BRINGING FAIRNESS TO EXTRADITION HEARINGS: PROPOSING A REVISED EVIDENTIARY BAR FOR POLITICAL DISSIDENTS

I. INTRODUCTION

> "Physical death I do not fear; death of conscience is the real death."[1]

The right to self-determination is the common language, the common voice, the common struggle of all revolutionaries. It is a motivation that speaks to truth, justice, and ultimately peace. Yet, shrouded by fear, the voices of revolutionaries are being suppressed.[2] For security, simplicity, and clarity, we label those who stand against repressive regimes as terrorists, without distinction, without contemplation. Fearful of being a haven to alleged terrorists, the United States is sending those who seek refuge from repressive regimes back to their torturers.[3] The willingness to embrace voices of

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1. CYNTHIA MAHMOOD, A SEA OF ORANGE: WRITINGS ON THE SIKHS AND INDIA 23-24 (2001) (quoting Jarnail Singh Bhindranwale who led the movement for Sikh civil and human rights and vociferously protested the second class status of Sikhs and other minorities in India).

2. *See generally* John Patrick Groarke, *Revolutionaries Beware: The Erosion of the Political Offense Exception Under the 1986 United States-United Kingdom Supplementary Extradition Treaty*, 136 U. PA. L. REV. 1515 (1988) (arguing that the United States amended its extradition treaties with other Western countries in order to facilitate the extradition of alleged terrorists); *see also* Susie Alegre, *European Arrest Warrants: A Lapse in Justice*, INT'L HERALD TRIBUNE, Feb. 2, 2004, *available at* http://www.iht.com/articles/2004/02/02/edalegre_ed3_php (noting that immediately after September 11, 2001, the European Arrest Warrant emerged which did away with "messy extradition procedures" among EU countries).

3. *See generally* Cheema v. Ashcroft, 383 F.3d 848 (9th Cir. 2004) (holding that the Immigration and Naturalization Service (INS) board did not provide enough evidence pointing to Cheema as a security risk). After being in detention for a dec-

dissent has dissipated, and safeguards that were once in place for political dissidents, in the arena of extradition and asylum law, are quickly being eroded.[4]

This Comment focuses on the story of Kulvir (or Kulbir) Singh "Barapind" and examines how inequitable extradition procedures, especially those relating to the political offense exception, undermine due process for the relator.[5] Barapind's story echoes the story of other folk heroes.[6] To Sikhs, Barapind is a human rights activist, advocating for a separate nation, *Khalistan*; to the Indian government, he is a terrorist.[7] For the Indian government, his identity is not defined by his sacrifice in challenging oppression amidst torture but by the Indian government's desire to suppress the will of the Sikhs.[8]

In India, from 1984 to 1995, to advocate for self-determination or human rights was to seal one's death warrant.[9] Whether one was a

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ade, Mr. Cheema decided to waive his Convention Against Torture (CAT) application because the government had appealed the favorable Ninth Circuit opinion. Camille T. Taiara, *Harpal Singh Cheema Chose "Voluntary" Deportation*, THE SIKH TIMES, Aug. 7, 2006, *available at* https://www.sikhtimes.com/news_080706a.html. It is a government tactic to prolong the granting of asylum to suspected militants and keep them indefinitely detained until they voluntarily waive CAT and go back to the countries which tortured them. *Id.*

4. *See, e.g.*, Groarke, *supra* note 2, at 1515-16 (explaining how the redefinition of the political offense exception within the new Supplementary Treaty between the United States and the United Kingdom no longer allows magistrates to decide whether crimes are of a political nature); Alegre, *supra* note 2.

5. Within this context, the term "relator" describes the individual whom the requesting country seeks to be extradited. For the purposes of this Comment, the terms "relator" and "defendant" are used interchangeably.

6. Najeeb Hasan, *The 11-Year Debate: For a Decade an Indian National Has Been Held in California Jails. He's Accused of Being a Terrorist. Is He*?, METRO ACTIVE, Oct. 13, 2004, *available at* http://www.metroactive.com/papers/metro/10.13.04/barapind-0442.html.

7. *See* Special Correspondent, *Punjab Terrorist Brought from U.S.*, THE HINDU, June 20, 2006, http://www.hindu.com/2006/06/20/stories/2006062006461200.htm ("Kulbir Singh Kulbeera alias Barapind of the Khalistan Commando Force was brought to India by a Punjab police team on Sunday night from the United States following his extradition ordered by the competent American court.").

8. Brad Adams, *Dead End in Punjab*, HUMAN RIGHTS WATCH, December 17, 2004, *available at* http://hrw.org/english/docs/2004/12/17/india9909.htm ("To destroy the movement [for Khalistan], security forces were given a free hand, leading to the worst kinds of abuse.").

9. *Id.* For example, Jaswant Singh Khalra was abducted and killed after he ex-

nonviolent protestor or a freedom fighter, the threat of "disappearance" was constant.[10] It was during this period that Barapind became an advocate for a separate homeland for Sikhs.[11]

After being tortured by the Indian government,[12] Barapind fled for his life under an alias and sought asylum in the United States.[13] From the beginning, Barapind's asylum case was complicated by the initial adverse credibility finding of the Immigration Judge (IJ) in 1994.[14] Eventually, the Ninth Circuit rejected the IJ's determination and "faulted the IJ for treating, as established facts, India's criminal allegations made against Barapind in the extradition request."[15] That extradition request was filed by India in 1997.[16] After Barapind appealed for a continuation of the asylum proceeding, the Ninth Circuit held that asylum and extradition were exclusive proceedings and directed that the asylum proceedings be held in abeyance pending the outcome of the extradition hearing.[17] The Ninth Circuit en banc,

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posed illegal cremations of unidentified corpses by the Punjab police. Press Release, Ensaaf, Anniversary of the Abduction of Jaswant Singh Khalra (Sept. 6, 2007), http://www.ensaaf.org/news/pr2007-09-06.php.

10. Press Release, Ensaaf, Punjab Police: Fabricating Terrorism through Illegal Detention and Torture (June 2005 to Aug. 2005) at 7 (Oct. 5, 2005), *available at* http://www.ensaaf.org/docs/ft-report.php.

11. Hasan, *supra* note 6.

12. *In re* Extradition of Singh, 170 F. Supp. 2d 982, 987 (E.D. Cal. 2001), *aff'd in part, rev'd in part, remanded to sub nom.* Barapind v. Enomoto, 400 F.3d 744 (9th Cir. 2005) (en banc) (using the district court opinion to flesh out background, history, and facts that were accepted by the Ninth Circuit), *remanded to* Barapind v. Amador, No. 1:01-CV-06215 OWW, (E.D. Cal. 2005) *and In re* Extradition of Singh, No. 01-6215 OWW, 98-5489 OWW (E.D. Cal. 2005).

13. *Id.*

14. *Id.* at 985. An adverse credibility finding is when an Immigration Judge (IJ) does not find the individual seeking asylum to be credible. *See* Immigration and Nationality Act of 1952 § 208(b)(2)(B)(iii), 8 U.S.C.A. § 1158(b)(2)(B)(iii) (West 2007). The IJ may consider, for example, that there are numerous inconsistencies or a lack of detail and specificity in the applicant's story. *Id.*

15. *Singh*, 170 F. Supp. 2d at 985 (affirming the district court's decision to remand for further proceedings).

16. *Id.* at 986.

17. *Id.*

in *Barapind v. Enomoto*, gave the final decision to extradite Barapind in 2005.[18]

Through the lens of *Barapind*, this Comment analyzes and challenges both the presumption of fairness accorded to the requesting state and the extreme evidentiary burdens placed on the defendant. The scope of the Comment is limited only to cases where the political offense exception is at issue in extradition hearings. Part II summarizes the background of extradition law focusing on the political offense exception, the rule of non-inquiry,[19] and the rule of non-contradiction.[20] Part III describes the Indian government's past and present use of coercive and abusive investigatory techniques. Part IV argues that, although courts are bound by the rule of non-inquiry, the rule should not bar the court from scrutinizing a foreign government's investigatory techniques for gathering evidence to form probable cause. Then, Part V proposes that a *Franks* hearing,[21] a hearing in which a defendant can challenge the veracity of the government's evidence, should replace the vague, overbroad rule of non-contradiction. Finally, Part VI concludes that removing the presumption of fairness given to foreign governments and relaxing the evidentiary burden on the defendant is in accordance with international human rights norms. Part VI also warns that in ignoring

18. Barapind v. Enomoto, 400 F.3d 744, 753 (9th Cir. 2005).

19. The rule of non-inquiry precludes courts from scrutinizing foreign governments' judicial systems and the procedures or treatment that await defendants in their countries of origin. Cornejo-Barreto v. Seifert [sic], 218 F.3d 1004, 1009 n.5 (9th Cir. 2000), *overruled on other grounds by* Arnbjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983); *Gallina*, 278 F.2d at 79.

20. Jacques Semmelman, *The Rule of Non-Contradiction In International Extradition Proceedings: A Proposed Approach to the Admission of Exculpatory Evidence*, 23 FORDHAM INT'L L.J. 1295, 1297 (2000) (coining the phrase "The Rule of Non-Contradiction" to define the rule that defendants in extradition cases cannot merely contradict the requesting country's evidence; they must obliterate it).

21. *See* Franks v. Delaware, 438 U.S. 154, 155-56 (1978) ("[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.").

these safeguards, the United States leaves itself vulnerable to imputation of violations committed by the requesting country.[22]

II. BACKGROUND: EXTRADITION

Historically, the United States has been cautious of entering into extradition agreements because of its mistrust for monarchial regimes and the widely-held belief that America is a refuge for those seeking asylum.[23] Thomas Jefferson disfavored extradition and recognized that the value of liberty was at stake in extradition proceedings.[24] The first extradition agreement appeared in 1842, and Congress followed in 1848 by enacting the first statue authorizing international extradition.[25] Today, extradition law is governed by treaty,[26] statutes,[27] and case law. In the absence of any law requiring the contrary, the policy of the United States is to deny extradition to the requesting foreign government.[28] Because an extradition hearing is not a criminal matter, both the Executive and Judicial Branches engage in a delicate balance between the rights of the relator[29] and foreign policy implications.[30]

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22. John Quigley, *The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law*, 15 N.C. J. INT'L L. & COM. REG. 401, 415-17 (1990).

23. Abraham Abramovsky, *The Political Offense Exception and the Extradition Process: The Enhancement of the Role of the U.S. Judiciary*, 13 HASTINGS INT'L & COMP. L. REV. 1, 8 (1989).

24. *See* Andrew J. Parmenter, *Death by Non-Inquiry: The Ninth Circuit Permits the Extradition of a U.S. Citizen Facing the Death Penalty for a Non-Violent Drug Offense [Prasoprat v. Benov, 421 F.3d 1009 (9th Cir. 2005)]*, 45 WASHBURN L.J. 657, 661 (2006).

25. *Id.* at 662.

26. *See, e.g.*, Treaty for the Mutual Extradition of Criminals Between the United States of America and Great Britain, U.S.– Gr. Brit., Dec. 22, 1931, 47 Stat. 2122 (made applicable to India in 1942 under art. 14) [hereinafter Extradition Treaty].

27. *See, e.g.*, 18 U.S.C. §§ 3181-3195 (1996).

28. Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 9 (1936) (no executive discretion to extradite the relator unless authorized by statute or treaty).

29. Rachel A. Van Cleave, *The Role of United States Federal Courts in Extradition Matters: The Rule of Non-Inquiry, Preventative Detention, and Comparative Legal Analysis*, 13 TEMP. INT'L & COMP. L.J. 27, 38 (1988).

30. *Id.* at 40.

Procedurally, a foreign government must first make a request to the U.S. State Department for extradition.[31] The treaty, which governs extradition procedures, sets parameters regarding the extent of documentation (evidence) needed to issue a warrant for the defendant's arrest.[32] Evidence of probable cause to charge the defendant with a specified crime is what leads to an issuance of a warrant.[33] The defendant is then presented before a magistrate judge.[34] During the hearing, the magistrate must first evaluate the foreign government's probable cause evidence to determine whether to extradite.[35] Additionally, the magistrate considers terms of the treaty that may bar extradition.[36] One such provision in most extradition treaties is the political offense exception doctrine.[37] If the court finds the relator extraditable, the court then considers additional arguments as to why the extradition should be denied.[38] If the magistrate finally agrees with the foreign government's contention, the magistrate must certify the extradition to the U.S. Secretary of State.[39]

The Executive Branch possesses the primary authority in extradition cases because of foreign policy implications.[40] This authority is vested within the Secretary of State who has ultimate discretion on the extraditability of the defendant.[41] Even if the magistrate certifies extradition, the Secretary of State can deny

31. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 478 cmt. a (1987).

32. *Id.* § 478 reporters' note 1 (1987).

33. *Id.*

34. *Id.*

35. *Id.* at cmt. d.

36. *See id.*

37. *See infra* Part II.A.

38. Van Cleave, *supra* note 29, at 37 (explaining that the scope of the rule of non-inquiry begins at this stage of the extradition process). The reason the rule of non-inquiry begins in the second phase is because that phase involves non-justiciable issues. *See* Lis Wiehl, *Extradition Law at the Crossroads: The Trend Toward Extending Greater Constitutional Procedural Protections to Fugitives Fighting Extradition from the United States*, 19 MICH. J. INT'L L. 729, 772 (1998).

39. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 478(2)(b) (1987).

40. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 478 cmt. a (1987).

41. *Id.* § 478(3).

extradition.[42] A magistrate's decision cannot be appealed; it is only reviewable by a federal district judge through a writ of habeas corpus.[43] In evaluating any extradition hearing, the judge must be mindful of three major doctrines: (1) the political offense exception, (2) the rule of non-inquiry, and (3) the rule of non-contradiction.[44]

A. Political Offense Exception

In 1843, the political offense exception[45] was first applied to a treaty between the United States and France.[46] The historical justification behind applying the exception to extradition treaties was threefold. First, political dissent may be a means to affect change.[47] Second, unsuccessful rebels could possibly face unfair procedure or punishment in their country of origin due to their anti-government actions or opinions.[48] Third, non-political branches of governments "should not intervene in the internal political struggles of other nations" by working to turn over political dissidents.[49]

Today, the scope of the political offense exception is being narrowed by the threat of global terrorism.[50] The distinction between *domestic uprisings* and international terrorism is being blurred.[51]

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42. *Id.*

43. *Id.* at cmt. c.

44. *See infra* Parts II.A-C.

45. Hereinafter, "political offense exception" will is used interchangeably with "exception" or "exception doctrine."

46. Parmenter, *supra* note 24, at 665.

47. Quinn v. Robinson, 783 F.2d 776, 793 (9th Cir. 1986) (quoting Note, *American Courts and Modern Terrorism: The Politics of Extradition*, 13 N.Y.U. J. INT'L L. & POL. 617, 622 (1981)).

48. *Id.* (citing M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 425 (1974); C. VAN DEN WINJNGAERT, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION 3 (1980); Manuel R. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*¸ 48 VA. L. REV. 1226, 1238 (1962)).

49. *See id.*

50. Groarke, *supra* note 2, at 1527-31.

51. *See* Barapind v. Enomoto, 400 F.3d 744, 750 (9th Cir. 2005); *see also* David M. Lieberman, *Sorting the Revolutionary from the Terrorist: The Delicate Application of the "Political Offense" Exception in U.S. Extradition Cases*, 59 STAN. L. REV. 181, 189-90 (2006).

Generally, international terrorism falls outside the scope of the political offense exception in extradition treaties; political uprisings within the requesting nation's boundaries have generally triggered the exception.[52] Many, feeling that the United States will become a haven for terrorists, have called for the eradication of the political offense exception doctrine altogether.[53] However, the exception doctrine is so fundamental to our notions of self-determination that it should not be hastily discarded for fear of harboring "terrorists."[54]

Recently, the Ninth Circuit ruled on Harpal Singh Cheema's asylum application applying asylum law's political offense exception, analogous to that of extradition law.[55] The court argued that "[o]ne country's terrorist can often be another country's freedom-fighter."[56] The court further explained that revolutionaries embraced by the United States who opposed repressive European powers, anti-Communists governments, and Apartheid (e.g., Nelson Mandela) would all be labeled terrorists today.[57] Furthermore, the court noted that, throughout the twentieth century, actions of revolutionaries abroad have had few consequences which directly affect persons or property in the United States.[58] The court concluded that any strain on foreign relations is "offset by the reputation earned by the United States as a continuing cradle for liberty in other parts of the world."[59]

The political offense exception has been shaped both judicially and by treaty. To fall under the exception, the defendant must satisfy a two-prong analysis.[60] First, the magistrate must determine whether a substantially violent uprising has arisen in the requesting country.[61]

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52. *Quinn*, 783 F.2d at 807.

53. *See, e.g.*, Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantanamo and Beyond*, 25 LOY. L.A. INT'L & COMP. L. REV. 457, 474 (2003); Miriam E. Sapiro, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception*, 61 N.Y.U. L. REV. 654 (1986).

54. *Quinn*, 783 F.2d at 793 n.11.

55. Cheema v. Ashcroft, 383 F.3d 848 (9th Cir. 2004).

56. *Id.* at 858.

57. *See id.* at 859.

58. *Id.* at 858.

59. *Id.*

60. *Barapind*, 400 F.3d at 750.

61. *Id.*

Civil wars are generally sufficient to meet the test of a violent uprising, as determined in *Barapind*.[62] On the other hand, the exception is narrowly tailored and many acts of violence will not fall under the exception.[63] Second, the magistrate determines whether the defendant's acts were in furtherance of or "incidental" to those uprisings.[64] The ultimate determination on whether the defendant meets the "incidence test" is made by the judiciary not the Secretary of State.[65] Additionally, political motivation by itself does not trigger the exception.[66] Each treaty sets parameters for what constitutes a political offense.[67] The treaty between India and the United States, for example, stipulates that attacks on heads of state and their families fall outside the scope of the exception.[68] Aircraft hijacking or sabotage, attacks upon or hostage-taking of dignitaries, and drug related offenses are also beyond the exception.[69]

The two-pronged framework is designed to balance the rights of political revolutionaries against the need to punish those who seek to instill fear by indiscriminately killing civilians.[70] Even when the political offense exception applies, however, extradition treaties give foreign nations a presumption of fairness with respect to the evidence they put forth.[71] The State will often certify the request for a warrant by the requesting nation based on whether the offense charged is in

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62. *Id.* at 756-57.

63. *See id.* at 750 (quoting Quinn v. Robinson, 783 F.2d 776, 797 (9th Cir. 1986)).

64. *Id.*

65. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 478 reporters' note 3 (1987) (citing Eain v. Wilkes, 641 F.2d 504, 513-17 (7th Cir. 1981)); United States v. Mackin, 668 F.2d at 132-37 (2d Cir. 1981).

66. *In re* Extradition of Lahoria, 932 F. Supp. 802, 819 (N.D. Tex. 1996).

67. *See, e.g.*, Parmenter, *supra* note 24, at 665.

68. Extradition Treaty, *supra* note 26, arts. 3, 6.

69. *Id.*

70. *See* Matthew S. Podell, *Removing Blinders from the Judiciary: In re Artt, Brennan, Kirby as an Evolutionary Step in the United States-United Kingdom Extradition Scheme*, 23 B.C. INT'L & COMP. L. REV. 263, 263 (Spring 2000) ("[O]n the one hand lies a desire to ensure that perpetrators of violence are duly punished for their unlawful acts; on the other is the historical notion that the United States should protect those who are unjustly persecuted in their native lands.").

71. Glucksman v. Henkel, 221 U.S. 508, 512 (1911).

the treaty itself.[72] In *Gallina v. Fraser*,[73] however, the court alluded to the possibility of challenging the presumption of fairness when criminal procedures or punishments of foreign governments offend the dignity of the judicial process.[74] Although no court has directly challenged the presumption of fairness that requesting nations receive at the onset of the extradition hearing, political offense exception cases provide a favorable context in which to rebut this presumption. Some scholars even argue that the political offense exception circumvents the rule of non-inquiry.[75] If so, this would give the courts the discretion to deny the presumption of fairness given to a requesting nation in certain limited circumstances.

B. Rule of Non-Inquiry

No law mandates that a foreign judicial proceeding or criminal sentencing conform to the notions of due process that the U.S. court system affords defendants. In fact, the rule of non-inquiry prevents habeas courts[76] from scrutinizing the "judicial process" of the requesting nation as well as the treatment that awaits a defendant.[77] The basis of the rule of non-inquiry was first enunciated in *Neely v. Henkel*.[78] The Court in *Neely* held that American citizens who commit a crime in a foreign nation and flee from justice cannot then complain "if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own

72. *See* 18 U.S.C.A. § 3184 (West 2007).

73. Gallina v. Fraser, 278 F.2d 77 (2d Cir. 1960).

74. *Id.* at 79.

75. Parmenter, *supra* note 24, at 665 (citing Abramovsky, *supra* note 23, at 9).

76. Sandhu v. Burke, No. 97 Civ. 4608(JGK) (S.D.N.Y. Feb. 10, 2000) (citing Ahmad v. Wigen, 910 F.2d 1063, 1066-67 (2d Cir. 1990); Gill v. Imundi, 747 F. Supp. 1028, 1049 (S.D.N.Y. 1990) ("The rule of non-inquiry, which prohibits the extradition court from considering such matters, applies with at least as great force to the habeas court.")).

77. Cornejo-Barreto v. Seifert [sic], 218 F.3d 1004, 1009 n.5 (9th Cir. 2000), *aff'd on other grounds sub nom.* Cornejo-Barreto v. Siefert, 379 F.3d 1075 (2004), *reh'g en banc granted* 386 F.3d 938 (9th Cir. 2004), *vacated as moot* 389 F.3d 1307 (9th Cir. 2004); Arnbjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983); *Gallina*, 278 F.2d at 79.

78. Neely v. Henkel, 180 U.S. 109, 122-23 (1901).

people . . . ."[79] The rule of non-inquiry relies on the principle foundation that the Executive Branch, not the courts, is best situated to look at a foreign government's judicial system and to make determinations that could implicate foreign policy.[80] However, in the decisions that have addressed the matter, there is no mention that the criminal procedure of the requesting nation cannot be challenged at the onset of the hearing, as implied in *Gallina*.[81]

An exception to the rule arguably occurs when the "procedures or punishment [are] so antipathetic to a federal court's sense of decency as to require reexamination of the principle [rule of non-inquiry]. . . ."[82] This is commonly regarded as the humanitarian exception.[83] This exception has never been applied to any extradition case because of international comity,[84] executive discretion,[85] and strict observance of the treaty provisions.[86] More importantly, the humanitarian exception's impact has been limited because it squarely challenges the rule of non-inquiry. Traditionally, the rule of non-inquiry is implicated during the second phase of the extradition

79. *Id.* at 123.

80. *See* Michael P. Scharf, *Foreign Courts on Trial*: *Why U.S. Courts Should Avoid Applying the Inquiry Provision of the Supplementary U.S.-U.K. Extradition Treaty*, 25 STAN. J. INT'L L. 257, 269 (1988) (observing that "the State Department is in a superior position to consider the consequences of a non-extradition decision upon foreign relations than the courts" because that department "has diplomatic tools, not available to the judiciary, which it can use to insure that the requesting state provides a fair trial").

81. *See* Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960) (indicating that the rule of non-inquiry is not absolute and that it will not be followed where the likely treatment in the requesting state is "antipathetic to a federal court's sense of decency").

82. *Id.*

83. Emami v. U.S. D. Ct. for N.D. of Cal., 834 F.2d 1444, 1452-53 (9th Cir. 1987).

84. Quigley, *supra* note 22, at 415.

85. Sindona v. Grant, 619 F.2d 167, 174 (2d Cir. 1980) (citing Wacker v. Bisson, 348 F.2d 602, 606 (5th Cir. 1965)).

86. Mainero v. Gregg, 164 F.3d 1199, 1210 (9th Cir. 1999) (finding "no basis for invoking any exception to the 'rule of non-inquiry' that constrains courts in this country from examining the penal systems of the nation requesting extradition in the extradition hearing"), *superseded by statute*, Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681, *as recognized in* Cornejo-Barreto v. Seifert [sic], 218 F.3d 1004, 1010 (9th Cir. 2000).

hearing,[87] which begins after the court has determined the extraditability of the relator and shifts to examine reasons why extradition should be denied.[88] Traditionally, it is at this juncture that the rule of non-inquiry is implicated.[89] Yet, courts have failed to apply an exception to the rule of non-inquiry even when questions are raised about the requesting nation's policies and procedures.[90] During the evidence phase, therefore, courts must inquire into the procedures of a foreign nation before certification of extradition in order to circumvent the rule of non-inquiry.

C. Rule of Non-Contradiction

The rule of non-contradiction refers to a defendant's limited right to contest the foreign government's evidence during an extradition hearing.[91] This evidentiary standard precludes a defendant from introducing evidence that merely contradicts the foreign government's evidence. A defendant is only allowed to introduce evidence that "obliterates" or "explain[s] away the requesting government's evidence of probable cause."[92] Not only is the evidentiary threshold extremely high, but it is also vague and confusing as to what evidence "obliterates" or "explains away" the government's evidence.[93] In fact, all that is known is that there must be "clear-cut proof" in order to destroy the government's evidence.[94]

For example, in *Barapind v. Enomoto*, the Indian government produced *unsigned* and *undated* affidavits, together with unsigned

87. Van Cleave, *supra* note 29, at 42.

88. *Id.*

89. *Id.*

90. *See* Hoxha v. Levi, 465 F.3d 554, 564 n.14 (3d Cir. 2006).

91. Semmelman, *supra* note 20, at 1304.

92. Barapind v. Enomoto, 400 F.3d 744, 749 (9th Cir. 2005).

93. *In re* Sindona, 450 F. Supp. 672, 685 (S.D.N.Y. 1978) ("The distinction between 'contradictory evidence' and 'explanatory evidence' is difficult to articulate."); David M. Rogers, *International Law: Extradition and The Political Offense Exception*, 26 SUFFOLK TRANSNAT'L L. REV. 479, 484 (2004) (describing the term "obliterate" as a tenuous definition); *In re* Extradition of Singh, 170 F. Supp. 2d 982; Semmelman, *supra* note 20, at 1304.

94. Semmelman, *supra* note 20, at 1304.

photographs,[95] to implicate the defendant in all eleven charges.[96] Each of the witness' affidavits purportedly identified the defendant as the attacker or accomplice in the homicides and attempted homicides.[97] To undercut the government's evidence, the defendant obtained *signed* affidavits, containing recantations, from *those same witnesses*.[98] The defense believed these recantation affidavits obliterated and explained away the Indian government's evidence.[99] The court, however, found that recantations could not be determined as credible without a trial.[100] Because extradition courts do not weigh contradictory evidence in probable cause determinations, the court found no basis to overturn the government's evidence.[101]

Although some courts have argued that magistrates have discretion in admitting contradictory evidence,[102] most courts have rarely exercised this discretion, leaving the defendants with the Herculean task of obliterating the government's evidence.[103] The extreme evidentiary burden for the defendant arises because the extradition proceeding is not a trial on the merits.[104] For the same

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95. The photographs presented were unsigned even though there was a place for putting one's signature and the date on the photograph. *See* Petitioner Kulvir Singh Barapind's Principal Brief at 29-30, Barapind v. Enomoto, No. 02-16944 (9th Cir. Apr. 9, 2003) [hereinafter Barapind's Principal Brief]. Also, witnesses were not shown multiple pictures at once or separately, rather they were shown only Barapind's picture. *Id.*

96. *Id.*

97. *Id.*

98. *Barapind*, 400 F.3d at 749-53.

99. Barapind's Principal Brief, *supra* note 95, at 48-49 ("When the government's only evidence is obliterated by recantations, the government fails to establish probable cause.") (citing *In re* Contreras, 800 F. Supp. 1462, 1465 (S.C. Tex. 1992)).

100. *Barapind*, 400 F.3d at 749-50.

101. *Id.* at 750.

102. *See, e.g.*, *In re* Gonzales, 52 F. Supp. 2d 725, 738 (W.D. La. 1999); Maguna-Celaya v. Haro, 19 F. Supp. 2d 1337, 1343 (S.D. Fla. 1998); *In re* Contreras, 800 F. Supp. 1462, 1464 (S.D. Tex. 1992); Republic of France v. Moghadam, 617 F. Supp. 777, 781 (N.D. Cal. 1985). In *Maguna-Celaya v. Haro*, the Eleventh Circuit subsequently reversed and ruled in favor of the government, the process undermined the rule of non-contradiction. Semmelman, *supra* note 20, at 1323.

103. *See, e.g.*, *Barapind*, 400 F.3d at 750.

104. *See generally* Goldberg v. Kelly, 397 U.S. 254, 266-67 (1970) (discussing

reason, in an extradition hearing, the foreign government is not expected to provide all its witnesses and evidence.[105] Nonetheless, the difficult distinction between contradictory and explanatory evidence blurs the boundaries regarding the rebuttal evidence the defendant must produce.[106] Hence, a new rule that presents a clear standard while giving the defendant a meaningful opportunity to counter the foreign government's evidence is essential.[107] Given the interplay between the exception doctrine, the rule of non-inquiry, and the rule of non-contradiction, the defendant's plight becomes even more burdensome when he opposes a foreign nation whose abusive practices are masked by a presumption of fairness, making an alternative rule essential.

III. THE INDIAN GOVERNMENT'S SANCTION OF ABUSES BY THE PUNJAB POLICE

The pogroms of Sikhs in 1984 ignited violent and nonviolent Sikh "movements" for a separate homeland.[108] After engaging in counter-insurgency efforts for over a decade, from 1984 to 1995, the Punjab police gained a reputation for being specialists in anti-terrorism. Yet, even a cursory inspection of the atrocities committed in the name of

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differences between administrative hearings and trials in the context of terminating welfare benefits). "We recognize the importance of not imposing upon the States or the Federal Government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process." *Id.* at 267.

105. *See id.*

106. *See* Semmelman, *supra* note 20, at 1298-99 (discussing how courts have not clearly distinguished between contradictory and explanatory evidence).

107. *See infra* Part V.

108. JASKARAN KAUR, ENSAAF, TWENTY YEARS OF IMPUNITY: THE NOVEMBER 1984 POGROMS ON SIKHS IN INDIA 102-18 (2d ed. 2004), *available at* http://ensaaf.org/complete-1984report-v2.pdf.

> In the November 1984 massacre of Sikhs, the organizers of the carnage were not primarily driven by an intent to drive Sikhs out to other territories, such as to Punjab. Instead, their actions, such as the use of kerosene and burning alive as the main method of murder, and their expressions all spoke of their intent to destroy Sikhs as a group.

Id. at 118. Barbara Crossette, *India's Sikhs: Waiting for Justice*, 21 WORLD POL'Y J., 70, 70 (Summer 2004), *available at* http://www.worldpolicy.org/journal/articles/wpj04-2/Crossette.html ("About 3,000 Sikhs [the number is still in dispute] were murdered in nothing less than a pogrom, most of them in Delhi.").

anti-terrorism reveals why the Punjab police eventually quelled the insurgency. The police systematically engaged in torture, extrajudicial killings, fake encounters, and disappearances.[109] The police mercilessly attacked militants and civilian men, women, and children.[110] Maintaining the Sikh identity or having a real or perceived affiliation with militants instantly put civilians in jeopardy of liquidation or police harassment.[111] Punjab's evolution into a police state led to forced confessions under duress, torture, and often violence against the victim's families if they pursued any form of redress.[112] The impunity enjoyed by the Punjab police, acting under the authority of the Indian government, allowed for continuous human rights violations such as illegal detentions and torture that continued even after the militancy was crushed.[113]

A. The Indian Government Presents a Good Example of Why a Foreign Government's Evidence Must Not Be Accorded a Presumption of Fairness

Beginning in November 1984, the Indian government deliberately suppressed, tampered, and destroyed evidence implicating high-ranking government officials in orchestrating genocide against Sikhs.[114] In order to insulate the government officials directly involved, inaction gripped the police, the government, and the administrative agencies.[115] Judge Dhingra, a Delhi judge, in a 1996 opinion, concluded, "[u]nless the system rewrites itself and the investigating agencies are liberated from the clutches of the executive, there is little possibility of faithful and honest investigation."[116]

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109. Ensaaf, *supra* note 10, at 4.

110. *See id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *See* RAM NARAYAN KUMAR, REDUCED TO ASHES: THE INSURGENCY AND HUMAN RIGHTS IN PUNJAB 45 (2003), *available at* http://www.ensaaf.org/docs/reducedtoashes.php. Judge Dhingra accused police of these abuses in a ninety-two-page opinion and held the government responsible for sheltering the agents involved in the genocide. *Id.*

115. *Id.*

116. *Id.* at 45.

During the decade-long insurgency, police officials in Punjab systematically violated their criminal procedures by exacting confessions under duress and through the destruction and fabrication of evidence.[117]

The unlawful investigatory techniques used by the police still continue today.[118] Since the practice of impunity remains unchecked, the police have never had to reconcile their abusive law enforcement practices. One torture survivor recounts how the police arrested him and forced him to drink water from the same bowl he used for excrement.[119] Furthermore, they attempted to scare him into "put[ting] [his] thumbprint on some papers."[120] These coerced signatures or thumbprints are generally placed on blank arresting documents so that the police can write the victims' confessions to implicate the victims themselves or a suspected militant.[121] For example, one case that gained international acclaim was that of Davinder Pal Singh Bhullar, who was sentenced to death by the Indian Supreme Court.[122] Amnesty International and other human rights organizations joined in urging clemency because Mr. Bhullar's confession was written by the police after he had signed a blank piece

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117. *See id.* at 172.

118. *See generally* Ensaaf, *supra* note 10, at 7.

119. Jaskaran Kaur, Comment, *A Judicial Blackout: Judicial Impunity for Disappearances in Punjab, India*, 15 HARV. HUM. RTS. J. 269, 279 (2002).

120. Kaur, *supra* note 119, at 279; *Singh*, 170 F. Supp. 2d at 1019 n.9 ("In half of the recantations, the witnesses state they were forced to sign or to place their thumbprint on the blank sheets of paper.").

121. *See, e.g.*, ENSAAF, PROTECTING THE KILLERS: A POLICE OF IMPUNITY IN PUNJAB, INDIA 90 (Oct. 2007), *available at* http://hrw.org/reports/2007/india1007/. ("According to Pritam Kaur, three officers, names withheld, at gunpoint forced Pritam Kaur and her granddaughter, who had accompanied her, to place their thumbprints on the FIR [First Information Report]."). A son who witnessed the Punjab Police kill his father filed a complaint the following day, and the police made him sign a blank piece of paper, which was later used to fabricate his father's cause of death. Amnesty International, *India: Break the Cycle of Impunity and Torture in Punjab* (Jan. 20, 2003), *available at* http://web.amnesty.org/library/index /engasa200022003.

122. Robert Matas, *Grant Clemency to Sikh Man, Canada Urges India*, GLOBE & MAIL (Canada), Oct. 14, 2003 at A12, *available at* http://www.theglobeandmail.com/servlet/ArticleNews/TPStory/LAC/20031014/ UTERRN.

of paper.[123] He was forced to sign the blank paper because the police threatened to kill him in a fake encounter.[124] Every Sikh living through the counter-insurgency period was gripped with fear because people in every village and town knew relatives or friends who had been killed in fake encounters.[125]

Another major case was the disappearance of Jaswant Singh Khalra. Khalra was a human rights lawyer who exposed cremation grounds in numerous districts in Punjab.[126] These cremation grounds functioned to obscure any evidence of those whom the government took, tortured, or killed in fake encounters.[127] Eventually, in 1995, after his investigation prompted threats to his life, Khalra disappeared.[128] Recently, six Punjab police officials were convicted for their roles in the 1995 abduction and murder of Khalra.[129] The Punjab police spared no one; even an Indian Justice was arrested because he called for nonviolent self-determination.[130] He further "castigated the police policy of *suppressio veri*, fabrication of evidence, and elimination and torture of 'terrorist' suspects."[131]

Sadly, these policies did not disappear like the militancy in the mid-1990s. In 2005, the same unlawful tactics emerged when bombs exploded in two movie theaters.[132] Over a span of three months, numerous Sikhs were detained.[133] Documentation by the human rights group Ensaaf shows that police systematically fabricated

123. *Id.*

124. *Id.*

125. *See* ENSAAF, *supra* note 10, at 20.

126. Press Release, *Punjab Cops Convicted of 1995 Murder of Activist Khalra*, ENSAAF, Nov. 18, 2005, www.ensaaf.org/publications/newsletter/dispatch-dec05.pdf.

127. *Id.*

128. *Id.*

129. *Id.*

130. P.M. Varadarajan, *Letter: Jailed for Speaking Out in India*, INDEPENDENT (London), June 24, 1992, at 20.

131. *Id.*

132. *Blasts Hit New Delhi Cinema*, ABC NEWS ONLINE, May 23, 2005, http://www.abc.net.au/news/newsitems/200505/s1374317.htm.

133. *See, e.g.*, Hari Kumar, *Top Sikh Militant Held in Cinema Blasts*, N.Y. TIMES, June 9, 2005, at A16.

evidence to justify the criminality of suspected militants.[134] The Ensaaf investigation revealed that there were contradictions between informants and the police regarding the place of arrest, which undermined the allegations of the crimes.[135] Moreover, the police harassed family members when they could not extract confessions by torturing the alleged suspects.[136] Informants also described family members who were tortured to elicit pressure on "the targeted individual."[137] After his release from jail, Kashmir Singh, a bus driver who claims he was tortured by Punjab police, showed signs of having received a physical beating and was unable to walk.[138] Undoubtedly, the police were able to extract Kashmir Singh's signature.[139]

These abusive police techniques in gathering evidence have persisted since 1984. Barapind's case and others must be viewed in context to fully appreciate the lack of impartiality that any foreign government would have when seeking extradition of a suspected militant.

B. Test Case: Barapind v. Enomoto

1. Background

Barapind's struggle to restore the dignity of Sikhs manifested in his leadership position with the All India Sikh Student Federation ("Federation"),[140] a nonviolent political organization.[141] At the age of twenty-four, Barapind learned directly about the police excesses he had spent years advocating against.[142] Shortly after he organized a

134. ENSAAF, *supra* note 10, at 4, 7 (Amnesty International reported that "Justice R.L. Anand, a member of the Punjab State Human Rights Commission [reported] that more than 80 percent of the complaints filed against the Commission were against Punjab policemen."). *Id.* at n.20.

135. *Id.* at 16.

136. *Id.* at 18.

137. *Id.*

138. *Id.* at 18-19.

139. *Id.* at 19.

140. Barapind's Principal Brief, *supra* note 95, at 1.

141. *See* Hasan, *supra* note 6.

142. *Id.*

protest, Barapind was arrested.[143] At the police station, he was stripped down and hoisted into the air with his hands tied behind his back.[144] As his shoulders contorted backwards he was struck repeatedly in the midsection.[145] Unsatisfied with Barapind's answers, the torture continued:

> Barapind was made to sit on the floor and extend his legs, his hands still tied behind his back. An officer rode a three-foot-long wooden roller . . . back and forth over Barapind's thighs a few dozen times. His shrieks of pain did nothing to stop the process. Next, officers grabbed each of Barapind's ankles and began pulling his legs in opposite directions until he felt as if the muscles in his groin would rip.[146]

After fainting from the pain, he was revived, and the process continued . . . for eight days.[147] Eventually, the charges against Barapind were dismissed.[148] However, the next summer he was arrested again for allegedly sheltering militants.[149] This time the police attached wires to his toes, fingers, and genitals to electrocute him.[150] He later described that he felt as if the skin on his penis was peeling off.[151]

In 1993, using false documents and a false identity, Barapind reached Los Angeles International Airport.[152] Upon arrival, the INS detained Barapind, and Barapind immediately sought asylum.[153] Subsequently, Barapind's asylum proceeding was interrupted and held in abeyance pending the outcome of the extradition hearing.[154]

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143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *See id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *In re* Extradition of Singh, 170 F. Supp. 2d 982, 985 (E.D. Cal. 2001).
153. *Id.*
154. Barapind v. Enomoto, 400 F.3d 744, 747 (9th Cir. 2005).

Instead of freedom, Barapind spent the next thirteen years enduring the physical and psychological effects of indefinite detention while prohibited from wearing his turban and, thus, being stripped of his identity.[155] After being imprisoned in a Bakersfield county detention center during his prime years, Barapind was recently extradited back to his torturers in Punjab.[156] This completed the evolution of a youthful activist struggling for self-determination into an alleged terrorist imprisoned by those who initiated him to India's form of justice. Now, almost forty-years-old and having spent the last thirteen years imprisoned, there is legitimate concern that he will be tortured, killed, or unjustly convicted in India.[157]

Human Rights Watch recently submitted a letter detailing the history of mistreatment Sikh activists have faced at the hands of the Indian government.[158] They urged the government to ensure that the police not torture or mistreat Barapind.[159] It is easy to lose sight of the fact that Barapind, until this day, has never accepted the Indian government's accusation that he was part of the Khalistan Commando Force.[160] He continues to advocate for nonviolent resistance.[161]

2. Procedural History

Barapind was charged with murder, attempted murder, and robbery on eleven different counts.[162] The magistrate at the

155. Kept in a Fresno County jail, Barapind was unable to wear his Turban. Hasan, *supra* note 6. The Turban for a Sikh encompasses his identity and not wearing a Turban violates a fundamental Sikh tenant. REHAT MARYADA art. XVI, § t. Similarly, Harpal Singh Cheema was only allowed to cover his head with a small turban when he prayed. Complaint at 8-9, Cheema v. Thompson (E.D. Cal. 2006), *available at* http://www.gurmat.info/sms/smspublications/sikhrehatmaryada.pdf. There is nothing more degrading for Sikhs than to be stripped of their identity.

156. Human Rights Watch, *India: Don't Torture Sikh Activist Extradited by U.S.: Security Forces Routinely Abuse Sikhs in Custody*, June 20, 2006, http://hrw.org/english/docs/2006/06/20/india13584_txt.htm [hereinafter *India: Don't Torture*].

157. *India: Don't Torture*, *supra* note 156.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. Barapind v. Enomoto, 400 F.3d 744, 748 (9th Cir. 2005).

extradition hearing certified Barapind for extradition on only three of the eleven crimes.[163] In response, Barapind petitioned for a writ of habeas corpus.[164] The United States District Court for the Eastern District of California denied the petition.[165] Barapind then appealed to the U.S. Court of Appeals for the Ninth Circuit, where a three-judge panel affirmed the lower court's ruling.[166] The Ninth Circuit found that the three counts fell outside the political offense exception.[167] The Ninth Circuit granted a re-hearing en banc and affirmed the district court's denial of habeas petition on two of the three counts.[168] The remaining count was remanded to the district court to determine whether it fell within the political offense exception as defined in *Quinn v. Robinson*.[169]

3. Eleven Criminal Counts

The extradition treaty created between the United States and Great Britain was made applicable to India in 1942 while India was still under British rule.[170] The court analyzed eight legal standards under the 1931 Treaty.[171] Barapind argued that the Indian government failed to satisfy two of the standards.[172] First, the court found that the evidence produced by the government *was not* sufficient to meet the probable cause threshold for certain charges.[173] Second, it found that *all* the criminal allegations met the political offense requirements.[174]

Additionally, the court found that five counts fell under the political offense exception and three counts were based on evidence

163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 752.
168. *Id.* at 753.
169. *Id.*; *see also* Quinn v. Robinson, 783 F.2d 776, 783 (9th Cir. 1986).
170. *Id.* at 747 n.3 (discussing the Extradition Treaty, *supra* note 26).
171. *In re* Extradition of Singh, 170 F. Supp. 2d 982, 992 (E.D. Cal. 2001), *aff'd in part, rev'd in part, remanded to sub nom.* Barapind v. Enomoto, 400 F.3d 744 (9th Cir. 2005) (en banc).
172. *Id.*
173. *Id.* at 1015-29.
174. *Id.* at 1030-38.

extracted under torture, threats to life, and fabrication of evidence.[175] Dropping eight of the eleven charges should have compelled the court to abandon the presumption of fairness it gave to the Indian government's evidence.[176] The defense further contended that, even if the remaining offenses fell outside the exception, the extradition was politically motivated.[177] Although the court affirmed that each offense must be looked at separately under the doctrine of specialty,[178] which generally limits prosecution to non-political charges, the court overlooked the obvious implication in this case, where the foreign country sought prosecution specifically because of the political nature of the offense.[179]

The Indian government's evidence was comprised solely of testimony from unsworn eye-witnesses or police officials; where the statements from witnesses were "uncertified translations in the English language."[180] No physical evidence linked Barapind to any of the crimes.[181] Even so, the U.S. government authenticated the evidence as meeting probable cause.[182] The district court judge acknowledged that India's identification evidence was subject to "substantial question" and would probably not meet the U.S.

175. *The Extradition of Kulvir Singh Barapind to India*, ENSAAF, http://www.ensaaf.org/docs/barapind.php (last visited Oct. 23, 2007).

176. Barapind's Principal Brief, *supra* note 95, at 1-4.

177. This can be countered by the rule of specialty. But does the rule of specialty work in political offense contexts?

178. *Barapind*, 400 F.3d at 749 (citing Quinn v. Robinson, 783 F.2d 776, 783 (9th Cir. 1986)) ("The doctrine of 'specialty' prohibits the requesting nation from prosecuting the extradited individual for any offense other than that for which the surrendering state agreed to extradite.").

179. *Contra id.* at 755 ("It is within the sole discretion of the Secretary of State to determine whether a country's extradition request is a subterfuge for punishing the accused for a political crime.").

180. *In re* Extradition of Singh, 170 F. Supp. 2d 982, 1013 (E.D. Cal. 2001) *aff'd in part, rev'd in part, remanded to sub nom.* Barapind v. Enomoto, 400 F.3d 744 (9th Cir. 2005).

181. *Id.*

182. *Id.* at 1013, 1015 (citing Collins v. Loisel, 259 U.S. 309, 317 (1922) ("Unsworn statements of absent witnesses may be acted upon by the committing magistrate.").

evidentiary burden of proof in criminal matters.[183] Nonetheless, the judge found it sufficient to merit probable cause.[184]

The court, weighing Barapind's recantation evidence, believed that it fell within the spectrum of obliterating to contradicting evidence.[185] Moreover, "except for crimes in which the eye-witnesses were employed by the Indian government or were opposed to the Khalistan movement . . . in all but one case, sworn recantations are offered, affirmatively stating that the witness did not make the purported identification of Barapind."[186] The one case where there was no recantation was a coerced confession by Tarlochan Singh—implicating Barapind as his accomplice—who perished after being cruelly tortured by the Indian police.[187] Moreover, Barapind provided expert opinion and affidavits certifying India's use of obtaining confessions through torture and fabrication of evidence, demonstrating that any evidence produced by the Indian government is unreliable.[188] The judge noted that "the inquiry into the reliability of India's evidence cannot be ignored."[189] Though the district court found some of the evidence unreliable because it was fabricated or obtained by torture[190] and found five counts eligible for the exception,[191] the court still affirmed three charges of murder and attempted murder.[192]

4. Three Criminal Counts Remaining

The Ninth Circuit, en banc, looked specifically at these three counts[193] that the lower court determined fell outside the exception.[194]

183. *Id.* at 1015.
184. *Id.* at 1020, 1024-27.
185. *Id.* at 1018.
186. *Id.* at 1019.
187. *Id.*
188. *Id.*
189. *Singh*, 170 F. Supp. 2d at 1019 n.9.
190. *Id.* at 1023, 1029.
191. *Id.* at 1033-35.
192. *Id.* at 1039.
193. FIR (First Information Report) 100, 89, 34. A FIR is a document prepared by Indian police in response to an alleged crime. Human Rights Initiative, Police and You, http://www.humanrightsinitiative.org/publications/police/fir.pdf (last visited Nov. 13, 2007).

In the First Information Report (FIR) 100, Barapind was charged with attempted murder and murder.[195] Allegedly, Barapind was an accomplice in a scooter drive-by when he shot and killed one man and injured another.[196] The evidence the government put forth was a statement by Makhan Ram who was injured during the shootout.[197] The defense submitted a recantation signed affidavit, which stated that Makhan Ram never identified Barapind.[198] On the contrary, Makhan Ram claims that he was forced "to sign a blank sheet of paper which they subsequently turned into affidavits identifying Barapind."[199] As stated before, this is a common practice by the Punjab police.[200] The court's determination, however, was that recantation evidence merely raised a triable issue of fact and therefore the conflicting evidence did not "obliterate" the government's evidence.[201]

It is important to note that there is a split of authority on the admissibility of recantation evidence as a means to obliterate government evidence.[202] In *Eain v. Wilkes*,[203] the Seventh Circuit excluded recantation evidence because it was a matter to be considered at trial.[204] In contrast, in *In re Matter of Extradition of Contreras,*[205] the court admitted recantation evidence, finding that it met the probable cause requirement.[206] Interestingly, there are a few major distinctions between *Contreras* and *Wilkes.*

First, in *Wilkes*, the "extraditees complained that the translations of the inculpating statements were inherently suspect, and that when

194. Barapind v. Enomoto, 400 F.3d 744, 748 (9th Cir. 2005).

195. *Id.* at 749.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *See supra* Part III.A.

201. *Barapind*, 400 F.3d at 749-50.

202. *In re* Extradition of Singh, 170 F. Supp. 2d 982, 994, 1016-17 (E.D. Cal. 2001), *aff'd in part, rev'd in part, remanded to sub nom.* Barapind v. Enomoto, 400 F.3d 744 (9th Cir. 2005).

203. Eain v. Wilkes, 641 F.2d 504, 511-12 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981).

204. *Id.* at 504, 511-12.

205. *In re* Extradition of Contreras, 800 F. Supp. 1462, 1469 (S.D. Tex. 1992).

206. *Id.* at 1469.

the statements were made, the extraditees mistakenly believed their statements could not harm them."[207] On the contrary, in *Contreras* the statements were coerced, some by torture, and were recanted at the first opportunity in open court.[208] The court in *Contreras* found this distinction significant and believed that its decision did not conflict with the Seventh Circuit finding.[209]

When comparing *Contreras* to *Singh*, the major difference is the lack of *in-person* recantation in *Singh*.[210] Interestingly, the district court in *Singh* found that an "indicia of reliability" would have been given to recantations if they had been made under oath and in court.[211] Yet, in-person recantation was not possible in Barapind's case because the Indian government refused discovery requests in India and refused to issue travel visas to Barapind's counsel to get the statements under oath.[212]

In FIR 89, Barapind was charged for his involvement in the murders of four individuals.[213] Three of the murders were found to be politically motivated but one of the murders, involving the wife of a police collaborator, was found to be outside the exception.[214] The court found it dispositive that Barapind had not answered the questions of whether: (1) the wife was a police collaborator; (2) whether Barapind intended to kill her because of her political beliefs; or (3) whether it was an accident.[215] One can only imagine the difficulty in providing the specific motivation for a crime when there has been no admission of participation in such a crime. Barapind can

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207. *Id.*; *see also Wilkes*, 641 F.2d at 511.

208. *Contreras*, 800 F. Supp. at 1469.

209. *Id.*

210. *Compare In re* Extradition of Contreras, 800 F. Supp. at 1462 (statements recanted in court), *with In re* Extradition of Singh, 170 F. Supp. 2d 982, 1018 (E.D. Cal. 2001), *aff'd in part, rev'd in part, remanded to sub nom.* Barapind v. Enomoto, 400 F.3d 744 (9th Cir. 2005) (statements recanted in affidavits and not in open court).

211. *In re* Extradition of Singh, 170 F. Supp. 2d 982, 1018 (E.D. Cal. 2001), *aff'd in part, rev'd in part, remanded to sub nom.* Barapind v. Enomoto, 400 F.3d 744 (9th Cir. 2005).

212. *Id.*

213. *Barapind*, 400 F.3d at 750.

214. *Id.* at 751-52.

215. *Id.*

only challenge the exception and point to the widespread fabrication of evidence produced by the Indian government.

In FIR 34, Barapind was charged for his role in the murder of four men during a shootout between insurgents and an Indian government officer, a former officer, and body guards.[216] India produced an affidavit as evidence alleging that police inspector, Nirmal Singh, identified Barapind as one of the shooters.[217] In response, Barapind produced a recantation affidavit from Nirmal Singh "stating that he never identified Barapind or any other participant in the shootout."[218] The court, however, found that FIR 34 suffered from the same problems as FIR 100.[219]

Eventually, the court affirmed FIR 100 and FIR 89 but remanded FIR 34 to determine the political affiliations of the victims and whether the acts themselves fell within the exception.[220] Given the level of manipulation, fabrication, and abuse apparent in Indian criminal procedure, it is evident that exception cases present a critical problem with respect to the impartiality of the requesting state. Therefore, to safeguard fundamental due process the court must abandon the presumption of fairness given to foreign governments in exception cases.

IV. THE PRESUMPTION OF FAIRNESS GIVEN TO FOREIGN GOVERNMENTS' EVIDENCE IN POLITICAL OFFENSE EXCEPTION CASES IS UNDULY PREJUDICIAL TO THE RELATOR

Extradition treaties typically invoke the notions of comity and sovereignty. Once a foreign nation sends an extradition request, the State Department certifies that the "requesting state may be relied upon to treat the accused fairly."[221] In most extradition cases, the foreign government is intervening on behalf of its nationals to secure

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 752-53.

220. *Barapind*, 400 F.3d at 753.

221. Ahmad v. Wigen**,** 726 F. Supp. 389, 415 (E.D. N.Y. 1989) (citing to S. Treaty Doc. No. 100-20, 100th Cong., 2d Sess. 7 (1988) (Secretary of State should use its discretion to ensure that the extraditee will not be subject to torture)), *aff'd*, 910 F.2d 1063 (2d Cir. 1990).

criminals abroad and return them for prosecution in the requesting country. In these cases, the foreign government is merely facilitating the process of redress for its nationals, acting almost as a neutral, disinterested party or intermediary.

However, in the exception context, foreign governments are seeking extradition for harm directly perpetrated against the government. They are neither neutral nor disinterested in their demand to have the relator extradited. Courts, recognizing the political motivations of requesting nations, have suggested limitations on the presumption of fairness given to requesting states if the defendant can persuasively demonstrate that he would be unjustly prosecuted or punished by the requesting nation.[222]

Although a reasonable argument, it has not prevailed because of the rule of non-inquiry, which bars courts from looking into the judicial process of the requesting nation and any punishment a defendant may receive upon his extradition.[223] As previously stated though, the application of the rule of non-inquiry is limited to the second phase of the extradition hearing.[224] Therefore, by analyzing the magistrate's role in determining probable cause, it is possible to show that the presumption of fairness can be attacked at the initial stage of the extradition hearing because judicial determinations are made at this stage and do not warrant the application of the rule of non-inquiry.[225]

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222. *Ahmad***,** 726 F. Supp. at 415; Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960) (recognizing that "the conditions under which a fugitive is to be surrendered to a foreign country are to be determined solely by the non-judicial branches of the Government," and that "[t]he right of international extradition is solely the creature of treaty," but commenting in dicta that "[w]e can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the principle set out above.").

223. Cornejo-Barreto v. Seifert [sic], 218 F.3d 1004, 1010 (9th Cir. 2000).

224. *Supra* Part II.B. (after certification of extradition is complete and the Secretary of State makes the final determination on extraditability).

225. Parretti v. United States, 122 F.3d 758, 765-66 (9th Cir. 1997), *withdrawn*, 143 F.3d 508 (9th Cir. 1998).

A. Magistrate's Role in Evidentiary Proceeding

An alien within the jurisdiction of the United States enjoys due process protections under the Fifth Amendment even if his presence is unlawful.[226] An extradition hearing is not a "criminal prosecution,"[227] and therefore, the federal rules of criminal procedure and evidence do not apply.[228] Within this context, the constitutional protections for the relator are decreased, while the government reaps the benefit of a lower threshold regarding the admissibility of evidence.[229] Even though the accused in an extradition hearing has due process rights, courts do not require that the evidence presented to extradite be sufficient to convict.[230]

The government must accomplish three objectives in a hearing: (1) show that there is a valid treaty between the two nations, (2) prove that the relator's conduct is a crime in both jurisdictions and does not fall within the exception, and (3) provide evidence sufficient to establish probable cause of the crime having been committed.[231] Once probable cause is deemed sufficient, the magistrate certifies the extradition request and the Secretary of State makes the final determination.[232]

After a determination on extraditability, the magistrate is often barred (by the rule of non-inquiry) from evaluating the judicial process and punishment that awaits the relator.[233] This task has been delegated to the Executive Branch, specifically the Secretary of State.[234] The rationale for having the Executive Branch make the final determination on extraditability is that the branch is better equipped to make judgments about the conditions that await a relator in the foreign country.[235]

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226. Mathews v. Diaz, 426 U.S. 67, 77 (1976).
227. Desilva v. Dileonardi, 181 F.3d 865, 868 (7th Cir. 1999).
228. Martin v. Warden, 993 F.2d 824, 828 (11th Cir. 1993).
229. *See* Bovio v. United States, 989 F.2d 255 (7th Cir. 1993).
230. *Peroff*, 542 F.2d at 1249.
231. *Gonzalez*, 52 F. Supp. 2d at 736.
232. *See* Van Cleave, *supra* note 29, at 36-38.
233. *Id.* at 37.
234. 18 U.S.C.A. § 3186 (West 2007).
235. *See* Martin v. Warden, 993 F.2d 824, 829 (11th Cir. 1993).

B. How Courts Determine Probable Cause

The standard used to examine the foreign government's evidence in an extradition proceeding is probable cause.[236] This is a common standard used in federal preliminary hearings.[237] "Under this standard, the government must show evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt."[238] Any confessions made under duress, even if authenticated, are "unreliable and would be given little weight."[239]

During the evidentiary proceeding, the magistrate looks at the totality of circumstances when evaluating the foreign government's evidence.[240] To comply with due process, each piece of evidence submitted by the foreign government must be separately evaluated.[241] The magistrate must then discern whether the facts establish probable cause for a crime under the specified treaty.[242] Thus, probable cause is a *justiciable* question to be determined by the magistrate.[243] Therefore, the rule of non-inquiry cannot be invoked at this stage of the proceeding since the magistrate "must make an independent judicial determination whether a factual basis exists for believing that the accused person committed an extraditable crime."[244]

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236. Sindona v. Grant, 619 F.2d 167, 175 (2d Cir. 1980).

237. *Id.*

238. *See also* Coleman v. Burnett, 477 F.2d 1187, 1202 (D.C. Cir. 1973); Michigan v. DeFillippo, 443 U.S. 31, 37 (1979) (internal quotes omitted).

239. United States v. Kin-Hong, 110 F.3d 103, 121 (1st Cir. 1997).

240. United States v. Welch, 55 F.2d 211, 213 (2d Cir. 1972) (holding that courts must consider the totality of the circumstances to determine whether a statement was voluntary).

241. Atuar v. United States, 156 Fed. Appx. 555, 563 (4th Cir. 2005) (unpublished opinion); *see* Bingham v. Bradley, 241 U.S. 511, 516-17 (1916) (requiring "competent and adequate evidence" for probable cause).

242. Ornelas v. Ruiz, 161 U.S. 502, 512 (1896).

243. *See id.*

244. Parretti v. United States, 122 F.3d 758, 767 (9th Cir. 1997) *withdrawn*, 143 F.3d 508 (9th Cir. 1998) (citing Glucksman v. Henkel, 221 U.S. 508, 512 (1911)).

C. Presumption of Fairness Not Protected by Rule of Non-Inquiry

Traditionally, courts have not scrutinized the investigatory techniques of foreign governments because of the presumption of fairness given to requesting nations and the rule of non-inquiry. Yet, the rule of non-inquiry does not bar courts from looking at whether the competency of evidence is undermined by abusive investigatory methods.[245] A warrant that possibly contravenes the Fourth Amendment is a judicial determination[246] and it behooves the courts to evaluate rather than to remain blind to the injustice.

Courts need not attack the rule of non-inquiry squarely; courts can circumvent the rule by focusing on the first phase of the extradition hearing, a phase in which the determination of extraditability still has to be weighed. The rule of non-inquiry does not extend to this phase of the hearing because the determination of extraditability is a justiciable question, whereas questions about why extradition should be denied once certified are arguably non-justiciable.[247]

For example, when the defense convincingly[248] demonstrates that the foreign government procured evidence unlawfully, the presumption of fairness given to foreign governments should be stricken. To argue that courts should not evaluate the methods in which foreign governments procure evidence lacks force because courts consistently look abroad—in exception cases—to establish the political nature of the offense.[249] In *Barapind*, the court should have given greater weight to its determination that the Indian government fabricated evidence, tortured a witness to death, and displayed a pattern of coercive investigatory procedures.[250] Hence, the justiciability of these issues preclude any reservations for contravening the rule of non-inquiry, and therefore, courts should have the discretion to look at the investigative process that

245. *Id.*

246. *Id.* (citing Quinn v. Robinson, 783 F.2d 776, 790 (9th Cir. 1986)).

247. *Id.* at 765-66.

248. The preponderance standard is generally appropriate for civil cases. Grogan v. Garner, 498 U.S. 279, 286 (1991).

249. Parmenter, *supra* note 24, at 674-75.

250. *See In re* Extradition of Singh, 170 F. Supp. 2d at 1029; Petitioner's Principal Brief, *supra* note 95, at 38-39.

governments undertake to procure evidence.[251] This evaluation avoids conflict with the rule of non-inquiry while allowing the defendant to rebut the presumption of fairness that foreign governments receive.

The rule of non-inquiry is a forward-looking device that is applied after the certification of extraditability is issued.[252] However, one court has applied the rule of non-inquiry prior to a finding of extraditability.[253] The *Assarson* court held that it was beyond the scope of judicial review to determine whether the relator was "properly charged."[254] The key distinction, however, is that the relator sought to extend the conditions of the treaty.[255] Where the treaty itself "conditions extradition on the existence," for example, of probable cause, then that provision is reviewable by the courts and falls outside the purview of the rule of non-inquiry.[256] Nevertheless, in *Assarson*, the treaty *did not* condition the extradition on the crime being properly charged; hence, any inquiry would be barred not by the rule of non-inquiry but by the treaty itself.[257] Additionally, the Second Circuit held that when "evidence indicated officially sanctioned torture and abusive criminal proceedings, the presumption of fairness accorded to a requesting nation might be abandoned."[258] Consequently, since one of the conditions of the treaty between the United States and India mandates that evidence meet the probable cause threshold,[259] which is an issue for judicial determination, any

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251. *See* Parmenter, *supra* note 24, at 674-75.

252. Van Cleave, *supra* note 29, at 40-41.

253. *See generally In re* Assarsson, 635 F.2d 1237 (7th Cir. 1980) (refusing to assess, out of respect for sovereignty, whether the foreign government complied with its own criminal procedure).

254. *Id.* at 1244.

255. *Id.* at 1241.

256. Emami v. U.S. D. Court for N.D. of Cal., 834 F.2d 1444, 1448 (9th Cir. 1987).

257. *Assarsson*, 635 F.2d at 1242.

258. David B. Sullivan, *Abandoning the Rule of Non-Inquiry in International Extradition*, 15 HASTINGS INT'L & COMP. L. REV. 111, 127 (citing Rosado v. Civiletti, 621 F.2d 1179, 1195 (2d Cir. 1980)). The Second Circuit has stated that the due process clause in the Constitution may bar extradition under some circumstances. *Id.* at 127.

259. *See* Extradition Treaty, *supra* note 26, art. 9.

application of the rule of non-inquiry would be an unauthorized extension of the rule at this juncture.[260]

Furthermore, courts and legal scholars have suggested that the rule of non-inquiry be limited—especially in the context of the political offense exception.[261] This is practical because courts have to inquire into the policies of foreign governments to determine if the crime meets the standard of a political offense. At this initial stage of the hearing, the court is best situated to examine how the foreign government procured its evidence. Proponents of this judicial model argue that the protection of the individual requires judges to take an active role and inquire into the conditions of the requesting country.[262] The rationale is based on the courts being an impartial arbitrator who can fairly safeguard the relator's human rights.[263] Also, courts provide a forum removed from diplomatic concerns that consume the Executive Branch and therefore can more objectively ferret out the truth.

When presented with convincing rebuttal evidence, courts should determine the veracity of the evidence received rather than leaving it to the Executive. The State Department's priority is to safeguard foreign policy, and therefore, the courts are an "important check on the executive's power to extradite."[264] The courts' review will ensure that individual rights during an extradition request are protected according to our constitutional ideals.

The Indian government is not the only government that continues to fabricate evidence and use torture to exact confessions.[265] Using

260. Parretti v. United States, 122 F.3d 758, 767 (9th Cir. 1997), *withdrawn*, 143 F.3d 508 (9th Cir. 1998).

261. *See* Ahmad v. Wigan, 726 F. Supp. 389, 415 (E.D. N.Y. 1989) ("The burden of proof is on petitioner to come forward with a written submission showing a substantial probability that he or she can rebut the presumption of State Department propriety in assuming the fairness of the judicial process in the requesting country."); Michael P. Shea, *Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering*, 17 YALE J. INT'L L. 85, 90-91 (1992).

262. Shea, *supra* note 261, at 91-92.

263. *Id.* at 92.

264. Van Cleave, *supra* note 29, at 40.

265. "Some police forces in Mexico still use torture to extract confessions from suspects, but have developed new, more sophisticated ways of doing so that are harder to detect." Associated Press, *Mexican Human Rights Commission Investigat-*

India as a template, any presumption of fairness accorded to requesting nations in the exception context should be vitiated. Moreover, if the evidence is not enough to destroy the presumption of fairness given to the requesting state, the evidence should at least be used to corroborate the relator's defense in attempting to defeat the probable cause determination.

V. PROPOSING A NEW EVIDENTIARY STANDARD THAT IS CONSISTENT WITH DUE PROCESS

The rule of non-contradiction acts almost as an absolute bar to challenging the veracity of a foreign government's evidence. Courts have held that contradicting the government's evidence is not enough; it must be "explained away" or "obliterated."[266] The rationale for employing such a strict standard is that an extradition hearing is not a trial on the merits.[267] The belief is that the accused will get a fair chance to rebut the foreign government's evidence during a trial in the foreign country. However, in the context of exception cases, the requesting nation is not a neutral party; the standard to challenge the government's evidence must be lowered to afford the relator an opportunity to mount a meaningful, but limited, defense.

The rule of non-contradiction is not only vague but also poorly defined.[268] Courts have differed over the interpretation of the rule and have even come to contradictory conclusions.[269] If the application of the rule has no predictability and is vague so as to deter a proper defense, it violates the relator's due process rights and is unconstitutional. With these deficiencies, it is no surprise that the rule has been eroded by case law.[270]

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ing 12 Torture Complaints So Far in 2005, SAN DIEGO UNION TRIBUNE, Nov. 22, 2005, *available at* http://www.signonsandiego.com/news/mexico/20051122-1406-mexico-torture.html.

266. *See In re* Extradition of Singh, 170 F. Supp. 2d 982, 994 (E.D. Cal. 2001), *aff'd in part, rev'd in part, remanded to sub nom*.

267. *See* Semmelman, *supra* note 20, at 1298.

268. *Id.* at 1297-98 (describing the rule as "somewhat murky" and noting that courts applying the Rule [of Non-Contradiction] have not clearly delineated between explanatory and contradictory evidence).

269. *Id.* at 1311-13.

270. *Id.* at 1314.

An alternative approach, which was first established in *Franks v. Delaware* and known as a *Franks* hearing,[271] would restore a sense of balance to the extradition hearing. Employing *Franks* hearings would provide clarity to the evidentiary hearing while giving the defendant a meaningful opportunity to contest the government's evidence. Additionally, a *Franks* hearing will maintain the goals of an extradition hearing by avoiding a trial on the merits. Even though defendants in extradition hearings are not accorded the plethora of constitutional rights given defendants in criminal proceedings, basic due process rights still govern extradition hearings.[272] A *Franks* hearing would satisfy these due process requirements.

A. Franks Hearing

In *Franks*,[273] the defendant challenged the affiant's description of the youth officer's identification of the defendant.[274] Allegedly, the youth counselor identified the defendant's clothing, which corroborated the victim's statements.[275] The defendant subsequently questioned the youth counselor who then recanted the statements recorded on the affidavit.[276] In adopting a hearing to determine the veracity of the government's affidavit, the Supreme Court had to contend with exactly the same concern as any extradition court: Does a defendant have a right to challenge the truthfulness of factual statements made in an affidavit supporting a warrant and used to establish probable cause?[277]

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271. Franks v. Delaware, 438 U.S. 154, 156 (1978).

272. Semmelman, *supra* note 20, at 1300.

273. It is important to note that *Franks v. Delaware* represents a criminal case, yet, the rationale adopted by the Supreme Court logically extends to the extradition arena because it is a limited hearing that provides the defense an opportunity to rebut the presumption of fairness given to the affiant. *See Franks*, 438 U.S. at 169-70 (explaining the role of such a hearing in protecting Fourth Amendment rights). This hearing safeguards fundamental constitutional rights. *Id.*

274. *Franks*, 438 U.S. at 156.

275. *Id.* at 157.

276. *Id.* at 157-60.

277. *Id*. at 155.

Here, the Court addressed two considerations that would militate against challenging the veracity of a warrant.[278] First, probable cause determinations do not adjudicate guilt or innocence.[279] Second, the Warrant Clause "takes the affiant's good faith as its premise."[280] Similarly, extradition courts are deterred from considering evidence that is more properly considered in a trial setting.[281] Moreover, an extradition treaty gives a presumption of fairness to the evidence provided by the foreign government.[282] However, the court in *Franks* found powerful mitigating reasons for allowing the defendant to challenge the veracity of the warrant.[283] First, "a flat ban on impeachment of veracity could denude the probable cause requirement of all real meaning."[284] Second, this complete ban could lead to intentional falsification of affidavits if there is no adequate check.[285] Third, *ex parte* proceedings, where the government and magistrate validate affidavits without the presence of the defendant, are less vigorous than an adversarial proceeding.[286] Finally, the Court held as follows:

> Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth amendment requires that a hearing be held at the defendant's request. In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant by *preponderance* of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining

278. *Id.* at 160-65.

279. *Id.* at 160-61.

280. *Id.* at 164.

281. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 476 cmt. b (2007).

282. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 478 cmt. b (2007) ("Depositions, warrants, and other papers are admissible in extradition hearings in the United States if they would be admissible for similar purposes in the requesting state, and if they are properly authenticated.").

283. *See generally Franks*, 438 U.S. at 168-71.

284. *Id.* at 168.

285. *Id.*

286. *Id.* at 169.

> content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.[287]

The Court, fully realizing the presumption of validity given to search warrants, mandated more than a conclusory attack or a desire to cross-examine to achieve an evidentiary hearing.[288] The defendant has the burden of specifying direct allegations of falsehood or reckless disregard for the truth.[289] These are strict standards, yet they afford the defendant a meaningful opportunity to mount a defense without having a trial on the merits. Moreover, a request for a *Franks* hearing in an extradition court would allow the defendant to show by a preponderance of the evidence that the evidence in the affidavit is false.[290]

Additionally, the *Franks* Court provided guidelines on what proof a defendant should proffer. First, the defendant should specifically point out what portion of the affidavit is false.[291] Second, the accusation should be supported by affidavits, sworn statements, or other reliable statements of witnesses.[292] Third, any allegations of negligence or good faith mistakes would be insufficient.[293] And finally, setting aside the false portion of the affidavit, the remaining content can be relied upon for determining probable cause.[294] Therefore, the defendant must attack the heart of the affidavit to be successful.

By applying a *Franks* hearing to *Barapind*, the court, instead of focusing on the contradictory evidence provided by the defense,[295] would look for a substantial preliminary showing that false evidence

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287. *Id.* at 155-56 (emphasis added).
288. *Id.* at 171.
289. *Id.*
290. *See id.* at 155.
291. *Id.* at 171.
292. *Id.*
293. *Id.*
294. *Id.* at 171-72.
295. Barapind v. Enomoto, 400 F.3d 744, 750 (9th Cir. 2005).

was knowingly or recklessly included by the affiant.[296] In *Singh*, the court found that some of the affidavits were fabricated and that one witness was killed by torture while being forced to identify Barapind.[297] Therefore, Barapind would meet the first prong of the *Franks* hearing by making a substantial preliminary showing.[298] Next, a hearing would be granted, and the defendant would have to show that the government provided false evidence by a preponderance of the evidence.[299] Here, the majority of Barapind's defense rested on recantation evidence, which underscores the argument that the government fabricated affidavits. Using the current framework, the rule of non-contradiction, the *Barapind* court found that recantation evidence did not "obliterate" the government's evidence because a trial was needed to make this determination.[300]

However, by implementing a *Franks* hearing, the magistrate would not be forced to make difficult, and sometimes arbitrary, decisions as to what evidence obliterates, negates, or simply contradicts the government's evidence. The magistrate's sole concern would be whether the defendant can show, by a preponderance of the evidence, that the government's evidence is false or obtained by a reckless disregard for the truth.

Barapind's defense provided substantial recantation evidence and corroborating documentation of the Indian government's abusive investigatory polices.[301] The court had already dismissed three counts

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296. *Franks*, 438 U.S. at 155-56.

297. *See Singh*, 170 F. Supp. 2d at 1029 ("It is probably more true than not true that Tarlochan was tortured [and] that his identification of Barapind was involuntarily obtained."). A credibility determination can be made to show evidence procured by the torture of Tarlochan is not competent evidence. India offers no contrary evidence. Petitioner Kulvir Singh Barapind's Corrected Reply Brief at 2-3, 9, Barapind v. Enomoto, 400 F.3d 744, (9th Cir. Apr. 09, 2003) (No. 02-16944) [hereinafter Barapind's Corrected Brief].

298. *Franks*, 438 U.S. at 155-56.

299. *Id.* at 156. A showing by the preponderance of the evidence would be consistent with the evidentiary standard in civil cases and hence is appropriate for an extradition hearing. Furthermore, to determine whether an offense is political in nature the defendant must also meet the preponderance threshold. *Singh*, 170 F. Supp. 2d at 995.

300. *See Barapind*, 400 F.3d at 750.

301. This is further substantiated by the Punjab Police's history of coercion in obtaining confessions. *See generally Singh*, 170 F. Supp. 2d 982.

because of falsification of evidence by the Indian government.[302] Five counts fell under the political offense context and the government's remaining affidavits had been directly challenged through recantation affidavits.[303] In contrast to the method adopted by the court in *Barapind*, which discounted an abundance of contradictory evidence,[304] a *Franks* hearing would provide an equitable venue to challenge the veracity of the government's evidence. With this standard, the *Barapind* court could have potentially found that the three remaining counts, weighed against the recantation evidence, would meet the preponderance threshold.

Yet, if *Barapind* still did not find in favor of the defendant, there should be one additional consideration: Can the taint from charges initially thrown out by the court because of knowing falsification and torture spread to the other counts?

B. How Far Should the Taint Flow?

The court in *Barapind* disagreed with the defendant's argument that a finding of falsification for three of the affidavits tainted the remaining affidavits upon which the court relied.[305] Such a threshold determination should have been made by looking at the *totality of the circumstances*. The magistrate should have considered: (1) how many falsified affidavits were produced; (2) the methods used in falsifying the evidence; (3) whether any corroborating evidence shows a pattern of repeated abuse; and finally (4) the "political" nature of the offense.

In *Barapind*, the government's falsification of evidence had been established.[306] The methods of torture, threats, and coercion used by the Punjab police had been recognized by the court.[307] The police had a history of gathering evidence unlawfully and the majority of the offenses that the court did not throw out were found to be "political"

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302. Barapind's Corrected Brief, *supra* note 297, at 2.

303. *Singh*, 170 F. Supp. 2d at 1019-39.

304. As stated previously, other courts have found recantation evidence to be formidable enough to obliterate or negate probable cause. *See supra* Part III.

305. *See* Barapind v. Enomoto, 400 F.3d 744, 752 (9th Cir. 2005) (affirming the district court's finding that Barapind's challenge to the affidavits did not destroy probably cause).

306. *See Singh*, 170 F. Supp. 2d at 1019 n.9.

307. *Id.* at 1019.

in nature.[308] If the court were assessing the totality of circumstances, the fact that three of the criminal allegations were found to be falsified and were thus tainted, plus the fact that five allegations fell under the exception, should have called into serious question the veracity of the three counts that led to Barapind's extradition.

In any exception case, a defendant should be able to rebut the evidence by a preponderance of the evidence. By retaining the strictures of the rule of non-contradiction, the exception doctrine is virtually swallowed. A foreign government cannot claim to be a disinterested party in exception cases; they are fully entrenched in the outcome of the decision. Therefore, a *Franks* hearing, combined with a totality of the circumstances test, provides a modicum of relief to the defendant, giving the defendant a meaningful opportunity to challenge the veracity of the requesting government's evidence.

VI. CONCLUSION

Only by removing the presumption of fairness given to requesting nations, specifically in exception cases, and by providing the defense an equitable evidentiary hearing, can the law preserve the impartiality of an extradition hearing. With the emergence of human rights law, domestic courts have grappled with the lack of procedural protections afforded to the relator. One district court has acknowledged that the United States may be imputed with human rights violations committed against the relator by the requesting nation.[309] The district court hypothesized a scenario where "an individual was involved in a civil war of liberation against a dictatorial government and . . . surrendered from the United States."[310] The court asserted that "to enforce extradition orders under such circumstances may implicate our courts in grave injustices and cruel repressions."[311] Almost two decades later, the United States has placed itself in just this situation.

Other nations have also stepped forward to announce that extradition should be denied "when there is an indication of violations

308. *See Barapind*, 400 F.3d at 748-49.
309. Ahmad v. Wigen, 726 F. Supp. 389, 405 (E.D. N.Y. 1989).
310. Quigley, s*upra* note 22, at 417.
311. *Ahmad*, 726 F. Supp. at 405.

of human rights standards by the requesting state."[312] Eventually, the United States must recognize it cannot value international comity over fundamental human rights. The relator must be given a meaningful opportunity to defend himself in an extradition hearing. Otherwise, the political offense exception, which protects revolutionaries, will be completely eroded by the politics of foreign affairs.

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312. Quigley, s*upra* note 22, at 421.

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