed to forge a rational relationship between the curfew order as limited and its legitimating purpose.[241] Responding to the obvious argument that a curfew applicable to everyone would have achieved the government's basic objective without any constitutionally suspect discrimination, the Court stated,

> In a case of threatened danger requiring prompt action [the argument would confront the government with] . . . a choice between inflicting obviously needless hardship on the many, or sitting passive and unresisting in the presence of the threat. We think that constitutional government, in time of war, is not so powerless and does not compel so hard a choice if those charged with the responsibility of our national defense have reasonable ground for believing that the threat is real.[242]

One may certainly question the wisdom or force of this argument even in the wartime context in which it was issued. Nevertheless, it is plain that the Court thought that a decision holding the curfew unconstitutional would impinge upon the ability of the government to carry out an important military objective; by imposing a "hard choice" on the government, the nondiscriminatory alternative would have impaired the objective itself.

The point is even plainer in *Korematsu v. United States*,[243] where the Court upheld a conviction for violation of an order excluding all persons of Japanese ancestry from the threatened West Coast area.[244] To the majority of the Court, if a curfew was valid, so was an exclusion order. But this time strong dissents were heard on two separate bases. Justice Murphy argued that the total and indefinite exclusion of all persons of Japanese ancestry from the entire West Coast bore no rational relationship whatsoever to the narrow object of protecting the country against sabotage and espionage.[245] The curfew order was suspect enough; total exclusion went too far. In what must surely stand as one of the more notable indictments of this unhappy chapter in our constitutional history, Justice Murphy described the exclusion order as nothing but the product of "the misinformation, half-truths and insinuations that for years have been directed against Japanese

241. *See id.* at 90-91, 96-99.
242. *Id.* at 95.
243. 323 U.S. 214 (1944).
244. *See id.* at 219.
245. *See id.* at 234-35 (dissenting opinion).

Americans by people with racial and economic prejudices."[246]

Justice Roberts was less certain, arguing that if the exclusion order had been temporary, it might have been considered essential to the government's objective.[247] What distinguishes his dissent from the majority, however, is his characterization of the government's action. Had the petitioner complied with the exclusion order by leaving the designated military zone, he would have violated a parallel antiremoval order. The only way he could have complied with both orders was to surrender himself for transfer to a relocation center or, as Justice Roberts insisted, "concentration camp."[248] According to the Justice, this combination of measures, applicable to all persons of Japanese ancestry without regard to their loyalty, bore no rational relationship whatsoever to the legitimate objects that the government said it was pursuing.[249]

Finally, in *Ex parte Endo*,[250] a unanimous Court ordered an American citizen of Japanese ancestry released from a relocation center after the government admitted that she was not disloyal.[251] The Court ruled that her continued retention, justified by the government on the ground that otherwise she would encounter difficulties in her home community, constituted no part of the national security rationale that alone had been used to justify the relocation program.[252]

Admittedly, these Japanese internment cases deal with an equal protection problem somewhat removed from the returned prisoners' cases. We certainly do not mean to suggest that one can automatically transfer the categorizations of traditional equal protection analysis—compelling state interest and rational relationship—to a means-ends analysis under the due process clause. Nevertheless, the cases are useful on a more modest level. They demonstrate the willingness of the Court to scrutinize the rational relationship between a particular government act—curfew, exclusion order, or relocation order—and the acknowledged wartime need to protect the nation against espionage and sabotage. This bespeaks a willingness to undertake a similar analysis under the due process clause whenever a particular governmental act claims to be justified by, and to derive its importance from, the nation's larger foreign policy objectives. Moreover, it is the special context of these cases, especially their wartime setting, that alone can explain this unfortunate lapse of judicial concern for the fundamental values of our society. If any-

246. *Id.* at 239.
247. *See id.* at 225 (dissenting opinion).
248. *Id.* at 230.
249. *See id.* at 226.
250. 323 U.S. 283 (1944).
251. *See id.* at 294.
252. *See id.* at 297, 301-04.

thing, one turns to these cases as a reminder that we must never again yield up those values at too cheap a price.[253] While the blind prejudice sanctioned by these decisions is not a problem in the Mexican and Canadian treaties, we cannot ignore the danger that, if upheld, the treaties might result in the systematic imprisonment of hundreds of Americans whose guilt was uncertain and whose convictions would offend our basic ideas of fairness and decency.

## IV. THE FINAL CALCULUS

### A. A Catalogue of Cases

In summary, two disparate strands of the argument must be drawn together. Perhaps because the governmental interests at stake in the Mexican and Canadian treaties do not evince the momentousness that runs through the political question cases, no deviation from a strict compliance with American constitutional safeguards should be tolerated.[254] On the other hand, *Neely v. Henkel*[255] reflects a contrary and, we suggest, a more persuasive position. The decision to extradite, at least in the context of that case, scarcely stood on an equal footing with a decision to recognize a foreign government or establish and maintain foreign bases as part of the nation's global military strategy. Yet, the Court in *Neely* quite plainly held that strict compliance with all due process and other constitutional safeguards was not required.[256] The practical and historical sense of that decision seems quite plain: the opposite determination would have rendered extradition treaties with most, if not all, foreign governments constitutionally suspect.

Applying the approach of *Neely* to our situation, one finds a certain parallel between the governmental interests served by an extradition treaty and those served by the prisoner exchange treaties. Therefore, since the critical distinction between *Neely* and the returned prisoners' cases arises out of the prospect that under the exchange treaties innocent persons will be imprisoned in American institutions,[257] it would seem that when such a danger does not exist —when the only constitutional standards violated by the foreign proceedings are prophylactic or deterrent in their purpose—the *Neely* balance should control. This is especially true since these lesser violations are undoubtedly of the kind that the Court in *Neely* recognized

253. *Cf.* Duncan v. Kahanomoku, 327 U.S. 304 (1946) (regarding imposition of martial law in Hawaii during World War II).

254. One can find something of this in the New York multiple offender cases. *See* notes 115-16 *supra.*

255. 180 U.S. 109 (1901), *discussed at* text accompanying notes 133-44 *supra.*

256. *See id.* at 122-23.

257. *See* text accompanying notes 144-68 *supra.*

as constituting the major difference between American and Cuban trials.

Acceptable lesser violations would include such matters as a failure to give *Miranda* warnings[258] or to apply the fourth amendment's exclusionary rule in nonflagrant cases.[259] It would seem to constitute only a modest extension of *Neely* to follow its approach in cases of arrests[260] and searches and seizures that violate our basic ideas of fairness or notions of privacy but are not accompanied by excessive brutality.[261] The same seems true for cases of undue delay in a prisoner's foreign trial, if the delay affects only his interest in avoiding "undue and oppressive incarceration prior to trial"[262] or in minimizing the anxieties accompanying public accusation.[263] Supportive of these conclusions is the fact that all of the constitutional values offended by these defects speak to our sense of humaneness in the administration of criminal justice. To the extent, therefore, that a returned prisoner benefits from the humane impulses of the treaty, any threat to these humane values that might result from his continued imprisonment would seem substantially mitigated.

Matters such as the presumption of innocence and the right of trial by jury present a somewhat more difficult issue. It can hardly be doubted that we assign these rights a high place in measuring the fairness of our criminal justice system.[264] Particularly with regard to the presumption of innocence, we tend to view its absence in other systems as the harbinger of an arbitrariness we consider intolerable. But for our purposes this is not the standard. We must inquire whether a foreign system's failure to accord an accused these safeguards would impair the basic integrity of American institutions when they undertake to execute a foreign sentence. The answer to this, we submit, is negative. It is well to keep in mind that the presumption of innocence and the right to trial by jury do not command universal allegiance.[265] Notwithstanding our own convictions, we

258. *See* United States v. Welch, 455 F.2d 211 (2d Cir. 1972).

259. *See* United States v. Controni, 527 F.2d 708 (2d Cir. 1975); Brulay v. United States, 383 F.2d 345 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967); Birdsell v. United States, 346 F.2d 775 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965).

260. Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886); Wentz v. United States, 244 F.2d 172 (9th Cir. 1967).

261. *See* United States v. Controni, 527 F.2d 708 (2d Cir. 1975); Brulay v. United States, 383 F.2d 345 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967); Birdsell v. United States, 346 F.2d 775 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965).

262. United States v. Ewell, 383 U.S. 116, 121 (1960).

263. *See, e.g.*, Barker v. Wingo, 407 U.S. 514 (1972).

264. *See In re* Winship, 397 U.S. 358 (1970); Reid v. Covert, 354 U.S. 1 (1957).

265. *See generally European Convention on Human Rights and Fundamental Freedoms*, Nov. 4, 1950, § 1, arts. 5-7, 213 U.N.T.S. 221, E.T.S. No. 5, *reprinted in* 45 AM. J. INT'L L. 24, 25-26 (Supp. 1951); *International Covenant on Civil and Political*

must recognize that other systems can reach fair results by other means, despite our well-founded skepticism concerning their overall performance. Consequently, even if these rights are fundamental when we deal free of foreign restraints, compromise is possible when we deal in the international setting. The absence of these rights certainly must have been among the principal differences between the United States and Cuba that the *Neely* Court had in mind.[266] Against this background, defects in regard to the presumption of innocence and the right to trial by jury would not seem sufficient to override the public purposes served by the Canadian and Mexican treaties. Foreign convictions based exclusively upon hearsay evidence should be treated similarly, unless the quality of that evidence raises doubts about the basic finding of guilt.

When we move to cases involving the use of coerced confessions that are inherently reliable or have been sufficiently corroborated to allay reasonable doubts about the finding of guilt, the balance becomes as close and difficult as any likely to be presented.[267] When the record of the foreign proceedings discloses procedural deficiencies that cast serious doubt on the basic determination of guilt, however, the balance moves decisively in favor of the prisoner's claim. If defects such as coerced or otherwise fraudulently induced confessions, total reliance on hearsay that is otherwise suspect, and the lack of effective assistance of counsel are accompanied by evidence of brutality, the prisoner's claim is only reinforced. Drawing upon all that has been said—the principles of *Toscanino, Lujan*, the coerced confession cases, and the contrast to *Neely* and *Holmes*—it scarcely can be doubted that such claims raised by returned prisoners will present a formidable constitutional challenge. From the contrast to the political question cases, the Status of Forces cases, and the other cases that we have discussed and from the balance that was involved in those cases, it seems equally clear that the governmental interests underlying the Canadian and Mexican treaties do not warrant ignoring that challenge. In sum, to deny claims casting serious doubt on the question of guilt would, but for the unique circumstances discussed below, make a mockery of due process.

From all of this, one must admit a genuine possibility that constitutional challenges to the Mexican treaty will fare differently in comparison to similar challenges to the Canadian treaty. The Mexican treaty promises to thrust the American courts into that second, largely uncharted region in which vindication of the right of the one

*Rights*, G.A. Res. 200, 21 U.N. GAOR, Supp. (No. 16) 52-58, U.N. Doc. A/6316 (1966), *reprinted in* 61 AM. J. INT'L L. 870 (1967).

266. *See* Neely v. Henkel, 180 U.S. 109, 122 (1901).

267. *See* text accompanying notes 122-31 *supra*.

prisoner before the court threatens to jeopardize the return of all those prisoners still abroad.

### B. One Against Many

As already noted, the case of the returned prisoner will differ from all the cases that we have reviewed. When the treaties were made, both the prisoners and the government sought the same benefit from a foreign government that exacted a certain price for its cooperation. If there is any conflict, it is principally between the interests of the prisoners who have returned and of society in the values they espouse, on the one hand, and the prisoners who remain abroad and the government, on the other. The question is whether, in light of this fact, the balance we have adduced thus far shifts decisively.

In all probability, the number of returned prisoners who may be able to raise a serious constitutional challenge—a claim of innocence—will be much smaller than the number of prisoners remaining abroad. This will certainly be true in the initial stages of the three-year program under the treaties.[268] As the program progresses, the disparity between these two groups undoubtedly will narrow somewhat, but it is unlikely to approach an equivalence. Hence, it seems both appropriate and necessary to analyze the problem under the assumption that a significant disparity will continue throughout the life of the treaties. Should this prove unfounded in later cases, it must still be remembered that a judgment invalidating the treaties, especially after a substantial number of prisoners have been returned—after the disparity has narrowed—would, at the very least, foreclose use of similar agreements to aid Americans imprisoned in countries with substantially different legal systems, which probably means foreclosing aid to people whom, on humanitarian grounds, we most want to assist. Seen in this broader dimension, it is likely that even as the Mexican and Canadian programs draw to a close, the prisoners who have returned will be pitted against other Americans imprisoned abroad. And while there are some caveats to offer, if the absolute numbers become large, it seems appropriate for the courts to act on the assumption that there will be a continuing disparity between these groups.

From this last point, at least two considerations emerge that substantially mitigate the compelling weight or urgency that would otherwise attend the returned prisoners' claims. First, any threat that a denial of those claims would pose to society's wider interest in the

268. *See* Canadian Treaty, *supra* note 2, art. VIII, para. 2; Mexican Treaty, *supra* note 1, art. X, para. 2.

integrity of its institutions and values would seem measurably diminished if the denial stemmed not solely from the government's desire to serve its own interests but principally from its desire to alleviate the suffering of Americans imprisoned abroad. The humanitarian motive, and the essential neutrality of the government in the decision to deprive the prisoners of their rights, suggests a diminished concern for institutional integrity. Second, any danger that a denial of the returned prisoners' claims would offend the nation's basic commitment to the individual and his liberties is diminished because that commitment itself seems somewhat less compelling when the individual seeks a vindication of his rights at the expense of others who may have suffered precisely the same deprivations.

In this connection, while the American courts do not refuse to redress constitutional deprivations merely because they wish to avoid visiting hardship upon others similarly situated, that is not invariably so. In a domestic setting, if the vindication of one person's rights may cause others to suffer, it generally lies within the power of the American government to alleviate that suffering.[269] In the international setting, this possibility often is far more remote. Too often, as in the prisoners' cases, the hardships consequent upon a vindication of one person's rights flow from the actions of a foreign government over which the American government has no control. This basic reality has led the courts in appropriate cases to withhold the judicial redress of rights where such redress might visit greater hardships upon others who have suffered similar deprivations but are unable to bring themselves within the jurisdiction of the courts.

*Banco Nacional de Cuba v. Sabbatino*[270] is the classic case in point. There, Justice Harlan unequivocally held that among the principal functional underpinnings of a refusal to adjudicate under the aegis of the "act of state" doctrine[271] in expropriation cases was the need to protect the interests of those victims of foreign expropriations who could not seek judicial redress.[272] Although the act of state doctrine technically is not applicable[273] and should not be extended to

269. *Cf.* Goss v. Lopez, 419 U.S. 565 (1975) (students facing temporary suspension from public school have property and liberty interests qualifying for due process protection); Goldberg v. Kelly, 397 U.S. 254 (1970) (pre-termination hearing necessary prior to removal of statutory welfare benefits).

270. 376 U.S. 398 (1964).

271. *See id.* at 431-32.

272. As Justice Harlan pointed out, the political departments could engage in bilateral and multilateral diplomacy and resort to economic and political sanctions in efforts to obtain general redress for American victims of the foreign state action. "Judicial determinations of invalidity of title, [could], on the other hand, have only occasional impact . . . . Piecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere" with the efforts of the executive. *Id.*

273. Our problem involves a challenge to the acts of the American government, with the validity of the acts of a foreign government being called into question only derivatively because the American government proposes to execute the latter. It would

our case, its broader protective principle seems quite apposite. If, in its more recent act of state decisions,[274] the Supreme Court seems to have lost sight of this basic purpose, the problems that have resulted serve only to emphasize its importance.[275]

On the other hand, innocent citizens will be the ones imprisoned. In some longer span of time the bitterness of those prisoners, the travesty of justice that their imprisonment represents, and the suspicion that they remain in prison only because the American government does not wish to offend a foreign power may come to dominate our own and the world's perception of this otherwise humane enterprise. In assessing this prospect, the courts cannot ignore the possibility that if they uphold the Mexican and Canadian treaties, similar arrangements with other countries will follow, increasing the numbers of wrongfully imprisoned Americans.

Moreover, in the case of the returned prisoners, it is constitutional rights that are at stake; in the case of prisoners remaining abroad, only an improvement in the conditions of their imprisonment is involved. To find this latter interest the more compelling of the two would be to leave all constitutional deprivations—those of the prisoners who have returned as well as those who remain behind—without effective redress.

In sum, the problem is a most difficult one, with little guidance from precedent. In this circumstance, we are tempted to offer our own essentially subjective appraisal that, on balance, the due process calculus has indeed changed and that the continued sentence provision of the treaties should be upheld. We can avoid reliance upon such impulses, however, by resort to one of the fundamental disciplining elements of our own methodology. Invariably, as the courts move toward the apparent necessity of subjective judgment and away from the guidance of history, they encounter, by definition, the case of the uncertain calculus. And as uncertainty increases, the political judgment becomes less suspect.

Equally important, we cannot forget that when a compromise with constitutional values appears trivial compared with the larger objects that would be served thereby, a failure to compromise can discredit the values themselves. While we cannot know with certainty whether we have arrived at such a place, it is a possibility. The numbers of those with credible claims—those of doubtful guilt—will

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simply be inappropriate to convert a due process inquiry into an "act of state" inquiry merely because the case has foreign policy overtones, especially since these latter considerations can be fully taken into account in the due process formula.

274. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

275. *See* Swan, *supra* note 188, at 864-70.

be very limited when compared with those who otherwise would be left to suffer. In light of this uncertainty and the distance we have moved from established principles, it would seem that we have a classic case for judicial restraint. In the end, the political departments' judgment in this matter represents an "uneasy but reasonable response to most troublesome questions."[276] There can be little justification for imposing on the nation the judiciary's particular solution to the problem.

276. Epstein, *supra* note 45, at 185.