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PEOPLES DIVIDED: THE APPLICATION OF UNITED STATES CONSTITUTIONAL PROTECTIONS IN INTERNATIONAL CRIMINAL LAW ENFORCEMENT

In an age of globalization, criminal activity too has become internationalized. The response from the United States and other countries has been a growing number of treaties, international accords, and multinational law enforcement programs. This Note addresses the extent to which these international agreements have impacted the rights of the accused both in the United States and abroad.

* * *

*"This clause, sir, will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect"*¹

James Wilson, Pennsylvania Delegate
to the Constitutional Convention

INTRODUCTION

The increasing internationalization of criminal activity has brought with it a growing number of treaties, international accords, and new multinational law enforcement programs.² The Framers intended the Supremacy Clause³ to permit the United States to create treaties with foreign nations that citizens of both the United States and other countries could invoke to protect their rights.⁴ This Note will

¹ 2 JONATHAN ELLIOT'S THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 490 (James McClellan & M.E. Bradford eds., 1989) (discussing the Supremacy Clause in Article VI of the United States Constitution), cited in Thomas Michael McDonnell, *Defensively Invoking Treaties in American Courts — Jurisdictional Challenges Under the U.N. Drug Trafficking Convention by Foreign Defendants Kidnapped Abroad by U.S. Agents*, 37 WM. & MARY L. REV. 1401, 1415 n.73 (1996).

² See ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 102–07 (1993).

³ U.S. CONST. art. VI, § 1, cl. 2.

⁴ See McDonnell, *supra* note 1, at 1401 n.2 (citing THE FEDERALIST No. 80 (Alexander Hamilton)). Article VI of the United States Constitution states:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.

address the degree to which the extension of international treaties and agreements has impacted the rights of the criminally accused under the Fourth, Fifth and Sixth Amendments to the United States Constitution in the United States and abroad. This Note also will address the degree to which international agreements and international application have impacted and shaped these rights.

The rights found in the United States Constitution do not exist solely in that document. Many countries in Europe have adopted the right to silence and the right to counsel.⁵ As the international criminal enforcement community has continued to expand and converge, it has become readily apparent that numerous nations share the same or similar protections of certain rights.⁶ These agreed-upon rights have, in turn, generated international conventions, agreements, and accords.⁷

The first eight amendments to the United States Constitution form the foundation of the United States criminal justice system. That judicial system has generated a great deal of case law regarding the operation of these rights. These constitutional protections set boundaries within which the United States government operates. Two hundred years of case law in the United States has painted a clear picture of which rights individuals may invoke to protect themselves from governmental abuse.

When applied in an international context, however, the enforceability and status of these rights are far less clear. In several cases, the United States Supreme Court has held constitutionally valid certain extraterritorial actions that would be unconstitutional if they had occurred in the United States.⁸ Current case law has led to the creation of two bodies of applicable rights. One type applies to United States citizens in the United States; the other applies to everyone else. The United States cannot continue to assert its own supremacy in advocating liberty and democracy

U.S. CONST. art. VI, § 1, cl. 2.

⁵ See, e.g., Gordon Van Kessel, *European Perspectives on the Accused as a Source of Testimonial Evidence*, 100 W. VA. L. REV. 799, 841-42 (1998) (noting that, in Europe, there is "universal recognition of a right to silence and of a privilege against self-incrimination").

⁶ See M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 236 n.2 (1993).

⁷ See Universal Declaration on Human Rights, G.A. Res. 217 A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966); Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999 [hereinafter Rome Statute].

⁸ See, e.g., *United States v. Balsys*, 524 U.S. 666 (1998) (addressing the application of the Fifth Amendment right against self-incrimination when the prosecution feared is foreign rather than domestic); *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (evaluating the ability of United States law enforcement officials to kidnap a suspect from Mexico); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (dealing with the search and seizure of evidence by Drug Enforcement Agency agents in Mexico).

and, yet, still permit two classes of rights for two classes of people.

The number of cases dealing with transnational individual rights will continue to rise as criminal activity occurring across national borders increases. The rise in transnational crime has led — and will continue to lead — to increased cooperation between nations, as well as the creation and expansion of entities within the law enforcement community charged solely with dealing with international crime.⁹ These cases will continually bring into question the constitutional protections of the United States' Bill of Rights and how those protections apply domestically and internationally. The need for swift responses to international requests for evidence will continue to conflict with the right of the individual to challenge such evidence collection based upon his constitutionally guaranteed rights.

The events of September 11, 2001, have served as a reminder of the importance of international cooperation among law enforcement entities from numerous countries. Whereas the trafficking of narcotics had previously led to strong ties between United States' law enforcement bodies and those of other countries, the new threat of international terrorism has exposed the need for continued cooperation between the United States and its fellow nations. This new level of cooperation and heightened need for rapid evidence production cannot, however, come at the cost of abridging the rights inherent in the United States criminal justice system.

This Note focuses on the circumstances under which the United States constitutional safeguards come into play both domestically and internationally in connection with evidence collection. Part I of this Note deals with the international treaties and agreements currently used by the United States in international criminal law enforcement. Part II focuses on the International Criminal Court and its place in the international law enforcement arena. Parts III–V examine the Fourth, Fifth and Sixth Amendments in their international contexts. Part VI examines possible justifications for the divergent constitutional rights enjoyed by United States citizens and non-United States citizens. Part VII looks to the future and examines the potential solutions to the current problems present in international criminal law.

I. INTERNATIONAL TREATIES

Article VI of the United States Constitution states:

This Constitution, and the Laws of the United States which shall be

⁹ In the United States, the Office of International Affairs was created in the Criminal Division of the Department of Justice to deal with all incoming and outgoing requests for evidence and all extradition treaty matters. In addition, it handles the searches for international fugitives such as Mark Rich and Ira Einhorn. Dep't of Justice, Office of International Affairs, at <http://www.usdoj.gov/criminal/oia.html> (last updated Jan. 16, 2002).

made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.¹⁰

The Framers intended this clause to permit persons to invoke the rights embodied in the treaties of the United States for their protection.¹¹ The United States participates in two main types of international treaties for the purpose of combating international crime. The first and most prevalent type is the Mutual Legal Assistance Treaty ("MLAT").¹² In a bilateral treaty, such as the MLAT, the United States implements the treaty between itself and one other country. The second type is the multilateral treaty. These treaties exist among the United States and numerous other countries simultaneously.

A. The Mutual Legal Assistance Treaty

The past three decades have seen an increasing number of United States treaties dealing with international law enforcement.¹³ The United States predominantly utilizes the Mutual Legal Assistance Treaty in its fight against international crime.¹⁴ The MLATs exist for the purpose of evidence collection in foreign jurisdictions.¹⁵ These treaties have become a vital tool in the past two decades as criminal enterprises have crossed numerous national borders in the commission of crimes. The use of the MLAT has expanded since the United States and Switzerland signed the first MLAT in 1973, to include over forty treaties entered into force.¹⁶ The MLAT provides the United States with a system by which evidence required for domestic prosecution, but present in a foreign country, may be obtained by a United States prosecutor.

Each MLAT provides that all requests for evidence between the two signatory

¹⁰ U.S. CONST. art. VI, § 1, cl. 2.

¹¹ See McDonnell, *supra* note 1, at 1401 n.2 (citing THE FEDERALIST No. 80 (Alexander Hamilton)).

¹² See NADELMANN, *supra* note 2, at 102-07.

¹³ In 2001 and 2002 alone, eleven MLATs entered into force between the United States and a host of other countries, including treaties with China, France, Russia, and South Africa. See U.S. Dep't of State, Treaty Actions — October 1, 2002 Update, at <http://www.state.gov/s/l/13897.htm>.

¹⁴ See U.S. Dep't of State, Mutual Legal Assistance in Criminal Matters Treaties (MLATs) and Other Agreements, available at <http://www.travel.state.gov/mlat.html> (last visited Mar. 20, 2003) [hereinafter MLATs and Other Agreements]. This number does not include the numerous treaties still in negotiation and those that have not yet entered into force.

¹⁵ *Id.*

¹⁶ *Id.*

countries are channeled through the central authorities of each country.¹⁷ The designated Central Authority in the United States is the Attorney General or his designated officials.¹⁸ The Office of International Affairs within the Criminal Division of the United States Department of Justice operates as the "Central Authority" for the United States.¹⁹ The ability to utilize the MLAT system is available solely to the prosecuting authority of each country; it is not available to individual citizens.²⁰

For those countries with whom the United States has not established an MLAT or where an MLAT has not entered into force, the letter rogatory process provides the means for evidence exchange.²¹ It is the method by which defendants can obtain evidence for their defense.²² Both letter rogatory requests and MLAT requests for

¹⁷ See, e.g., Agreement on Mutual Legal Assistance in Criminal Matters, June 19, 2000, U.S.-P.R.C., STATE DEP'T DOC. NO. 01-44 (2001) [hereinafter P.R.C. MLAT].

¹⁸ See, e.g., Treaty on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1985, U.S.-Can., art. I, S. TREATY DOC. NO. 100-14 (1988) [hereinafter Canadian MLAT].

¹⁹ See U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 276 (1997).

²⁰ *United Kingdom v. United States*, 238 F.3d 1312, 1317 (11th Cir. 2001), *cert. denied*, *Raji v. United States*, 534 U.S. 891 (2001). The 11th Circuit upheld a district court denial of a request for evidence from the United States by British defendants charged with crimes in the United Kingdom. Due to the fact that the defendants were not party to the United States-United Kingdom MLAT, nor did its creators intend for defendants to use the MLAT for the acquiring of evidence, the circuit court upheld the determination that the defendants did not have the right to make the request. In *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987), the U.S. Supreme Court rejected the appellants' assertion that the Hague Convention on the Taking of Evidence Abroad in Civil Matters constituted the exclusive and mandatory method by which to obtain documents and information located in a foreign country. *Id.*, cited in James I.K. Knapp, *Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy*, 20 CASE W. RES. J. INT'L L. 405, 426 (1988).

²¹ "Before the advent of tax treaties, MLATs, TIEAs, and other types of mutual assistance agreements, law enforcement authorities (just as private litigants) primarily relied upon deposition by stipulation, deposition by notice, deposition by commission, and letters rogatory . . ." TAX DIV., U.S. DEP'T OF JUSTICE, CRIMINAL TAX MANUAL § 41.05[1] (1994) [hereinafter CRIMINAL TAX MANUAL]. Additionally, the letter rogatory process is the only means by which defendants can acquire evidence abroad. See MLATs and Other Agreements, *supra* note 14 ("Generally, the remedies offered by the treaties are only available to the prosecutors. The defense must usually proceed with the methods of obtaining evidence in criminal matters under the laws of the host country which usually involve letters rogatory."). There are problems with the letter rogatory process that the MLATs have attempted to solve, one of which is that there is no obligation to honor the request. See CRIMINAL TAX MANUAL, *supra*, § 41.05[5]. Bank secrecy laws may prevent the attainment of bank records. *Id.* There is no mutually agreed upon procedure for obtaining evidence in a form admissible in U.S. courts. *Id.* Finally, the process is long and delays may hinder criminal prosecutions. *Id.*

²² See CRIMINAL TAX MANUAL, *supra* note 21, § 41.05[3].

assistance from foreign countries are executed according to the guidelines set forth in 28 U.S.C. §§ 1781–1783. Section 1782 provides that a United States federal district court may require the execution of foreign or international tribunal requests for testimony if the execution of the request does not violate any legally applicable privilege.²³ Section 1783 permits a federal district court to issue a subpoena for persons to appear either before it, or before a designated body, and give testimony that will be admissible in a U.S. court.²⁴ Service of the subpoena and testimony must be done in accordance with U.S. civil procedure rules.²⁵ The rules and laws of the Requested State are examined when deciding whether to grant the request.²⁶ Provided that the request does not violate the laws of the Requested State, the state must execute the request.²⁷

The negotiation process for the MLATs tends to be long and complicated.²⁸ Ensuring that the foreign country collects the evidence requested in a manner in accordance with United States constitutional constraints presents a significant hurdle for U.S. and foreign negotiators. The rights and duties present in the Bill of Rights strictly circumscribe the admissibility of evidence in United States courts. Regardless of the nature of the evidence, the collection of that evidence may not abridge the constitutional rights granted to the accused; failure to do so would violate the protections of the U.S. Constitution, thereby making the evidence inadmissible.²⁹ The need to gather evidence must be balanced against protecting the rights of the accused.³⁰ This balance is the responsibility of U.S. authorities acting at the behest of foreign authorities as well as foreign authorities assisting the United States. Despite this need, the United States Supreme Court has held that the

²³ 28 U.S.C. § 1782 (1994).

²⁴ *Id.* § 1783(a).

²⁵ *Id.* § 1783(b).

²⁶ See Canadian MLAT, *supra* note 18, art. II. The “Requesting State” is that State which makes the MLAT request, whereas the “Requested State” is that State which will execute the MLAT.

²⁷ 28 U.S.C. § 1782 (1994); see also Canadian MLAT, *supra* note 18, art. II.

²⁸ For a discussion of the history of the negotiations and ratification of the U.S.-Mexico MLAT, see Bruce Zagaris & Jessica Resnick, *The Mexico-U.S. Mutual Legal Assistance in Criminal Matters Treaty: Another Step Toward the Harmonization of International Law Enforcement*, 14 ARIZ. J. INT’L & COMP. L. 1, 18–20 (1997); see also NADELMANN, *supra* note 2.

²⁹ See 28 U.S.C. § 1782 (1994).

³⁰ The creation of the MLATs has led to increased sharing of technology as well as joint international crime fighting efforts by the United States. Of this, Diane Marie Amann wrote: “The insistence on uniform laws has led to the abolition of bank secrecy, not long ago considered an aspect of personal privacy. Fears of further governmental encroachment into individual privacy are at the heart of the current encryption debate.” Diane Marie Amann, *The Rights of the Accused in a Global Enforcement Arena*, 6 ILSA J. INT’L & COMP. L. 555, 557 (2000).

constitutional restraints placed on domestic law enforcement officials do not limit foreign law enforcement officials or even United States officials operating outside United States boundaries.³¹

1. The United States — Canada Mutual Legal Assistance Treaty

The United States signed the first MLAT treaty with Switzerland in 1973.³² Though numerous conflicts between United States and Swiss law arose during the negotiations, U.S. negotiators were successful in securing certain concessions by the Swiss authorities.³³ Despite its distinctiveness as the first MLAT signed by the United States, the U.S.-Swiss MLAT has several unique aspects dealing with bank secrecy.³⁴ Conversely, the U.S.-Canada MLAT embodies the characteristics present in many MLATs. As such, the U.S.-Canada MLAT will be analyzed below as an example of a typical U.S. MLAT.

The U.S.-Canada treaty states as its purpose: “[The desire] to improve the effectiveness of both countries in the investigation, prosecution and suppression of crime through cooperation and mutual assistance”³⁵ The treaty specifies the means of assistance that the requested country may provide to the requesting country.³⁶ These means include the taking of evidence from persons and the execution of searches and seizures.³⁷ The treaty also limits the power of the requested authorities to restrict execution of the requests.³⁸ The United States-Canada MLAT requires that “request[s] shall be executed in accordance with the law of the Requested State and, to the extent not prohibited by the law of the Requested State, in accordance with the directions stated in the request.”³⁹ The

³¹ See *supra* note 8.

³² Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., 27 U.S.T. 2019.

³³ See NADELMANN, *supra* note 2, at 332–33. Concessions made by the Swiss authorities included the process by which documents would be authenticated and testimony would be taken under oath. Additionally, the treaty included the constitutional protections against self-incrimination. The purpose of the concessions was to create a sense that the actions taken in Switzerland, by Swiss officials, were analogous to those that U.S. officials would take if the investigation had taken place in the U.S., particularly since the actions were instigated at the behest of U.S. prosecutors.

³⁴ See Knapp, *supra* note 20, at 415–16, 419–20.

³⁵ Canadian MLAT, *supra* note 18, pmbl.

³⁶ See *id.* art. II., para. 2.

³⁷ See *id.* art. II.

³⁸ See *id.* art. V., para. 1 (“The Requested State may deny assistance to the extent that a) the request is not made in conformity with the provisions of this Treaty; or b) execution of the request is contrary to its public interest, as determined by its Central Authority.”).

³⁹ *Id.* art. VII, para. 2.

treaty also provides that "[t]he competent authority that has executed a request for search and seizure shall provide such certifications as may be required by the Requesting State concerning, but not limited to, the circumstances of the seizure, identity of the item seized and integrity of its condition, and continuity of possession thereof."⁴⁰ Canadian authorities can thereby certify that they have conducted a search in a manner in accordance with U.S. law. This will allow the evidence to be entered in a United States court at trial.

2. Potential Problems in the Mutual Legal Assistance System

The greatest issue of potential abridgement of constitutional rights comes under the Fourth Amendment guarantee against illegal searches and seizures.⁴¹ In order to introduce evidence in U.S. courts, acquisition of the evidence must adhere to the rules and constraints embodied in the United States Bill of Rights. The U.S.-Canada MLAT provides that "[a] request for search and seizure shall be executed in accordance with the requirements of the law of the Requested State."⁴² Furthermore, "[n]o item seized shall be provided to the Requesting State until that State has agreed to such terms and conditions as may be required by the Requested State to protect third party interests in the item to be transferred."⁴³ These restraints are ambiguous in that they fail to provide an adequate explanation of the protections. American law enforcement authorities must hope that foreign authorities abide by U.S. constitutional restraints with which the foreign authorities are often unfamiliar in order to ensure the admissibility of the evidence in U.S. courts. Conversely, American officials are duty-bound to abide by the restraints placed upon evidence collection by foreign laws and constitutions, and by the United States Constitution.⁴⁴ In both instances, U.S. and foreign officials often are relatively unfamiliar with each other's restraints.

The dependence on foreign actors to abide by the proper laws and constraints creates the possibility of infringement on the personal liberties and rights of the accused. Whereas the United States Constitution protects the rights and privileges of U.S. citizens, other countries' citizens do not necessarily enjoy the same rights

⁴⁰ *Id.* art. XVI, para. 2.

⁴¹ See *infra* note 82 and accompanying text (discussing MLAT search and seizure provisions).

⁴² Canadian MLAT, *supra* note 18, art. XVI, para. 1.

⁴³ *Id.* art. XVI, para. 4.

⁴⁴ See *id.* art. XII, para. 1 ("A person requested to testify and produce documents, records or other articles in the Requested State may be compelled by subpoena or order to appear and testify and produce such documents, records and other articles, in accordance with the requirements of the law of the Requested State."). If the request is to be executed in the United States, the Constitution binds the executing officials to abide by the protections and rights guaranteed therein.

or protections.⁴⁵ To address this dilemma, some treaties have restrictions that exceed those within the U.S. Constitution, such as the requirement of dual criminality.⁴⁶

One problem posed by the use of MLATs arises when a defendant seeks to prevent the United States from retrieving evidence from another country. If a defendant and his attorneys seek to prevent the execution of a search warrant or the taking of a deposition, they may do so by appealing to the branch of the foreign government charged with the execution of MLAT requests, thereby avoiding that country's judicial system.⁴⁷ For the U.S. government, many MLATs include a compulsory process provision that requires the execution of any MLAT request.⁴⁸ In the United States, 28 U.S.C. § 1782 incorporates the process for MLAT requests into the United States Code.⁴⁹ Within the requested country, a defendant may be forced to secure counsel in order to oppose the execution of the request.

A similar problem exists for those defendants needing evidence for their defense against U.S. prosecution. Persons desiring evidence located in another country (either an American defendant requiring evidence from a foreign country, or a defendant in another country requiring evidence existing in the United States) must resort to the time-consuming letters rogatory process.⁵⁰ Without the ability to obtain evidence, the defendant may not be able to present a full defense.

The MLATs are designed for the purpose of exchanging evidence through the use of central authorities.⁵¹ Absent from the treaties is any provision for private parties, criminal defendants, and their legal counsel to request evidence, records, or aid from the foreign Central Authority.⁵² On the other hand, the majority of

⁴⁵ See Van Kessel, *supra* note 5, at 810 (noting that, in continental Europe, there is no general belief in the necessity of counsel during initial questioning of suspects by police).

⁴⁶ See Amann, *supra* note 30, at 561. Dual criminality, or double criminality, is the requirement that the crime be a chargeable offense in both the country seeking assistance and the country providing that assistance. In extradition treaties, some countries refuse to hand over their own nationals for foreign prosecution. Also, many countries will not extradite persons facing the death penalty to the United States. This was the case in the extradition battle over Ira Einhorn. See, e.g., Jonathan O. Hafen, Comment, *International Extradition: Issues Arising Under the Dual Criminality Requirement*, 1992 BYU L. REV. 191.

⁴⁷ Bruce Zagaris, *U.S. International Cooperation Against Transnational Organized Crime*, 44 WAYNE L. REV. 1401, 1448 (1998).

⁴⁸ *Id.*

⁴⁹ 28 U.S.C. § 1782(a) (1994). "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." *Id.*

⁵⁰ See *supra* note 20 (discussing *United Kingdom v. United States*, 238 F.3d 1312 (11th Cir. 2001)).

⁵¹ See *supra* notes 17–19 and accompanying text.

⁵² *United Kingdom*, 238 F.3d at 1317.

MLATs provide recourse to defendants facing foreign prosecution within the requested country to obtain evidence in that country.⁵³ Such provisions permit the subject of foreign prosecution to challenge the execution of the treaty request based upon the rights and protections guaranteed in the requested country.⁵⁴ For example, the Fourth Amendment would provide protection from illegal search and seizure in the United States to a person facing prosecution in China, in situations where Chinese officials made an MLAT request to the United States.⁵⁵ The execution of a search and seizure in the United States must abide by U.S. constitutional protections.⁵⁶ In defending against the request or attempting to prevent its execution, a person whose records have been subpoenaed pursuant to a treaty request may seek to prevent the production of those records or their transmission to the requesting country by asserting those rights available under the laws of the requested country.⁵⁷ A defendant, or even someone whose records have been requested, may seek to prevent execution of requests that are not authorized under the treaty.⁵⁸ Most MLATs provide U.S. courts with the ability to execute warrants pursuant to needs in prosecutions.⁵⁹

The problems inherent in the treaty formation have led to a skewing of defendants' rights that can only be solved through reformation, so as to ensure that the person whose papers and other effects are the subject of a treaty request retains the same basic privileges outside U.S. boundaries as he possesses within those boundaries. The future of the MLAT and the cooperation entailed in the terms of the different MLAT treaties will become the subject of increased debate in light of the potential test Justice Souter constructed in *United States v. Balsys*.⁶⁰

The Mutual Legal Assistance Treaties have afforded the United States and its treaty partners a method by which to obtain evidence scattered across the globe quickly and efficiently. Although problems with the MLATs do exist, they give the United States and its treaty partners a strong weapon that can be used to fight international crime.⁶¹

⁵³ Zagaris, *supra* note 47, at 1448–49.

⁵⁴ *Id.*

⁵⁵ See P.R.C. MLAT, *supra* note 17, art. III.

⁵⁶ Zagaris, *supra* note 47, at 1448–49.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See 28 U.S.C. § 1782 (1994).

⁶⁰ 524 U.S. 666 (1998). See *infra* text accompanying note 216 (discussing the test set forth by Justice Souter).

⁶¹ For an examination and explanation of the process by which an MLAT is formed, see NADELMANN, *supra* note 2, and Zagaris & Resnick, *supra* note 28.

B. Multilateral Treaties

Multilateral treaties are those treaties joined by numerous nations collectively.⁶² These treaties have become commonplace in recent years. For instance, in response to the bombings of the World Trade Center and the Pentagon, the United Nations convened for the purpose of drafting a multilateral treaty on terrorism in November 2001.⁶³ The Rome Statute, the basis for the International Criminal Court, is another example of a multilateral treaty,⁶⁴ as is the International Covenant on Civil and Political Rights.⁶⁵ At present, 530 multilateral treaties are on record at the United Nations.⁶⁶

C. Conclusion

The efforts catalogued above form the basis of U.S. attempts to combat international crime. The United States has led the way internationally in organizing and creating a network of treaties that aid in the combating of international crime.⁶⁷ In their attempts to create this world crime-fighting network, U.S. authorities,

⁶² See TREATY SECTION, UNITED NATIONS, *Glossary*, in TREATY HANDBOOK, at <http://untreaty.un.org/english/treatyhandbook/hbframeset.htm> (last visited Mar. 22, 2003).

⁶³ See Treaty Section, United Nations, Treaty Event — Multilateral Treaties on Terrorism, at <http://untreaty.un.org/english/teventen.asp> (last visited Mar. 22, 2003).

⁶⁴ The implications of this multilateral treaty are addressed later in the paper. See *infra* Part II.

⁶⁵ Sometimes referred to as the International Bill of Rights, the Covenant details “rights to personal liberty, dignity, and privacy.” Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 825 (2000). Addressing the topic of the constitutional rights in an international context, Amann wrote:

Its fair trial rights were most extensive, providing for, inter alia: an equal, fair, public, and speedy trial before a competent tribunal; a presumption of innocence; the rights to be informed of the charges, to have assistance of an interpreter, and to have adequate time and resources to prepare a defense; the assistance of counsel, including appointment of state-paid counsel if necessary; the rights to cross-examine adverse witnesses and to secure favorable witnesses; the right to silence; the right to an appeal; compensation for unjust convictions; and the right against double jeopardy.

Id.

⁶⁶ UNITED NATIONS, *Introduction*, in MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/introduction.asp> (last updated Apr. 25, 2003).

⁶⁷ NADELMANN, *supra* note 2, at 315 (noting that those efforts were “inspired originally by the United States but increasingly involv[e] multinational initiatives . . . to better immobilize transnational criminals by obtaining the evidence required not just to indict and convict them in courts of law but also to freeze, seize, and forfeit their assets”).

particularly those charged with negotiating and implementing these international agreements, must not lose sight of the values embodied in the constitutional guarantees found in the Fourth, Fifth and Sixth Amendments to the United States Constitution. A two-tiered system of citizens' rights has already begun to emerge. The first tier encompasses U.S. citizens who, by either birth or residency, are guaranteed the rights protected by the United States Constitution. The second tier encompasses all others, who lack the same rights.

II. INTERNATIONAL CRIMINAL COURT

In 1998, 120 countries endorsed a treaty in Rome that established the International Criminal Court ("ICC").⁶⁸ The ICC is now in existence, having been ratified by sixty countries.⁶⁹ This court focuses on war crimes and crimes against humanity.⁷⁰ The Rome Statute, the codified basis for the ICC, seeks to secure extensive rights for the accused before, during, and after trials.⁷¹ Although the typical U.S. MLAT covers searches and seizures, it does so in an abbreviated and ambiguous manner.⁷² Conversely, the Rome Statute and the Draft Rules of Procedure do not protect individuals to even this limited degree.⁷³ The necessary safeguards for protection of individual rights against illegal and unwarranted searches and seizures are absent from the Rome Statute.⁷⁴

As one of last acts of the Clinton Administration, the United States signed the agreement creating the ICC despite opposition from Congress.⁷⁵ The Bush Administration strongly opposed the ratification; the United States did not ratify the treaty itself and even boycotted the ratification ceremony at the U.N. on April 11,

⁶⁸ See Amann, *supra* note 65, at 844.

⁶⁹ See Colum Lynch, *War Crimes Court Created Over Fierce U.S. Objection*, WASH. POST, Apr. 12, 2002, at A20.

⁷⁰ *Id.*

⁷¹ See Rome Statute, *supra* note 7.

⁷² See *supra* notes 36–40 and accompanying text (discussing general restrictions included in the Canadian MLAT).

⁷³ George E. Edwards, *International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy*, 26 YALE J. INT'L L. 323, 356 (2001). Edwards explained that Part IX of the Rome Statute mimics the MLATs and attempts to replicate the highlights of the MLAT as well as other agreements. The problem that he pointed to, however, is that even the MLATs only modestly cover the protections against search and seizure, and "some of that coverage is not expressly incorporated into the Rome Statute and Draft Rules of Procedure. Thus, like the typical MLAT, neither Part IX of the Rome Statute nor the corresponding section of the Draft Rules of Procedure appears to offer adequate safeguards against privacy invasions." *Id.*

⁷⁴ *Id.*

⁷⁵ See Lynch, *supra* note 69.

2002.⁷⁶ Because of the United States' position in the world as one of the leading advocates of democracy and human rights, affirmation by the President of the United States would lend credence to the values embodied in this treaty. If the United States had joined this treaty or similar treaties, however, it would have needed to take steps to ensure that the same rights enjoyed by U.S. residents are provided to the world citizenry.⁷⁷ If steps were not taken to protect these rights, values held in high regard in the United States, including equality and fairness, would be diminished significantly. The President and Congress should never interpret the Constitution in a way that permits the United States government to participate in international law enforcement efforts absent any constitutional restraints solely because those acts occur extraterritorially.

III. FOURTH AMENDMENT

The Fourth Amendment of the United States Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . . but upon probable cause"⁷⁸ The amendment protects persons from illegal invasion of their privacy by law enforcement officers of the United States or other governmental authorities.⁷⁹ The drafters of the MLATs have included this type of Fourth Amendment protection within the treaties, albeit ambiguously.⁸⁰ The foreign officials conducting the searches and seizures are not always aware of U.S. constitutional safeguards, and thus, provisions have been included in the MLAT for certification of the methods of the search and seizure.⁸¹

Some foreign investigations initiated for the benefit of domestic United States law enforcement may result in infringements on individuals' Fourth Amendment rights. The restraints on evidence collection should bind foreign evidence collection just as they bind U.S. evidence collection. Search and seizure can be the most readily abused of the rights of the accused in the international context, as it is

⁷⁶ *Id.*

⁷⁷ Audrey Benison asked: "[T]he Supreme Court has confirmed the general view that the treaty power may not be used to contradict any affirmative prohibition of the Constitution. . . . But does that same prohibition extend to actors outside of the U.S. government?" Audrey I. Benison, *International Criminal Tribunals: Is There a Substantive Limitation on the Treaty Power?*, 37 STAN. J. INT'L L. 75, 76 (2001). Without such an application of affirmative constitutional prohibitions to international tribunals, not only will foreign citizens be open to abuses that would be prohibited in the United States, U.S. citizens could face violations of their constitutional rights before such tribunals. *Id.*

⁷⁸ U.S. CONST. amend. IV.

⁷⁹ See *Katz v. United States*, 389 U.S. 347, 349–50 (1967).

⁸⁰ See Canadian MLAT, *supra* note 18, art. XVI.

⁸¹ See *id.*, art. XVI, para. 1.

the most frequently provided and utilized MLAT provision.⁸² The Supreme Court, however, has declined to hold that the United States Constitution extends beyond the U.S. territorial borders. The Court repeatedly has expressed the view that when the United States engages in extraterritorial activities, it does so free from the constraints of the United States Constitution or of international law.⁸³

A. The Ker-Frisbie Doctrine

The *Ker-Frisbie* Doctrine is a unique aspect of U.S. law dealing with constitutional rights in an international context. Two cases decided by the United States Supreme Court form the basis for this doctrine: *Ker v. Illinois*⁸⁴ and *Frisbie v. Collins*.⁸⁵ The doctrine holds that abduction from another country⁸⁶ or from another state⁸⁷ does not violate the Due Process Clause of the U.S. Constitution.

⁸² Article II, paragraph 2 of the Canadian MLAT states: "Assistance shall include: a) examining objects and sites; b) exchanging information and objects; c) locating or identifying persons; d) serving documents; e) taking the evidence of persons; f) providing documents and records; g) transferring persons in custody; h) executing requests for searches and seizures." Of these eight types of assistance, three — items a, b and h — all deal with search and seizure of places and items, with Item h stating this explicitly.

⁸³ See Eric Bentley, Jr., *Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After Verdugo-Urquidez*, 27 VAND. J. TRANSNAT'L L. 329, 332 n.5 (1994). In support of this proposition, Bentley cited *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (refusing to extend reach of statute and human rights covenant, which dealt with refugees, beyond domestic territorial waters), and *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (restricting the extraterritorial reach of domestic statutes). Bentley, *supra*, at 332 n.5. Bentley also cited *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), both of which are discussed *infra*. See Bentley, *supra*, at 332 n.5; *infra* Parts III.B, III.D.

⁸⁴ 119 U.S. 436 (1886).

⁸⁵ 342 U.S. 519 (1952).

⁸⁶ In *Ker v. Illinois*, 119 U.S. 436 (1886), the Supreme Court held that an Illinois court properly exercised jurisdiction over Ker, despite the fact that Ker was kidnapped by a U.S. official and returned to the United States against his will and without approval of the Peruvian government. The Court found that, due to the manner in which he was returned to the U.S., Ker arrived "clothed with no rights which a proceeding under the treaty could have given him." *Id.* at 443. The Court held that Ker had claimed the breach of a right that he did not possess, because he had no rights upon return to the U.S. *Id.* The Court also held that although Ker had no recourse against the state of Illinois or the United States, both Ker and Peru had legitimate claims against Julian, the U.S. official who kidnapped Ker. *Id.* at 444.

⁸⁷ Sixty-six years later, the Supreme Court, in *Frisbie v. Collins*, 342 U.S. 519 (1952), held that forcible abduction from one state to another did not negate the validity of the conviction and sentence in the latter state as a violation of due process. Collins lived in Chicago when officers from Michigan arrested him and took him to Michigan. The Court determined that the Constitution does not require a court to permit a guilty person, rightfully convicted, to go free due to his being brought to trial against his will. *Id.* at 523.

Reaffirming the Court's holding in *Ker*, the Court in *Frisbie* stated that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'"⁸⁸ In spite of the arguments of foreign governments and international organizations that it is improper to exercise jurisdiction over a defendant whose presence in the courts is the result of abduction from another country,⁸⁹ the United States Supreme Court reaffirmed *Frisbie* in *United States v. Alvarez-Machain*.⁹⁰

B. United States v. Verdugo-Urquidez

The Supreme Court has not bolstered safeguards for foreign search and seizure but, instead, has made such searches and seizures easier to execute. In *United States v. Verdugo-Urquidez*,⁹¹ the Court addressed the constitutionality of evidence obtained in a search of the Mexican home of a Mexican citizen by Drug Enforcement Agency agents operating in Mexico.⁹² The Court split as to the extent that the Constitution protects suspects who are being investigated, apprehended, or searched outside the borders of the United States.⁹³ In holding the search and seizure permissible, Chief Justice Rehnquist, writing for the majority, stated: "There is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters."⁹⁴ While encouraging foreign nations to support democracy and to grant the civil liberties enjoyed by American citizens, that statement by the Court indicates that it will not recognize those same civil liberties when the United States acts against foreign nationals in

⁸⁸ *Frisbie*, 342 U.S. at 522.

⁸⁹ Zagaris, *supra* note 47, at 1435 & nn.191-93.

⁹⁰ 504 U.S. 655 (1992). The Second Circuit strongly criticized the *Ker-Frisbie* doctrine in *United States v. Toscanino*, 560 F.2d 267 (2d Cir. 1974). The *Toscanino* decision, however, has been all but eviscerated in the wake of *Alvarez-Machain*. See *United States v. Matta-Ballesteros*, 71 F.3d 754, 763 (9th Cir. 1995); *Kennon v. Hill*, 44 F.3d 904, 906 n.1 (10th Cir. 1995).

⁹¹ 494 U.S. 259 (1990).

⁹² *Id.* at 262.

⁹³ See generally *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

⁹⁴ *Id.* at 267. Justice Kennedy noted in his concurring opinion:

In cases involving the extraterritorial application of the Constitution, we have taken care to state whether the person claiming its protection is a citizen. The distinction between citizens and aliens follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory.

Id. at 275 (Kennedy, J., concurring) (citations omitted).

their own countries.⁹⁵ Justice Brennan, writing for the dissent, noted this contradiction when he stated that: "Today the Court holds that although foreign nationals must abide by our laws even when in their own countries, our Government need not abide by the Fourth Amendment when it investigates them for violations of our laws."⁹⁶

The cases relied upon by the majority as examples of the Framers' intent occurred during the "undeclared war" with France,⁹⁷ a unique episode that should not be used to justify actions like those present in this case. In addition to the case dealing with France, the Court also cited cases in which it held that constitutional provisions did not apply outside of the confines of the United States.⁹⁸ The Court cited *Dorr v. United States*,⁹⁹ in which it determined that in the U.S. territory of the Philippines, Congress was not mandated to afford the residents a trial by jury.¹⁰⁰ In fact, the Court noted that constitutional guarantees did not apply to a U.S. territory — such as the Philippines — unless Congress has so mandated through law.¹⁰¹ The Court expressly stated that "[o]nly 'fundamental' constitutional rights are guaranteed to inhabitants of those territories."¹⁰²

In light of its examination of *Dorr* and the other *Insular Cases*,¹⁰³ the Court

⁹⁵ *Id.*

⁹⁶ *Id.* at 279 (Brennan, J., dissenting).

⁹⁷ *Id.* at 289 n.10 (Brennan, J., dissenting). The majority wrote:

Only seven years after the ratification of the Amendment, French interference with American commercial vessels engaged in neutral trade triggered what came to be known as the "undeclared war" with France. In an Act to "protect the Commerce of the United States" in 1798, Congress authorized President Adams to "instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas."

Id. at 267 (quoting Act of July 9, 1798, § 1, 1 Stat. 578, 578).

⁹⁸ *Id.* at 268–69.

⁹⁹ 195 U.S. 138 (1904), cited in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268–69 (1990).

¹⁰⁰ The *Dorr* Court cited *Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1, 44 (1890), for the general proposition:

Doubtless Congress in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions.

Dorr, 195 U.S. at 146 (quoting *Church of Jesus Christ of Latter Day Saints*, 136 U.S. at 44).

¹⁰¹ *Verdugo-Urquidez*, 494 U.S. at 268.

¹⁰² *Id.* In *Dorr*, the Court indicated that neither trial by jury nor presentment to a grand jury were fundamental rights. *Dorr*, 195 U.S. at 145.

¹⁰³ In the *Insular Cases*, the Court held "that not every constitutional provision applies to governmental activity even where the United States has sovereign power." *Verdugo-*

determined that it could not advocate a position that meant applying every constitutional provision in every territory where the United States exercised power.¹⁰⁴ In a five to four decision, the Court held that the Fourth Amendment's prohibitions did not apply in *Verdugo-Urquidez*.¹⁰⁵ The Court made this decision despite acknowledging the lack of a search warrant and the fact that the only accession to the search came from the Director General of the Mexican Federal Judicial Police, not from an independent judicial authority.¹⁰⁶ Had this chain of events occurred in the United States, the warrant and search likely would have been excluded from the evidence as violations of the Fourth Amendment.¹⁰⁷ The Court, however, held that "restrictions on searches and seizures which occur incident to . . . American action [abroad] . . . must be imposed by the political branches through diplomatic understanding, treaty, or legislation."¹⁰⁸ If the political branches do not enact such limits, little or no restraint will be placed on searches and seizures conducted abroad.

Verdugo-Urquidez serves as an example of the type of constitutional case that has helped create two classes of people in the United States in terms of rights: citizens and non-citizens. Under the current laws, the former group receives full protection of U.S. constitutional restraints while the latter group must abide by the laws of the United States but cannot be protected from overzealous law enforcement. Justice Brennan's dissent in *Verdugo-Urquidez* pointed out this paradox:

The Fourth Amendment guarantees the right of "the people" to be free from unreasonable searches and seizures and provides that a warrant shall issue only upon presentation of an oath or affirmation demonstrating probable cause and particularly describing the place to be searched and the persons or things to be seized. According to the majority, the term "the people" refers to "a class of persons who are part

Urquidez, 494 U.S. at 268. The *Insular Cases* cited in *Verdugo-Urquidez* include: *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (holding that the Sixth Amendment right to jury trial did not apply in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91 (1914) (holding that the right to a grand jury did not apply in the Philippines); *Dorr v. United States*, 195 U.S. 138 (1904) (holding that the right to a jury trial did not apply in the Philippines); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (holding that certain rights in the Fifth and Sixth Amendments did not apply in territorial Hawaii); *Downes v. Bidwell*, 182 U.S. 244 (1901) (holding that the Revenue Clauses of Constitution did not apply to Puerto Rico).

¹⁰⁴ *Verdugo-Urquidez*, 494 U.S. at 269.

¹⁰⁵ *Id.* at 275.

¹⁰⁶ *Id.* at 262-63.

¹⁰⁷ See *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971) (holding invalid a warrant issued by the chief law enforcement officer of the state, the Attorney General).

¹⁰⁸ *Verdugo-Urquidez*, 494 U.S. at 275.

of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”¹⁰⁹

Justice Brennan noted that the majority had admitted that “the people” extended beyond United States citizens, but that the majority had been unclear as to where the exact boundary stopped.¹¹⁰

C. United States v. Alvarez-Machain

In *United States v. Alvarez-Machain*,¹¹¹ the Supreme Court reinforced the values embodied in *Verdugo-Urquidez* and the *Ker-Frisbie* Doctrine. In *Alvarez-Machain*, U.S. officials operating in Mexico kidnapped the defendant and brought him to the United States for prosecution.¹¹² The Court denied the defendant’s claims that the kidnapping in Mexico violated the United States-Mexico Extradition Treaty and the U.S. Constitution.¹¹³ Determining that the treaty did not prohibit the abduction in Mexico, the Court upheld the defendant’s arrest and conviction.¹¹⁴ The Court reasoned that “[t]he Treaty [said] nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs.”¹¹⁵ The Court found no provision against abduction, stating that “Article 9 does not purport to specify the only way in which one country may gain custody of a national of the other country for the purposes of prosecution.”¹¹⁶

The Court reasoned that the Mexican government had been on notice as early as 1906 that the *Ker-Frisbie* Doctrine existed.¹¹⁷ The history of the negotiations and actions under the treaty did not indicate that abduction constituted a violation.¹¹⁸ The Court also found that the current version of the United States-Mexico Extradition Treaty, signed in 1978, made no mention of or attempted to institute a rule against abduction by one country of another’s citizens.¹¹⁹ The Court took into consideration the fact that legal scholars at Harvard had discussed the same right the defendant now sought — the right against abduction by a foreign country.¹²⁰ Its

¹⁰⁹ *Id.* at 282 (Brennan, J., dissenting) (quoting *id.* at 265).

¹¹⁰ *Id.*

¹¹¹ 504 U.S. 655 (1992).

¹¹² *Id.* at 657.

¹¹³ *Id.* at 669–70.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 663.

¹¹⁶ *Id.* at 664.

¹¹⁷ See *Alvarez-Machain*, 504 U.S. at 665–66.

¹¹⁸ See *id.* at 665–66.

¹¹⁹ See *id.* at 666.

¹²⁰ See *id.* at 665–66.

absence from the treaty, however, offered further support for the Court's ruling by providing evidence that the Mexican government knew, or should have known, that no such prohibition existed in the treaty.¹²¹ Without such a clause, no right against abduction existed, and no right applied.

In both *Verdugo-Urquidez* and *Alvarez-Machain*, the Supreme Court endorsed the view that the rights of the accused guaranteed in the Bill of Rights do not extend beyond the physical borders of the United States.¹²² For this reason, "the principal incentive for many foreign governments to negotiate MLATs with the United States was, and remains, the desire to curtail the resort by U.S. prosecutors, police agents, and courts to unilateral, extraterritorial means of collecting evidence from abroad."¹²³ Many MLATs, therefore, have incorporated prohibitions against foreign law enforcement officials operating in the treaty country without leave from that country's government.¹²⁴ These two cases fail to discuss the degree to which the constitutional guarantees that exist within the borders of the United States protect defendants facing foreign prosecution.¹²⁵ Chances are, American leadership and popular opinion would strongly oppose the kidnapping of an American citizen from his home to face prosecution in Mexico. Following the reasoning in the Supreme Court's decision in *United States v. Balsys*,¹²⁶ however, few Fourth Amendment restraints exist on domestic evidence collection for the purposes of foreign prosecution.¹²⁷

The Court has established through a line of cases that evidence otherwise inadmissible in U.S. courts (if collected in the United States) becomes admissible because its collection occurred outside of the United States.¹²⁸ To suppress such

¹²¹ See *id.* Although language that would grant individuals exactly the right sought by the respondent had been considered and drafted as early as 1935 by a prominent group of legal scholars sponsored by the faculty of Harvard Law School, no such clause appears in the current Treaty. *Id.* at 666 & n.13.

¹²² See *supra* Parts III.B, III.D.

¹²³ NADELMANN, *supra* note 2, at 315.

¹²⁴ See *id.* at 324-41 (discussing MLAT negotiations between the United States and Switzerland).

¹²⁵ This question was answered in 1998 by the *Balsys* decision. *United States v. Balsys*, 524 U.S. 666 (1998); see discussion *infra* Part IV.B.

¹²⁶ 524 U.S. 666 (1998).

¹²⁷ In *Balsys*, the Court determined that Fifth Amendment protections against self-incrimination did not come into play when the only potential prosecution that the defendant faced was foreign prosecution and not domestic prosecution. *Id.* at 674. For a full discussion of the *Balsys* decision, see *infra* Part IV.B.

¹²⁸ Zagaris, *supra* note 47, at 1450-51. Evidence seized outside the United States that would be inadmissible due to the manner in which it was seized generally has been admissible in United States courts. *Id.* He added, however, that "[i]f the defendant is a U.S. national or resident, the fruits of an unconstitutional search abroad may be inadmissible where a U.S. agent substantially participates in the search." *Id.* at 1451 (citation omitted).

evidence, the defendant is required to prove that the United States and the foreign country acted in concert to procure the evidence.¹²⁹ The close cooperation between the United States and foreign governments through the use of MLATs, however, has blurred the line of domestic versus international criminal prosecution by bringing together the law enforcement bodies of two or more countries.

Treaty negotiators, in their negotiations of MLATs, have attempted to combat the primary problems concerning the status of protected rights. The terms of the MLATs are an attempt to ensure, at least within these treaties, that searches and seizures are executed according to the restrictions of the Bill of Rights.¹³⁰ These restrictions are vague at times. Furthermore, actual assurances that foreign searches and seizures abide by constitutional restraints rely on the good faith execution of the requests by foreign actors unfamiliar with U.S. constitutional restraints.¹³¹ The only safeguard to ensure constitutional compliance comes from the U.S. courts' approval or denial of the prosecutorial requests that then lead to MLAT requests.

D. United States v. Toscanino: "Shock the Conscience"

The counter-balance to the *Ker-Frisbie* doctrine is the "Shock the Conscience" test. In *United States v. Toscanino*,¹³² the Court of Appeals for the Second Circuit presented this possible exception to the *Ker-Frisbie* Doctrine. In its *Toscanino* decision, the Second Circuit looked to the Supreme Court decisions in *Rochin v. California*¹³³ and *Mapp v. Ohio*.¹³⁴ The Second Circuit stated that "the Court's decisions in *Rochin* and *Mapp* unmistakably contradict its pronouncement in *Frisbie* that 'due process of law is satisfied when one present in court is convicted of crime after being fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards.'"¹³⁵ Looking to the wording in *Rochin*, the Second Circuit held that where a court achieved jurisdiction over a defendant through acts that shocked the conscience,¹³⁶ due process

¹²⁹ See *infra* text accompanying note 216 (discussing Justice Souter's test).

¹³⁰ See discussion *supra* Part I.A.1.

¹³¹ See discussion *supra* Part I.A.2.

¹³² 500 F.2d 267 (2d Cir. 1974). *Toscanino* charged that he had been kidnapped in Uruguay by United States agents and taken into Brazil. *Id.* at 269-70. In Brazil, *Toscanino* was subjected to various forms of torture. He was then placed on an airplane while drugged and flown to the United States. Upon his arrival in the U.S., authorities arrested *Toscanino*. *Id.* at 270.

¹³³ 342 U.S. 165 (1952) (holding inadmissible two capsules of morphine obtained through forced stomach pumping of the accused).

¹³⁴ 367 U.S. 643 (1961) (holding inadmissible the fruits of a warrantless search in which officers broke into a dwelling and presented a false warrant).

¹³⁵ *Toscanino*, 500 F.2d at 274.

¹³⁶ *Id.* at 273.

“requir[es] a court to divest itself of jurisdiction over the person of a defendant.”¹³⁷ Most courts, however, have construed this exception narrowly, stripping it of its force and leaving the *Ker-Frisbie* Doctrine intact.¹³⁸

E. Colello v. United States Securities and Exchange Commission

Colello v. United States Securities and Exchange Commission demonstrated the steps taken in executing an MLAT request and the problems that exist in the MLAT system.¹³⁹ In *Colello*, the District Court for the Central District of California held that a freeze placed on the appellant’s Swiss Bank account pursuant to a securities enforcement investigation was unconstitutional, because it violated the Fourth Amendment right against unreasonable seizures and the Fifth Amendment right to due process.¹⁴⁰ The Securities and Exchange Commission (“SEC”) initiated the suit against Colello.¹⁴¹ On June 13, 1994, the SEC sought to freeze the *Colello* defendant’s assets in Swiss Bank accounts.¹⁴² Acting through the Office of International Affairs in the Justice Department, the SEC made a request to Swiss authorities in accordance with the U.S.-Swiss MLAT to have Colello’s assets frozen.¹⁴³ On June 23, 1994, the district court issued a temporary restraining order and froze Colello’s domestic assets.¹⁴⁴ Subsequently, the restraining order expired; however, the assets in Switzerland remained frozen.¹⁴⁵ When Colello sought to unfreeze his assets, the SEC argued that the Swiss asset freeze had not been part of the temporary restraining order because the district court had never ordered the Swiss to freeze those assets.¹⁴⁶ The Department of Justice declined to alter its request to the Swiss authorities, since the SEC believed that the court’s decision to

¹³⁷ *Id.* at 275.

¹³⁸ The Ninth Circuit stated in *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995): “In the shadow cast by *Alvarez-Machain*, attempts to expand due process rights into the realm of foreign abductions, as the Second Circuit did in *United States v. Toscanino*, have been cut short.” *Id.* at 763 (citation omitted).

¹³⁹ 908 F. Supp. 738 (C.D. Cal. 1995).

¹⁴⁰ *Id.* at 752, 754–55.

¹⁴¹ *See id.* at 742.

¹⁴² *Id.* at 741.

¹⁴³ *Id.* at 741–42. The request stated:

Please freeze funds in the accounts listed in the Attachment at Finter Bank Zurich and at Bank Leu A.G., as well as any funds in other accounts at Finter Bank Zurich, Bank Leu A.G. and any other bank in Switzerland traceable to the subject matter of this request, including funds in the name of any of the above-mentioned parties . . . , so that the funds are available for return to the victims.

Id. at 742.

¹⁴⁴ *See id.* at 742.

¹⁴⁵ *See id.* at 742–43.

¹⁴⁶ *Id.* at 743.

allow the temporary restraining order to lapse did not affect the SEC's case.¹⁴⁷ The Swiss Federal Supreme Court also declined to remove the asset freeze.¹⁴⁸ After the Swiss Federal Supreme Court determined that any challenges to the asset freeze must be adjudicated by U.S. courts, Colello challenged the asset freeze as unconstitutional.¹⁴⁹

The *Colello* plaintiffs alleged that the SEC had violated their Fourth and Fifth Amendment rights by seeking and obtaining a freeze of their assets in Switzerland without a hearing through the use of the U.S.-Swiss MLAT.¹⁵⁰ The district court held that if the laws embodied in treaty provisions were not subject to the same constitutional limitations as domestic laws, then the Supremacy Clause would allow the Executive Branch to use the treaty power to circumvent a constitutional limitation and enact unconstitutional laws.¹⁵¹

1. Fourth Amendment Concerns

In *Colello*, the government conceded that a seizure had occurred but argued that it was reasonable under the Fourth Amendment.¹⁵² The treaty did not require probable cause for the execution of an MLAT request but only required reasonable suspicion.¹⁵³ The court rejected the several arguments made by the United States in justifying its actions. The government first asserted that "by placing their assets abroad, plaintiffs (U.S. citizens) are not entitled to the full panoply of Constitutional

¹⁴⁷ See *Colello*, 908 F. Supp. at 743.

¹⁴⁸ See *id.* at 743-44. The Swiss Federal Supreme Court stated:

In matters of judicial assistance, the Federal Supreme Court examines an administrative court complaint only to determine whether the preconditions for the provision of judicial assistance have been met. If the judicial assistance is requested by the United States, it cannot be denied just on the basis of deficiencies in the American proceedings, because the treaty does not contain any corresponding provision. Even alleged violations of human rights in the American proceedings form no basis for denying judicial assistance. The complaint of a "control vacuum" deals with an alleged deficiency in the American proceedings, which if it is true, must be heard before the American courts. The objection raised in the Swiss proceedings with respect to the denial of justice is unfounded.

Id. at 743-44 (quoting *Colello & Romano v. Fed. Office of Police Affairs*, No. 1A.108/1995/szu, certified translation at 3 (Switz. June 15, 1995)).

¹⁴⁹ *Id.* at 740-41.

¹⁵⁰ See *id.* at 741.

¹⁵¹ See *id.* at 748 ("[T]reaties, under the Constitution, are the supreme law of the land. . . . [T]reaty provisions which create domestic law . . . are subject to the same substantive limitation as any other legislation.") (quoting *In re Aircrash in Bali*, 684 F.2d 1301, 1309 (9th Cir. 1982) (second omission in original)).

¹⁵² *Id.* at 752-53.

¹⁵³ *Id.* at 753.

rights.”¹⁵⁴ Citing *Reid v. Covert*,¹⁵⁵ the court noted that: “‘When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.’”¹⁵⁶ The court also found the extraterritorial actions of the SEC to conflict with the constitutional safeguards in place.¹⁵⁷ The court, finding that the treaty did in fact provide for a skirting of the Bill of Rights, held that actions taken abroad against United States citizens are protected by the constitutional safeguards present therein.¹⁵⁸

As a creature of the Constitution, the United States derives its power from the Constitution and, therefore, must act according to and within the boundaries established by that document.¹⁵⁹ The United States should not, while seeking to punish a non-citizen domestically, resort to actions that abridge the rights of those who are in the United States. No differentiation should exist between actions taken domestically and those taken extraterritorially. In *Reid v. Covert*,¹⁶⁰ the Supreme Court rejected the suggestion that only “‘fundamental’ [constitutional rights] protect Americans abroad.”¹⁶¹ The Court added that: “‘[W]e can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of ‘Thou shalt nots’ which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.’”¹⁶² The *Colello* court concluded that an assertion that the Bill of Rights becomes inoperative if expediency so requires would create a dangerous precedent that could effectively destroy the purpose of having a codified constitution.¹⁶³

¹⁵⁴ *Colello*, 908 F. Supp. at 754–55.

¹⁵⁵ 354 U.S. 1 (1957).

¹⁵⁶ *Colello*, 908 F. Supp. at 754 (quoting *Reid v. Covert*, 354 U.S. 1, 5–6 (1957)). *Reid* addressed the applicability of the Uniform Code of Military Justice (UCMJ) to civilian dependents of military personnel. Ms. Covert murdered her husband on a military base and was convicted in a court martial proceeding. *Reid*, 354 U.S. at 3. The Supreme Court found the UCMJ’s extension of court-martial jurisdiction unconstitutional when applied to civilians tried for capital crimes in peace time. *Id.* at 39–41. The Court took into consideration what it termed the UCMJ’s emphasis on the “iron hand of discipline” as opposed to the civilian legal system’s “even scales of justice.” *Id.* at 38.

¹⁵⁷ See *Colello*, 908 F. Supp. at 755.

¹⁵⁸ *Id.* at 754.

¹⁵⁹ *Id.*

¹⁶⁰ 354 U.S. 1 (1957).

¹⁶¹ *Id.* at 9.

¹⁶² *Id.*

¹⁶³ See *Colello*, 908 F. Supp. at 754. The court concluded, in speaking of the treaty’s provisions, “the fact that the government complies with the literal terms of a treaty will not validate an otherwise unconstitutional search or seizure.” *Id.* at 754–55.

2. Due Process Concerns

The MLATs may, in fact, serve to circumvent the Constitution. In *Colello*, the court was forced to determine whether the government could act extraterritorially to freeze assets of an American citizen without providing the accused an opportunity for a domestic hearing to contest the freeze. The district court stated that, under normal circumstances, persons affected by actions such as those present in *Colello* have the right to a hearing.¹⁶⁴ The district court found that, "[a]s a general rule, . . . due process requires a hearing before a person may be deprived of her property."¹⁶⁵ The court continued by noting that: "The general rule regarding predeprivation hearings yields, however, 'in extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'"¹⁶⁶ This certainly creates numerous problems for the MLAT system. The fact that evidence or assets reside outside the United States should not allow an abrogation of constitutional requirements and safeguards, regardless of added time or expense.¹⁶⁷ The system created under the Constitution works to protect rights above all else.

F. Conclusion

The importance of protecting the constitutional rights of individuals facing prosecution in the United States is not diminished by the argument that protecting constitutional rights places an extra strain on the judicial system. These rights should not become casualties of the need for faster and more decisive law

¹⁶⁴ *Id.* at 748–49.

¹⁶⁵ *Id.* at 748 (quoting *Spiegel v. Ryan*, 946 F.2d 1435, 1439 (9th Cir. 1991)) (alterations in original).

¹⁶⁶ *Colello*, 908 F. Supp. at 748 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972)).

¹⁶⁷ *See id.* at 753:

The Treaty provides for mutual assistance between Switzerland and this country based on "reasonable suspicion," *not* probable cause. The Technical Analysis establishes that the parties intended to substitute the lower standard for the higher probable cause requirement. The Commission and DOJ argue that the Treaty's reasonable suspicion standard passes Constitutional muster because: (1) the plaintiffs, in effect, "assumed the risk" of depositing their money in a foreign country, (2) "traditional domestic investigatory methods" are relatively ineffective abroad, and (3) the public interest in combatting international crime and maintaining the integrity of U.S. securities markets justifies the lesser standard. Although the latter two justifications derive from serious, urgent, and complex challenges facing law enforcement agencies in the late 20th century, they do not permit circumvention of the constitutional limitation on governmental power by treaty where legislation could not accomplish the same objective.

enforcement action. The importance of bringing to justice those responsible for the attacks on September 11, 2001, would not justify abridging the constitutional rights of hundreds or thousands in the name of expediency.¹⁶⁸ The DEA should not be permitted to seize persons extraterritorially when the citizens of this country would abhor such actions if committed against fellow citizens. This country cannot have "justice for all" at the expense of the rights of some.

The system that the United States-Switzerland MLAT created has existed for over thirty years. Following this initial MLAT, the United States has entered into over forty MLAT treaties.¹⁶⁹ The *Colello* decision should not be interpreted as an attack upon the MLAT system but, rather, as a reminder of the importance of constitutional rights and privileges within the American and international criminal treaty system. The *Colello* decision points out deficiencies in the system and serves as a warning to those who seek to exploit those deficiencies.¹⁷⁰ It does not condemn the system as a whole.

According special rights to treaty actions reinforces the division between the rights of citizens and the rights of non-citizens. The constitutional protections have little meaning if the United States permits them to be applied in favor of one group and against another. If, in fact, they are truly inherent rights, then they should apply regardless of nationality. The United States, especially after World War II, has taken the position in the world as the primary defender and proponent of democracy and individual rights.¹⁷¹ The Framers founded the country on those principles.¹⁷² Allowing a dual set of rights to exist based on the classification of individuals undermines the United States' ability to advocate the principles upon which the Framers based their new nation. It creates a two-tiered system of rights repugnant to those principles.

IV. FIFTH AMENDMENT

The Fifth Amendment of the United States Constitution provides: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private

¹⁶⁸ See Leonard Pitts, *A Pox on Sneaky Behavior*, CHI. TRIB., Dec. 4, 2001, at 23.

¹⁶⁹ See MLATs and Other Agreements, *supra* note 14. This list does not include the numerous treaties still in negotiation and those that have not yet entered into force.

¹⁷⁰ *Colello*, 908 F. Supp. at 754–55. The Court of Appeals for the Ninth Circuit reviewed *Colello* but did not address any of the treaty issues dealt with in the district court opinion. See *SEC v. Colello*, 139 F.3d 674 (9th Cir. 1998).

¹⁷¹ See, e.g., Videotape Remarks to the Iraqi People, 39 WEEKLY COMP. PRES. DOC. 424 (Apr. 10, 2003) (explaining that the United States wants to "help . . . build a peaceful and representative government that protects the rights of all citizens").

¹⁷² See U.S. CONST. pmbl.

property be taken for public use, without just compensation.”¹⁷³ The right against self-incrimination is rooted in the English rule against compulsory self-incrimination.¹⁷⁴ As with the English rule, the American right against self-incrimination does not protect witnesses from disclosing violations of foreign laws.¹⁷⁵ How the rule against self-incrimination protects individuals internationally has become an issue in the international arena. The prevalent use of the MLATs has made evidence collected in the United States available to any foreign government with which America has an MLAT.¹⁷⁶ Such collected evidence may be used against persons in the United States as well as outside of the United States.¹⁷⁷

A. The Fifth Amendment Internationally

In the case of *Johnson v. Eisentrager*,¹⁷⁸ the Court dealt with the Fifth Amendment in an international context. The Court held that enemy aliens arrested in China and imprisoned in Germany after World War II did not have Fifth Amendment rights and therefore could not obtain writs of habeas corpus in U.S. federal court.¹⁷⁹ *Eisentrager* stemmed from the apprehension, trial, and conviction of several German nationals.¹⁸⁰ They operated in China after the surrender of Germany — but prior to the surrender of Japan — and aided the Japanese army by giving them information about American troop movements.¹⁸¹ The Court reasoned that: “The alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society.”¹⁸² The Germans had no identification with the United States but, rather, had worked against America during the waning days of World War II.¹⁸³ The Court in *Eisentrager* stated the rule that would eventually direct the Court in the recent case, *United States v. Balsys*.¹⁸⁴ The Court stated in *Eisentrager* that “[s]uch extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment.”¹⁸⁵ The lack of debate during the early years of the Constitution’s

¹⁷³ U.S. CONST. amend. V.

¹⁷⁴ See *United States v. Balsys*, 524 U.S. 666, 676–77 (1998).

¹⁷⁵ *Id.*

¹⁷⁶ See discussion *supra* Part I.A.

¹⁷⁷ See *Balsys*, 524 U.S. at 670, 699 n.19.

¹⁷⁸ 339 U.S. 763 (1950).

¹⁷⁹ See *id.*

¹⁸⁰ *Id.* at 777.

¹⁸¹ See *id.* at 765–66.

¹⁸² *Id.* at 770.

¹⁸³ See *id.* at 765–66.

¹⁸⁴ 524 U.S. 666 (1998).

¹⁸⁵ *Eisentrager*, 339 U.S. at 784. *Eisentrager* undoubtedly will be relied upon repeatedly as the argument over the legitimacy of using military tribunals in the case of the Taliban

existence prevented the Court from finding an extraterritorial application of the Fifth Amendment rights.¹⁸⁶

B. The Hamdis and the Aftermath of Afghanistan

1. Hamdi v. Rumsfeld I, II & III

The constitutional constraints in military tribunals and the rights of foreign combatants and citizens when applied to extraterritorial activities have all

detainees intensifies. Justice Jackson stated in *Eisentrager* that: "The ultimate question in this case is one of jurisdiction of civil courts of the United States *vis-à-vis* military authorities in dealing with enemy aliens overseas." *Id.* at 765. Following the Germans' conviction, the military tribunal sent the Germans back to Germany to serve out their sentence. *See id.* In their claim in United States Federal District Court for the District of Columbia, the Germans asserted that they should be produced before the court in order to ascertain whether their confinement violated Articles I and III and the Fifth Amendment of the United States Constitution as well as provisions of the Geneva Convention. *See id.* at 767.

Lacking any guidance, Justice Jackson stated that: "We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction," nor does the United States Constitution afford such a right. *Id.* at 768. The Court held that the United States, as with so many other countries, draws a line between its citizens and aliens. Within this group of non-citizens, another line is drawn between resident aliens who have submitted themselves to the laws of the United States and aliens who have remained loyal to their homeland. *See id.* at 769.

Having established this guideline, Jackson referred to *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), for its assertion that where the Court has determined that constitutional protections do extend beyond the citizenry, the Court has stressed that this only applies to aliens that have submitted to the territorial jurisdiction of the United States. *See Eisentrager*, 339 U.S. at 771. Where the enemy alien remained in the service of his country against the United States, that alien does not have the right of access to the courts of the United States. *See id.* at 776. In summing up the question before the Court, Jackson stated:

We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

Id. at 777. The Court determined that military tribunals had the jurisdiction to sentence the Germans and invalidated the claims made by the Germans concerning due process. *Id.* at 788-90.

¹⁸⁶ *Id.*

reemerged as a central constitutional question due to the war on terrorism and the war in Afghanistan. Two recent cases have brought *Eisentrager* back into the spotlight. The courts in both cases declined to extend constitutional rights to the subjects of the cases.

The Fourth Circuit determined that the issues presented in *Hamdi v. Rumsfeld*¹⁸⁷ mandated judicial deference to the President's war making powers, as opposed to judicial enforcement of a citizen's constitutional rights under the Fourth, Fifth and Sixth Amendments.

The U.S. military captured Hamdi and thousands of other Taliban fighters during operations in Afghanistan, which occurred as a result of the September 11, 2001, terrorist attacks.¹⁸⁸ After his capture, the United States transported Hamdi to Camp X-Ray at the Naval Base at Guantanamo Bay, Cuba, before moving the detainee to the Brig at the Norfolk Naval Station in Virginia.¹⁸⁹ What makes Hamdi unique from the other combatants detained in Afghanistan is the fact that he is a United States citizen, born in Louisiana.¹⁹⁰ According to the Mobbs declaration submitted by the Department of Defense following *Hamdi II*, Hamdi traveled to Afghanistan in 2001 and became affiliated with a Taliban military unit.¹⁹¹ The military captured Hamdi in possession of an AK-47 when his Taliban unit surrendered.¹⁹² Based on these facts, the U.S. government designated Hamdi as an enemy combatant.¹⁹³

In assessing the claim that Hamdi had a right to counsel in *Hamdi III*, the Fourth Circuit stated: "Drawing on the Bill of Rights' historic guarantees, the judiciary plays its distinctive role in our constitutional structure when it reviews the detention of American citizens by their own government."¹⁹⁴ While noting the deference the Executive Branch deserves in its foreign affairs and war making powers, the court also noted that "[t]he duty of the judicial branch to protect our individual freedoms

¹⁸⁷ See *Hamdi v. Rumsfeld (Hamdi III)*, 316 F.3d 450 (4th Cir. 2003) (holding that the District Court again erred in concluding that Hamdi had a right to assistance of counsel due to his status as a combatant and the authorization of his detention by the President and by Congress under their respective constitutional powers); *Hamdi v. Rumsfeld (Hamdi II)*, 296 F.3d 278 (4th Cir. 2002) (holding that the grant of the District Court of "Next Friend" status to Hamdi's father did not take into account Hamdi's status as a combatant and did not show proper deference to the Executive branch); *Hamdi v. Rumsfeld (Hamdi I)*, 294 F.3d 598 (4th Cir. 2002) (holding that the Federal Public Defender and a private citizen did not meet the requirements for "Next Friend" standing).

¹⁸⁸ *Hamdi I*, 294 F.3d at 601.

¹⁸⁹ *Id.* At the time of this writing, Hamdi is still being held at the Norfolk Naval Station.

¹⁹⁰ *Id.* The Fourth Circuit indicated that there was question as to whether Hamdi renounced his U.S. citizenship. *Id.*

¹⁹¹ *Hamdi III*, 316 F.3d at 461.

¹⁹² *Id.*

¹⁹³ *Id.* at 461-62.

¹⁹⁴ *Id.* at 464.

does not simply cease whenever our military forces are committed by the political branches to armed conflict.”¹⁹⁵ It was the classification of Hamdi as an enemy combatant that led the Fourth Circuit to hold that his detention did not violate the Constitution.¹⁹⁶

The holding in this case seems to run contrary to the holding in *Eisentrager*. In *Eisentrager*, the Court stated that it was the defendants’ lack of contact with the United States that barred them from establishing standing to challenge their detention.¹⁹⁷ More recently, the Court in *Verdugo-Urquidez*¹⁹⁸ used the lack of contacts with the United States to bar a Mexican citizen’s ability to challenge the search and seizure conducted at his Mexican residence. In discussing the citizenship distinction, the *Eisentrager* Court stated: “If a person’s claim to United States citizenship is denied by any official, Congress has directed our courts to entertain his action to declare him to be a citizen ‘regardless of whether he is within the United States or abroad.’”¹⁹⁹ Yet the Fourth Circuit decided against granting Hamdi his citizenship rights, giving the Executive Branch, under its war-making powers, the ability to indefinitely detain Hamdi without assistance of counsel. The *Eisentrager* Court did acknowledge the inability of the Executive Branch to conduct trials during wartime, holding that “trials would hamper the war effort and bring aid and comfort to the enemy.”²⁰⁰ The Court, however, limited the application of this statement to enemy aliens.²⁰¹

Regardless of the breadth of the President’s war making power or Congress’s grant to use “‘use all necessary and appropriate force,’”²⁰² neither body should have the discretion to eliminate the ability of a citizen to assert his or her constitutional rights without due process of law. The plurality in *Reid* held that “the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in

¹⁹⁵ *Id.*

¹⁹⁶ *Hamdi III*, 316 F.3d at 459. “Congress authorized the President ‘to use all necessary and appropriate force against those . . . persons he determines planned, authorized, committed, or aided the terrorist attacks.’” *Id.* (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)) (emphasis added).

¹⁹⁷ *Johnson v. Eisentrager*, 339 U.S. 763, 776–77 (1950).

¹⁹⁸ 494 U.S. 259 (1990).

¹⁹⁹ *Eisentrager*, 339 U.S. at 769–70 (quoting 8 U.S.C. § 903 (repealed 1952)).

²⁰⁰ *Id.* at 779.

²⁰¹ *Id.* at 765. The opening to Justice Jackson’s opinion stated: “The ultimate question in this case is one of jurisdiction of civil courts of the United States *vis-à-vis* military authorities in dealing with enemy aliens overseas,” and the opinion repeatedly termed the appellants as “enemy aliens.” *Id.*

²⁰² *Hamdi v. Rumsfeld (Hamdi III)*, 316 F.3d 450, 459 (4th Cir. 2003) (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)) (emphasis added).

another land.”²⁰³ As of this time, Hamdi has been prevented from even filing an action that would give him due process. Moreover, Hamdi has been barred from asserting his constitutional rights as a citizen due to his classification as an enemy combatant.

2. *Al Odah v. United States*

The second case, *Al Odah v. United States*,²⁰⁴ followed the reasoning and holding of *Eisentrager*. In this case, the detainees captured in Afghanistan and held at Guantanamo Bay filed a habeas petition and claims under the Alien Tort Act for the conditions of their detainment.²⁰⁵ The appellants in this case shared many attributes with the *Eisentrager* appellants.²⁰⁶ Similarly, the Court of Appeals for the District of Columbia found that it could not issue a writ to a group of persons who do not possess constitutional rights, since such rights do not apply abroad.²⁰⁷

Both *Eisentrager* and *Al Odah* present factual situations that justify the denial of constitutional protections to foreign nationals. If the constitutional protections present in the U.S. Constitution are fundamental, they should apply to all defendants that come before U.S. courts. The country, however, should not accord these rights to persons actively subverting the United States from outside its borders. Such application would be illogical. Hamdi, on the other hand, falls into both categories. As a United States citizen, he deserves the rights guaranteed U.S. citizens. As a person who left the country and then joined a group that sought to subvert the United States and that system of rights, Hamdi may have surrendered those rights. Both cases present the only situation in which the non-application of fundamental constitutional rights may be forgivable.

C. *United States v. Balsys*

The way in which the right against self-incrimination has been integrated into the MLAT system is through the compulsory process requirement of 28 U.S.C. § 1782. Section 1782 states that a person cannot be compelled to give testimony or to produce a document pursuant to an MLAT or letter rogatory request if doing so would violate any legally applicable privilege.²⁰⁸ This, of course, includes the

²⁰³ Reid v. Covert, 354 U.S. 1, 6 (1957).

²⁰⁴ 321 F.3d 1134 (D.C. Cir. 2003).

²⁰⁵ *Id.* at 1136.

²⁰⁶ See *id.* at 1140 (noting that the detainees were similar to the *Eisentrager* appellants in that “[t]hey too are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States”).

²⁰⁷ *Id.* at 1141.

²⁰⁸ 28 U.S.C. § 1782(a) (1994).

privilege against self-incrimination. The problem arises when the individual asserting this privilege does so based upon fear of prosecution that may arise in a foreign jurisdiction.

The case of *United States v. Balsys*,²⁰⁹ like *Hamdi*, also dealt with a person's reprehensible conduct. Here, the appellant was not a defendant in a case pending before a U.S. Court, but rather, was accused of being a Nazi war criminal who the U.S. Immigration and Naturalization Service ("INS") was questioning to ascertain his alien status in a non-criminal proceeding.²¹⁰ Balsys asserted his Fifth Amendment claim against self-incrimination during the INS interview.²¹¹

Balsys asserted that, although he faced no possibility of criminal prosecution in the United States because his testimony was only required for the purpose of ascertaining his resident alien status, the testimony would expose him to possible criminal prosecution in Lithuania and Israel.²¹² At the time, the United States had MLATs with both countries and accordingly would be obligated to produce this evidence at the request of those foreign governments.²¹³ The Supreme Court, however, denied Balsys's claim.²¹⁴ Justice Souter, writing for the majority, found that the Constitution and its protections only bound officers of the United States and not non-U.S. officials.²¹⁵ Fear of foreign prosecution did not generate a valid basis on which to assert a Fifth Amendment right.²¹⁶ The Court pointed out that the United States could not grant immunity from foreign prosecution.²¹⁷ If a person could object to giving testimony because of a threat of foreign prosecution, his testimony would be unavailable for domestic purposes because of the assertion of the privilege.²¹⁸ In the Court's view, the value of the testimony to the United States outweighed any right of the witness against self-incrimination based on a fear of foreign prosecution.²¹⁹ Justice Souter, however, fashioned a hypothetical wherein such a right could be properly asserted. In the case where a substantial amount of international cooperation generated a *de facto* American prosecution, this could give rise to a legitimate self-incrimination claim.²²⁰ This decision signaled a departure

²⁰⁹ 524 U.S. 666 (1998).

²¹⁰ *Id.* at 670.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *See id.* at 699 n.19.

²¹⁴ *Id.* at 698.

²¹⁵ *Balsys*, 524 U.S. at 674-75.

²¹⁶ *Id.* at 673-74 ("We therefore take this to be the fair reading of the adjective 'any,' and we read the Clause contextually as apparently providing a witness with the right against compelled self-incrimination when reasonably fearing prosecution by the government whose power the Clause limits, but not otherwise.").

²¹⁷ *Id.* at 697.

²¹⁸ *Id.*

²¹⁹ *Id.* at 697-98.

²²⁰ Justice Souter stated:

from the precedent set in a number of cases.²²¹

The test formulated by Justice Souter in *Balsys* found its first potential application in *In re Impounded*.²²² In this case, the defendants asserted claims analogous to those asserted by *Balsys*.²²³ The defendants were immunized witnesses who refused to testify before an impaneled grand jury regarding possible Sherman Act violations.²²⁴ They claimed that their case fit into the exception that Justice Souter had fashioned in *Balsys*.²²⁵ The defendants asserted that requests by the United States to foreign governments for documents, inquiries of foreign contacts, and increases in foreign antitrust penalties indicated an international

This is not to say that cooperative conduct between the United States and foreign nations could not develop to a point at which a claim could be made for recognizing fear of foreign prosecution under the Self-Incrimination Clause as traditionally understood. If it could be said that the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character, and if it could be shown that the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries, then an argument could be made that the Fifth Amendment should apply based on fear of foreign prosecution simply because that prosecution was not fairly characterized as distinctly "foreign." The point would be that the prosecution was as much on behalf of the United States as of the prosecuting nation, so that the division of labor between evidence gatherer and prosecutor made one nation the agent of the other, rendering fear of foreign prosecution tantamount to fear of a criminal case brought by the Government itself. Whether such an argument should be sustained may be left at the least for another day, since its premises do not fit this case.

Id. at 698–99.

²²¹ For a general discussion of the Supreme Court's decision in *Balsys* and the cases surrounding the decision, see Daniel J. Steinbock, *The Fifth Amendment at Home and Abroad: A Comment on United States v. Balsys*, 31 U. TOL. L. REV. 209 (2000).

The Court has never purported to decide the Constitution's extraterritorial reach on the basis of one overarching theory. Nevertheless, an examination of the cases reveals three factors that have influenced the outcomes: (1) the legal status of the individual in relation to the United States (e.g. citizen, resident-alien, alien); (2) the place of the governmental action; and (3) the place the fruits (or the result) of the government action will be used. . . . [U]ntil *Balsys*, no case had ever held that a U.S. citizen or lawful resident alien would not be protected from otherwise unconstitutional governmental conduct within the fifty states.

Id. at 216.

²²² 178 F.3d 150 (3d Cir. 1999).

²²³ Compare *id.* at 154–55, with *Balsys*, 524 U.S. at 670–71.

²²⁴ See *Impounded*, 178 F.3d at 151. The Sherman Act, 15 U.S.C. §§ 1–7 (2000), is one of two primary statutes in the United States, the other being the Clayton Act, 15 U.S.C. §§ 12–27 (2000), 29 U.S.C. §§ 52–53 (2000), which deals with antitrust violations.

²²⁵ See *Impounded*, 178 F.3d at 152.

prosecution of the type Justice Souter had pointed to in *Balsys*.²²⁶ The United States Court of Appeals for the Third Circuit found this argument flawed.²²⁷ First, the threat and fear of foreign prosecution must be real and substantial.²²⁸ In this case, the appellate court found such a threat to be absent. The court stated that even if it did agree that *Balsys* had created a test, the court did not believe that the limited foreign contacts in the present case rose to the level the *Balsys* test would require.²²⁹ Second, the acts of the government did not indicate an international prosecution of the type described in *Balsys*.²³⁰ Finally, *Balsys* did not fashion any sort of exception or test for asserting Fifth Amendment rights against self-incrimination in relation to possible foreign prosecution.²³¹ With regard to the way in which the *Balsys* decision should be interpreted, one commentator has argued the following: "The decision means that, pursuant to requests from foreign governments, U.S. prosecutors will compel the production of testimony and documents that may be used to prosecute the witness who receives a subpoena or summons to testify."²³² This requirement indicates that any legitimate fear of domestic prosecution automatically triggers the ability to assert Fifth Amendment rights, regardless of the fear of foreign prosecution.²³³

D. Miranda Rights

Numerous legal systems advocate different notions of fairness with regards to arrest, interrogation, and the right to remain silent. The countries of Europe recognize both the right to remain silent from the Fifth Amendment and the right to counsel from the Sixth Amendment.²³⁴ In these countries, however, the rules addressing the right against self-incrimination will not present substantial barriers to gathering testimonial evidence.²³⁵ This difference in the treatment of the right to silence becomes important when testimony is being collected for an MLAT request or when a defendant has been detained on a preliminary arrest.²³⁶

²²⁶ See *Impounded*, 178 F.3d at 155–57.

²²⁷ See *id.* at 155–57.

²²⁸ See *id.* at 156.

²²⁹ See *id.* at 155.

²³⁰ See *id.* at 155–57.

²³¹ See *id.* at 155.

²³² Zagaris, *supra* note 47, at 1460.

²³³ *Id.*

²³⁴ See Van Kessel, *supra* note 5, at 841–42.

²³⁵ *Id.* at 842.

²³⁶ *Id.*

1. *Miranda v. Arizona*

As a result of *Miranda v. Arizona*,²³⁷ government officials in the United States must apprise arrestees of their constitutional rights.²³⁸ In the case of apprehension, both abroad for extradition to the United States and in the United States for extradition abroad, the question of Miranda rights arises in a unique context. *Balsys* places some portions of the *Miranda* decision into question.²³⁹ The arrestee may not have the right to remain silent when police interrogate the suspect for the purpose of foreign prosecution.²⁴⁰ If the person faces domestic as well as foreign prosecution, however, he may assert his right to remain silent.²⁴¹ Under *Balsys*, the police may compel a person to make statements during a domestically valid interrogation.²⁴² Such statements may be sent to a foreign country pursuant to an MLAT request for official documents.²⁴³ The forced interrogation could lead a person to incriminate himself in a foreign country due to his inability to assert his *Miranda* right to remain silent.

2. *United States v. Lombera-Camorlinga*

In *United States v. Lombera-Camorlinga*,²⁴⁴ the defendant asserted that although the arresting officers read his *Miranda* rights upon arrest in California, his right to advice from the Mexican consulate had been violated based upon Article 36 Vienna Convention on Consular Relations.²⁴⁵ The defendant analogized the right to consulate advice to the right to counsel included in *Miranda*.²⁴⁶ The Court found this argument faulty.²⁴⁷ The Vienna Convention fails to link the right to consular notification with police interrogation, and furthermore, the treaty fails to create any affirmative rights that would require officers to cease the interrogation at the request of the accused.²⁴⁸

²³⁷ 384 U.S. 436 (1966).

²³⁸ *See id.*

²³⁹ *See United States v. Balsys*, 524 U.S. 666, 693 (1998).

²⁴⁰ Van Kessel, *supra* note 5, at 842.

²⁴¹ *See Balsys*, 524 U.S. at 671-72.

²⁴² *See id.* at 672-74.

²⁴³ *See id.* at 698-700.

²⁴⁴ 206 F.3d 882 (9th Cir. 2000).

²⁴⁵ *Lombera-Camorlinga*, 206 F.3d at 884; *see* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, art. 36.

²⁴⁶ *Id.* at 886.

²⁴⁷ *Id.*

²⁴⁸ *See generally* Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77; *Lombera-Camorlinga*, 206 F.3d at 886.

C. Conclusion

The same arguments made earlier in the unequal application of Fourth Amendment safeguards are applicable here.²⁴⁹ These cases present the same type of double standard.²⁵⁰ As reprehensible as Balsys's actions may have been, they do not justify depriving him of the protections guaranteed him by the Fifth Amendment. The presence of the MLAT brings foreign prosecutions much closer to the possible exception that Justice Souter carved out in the *Balsys* opinion.²⁵¹ For example, when domestic officials generate documents and information that, by itself, create grounds for foreign prosecution, there may be a sufficient amount of cooperation to trigger the constitutional safeguards under the test formulated by Justice Souter.

Balsys did not address whether a person may assert his right against self-incrimination in a criminal context outside the United States when an MLAT or letter rogatory request seeks the testimony.²⁵² The question remains whether the witness may assert the privilege when the inquiry does not pertain to an interest of the United States.²⁵³ This lack of clarity is troubling, particularly in light of the potential implications this problem has for U.S. residents and citizens. If a person could not exert his or her right against self-incrimination when facing foreign prosecution, the compulsory nature of the MLATs could be used to force testimony that may lead to extradition.

The Second Circuit may have provided an answer to this quandary in *In re Flanagan*.²⁵⁴ The Second Circuit's examination considered the following factors: (1) "whether . . . an existing or potential foreign prosecution" of the person exists, and if so, "what foreign charges could be filed against him"; (2) whether that prosecution "would be initiated or furthered by his testimony"; (3) whether any such charges could serve as a basis on which the foreign jurisdiction could have him extradited from the United States; and (4) whether a likelihood exists that "his testimony . . . would be disclosed to the foreign government."²⁵⁵

It is not completely impossible that such a test might be transferred to an international context. The *Ker-Frisbie* doctrine is partially based upon the

²⁴⁹ See *supra* Part III.

²⁵⁰ See *supra* Part III.F.

²⁵¹ *United States v. Balsys*, 524 U.S. 666, 698–99 (1998).

²⁵² *Zagaris*, *supra* note 47, at 1459.

²⁵³ In *Balsys*, the United States was inquiring into Balsys's immigration status. See also *Zagaris*, *supra* note 47, at 1459 (noting that U.S. courts have yet to "expressly rule[] on the issue").

²⁵⁴ 691 F.2d 116 (2d Cir. 1982).

²⁵⁵ *Id.* at 121; see *In re Impounded*, 178 F.3d 150, 157 (3d Cir. 1999) (adopting the *Flanagan* test).

resolution of an interstate dispute.²⁵⁶ The basis for that ruling was merely applied internationally.²⁵⁷ Claims under 28 U.S.C. § 1782 arise when foreign governments make MLAT or letter rogatory requests for assistance with regards to ongoing investigations or court proceedings in that country.²⁵⁸ The danger to the person attempting to assert the privilege, therefore, is not speculative, but assured. For this reason, it is likely that courts would uphold the right of a witness to assert his Fifth Amendment privilege, although this assertion is speculative.²⁵⁹ If this speculation is incorrect, the danger is great for those persons whose testimony is requested.

Greater problems arise while testimony is being given and, even more so, after the testimony has been taken. Often in the United States, witnesses whose testimony is compelled for use in foreign prosecutions do not have counsel to advise them of their rights and of what they should say.²⁶⁰ As such, this testimony can be used in countries that do not have a right against self-incrimination or the Sixth Amendment right to confrontation.²⁶¹ Not all countries in which this testimony may be acquired have safeguards such as the defendant's ability to challenge the admission of evidence or the method of its collection.²⁶² In examining how to present their defense, "defendants must save such arguments for *habeas corpus* or *amparo* proceedings that are separate and more difficult to utilize to remedy a procedural defect. Most defendants cannot afford to initiate these separate proceedings."²⁶³

In light of the problems presented above, the right against self-incrimination may be abused, especially by countries with no such right. Considering the numerous transnational companies, *In re Impounded* raises a legitimate fear: Could officers of United States corporations be compelled to testify about procedures of their foreign operations? Barring any domestic repercussions, the testimony would not be privileged in any way and, therefore, would be available for use against the corporate officers and the corporation itself.²⁶⁴ The standard set forth in *Balsys* does raise the question of when and if the privilege may be asserted when no fear of domestic prosecution exists.²⁶⁵

²⁵⁶ See *Frisbie v. Collins*, 342 U.S. 519 (1952).

²⁵⁷ See *United States v. Alvarez-Machain*, 504 U.S. 655, 661–62 (1992).

²⁵⁸ See 28 U.S.C. §§ 1781–1782 (2000).

²⁵⁹ *Zagaris*, *supra* note 47, at 1459.

²⁶⁰ *Id.* at 1460–61.

²⁶¹ *Id.* at 1461.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ See *In re Impounded*, 178 F.3d 150, 152 (3d Cir. 1999) (discussing arguments made by targets of grand jury testimony regarding fears of foreign prosecution).

²⁶⁵ See *id.* at 155.

V. THE SIXTH AMENDMENT

The Sixth Amendment of the United States Constitution provides that, in criminal prosecutions, the defendant “shall enjoy the right to a speedy and public trial.”²⁶⁶ The defendant will be tried “by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.”²⁶⁷ The defendant will “be informed of the nature and cause of the accusation.”²⁶⁸ Finally, the defendant shall have the right “to be confronted with the witnesses against him” and “to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”²⁶⁹ The Supreme Court has dealt with the international application of the Sixth Amendment rights in a line of cases known as the *Insular Cases*. Sixth Amendment concerns also are raised both in the context of the structure of the ICC and in the taking of depositions in MLAT requests.²⁷⁰ Finally, the need to obtain information from abroad also affects the Sixth Amendment right to a speedy trial.

A. *The Insular Cases*

The Supreme Court has addressed the application of the Sixth Amendment internationally in a line of cases known as the *Insular Cases*.²⁷¹ In its discussion of these cases, the Court, in *Verdugo-Urquidez*, stated “that not every constitutional provision applies to governmental activity even where the United States has sovereign power,” including U.S. territories and protectorates.²⁷² The *Verdugo-Urquidez* Court cited the *Insular Cases* in support of its assertion that the proposition of non-U.S. citizens possessing constitutional rights contradicts U.S. constitutional law.²⁷³ In support of this proposition, the Court cited *Hawaii v. Mankichi*,²⁷⁴ wherein the Supreme Court held that the rights contained in the Fifth and Sixth Amendments did not apply in territorial Hawaii.²⁷⁵ It also cited decisions holding that Philippine citizens did not have the right to a jury trial²⁷⁶ or the right

²⁶⁶ U.S. CONST. amend. VI.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ See *infra* notes 281–83 and accompanying text.

²⁷¹ See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (citing a complete list of the *Insular Cases*).

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ 190 U.S. 197 (1903).

²⁷⁵ *Id.*

²⁷⁶ *Dorr v. United States*, 195 U.S. 138 (1904).

to a grand jury.²⁷⁷ Even in U.S. protectorates, the Supreme Court has held that the right to a jury trial did not apply.²⁷⁸ This line of cases firmly supports the proposition that the rights of the Sixth Amendment do not — and will not — extend beyond the territorial borders of the United States.

B. The Right to Trial by Jury in the International Criminal Court

Whereas the rights in the Sixth Amendment do not extend beyond the territorial borders of the United States for the purposes of U.S. constitutional law, the rights guaranteed in the Sixth Amendment have been incorporated, in part, in the Rome Statute.²⁷⁹ The system created through the International Criminal Court and the Rome Statute embodies the majority of rights included in the Sixth Amendment: the right to counsel, the right to a public trial, and the right of a defendant to question the witnesses against him.²⁸⁰ The only right guaranteed under the Sixth Amendment that is absent from the Rome statute is the right to trial by jury.²⁸¹ One legal author, Audrey Benison, has argued that the lack of this particular constitutional guarantee should not foreclose the United States' participation in the Rome Statute.²⁸² Citing the presence of military courts and the curtailing of Congress's power to regulate certain non-Article III tribunals and courts, Benison recognized some flexibility within the rights present in the Sixth Amendment.²⁸³

U.S. participation in the International Criminal Court, however, may only serve to reinforce the presence of a two-tiered system of rights within the American legal system and worldwide. The participation of the United States in a court that lacks the constitutionally protected rights guaranteed to all accused in the United States would set an example that compromises the United States' ability to assert an argument of establishing the moral high ground.²⁸⁴ For example, whether Slobodan Milosevic should face a trial without a jury as the Nazis did in the Nuremberg trials is a question for public debate. The right to trial by jury may very well be a lesser-

²⁷⁷ *Ocampo v. United States*, 234 U.S. 91 (1914).

²⁷⁸ *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

²⁷⁹ Rome Statute, *supra* note 7.

²⁸⁰ *Id.* at 1040.

²⁸¹ See Benison, *supra* note 77, at 96. Benison posed the question of how such a right would be accomplished. "Certainly it is understandable why the jury right was excluded from the Statute, for it would be difficult to imagine how the jury process would work on an international scale. What would a representative jury look like?" *Id.* at 97.

²⁸² For a more thorough discussion of the relation of the ICC to U.S. military tribunals, see *id.* at 96–101.

²⁸³ *Id.* at 97–98.

²⁸⁴ *Reid v. Covert*, 354 U.S. 1, 16 (1957), stated: "There is nothing in [the Supremacy Clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution."

protected freedom. Arguing that certain constitutionally guaranteed rights deserve less scrutiny is not new, but lesser scrutiny for enumerated rights certainly would be.²⁸⁵

C. The Confrontation Clause and MLAT Requests

The right to confront one's accusers and cross-examine them is also a part of the Sixth Amendment. Under the Federal Rules of Civil Procedure, Rule 30(b), attorneys for parties must have reasonable notice, in writing, of the time and place for taking the deposition and the name and address of each person to be examined so that they may protect their clients' interests.²⁸⁶ Rule 30(c) permits attorneys to cross-examine deponents as permitted at trial under the provisions of the Federal Rules of Evidence.²⁸⁷ Testimony taken in the United States on behalf of foreign countries, pursuant to the Federal Rules of Civil Procedure, must fulfill the assistance of counsel and confrontation requirements imposed by the Sixth Amendment.²⁸⁸ The Second Circuit held that the Confrontation Clause does not present a problem with regards to the admissibility of a deposition taken pursuant to an MLAT request in U.S. courts.²⁸⁹ The admissibility of the deposition is, however, contingent on the defendant having the opportunity to attend the deposition at the government's expense.²⁹⁰

Problems arise when the requesting country has neither a requirement for representation by counsel nor the right to confrontation.²⁹¹ If the government or its agents take testimony, the defendant, according to the United States Constitution, should have the ability to challenge the taking of the deposition and ask questions during the deposition.²⁹² Although the Second Circuit's decision indicated that the defendant must have this right, the *Colello* court noted that the requirements set forth by the Second Circuit in *United States v. Johnpoll*²⁹³ were not being met.

Should the United States join actions and proceedings that abridge the rights of citizens of another nation? Just as the abductions of citizens may, in fact, allow

²⁸⁵ See *supra* notes 100–02 and accompanying text.

²⁸⁶ FED. R. CIV. P. 30(b).

²⁸⁷ FED. R. CIV. P. 30(c).

²⁸⁸ Zagaris, *supra* note 47, at 1452.

²⁸⁹ *United States v. Johnpoll*, 739 F.2d 702 (2d Cir. 1984).

²⁹⁰ *Id.* at 709–10.

²⁹¹ The district court in *Colello* recognized an analogous problem, finding that the freeze of the defendant's assets in Switzerland abridged his due process rights. See *Colello*, 908 F.Supp. at 748–51.

²⁹² See U.S. CONST. amend. VI. This amendment requires that persons have the right to confront and cross-examine witnesses against them. This is known as the "Confrontation Clause."

²⁹³ 739 F.2d 702 (2d Cir. 1984).

circumvention of the Constitution by U.S. authorities, the taking of testimony in the absence of representatives of the defendant abridges the constitutional guarantees in the United States.²⁹⁴ By taking testimony in this manner, the United States does not accord foreign nationals rights equivalent to those of its own citizens — a position in accord with the rule set forth in *Balsys*.²⁹⁵ Bruce Zagaris has argued that “[s]ince the Sixth Amendment and the International Civil and Political Covenant guarantee the rights to assistance of counsel and confrontation in all criminal prosecutions, the issue is whether the term ‘all’ includes criminal prosecutions in foreign states.”²⁹⁶

D. Conclusion

The structure currently in place in the United States creates rights that apply to U.S. citizens and residents within its borders. An entirely separate set of rights exists for legal aliens and for non-residents or non-citizens that apply outside the territorial borders of the United States. The United States cannot continue to argue for democracy, citing itself as the example to follow, when it permits and encourages the segregation of rights based upon a person’s domicile. In light of the apparent ability to circumvent the constitutional safeguards when collecting evidence extraterritorially, the United States may, in effect, benefit from the fruits of a tainted tree when it uses ill-gotten foreign evidence in domestic prosecutions.

VI. JUSTIFICATIONS AND REASONS FOR THE TWO-TIERED SYSTEM

The examination of judicial treatment of rights under the three amendments has revealed that a two-tiered system of rights exists based upon the citizenship of the accused and where the accused resides at the time of application. The dissent in *Verdugo-Urquidez* stated:

The Court admits that “the people” extends beyond the citizenry, but leaves the precise contours of its “sufficient connection” test unclear. At one point the majority hints that aliens are protected by the Fourth Amendment only when they come within the United States and develop “substantial connections” with our country. At other junctures, the Court suggests that an alien’s presence in the United States must be voluntary and that the alien must have “accepted some societal obligations.” At yet other points, the majority implies that respondent would be protected by the Fourth Amendment if the place searched were

²⁹⁴ See *Johnpoll*, 739 F.2d at 709–10.

²⁹⁵ *United States v. Balsys*, 524 U.S. 666 (1998).

²⁹⁶ Zagaris, *supra* note 47, at 1453.

in the United States.²⁹⁷

The reluctance on the part of the Supreme Court to apply the Bill of Rights extraterritorially may in part be explained by its reluctance to look beyond the U.S. borders for guidance when examining constitutional challenges.

Throughout U.S. constitutional history, the Supreme Court has been hesitant to look anywhere but within the United States for guidance on how to interpret the Constitution and the Constitution's restrictions and requirements.²⁹⁸ This system, however, ignores the large body of law residing outside of the United States regarding the same rights and the same protections as those present in the Bill of Rights. This reluctance to look elsewhere for guidance in interpreting constitutional provisions may help to explain the Court's reluctance to grant any sort of U.S. constitutionally guaranteed rights to cases in which violations occur outside the territorial borders of the United States. In his article dealing with this topic, Sujit Choudhry recognized both a benefit and a cost to the reliance on domestic case law and interpretation reference points.²⁹⁹ He asserted that, as a positive consequence, "the tendency of American constitutional theorists to rely on local and particular sources . . . in constitutional reasoning secures the legitimacy of judicial review. Negatively, it suggests that reliance on foreign sources is *prima facie* illegitimate, because those sources are drawn from outside the legal system at hand."³⁰⁰

In *Printz v. United States*,³⁰¹ Justice Scalia dismissed attempts by appellants to support their argument through the use of comparative constitutional principles, stating that: "We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."³⁰² The Supreme Court rarely refers to foreign law and foreign constitutional principles in its decisions.³⁰³

Diane Marie Amann explained this apparent reluctance to look elsewhere in two ways.³⁰⁴ First, the United States has a long tradition of applying certain individual rights and safeguards — and has ratified treaties that differed from those particular rights — only after attaching reservations and declarations that alter or remove the offending provisions.³⁰⁵ The second reason explaining the judiciary's

²⁹⁷ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 282–83 (1990) (Brennan, J. dissenting) (quoting *id.* at 271–73) (citations omitted).

²⁹⁸ Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 825 (1999).

²⁹⁹ See *id.* at 819.

³⁰⁰ *Id.* at 825.

³⁰¹ 521 U.S. 898 (1997).

³⁰² *Id.* at 921 n.11.

³⁰³ See Choudhry, *supra* note 298, at 825.

³⁰⁴ Amann, *supra* note 30.

³⁰⁵ *Id.* at 561.

reluctance is its heightened deference to the political branches in the area of international affairs so as to prevent any possible disruption in foreign policy.³⁰⁶ This type of isolationist constitutional review may explain the lack of credit given to any suggestion that constitutionally guaranteed rights extend beyond U.S. borders.

VII. CONCLUSION

In light of the increasingly international scope of law enforcement, the United States must not lose sight of the values in its own Constitution. The rights and privileges of the accused must remain strong so that the United States' participation in international law enforcement will not be an exercise in circumventing the constitutional principles which proscribe the powers of domestic law enforcement activities. The MLAT system gives the United States and its treaty partners the most efficient means to engage in international criminal investigations and prosecutions. In designing an efficient system, however, the United States must remain cognizant of the rights of the accused embodied in the Bill of Rights and the restraints placed upon the government by the Constitution. It cannot use the treaty power as a way to circumvent the rights it continuously advocates for other emerging democracies.

A. The Balsys Test May Be the Answer

Justice Souter's test in *Balsys* presents the most promising avenue for preventing the abridgement of the rights of the accused in international criminal investigations.³⁰⁷ The MLAT system creates a compulsory system by which evidence obtained in the absence of the threat of prosecution may be used in a

³⁰⁶ See *id.* Professor Amann explained:

In transnational criminal cases the United States Supreme Court has followed a policy of extreme deference to the political branches, lest its decisions upset foreign relations. In the area of extradition, courts adhere to a rule against inquiring into the fairness of the requesting state's legal system. Courts have sustained legislation depriving defendants of standing to challenge violations of international law that had been incorporated into statutory law. Although United States courts sometimes look to international law to determine the scope of the United States Constitution, a number of sitting Justices contend that international norms play no role in constitutional interpretation.

Id. at 562. The *Colello* court voiced a similar reluctance to examine cases that fall into the category of political questions. The court, however, determined that treaties that create domestically applicable law must still adhere to the constitutional restraints imposed upon all United States laws. See *Colello*, 908 F. Supp. at 748.

³⁰⁷ *United States v. Balsys*, 524 U.S. 666, 698–99 (1998).

foreign country for the purposes of prosecution.³⁰⁸ It is a short jump from the current state of affairs to what Justice Souter described as “cooperative conduct.”³⁰⁹ A great deal of cooperation exists between the United States and other countries.³¹⁰ This cooperation could develop to a level where a claim of fear of foreign prosecution could violate constitutional requirements for asserting the Fifth Amendment privilege under Souter’s test.

The number of MLAT treaties continues to grow. With them, the number of law enforcement organizations engaging in cooperative investigations across national borders continues to increase. As they do, those under investigation of foreign prosecutions face an increased threat from evidence gathered innocuously in the United States or evidence obtained in foreign countries. The courts must be aware of the problems inherent in the system as it currently operates and remain vigilant to ensure protection of the rights designed to protect persons from potential governmental abuses, by both United States and foreign actors.

The *Balsys* decision presents the courts with a basis upon which they may ground their denial of improperly obtained evidence. More importantly, it provides those facing prosecution outside the United States with standing to challenge evidence taken within the United States. If the facts in *Balsys* were altered so that Israel had requested the deposing of Balsys for use in another case against a different defendant, or even for use against Balsys, Balsys almost certainly could have successfully asserted his Fifth Amendment right against self-incrimination. If the deposition had been taken in Israel for use in a U.S. prosecution, Balsys should be able to challenge it in a United States court based upon his inability to assert the privilege. Given that the Rome Statute includes the right against self-incrimination among its protections,³¹¹ the issue raised in *Balsys* may become moot over time.

B. The System Isn't Broken, But It Can Be Fixed

All this is not to say that the system is broken and cannot be fixed. Steps should be taken to require the inclusion of all of the rights contained in the Bill of Rights in all future treaties to ensure that not only American citizens, but also citizens of other countries, enjoy the rights that the United States has sought to instill worldwide. As new MLATs and international accords are reviewed, the Senate and the President should use these agreements as tools to bring all of the rights present in the Bill of Rights into foreign jurisdictions, not only to protect the sanctity of the

³⁰⁸ See discussion *supra* Part I.A.

³⁰⁹ See *Balsys*, 524 U.S. at 698.

³¹⁰ See *supra* text accompanying note 16 (indicating that over forty MLATs have entered into force since the first such treaty was signed in 1973).

³¹¹ See Rome Statute, *supra* note 7.

United States judicial process, but also to strike down the division that has arisen between U.S. citizens and foreign citizens in the rights accorded to them in the United States during international criminal investigations. Whereas criminal defendants in the United States have advocacy groups, such as the National Association of Criminal Defense Lawyers, to advocate for their rights and protections, no such organization exists to publicize the rights of defendants facing transnational prosecutions.³¹² The judiciary has chosen to show substantial deference to the political branches in this area and has narrowly construed the assertion of constitutional rights in an international context. As such, it falls to those writing and negotiating these treaties and participating in the international agreements to promote the inclusion of such rights as the right against self-incrimination, the right to counsel, and the right to trial by jury.

The rights present in the Bill of Rights are needed to preserve the individual liberties that formed the basis for the war for independence of the American colonies. By using the treaty power to incorporate these rights into the numerous international agreements that the United States forms, the United States can expand the prevalence of these principles. Allowing two separate groups of people to have two separate sets of rights when facing criminal investigation and prosecution violates the founding principles of the United States. The United States must spearhead efforts to incorporate the rights enjoyed by U.S. citizens into international agreements by making U.S. support contingent upon the inclusion of such rights. The United States must simultaneously acknowledge these rights as inherent rights enjoyed by domestic and foreign defendants. As such, the two separate classes of people will be eliminated and the founding principles of the United States will be realized.

The Framers intended the Supremacy Clause of Article VI of the U.S. Constitution to permit the United States to create treaties with other countries that could then be invoked by citizens of both the United States and other countries in order to protect those persons' rights.³¹³ The Supremacy Clause requires incorporation of treaty provisions into United States law. The United States should use the treaty power to spread the individual liberties found in the Bill of Rights to other nations and apply those liberties to persons regardless of nationality.

Ian R. Conner

³¹² See Amann, *supra* note 30, at 559–60.

³¹³ See McDonnell, *supra* note 1, at 1401 n.2 (1996) (citing THE FEDERALIST No. 80 (Alexander Hamilton)).