THE DEFAULT RULE AND DUE PROCESS: DIVERGING INTERPRETATIONS OF "THE CHARGING DOCUMENT" REQUIREMENT IN EXTRADITION TREATIES

JACOB M. KARLIN*

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* Executive Senior Editor, *Southern California Law Review*, Volume 98; J.D. Candidate 2025, University of Southern California Gould School of Law; B.A. 2017, Science in Society Program, Wesleyan University. All views and conclusions expressed in this Note are solely my own and do not express the opinions or positions of my employer. Many thanks to Professor Marcela Prieto for her invaluable guidance throughout the drafting process. I also want to thank the talented *Southern California Law Review* staff and editors for their work throughout the publication process.

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INTRODUCTION

The United States is a party to over one hundred bilateral extradition treaties with foreign governments.[1] These treaties allow the U.S. and foreign countries to facilitate the transfer of individuals accused of crimes to the jurisdictions seeking to prosecute them.[2] Extradition is an ancient practice: processes resembling extradition have existed since antiquity, and the United States has entered into versions of bilateral extradition treaties and received extradition requests since shortly after the country's founding in the 18th century.[3]

As the world continues to grow smaller by means of technological advances and ever-increasing accessibility to international travel, extradition has become increasingly important as a means of international law enforcement.[4] This growth in extradition has forced the judiciary of the United States to face unique issues of law that relate to the constitutional rights of the individuals whose extradition from the United States is requested by foreign countries. In that same vein, the recognition and enforcement of international human rights law has grown in the last century, and as rules of international human rights law have become binding on the United States judiciary, courts are faced with new, conflicting demands of both extradition requests and international law-derived rights of relators (that is, the individuals whose extradition is requested by foreign countries).

In 2023, two federal circuit courts analyzed the phrase "the charging document" in two bilateral extradition treaties: the Fourth Circuit reviewed an extradition treaty between the United States and Lithuania, and the Ninth Circuit reviewed an extradition treaty between the United States and Peru. The Fourth and Ninth Circuits disagreed over how to approach the phrase

1. TREATY AFFS. STAFF, OFF. OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2020 (2020).

2. *Extradition Treaty*, BLACK'S LAW DICTIONARY (12th ed. 2024).

3. William Magnuson, *The Domestic Politics of International Extradition*, 52 VA. J. INT'L L. 839, 846 (2012); *see* Christopher D. Man, *Extradition and Article III: A Historical Examination of the "Judicial Power of the United States*,*"* 10 TUL. J. INT'L & COMPAR. L. 38, 40 (2002); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 63 (6th ed. 2014).

4. MICHAEL ABBELL, EXTRADITION TO AND FROM THE UNITED STATES 10 (2010); Ann Powers, *Justice Denied? The Adjudication of Extradition Applications*, 37 TEX. INT'L L.J. 277, 279–80 (2002).

and its effect on the extradition process. In *Manrique v. Kolc*, the Ninth Circuit found "the charging document" requirement in the U.S.-Peru Extradition Treaty to be ambiguous and subject to multiple interpretations. Utilizing court precedents on treaty interpretation, the Ninth Circuit deferred to the executive branch's interpretation of the phrase. In doing so, the court found that Peru had provided the necessary documents to satisfy the "charging document" requirement. On the other hand, the Fourth Circuit found that the phrase was clear and unambiguous, holding in *Vitkus v. Blinken* that the judiciary was compelled to decline Lithuania's extradition request upon analyzing the "charging document" requirement in the U.S.-Lithuania Extradition Treaty. The Fourth Circuit found that the inclusion of "the charging document" in the U.S.-Lithuania treaty was a requirement that Lithuania had not satisfied when it had presented prosecutorial documents to the Secretary of State in an extradition request. The court rejected the Secretary of State's argument as to the adequacy of Lithuania's submitted documents.

The discrepancy between these two circuit courts illustrates how the judiciary's deference to the executive branch (a deference codified by the Supreme Court in the early 20th century and referred to in this Note as the "default rule") in matters of extradition treaty interpretation has manifested in the 2020s. At least twenty-eight extradition treaties that the United States has entered into with foreign nations reference the "charging document" in their lists of documents that a foreign nation is required to provide in an extradition request to the United States.[5] As the judiciary will likely be called

5. Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Albania, Alb.-U.S., art. 8, Dec. 22, 2020, S. TREATY DOC. NO. 117-2 (2022); Extradition Treaty Between the United States of America and the Argentine Republic, Arg.-U.S., art. 8, June 10, 1997, S. TREATY DOC. NO. 105-18 (1997); Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Austria, Austria-U.S., art. 10, Jan. 8, 1998, S. TREATY DOC. NO. 105-50 (1998); Extradition Treaty Between the United States of America and the Kingdom of Belgium, Belg.-U.S., art. 7, Apr. 27, 1987, T.I.A.S. No. 97-901; Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Bolivia, Bol.-U.S., art. VI, June 27, 1995, S. TREATY DOC. NO. 104-22 (1995); Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Bulgaria, Bulg.-U.S., art. 8, Sept. 19, 2007, T.I.A.S. No. 09-521; Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Cyprus, Cyprus-U.S., art. 8, June 17, 1996, S. TREATY DOC. NO. 105-16 (1997); Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Estonia, Est.-U.S., art. 8, Feb. 8, 2006, T.I.A.S. No. 09-407; Extradition Treaty Between the United States of America and France, Fr.-U.S., art. X, Apr. 23, 1996, S. TREATY DOC. NO. 105-13 (1997); Extradition Treaty Between the Government of the United States of America and the Government of the Republic of India, India-U.S., art. 9, June 25, 1997, S. TREATY DOC. NO. 105-30 (1997); Protocol Between the Government of the United States and the Government of the State of Israel Amending the Convention on Extradition, Isr.-U.S., art. 6, July 6, 2005, S. TREATY DOC. NO. 109-3 (2005); Extradition Treaty Between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan, Jordan-U.S., art. 8, Mar. 28, 1995, S. TREATY DOC. NO. 104-3 (1995); Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Korea, S. Kor.-U.S., art. 8, June 9,

to interpret the "charging document" in future extradition requests, the judiciary's decision to give deference to the executive branch in interpreting this phrase merits attention. The interpretation of the "charging document" requirement implicates due process concerns of relators, given that the charging document requirement ensures that the country requesting extradition complies with the procedure outlined in its treaty. This Note argues that courts, when faced with extradition requests from countries whose treaties include the "charging document" requirement, are bound by precedent to apply the default rule in a way that may conflict with a relator's constitutional, due process rights. This Note also contends that this form of deferential interpretation to the executive branch may conflict with the fundamental right of due process afforded to relators by international law. However, departing from executive deference affects the United States' foreign relations with other sovereign countries—this Note will briefly explore this ramification as well.

Part I of this Note provides an overview of how extradition treaties are utilized by the United States and how they are interpreted by both the executive and judicial branches. In brief, the statute governing extraditions in the United States bestows the judiciary with the responsibility of certifying

1998, T.I.A.S. No. 12962; Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Latvia, Lat.-U.S., art. 7, Dec. 7, 2005, T.I.A.S. No. 09-415; Protocol on the Application of the Agreement on Extradition Between the United States of America and the European Union to the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Lithuania, Lith.-U.S., art. 8, June 15, 2005, T.I.A.S. No. 10-201.14; Extradition Treaty Between the Government of the United States of America and the Government of the Grand Duchy of Luxembourg, Lux.-U.S., art. 8, Oct. 1, 1996, S. TREATY DOC. NO. 105-10 (1997); Extradition Treaty Between the Government of the United States of America and the Government of Malaysia, Malay.-U.S., art. 7, Aug. 3, 1995, S. TREATY DOC. NO. 104-26 (1996); Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Paraguay, Para.-U.S., art. VII, Nov. 9, 1998, S. TREATY DOC. NO. 106-4 (1999); Extradition Treaty Between the United States of America and the Republic of Peru, Peru-U.S., art. VI, July 26, 2001, T.I.A.S. No. 03-825; Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Philippines, Phil.-U.S., art. 7, Nov. 13, 1994, T.I.A.S. No. 96-1122; Extradition Treaty Between the United States of America and the Republic of Poland, Pol.-U.S., art. 9, July 10, 1996, S. TREATY DOC. NO. 105-14 (1997); Extradition Treaty between the United States of America and Romania, Rom.-U.S., art. 8, Sept. 10, 2007, T.I.A.S. No. 09-508; Treaty Between the United States of America and the Republic of Serbia on Extradition, Serb.-U.S., art. 8, Aug. 15, 2016, T.I.A.S. No. 19-423; Extradition Treaty Between the Government of the United States of America and the Government of the Republic of South Africa, S. Afr.- U.S., art. 9, Sept. 16, 1999, T.I.A.S. No. 13060; Extradition Treaty Between the Government of the United States of America and the Government of the Democratic Socialist Republic of Sri Lanka, Sri Lanka-U.S., art. 8, Sept. 30, 1999, T.I.A.S. No. 13066; Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Trinidad and Tobago, Trin. & Tobago-U.S., art. 7, Mar. 4, 1996, T.I.A.S. No. 1129; Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, U.K.-U.S., art. 8, Mar. 31, 2003, T.I.A.S. No. 07-426; Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Zimbabwe, U.S.-Zim., art. 6, Jul. 25, 1997, T.I.A.S. No. 00-426. The phrase "the charging document" appears in the above referenced treaties in various capacities: some note "the charging document, if any" or other conditional language regarding "the charging document."

an individual for extradition: the judiciary interprets the relevant extradition treaty to determine whether the person being sought by the requesting country may be certified as extraditable.[6] Once the court certifies the extraditability of a relator, the Secretary of State has the discretion to either extradite the relator or deny the foreign country's extradition request.[7] Importantly, although extradition is neither a full trial nor a solely administrative function, relators are deemed to have certain constitutional rights when subject to extradition proceedings in the United States.[8] However, the unique procedural characteristics of extradition do not align with notions of constitutionally mandated due process, as relators do not benefit from the constitutional protections that courts have recognized for criminal defendants.[9] Judicial precedent also mandates that courts defer to the executive branch's interpretation of extradition treaties.[10] This deference has created friction between the judicial and executive branches, as the judiciary has been tasked with balancing relators' due process rights against the executive branch's foreign relations commitments to other sovereign nations. As the fundamental right to due process has been developed by international human rights bodies over the course of the 20th century, the judiciary's deference to the executive branch has come into conflict with the advancement of due process as an international human right as well.[11]

Part II surveys two appellate court cases decided in 2023, *Vitkus v. Blinken* and *Manrique v. Kolc*. In these cases, the Fourth and Ninth Circuits

6. 18 U.S.C. § 3184; Artemio Rivera, *A Case for the Due Process Right to a Speedy Extradition*, 50 CREIGHTON L. REV. 249, 252–53 (2017) [hereinafter Rivera, *Speedy Extradition*].

7. Rivera, *Speedy Extradition*, *supra* note 6, at 254; United States v. Lui Kin-Hong, 110 F.3d 103, 109 (1st Cir. 1997) ("It is . . . within the Secretary of State's sole discretion to determine whether or not the relator should actually be extradited."); 18 U.S.C. § 3186 ("The Secretary of State may order the person . . . to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged."); Aimée J. Buckland, Note, *Offending Officials: Former Government Actors and the Political Offense Exception to Extradition*, 94 CALIF. L. REV. 423, 439 (2006).

8. *See infra* note 71.

9. Man, *supra* note 3, at 44 n.34 ("Courts have held that the fugitive has no right to discovery; he may not cross-examine anyone who testifies at the extradition hearing; he may not cross-examine the affiants or deponents on whose affidavits or depositions the foreign complaint is based; his right to present evidence is severely limited; the Sixth Amendment guarantee of a speedy trial does not apply to an extradition hearing; the Federal Rules of Evidence do not apply to extradition proceedings; the Federal Rules of Criminal Procedure do not apply to extradition proceedings; a fugitives [sic] right to controvert the evidence against him is extremely limited; the constitutional prohibition against double jeopardy does not apply in the context of extradition; a fugitive who defeats an extradition attempt cannot claim the protection of double jeopardy or res judicata in a later extradition proceeding on the same charge; the exclusionary rule does not apply in extradition proceedings; hearsay is allowed in extradition proceedings; unsworn summaries of witness statements can be used in support of a finding that the fugitive is extraditable; and, the extradition may go forward even if the accused is not sane." (alteration to the original)).

10. *See* GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637, 1647 (2020).

11. *Infra* Part III.A.

both analyzed "the charging document" requirement in extradition treaties, and in doing so, they exemplify the divergent approaches to granting deference to the executive branch in extradition procedures. In their divergent outcomes, these cases demonstrate the impact the default rule may have on a court's decision to determine whether a relator is extraditable.

Part III of this Note analyzes the decisions of the Fourth and Ninth Circuits in *Vitkus v. Blinken* and *Manrique v. Kolc*. In analyzing the decisions, this Note argues that the Fourth Circuit's avoidance of the default rule in reviewing "the charging document" requirement protects the relator from a potential infringement of their constitutional due process rights under domestic law, even at the cost of the executive branch's ability to maintain foreign relations. The Fourth Circuit's interpretation also respects the relator's fundamental right to due process as established by international human rights law. This Note contends that the Fourth Circuit's interpretation of a bilateral extradition treaty is one example of how the judiciary should approach the "charging document" requirement, notwithstanding other circumstances in the extradition process.

I. BACKGROUND

A. EXECUTING BILATERAL EXTRADITION TREATIES

The United States and foreign countries usually coordinate the extradition of relators through bilateral extradition treaties. A treaty is "[a]n agreement formally signed, ratified, or adhered to between two countries or sovereigns; [or] an international agreement concluded between two or more states in written form and governed by international law."[12] In the United States, treaties are "international agreements made by the President with the advice and consent of the Senate in accordance with Article II, [S]ection 2 of the Constitution of the United States."[13] Extradition treaties are treaties that contain the general, agreed-upon terms of the extradition process that both signatories must abide by. There are various forms of extradition treaties[14]: there are bilateral extradition treaties, which are "concluded between [a country adopting the law] and a foreign country," and multilateral treaties, which contain "provisions governing extradition of persons who are present in the territory of [country adopting the law]."[15]

12. *Treaty*, BLACK'S LAW DICTIONARY (12th ed. 2024).

13. TREATY AFFS. STAFF, OFF. OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, *Foreword to* TREATIES IN FORCE 2021—2023: SUPPLEMENTAL LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS, https://www.state.gov/wp-content/uploads/2023/06/TIF-Supplement-Report-2023.pdf [https://perma.cc/A9YW-HUCT].

14. BASSIOUNI, *supra* note 3, at 91.

15. U.N. OFF. ON DRUGS AND CRIME (UNODC), MODEL LAW ON EXTRADITION 8 (2004),

The United States has entered into extradition agreements with foreign countries since shortly after its founding in the 18th century.[16] The United States primarily executes bilateral extradition treaties.[17] This means that for the United States to engage in an extradition proceeding, the United States usually must have executed an extradition treaty directly with the foreign country requesting extradition in order to consider an extradition request.[18]

The extradition process falls under the umbrella of the United States' foreign relations responsibilities and therefore, extradition is considered by the United States as a responsibility of the executive branch. The executive branch is authorized to manage the extradition process "by virtue of its constitutional power to conduct foreign relations."[19] The treaties that the executive branch enters into on behalf of the United States can be divided into two kinds of treaties: self-executing treaties, which are akin to legislative acts, and non-self-executing treaties, which are treaties that the federal legislature is required to ratify and enforce.[20] Self-executing treaties do not need legislation to be enacted, as their self-executing nature imbues them with the power of domestically-created federal legislation that supersedes both state law and prior federal law.[21] Bilateral extradition treaties are self-executing.[22] Upon ratification of the bilateral extradition treaty with a foreign

https://www.unodc.org/pdf/model_law_extradition.pdf [https://perma.cc/FJN5-CFHZ].

16. John T. Parry, *The Lost History of International Extradition Litigation*, 43 VA. J. INT'L L. 93, 105 (2002).

17. Artemio Rivera, Interpreting Extradition Treaties, 43 U. DAYTON L. REV. 201, 202 (2018) [hereinafter Rivera, *Interpreting Extradition Treaties*]; BASSIOUNI, *supra* note 3, at 91.

18. *Frequently Asked Questions Regarding Extradition*, U.S. DEP'T OF JUST.: CRIM. DIV., https://www.justice.gov/criminal/criminal-oia/frequently-asked-questions-regarding-extradition [https://perma.cc/PQ6P-F6M4]. *But see* Ntakirutimana v. Reno, 184 F.3d 419, 425 (5th Cir. 1999) ("[A]lthough some authorization by law is necessary for the Executive to extradite . . . the Constitution's text [does not] require that the authorization come in the form of a treaty.").

19. BASSIOUNI, *supra* note 3, at 70. The executive's influence on the extradition process is further explored in Part I.C.

20. Medellin v. Texas, 552 U.S. 491, 526–28 (2008); *see* Foster v. Neilson, 27 U.S. 253, 314 (1829) *overruled by* United States v. Percheman, 32 U.S. 51 (1833); Cook v. United States, 288 U.S. 102, 119 (1933) (noting that a self-executing treaty is one for which "no legislation [is] necessary to authorize executive action pursuant to its provisions").

21. Whitney v. Robertson, 124 U.S. 190, 194 (1888); BASSIOUNI, *supra* note 3, at 119; Terlinden v. Ames, 184 U.S. 270, 288 (1902) (citing Foster v. Neilson, 27 U.S. 253 (1829)); U.S. CONST. art. VI., cl. 2 ("[A]ll 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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 86 AM. J. INT'L L. 695, 699–700 ("The effect of the Supremacy Clause was to superimpose the nation's treaty obligations, as well as the Constitution and federal statutes, on the existing corpus juris of the states as supreme federal law. By virtue of the Supremacy Clause, treaties of their own force nullify inconsistent state laws and earlier federal laws, and the judicial mechanisms available generally to enforce laws in the United States are available to enforce treaties.").

22. Cheung v. United States, 213 F.3d 82, 95 (2d Cir. 2000); BASSIOUNI, *supra* note 3, at 119; *see, e.g.*, Agreement on Extradition Between the United States of America and the European Union, Eur. Union-U.S., June 25, 2003, S. TREATY DOC. NO. 109-14 (2006), at vi, https://www.congress.gov/treaty-

government, the legislative branch enacts statutes, based on the terms of the extradition treaties, that govern the procedures by which the executive and judicial branches respond to extradition requests.[23] When domestic legislation and treaty provisions conflict, treaty provisions "prevail."[24]

A pertinent aspect of treaty enforcement for purposes of this Note is the inclusion of the "documents required" section in an extradition treaty. In the modern era of extradition treaty drafting, extradition treaties usually list the required documents a requesting foreign country must provide to the Secretary of State to initiate proceedings in the United States.[25] Under the *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty Mutual Assistance in Criminal Matters* (the "Manual"), the UN provides recommendations on drafting extradition treaties, including how parties should list the documents that accompany an extradition request:

> [T]he request must contain a precise description of the person sought; a copy of the applicable legal provisions (or a statement of the relevant law), a statement of the penalty that can be imposed for the offence; proof of the enforceable sentence or of the warrant of arrest (as the case requires) and any other documents having the same force; and an exposition of the facts for which extradition is requested (including a description of the acts or omissions constituting the alleged offence and an indication of the time and place of its commission). A reference to the basis of jurisdiction has been found to be useful. Additional requirements apply where the person has been convicted of an offence in his or her absence and where the person has been convicted of an offence but no sentence has yet been imposed.[26]

The Manual explains that in order "[t]o obtain speedy and efficient execution of requests, [the treaty] should provide a precise description of the information to be included in the request," and that "[t]he treaty will then act as a guide for those who are called upon to provide the information."[27] Given the discrepancy between countries' legal systems, the Manual recommends that the negotiating parties draft the treaty with reference to specific

document/109th-congress/14/document-text [https://perma.cc/7W8F-WTE6] ("The U.S.-EU Extradition Agreement and bilateral instruments are regarded as self-executing treaties under U.S. law, and thus will not require implementing legislation for the United States.").

23. BASSIOUNI, *supra* note 3, at 71.

24. *Id.*

25. *See* Amy Jeffress, Samuel Witten & Kaitlin Konkel, *International Extradition: A Guide to U.S. and International Practice*, ARNOLD & PORTER (Nov. 10, 2020), https://www.arnoldporter.com/en/perspectives/advisories/2020/11/international-extradition-a-guide [https://perma.cc/K8JZ-6FHX].

26. U.N. OFFICE ON DRUGS AND CRIME (UNODC), REVISED MANUALS ON THE MODEL TREATY ON EXTRADITION AND ON THE MODEL TREATY ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS 31–32 (2004), https://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf [https://perma.cc/DF97-J4EW].

27. *Id.* at 32.

documents relevant to each country's criminal procedure to avoid erroneous interpretation of foreign criminal procedure.[28] Although guidance on how parties should draft treaties is publicly available, drafting histories of treaties are rarely accessible to the public.[29] As such, this Note does not address how bilateral extradition treaties are negotiated and executed by two sovereign nations.

B. THE EXTRADITION PROCESS IN THE UNITED STATES: FOREIGN REQUESTS

The extradition process is initiated when a foreign government makes an extradition request to the U.S. State Department. Usually, a foreign government makes this request by providing the supporting documents that are listed in the "documents required" section of the relevant extradition treaty.[30] The procedure for responding to an extradition request is codified in 18 U.S.C. § 3184.[31] Under 18 U.S.C. § 3184, once a foreign country with an extradition treaty with the United States has submitted an extradition request to the Department of State, a warrant is issued for the wanted individual.[32] Once the individual is located and arrested, "any justice or judge of the United States" may hear evidence of the "criminality" being heard and considered, and "[i]f, on such hearing, he deems the evidence sufficient to sustain the charge . . . he shall certify the same . . . to the Secretary of State . . . for the surrender of such person, according to the stipulations of the treaty or convention."[33]

When a court hears evidence of the criminality of an individual sought by a foreign government, "the extradition magistrate examines the treaty to ascertain whether it allows extradition in the circumstances presented by the relator."[34] Generally, the magistrate is required to review whether the government has established:

28. *Id.*

29. Georgetown Law Library, *Drafting & Ratification History for U.S. Treaties*, GEO. L., https://guides.ll.georgetown.edu/c.php?g=365734&p=3644889 [https://perma.cc/LAV3-MZRS]; *see* Off. of Treaty Affs., *Treaty Procedures*, U.S. DEP'T OF STATE (Nov. 26, 2018), https://www.state.gov/treaty-procedures [https://perma.cc/7BFZ-GYYX].

30. Jonathan Masters, *What is Extradition?*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/backgrounder/what-extradition [https://perma.cc/LG6E-6P36] ("The process generally begins with a foreign government making a request to the U.S. State Department with treaty-required paperwork, which often includes details on the person sought, the offenses alleged, charging documents, arrest warrants, and evidence.").

31. 18 U.S.C. § 3184; *see* Parry, *supra* note 16, at 134–35.

32. 18 U.S.C. § 3184; Office of the Legal Adviser, *Extraditions*, U.S. DEP'T OF STATE, https://www.state.gov/extraditions [https://perma.cc/9BPM-RRD7].

33. 18 U.S.C. § 3184.

34. Vo v. Benov, 447 F.3d 1235, 1245–46 (9th Cir. 2006).

> (1) probable cause that the relator committed the alleged offense at the requesting country; (2) the offense upon which extradition is requested is extraditable according to the applicable treaty; (3) the offense in question constitutes a crime [in] both the requesting country and the United States ("dual criminality"); (4) an enforceable extradition treaty exists between the United States and the requesting country; and (5) the arrested individual is the person sought by the requesting country.[35]

The extradition court does not determine the "guilt or innocence" of the relator.[36] The extradition court is limited to hearing the evidence of a case to determine whether "the facts alleged constitute a crime in the prosecuting country"; interpreting the provisions of the treaty to ensure their applicability to the extradition request; and ensuring that the extradition process complies with the relevant constitutional provisions.[37] Given its responsibilities, the extradition court's role in the extradition process is akin to its role in a preliminary hearing in United States criminal court.[38] Following the extradition court's findings on the extradition request, the extradition court may enter "an order certifying extradition to the Secretary of State."[39] Once the judiciary certifies the relator for extradition, the certification is passed on to the Secretary of State, who has the ultimate discretion to either accept or deny the extradition request.[40]

The judiciary's role in extradition proceedings is somewhat "constrained" by the executive branch.[41] The judiciary is "limited because it cannot enjoin, prohibit, or mandate the executive's negotiation of an agreement or a treaty, nor can it enjoin or mandate the executive's exercise of discretion to request a relator's extradition or to refuse to grant extradition

35. Rivera, *Speedy Extradition*, *supra* note 6, at 253 (footnote omitted) (citation omitted).

36. Melia v. United States, 667 F.2d 300, 302 (2d Cir. 1981) ("An extradition hearing is not the occasion for an adjudication of guilt or innocence. Rather, its purpose is to determine whether there is reasonable ground to believe that the person whose extradition is sought is guilty, that is, whether there is sufficient evidence to justify extradition under the appropriate treaty.").

37. Masters, *supra* note 30; BASSIOUNI, *supra* note 3, at 71.

38. Man, *supra* note 3, at 115–16; Ward v. Rutherford, 921 F.2d 286, 288 (D.C. Cir. 1990) ("[T]he proceeding is essentially a 'preliminary examination to determine whether a case is made out which will justify the holding of the accused and his surrender to the demanding nation.' " (quoting United States v. Kember, 685 F.2d 451, 455 (D.C. Cir. 1982))).

39. Santos v. Thomas, 830 F.3d 987, 993 (9th Cir. 2016); *Vo*, 447 F.3d at 1237–38.

40. *Santos*, 830 F.3d at 993; United States v. Lui Kin-Hong, 110 F.3d 103, 109–10 (1st Cir. 1997) ("It is . . . within the Secretary of State's sole discretion to determine whether or not the relator should actually be extradited. . . . The Secretary may also decline to surrender the relator on any number of discretionary grounds, including but not limited to, humanitarian and foreign policy considerations.").

41. Hilton v. Kerry, 754 F.3d 79, 84 (1st Cir. 2014); Lopez-Smith v. Hood, 121 F.3d 1322, 1326 (9th Cir. 1997) ("Extradition is a matter of foreign policy entirely within the discretion of the executive branch, except to the extent that the statute interposes a judicial function."); Demjanjuk v. Petrovsky, 776 F.2d 571, 584 (6th Cir. 1985) ("Extradition is an act of the Executive Branch."), *vacated*, 10 F.3d 338 (1993); *see* Rivera, *Speedy Extradition*, *supra* note 6, at 252–53.

although the terms of the applicable treaty have been satisfied."[42] The court reviewing a request for extradition does not determine whether the accused is innocent or guilty, as the extradition process only serves to begin the "criminal proceedings against an accused" individual—the foreign court ultimately decides the guilt or innocence of the accused.[43] Therefore, the extradition court in the United States is required to review whether a foreign country's extradition request satisfies the provisions of the relevant treaty "and that no valid defense or exception to extradition is in order."[44]

Importantly, extradition orders by the extradition court can only be challenged through petitions for writs of habeas corpus,[45] and habeas petitions "can challenge detention by the government if [the detention] is in violation of the Constitution, laws or treaties of the United States."[46] In general, when considering a habeas petition following a magistrate's extradition order, the reviewing court considers the following factors: (1) the jurisdiction of the judge presiding over the extradition proceeding; (2) the jurisdiction of the relevant court over the relator; (3) the applicable treaty provisions and their requirements; (4) "the character of the crime charged and whether" the crime is included within the treaty provisions; and (5) whether the government has provided evidence to substantiate a claim of extraditability.[47]

C. EXTRADITION TREATY INTERPRETATION IN THE UNITED STATES

The magistrate court is responsible for reviewing an extradition treaty to determine whether the requesting country has satisfied the requirements listed in the extradition treaty.[48] When an extradition court finds that written portions of a treaty are ambiguous and subject to multiple meanings, the court is tasked with interpreting those ambiguous terms. The interpretation of treaty provisions highlights the relationship between the judiciary and the executive branches in enforcing the provisions of an extradition treaty. The executive branch "has authority to determine the interpretation of an international agreement to be asserted by the U.S. in its relations with other

42. BASSIOUNI, *supra* note 3, at 71.

43. Valencia v. Limbs, 655 F.2d 195, 198 (9th Cir. 1981).

44. Rivera, *Interpreting Extradition Treaties*, *supra* note 17, at 204–05; United States v. Lui Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997) ("[U]nder 18 U.S.C. § 3184, the judicial officer's inquiry is limited to a narrow set of issues concerning the existence of a treaty, the offense charged, and the quantum of evidence offered. The larger assessment of extradition and its consequences is committed to the Secretary of State.").

45. Vo v. Benov, 447 F.3d 1235, 1240 (9th Cir. 2006).

46. *Santos*, 830 F.3d at 1015.

47. Valencia v. Limbs, 655 F.2d 195, 197 (9th Cir. 1981); Caplan v. Vokes, 649 F.2d 1336, 1340 (9th Cir. 1981).

48. *Vo*, 447 F.3d at 1245–46.

states," but "[c]ourts in the U.S. have final authority to interpret an international agreement for purposes of applying it."[49]

The judiciary analyzes extradition treaties in the same manner that it analyzes contracts and statutes.[50] Courts begin their analysis of treaties by first examining the text of the treaty, or the four corners of the document.[51] Much like the interpretation of statutes or contracts, "[w]hen interpreting a treaty, [courts] begin with the text of the treaty and the context in which the written words are used."[52] If the court finds that a treaty's language is clear and unambiguous, the court will cease its analysis of the meaning of the words of the treaty and "apply the words of the treaty as written."[53]

When interpreting treaty provisions, courts may find that the treaty provisions, much like statutory provisions, are ambiguous. When courts encounter ambiguous provisions in treaties, they expand their scope of focus to incorporate intrinsic and extrinsic evidence to evaluate the text of the treaty "in light of its object and purpose."[54] In understanding ambiguous terms, courts are meant to undertake an interpretation in a " 'holistic endeavor' and must account for the statute's 'full language, text, language as well as punctuation, structure and subject matter.' "[55] In ascertaining ambiguous terms in a treaty, courts "may look . . . to the history of the treaty, the negotiations, and the practical construction adopted by the parties."[56]

49. BASSIOUNI, *supra* note 3, at 116 (quoting RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 326 (1987)).

50. BG Group PLC v. Republic of Arg., 572 U.S. 25, 37 (2014) ("[A] treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent."); Medellin v. Texas, 552 U.S. 491, 506 (2008) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text."); Sullivan v. Kidd, 254 U.S. 433, 439 (1921) ("[T]reaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals, and are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties."); Kahn Lucas Lancaster v. Lark Int'l, 186 F.3d 210, 215 (2d Cir. 1999).

51. Marks *ex rel.* SM v. Hochhauser, 876 F.3d 416, 420 (2d Cir. 2017) (quoting Abbott v. Abbott, 560 U.S. 1, 10 (2010)).

52. E. Airlines, Inc. v. Floyd, 499 U.S. 530, 534 (1991) (quoting Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988)).

53. United States v. Duarte-Acero, 208 F.3d 1282, 1285 (11th Cir. 2000).

54. Vienna Convention on the Law of Treaties § 3, arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [https://perma.cc/ZBC6-RR9T] ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose . . . A special meaning shall be given to a term if it is established that the parties so intended."). The Vienna Convention also notes that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation . . . leaves the meaning ambiguous or obscure . . . or leads to a result which is manifestly absurd or unreasonable."). *Id.* at art. 32.

55. *Kahn Lucas Lancaster*, 186 F.3d at 215 (quoting U.S. Nat. Bank v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993)).

56. Air France v. Saks, 470 U.S. 392, 396 (1985) (quoting Choctaw Nation of Indians v. United

One of the most important tools of extradition treaty interpretation used by the judiciary, and which scholars and courts have both criticized and utilized since the Supreme Court issued its opinion in 1933, is the extradition treaty interpretation principle established in *Factor v. Laubenheimer*.[57] *Factor v. Laubenheimer* involved an extradition request by the United Kingdom for Factor, who had allegedly committed a financial crime there and fled to Illinois. Factor argued that because Illinois did not have a comparable criminal statute, the extradition treaty between the United States and the United Kingdom could not be used to extradite him.[58] In one of the most influential and long-standing guides on how courts should interpret treaties, the court in *Factor* considered whether a broad or narrow interpretation of a treaty should be utilized by an extradition court:

> In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be *liberally construed* so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, *one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.*[59]

This construction—that when faced with two possible constructions of an ambiguous term in a treaty, courts should broaden the interpretive scope of the extradition treaty in favor of the executive branch—is referred to as the default rule of extradition treaty interpretation.[60] This rule has been used to argue that, as the purpose of the extradition treaty is to extradite

States, 318 U.S. 423, 431–32 (1943)); Medellin v. Texas, 552 U.S. 491, 507 (2008) ("Because a treaty ratified by the United States is 'an agreement among sovereign powers,' we have also considered as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of the signatory nations." (quoting Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996))).

57. Factor v. Laubenheimer, 290 U.S. 276 (1933); Rivera, *Interpreting Extradition Treaties*, *supra* note 17, at 228.

58. *Factor*, 290 U.S. at 286–87.

59. *Id.* at 293–94 (emphasis added). This interpretation of sovereign nation's rights is in line with the concept that human beings under sovereign control were not afforded rights in international law. *See* Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV 1999, 2008 (2003) ("[Extradition treaties] posed significant benefits for U.S. law enforcement, and were considered to be in the crucial national interest. Otherwise applicable individual rights were submerged in the face of international imperatives.") (footnote omitted).

60. Rivera, *Interpreting Extradition Treaties*, *supra* note 17, at 202; United States v. Lui Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997) (highlighting that the "executive branch's construction of a treaty, although not binding upon the courts is entitled to great weight" and that extradition treaties "are to be construed liberally in favor of enforcement"); *In re* Extradition of Howard, 996 F.2d 1320, 1330–31 (1st Cir. 1993).

individuals, courts should interpret treaty provisions broadly to fulfill that purpose.[61] This principle has been articulated by various courts since 1933, such as the Sixth Circuit in the 2016 case *Martinez v. United States*, in which the court stated that "ambiguity in an extradition treaty must be construed in favor of the 'rights' the 'parties' may claim under it," and in extradition proceedings, the parties are the countries and the "right the treaty creates is the right of one country to demand the extradition of fugitives in the other country," as "[t]he point of an extradition after all is to facilitate extradition, as any country surely would agree at the time of signing."[62]

The judiciary's deference to the executive's interpretation of international treaties is noteworthy.[63] This deference stems from the executive branch's role in foreign relations. Since *United States v. Curtiss-Wright Export Corporation* in 1936, the U.S. Supreme Court has codified the executive branch's power in foreign relations by proclaiming the "exclusive power of the President as the sole organ of the federal government in the field of international relations."[64] Later, in *Kolovrat v. Oregon*, the Supreme Court stated that "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."[65] Additionally, courts will consider how the parties to the treaty constructed and interact with the treaty, as such behavior informs its application.[66]

There are foreign policy concerns when courts are called to interpret extradition treaties. Courts are likely to give deference to an executive branch's interpretation given its role "in diplomatic negotiation with other countries, on the ground that the U.S. should speak with one voice, than to one adopted by the Executive in relation to a case before the courts, especially where individual rights or interests are involved."[67] There are also concerns that the executive branch, in finding that an extradition request is inadequate, should not "expand the obligations of another nation in a

61. *Kin-Hong*, 110 F.3d at 110; *see* Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); *In re* Gomez, No. 24-MJ-458, 2024 U.S. Dist. LEXIS 199218, at *13 (E.D.N.Y. Nov. 1, 2024); *In re* Extradition of D'Monte, No. 22-mj-230, 2023 U.S. Dist. LEXIS 202356, at *16–18 (D.P.R. Nov. 9, 2023); *In re* Rodriguez-Lastre, No. 23-MJ-2028, 2024 U.S. Dist. 8836, at *5–6 (S.D. Tex. Jan. 17, 2024).

62. Martinez v. United States, 828 F.3d 451, 463 (6th Cir. 2016) (quoting *Factor*, 290 U.S. at 293–94).

63. *See* Rivera, *Interpreting Extradition Treaties*, *supra* note 17, at 206.

64. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).

65. *Kolovrat*, 366 U.S. at 194–95; *see also* Air France v. Saks, 470 U.S. 392, 399 (1985) ("[I]t is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.").

66. United States v. Stuart, 489 U.S. 353, 369 (1989).

67. BASSIOUNI, *supra* note 3, at 117; *see* Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185 (1982).

treaty."[68] In 2020, the Supreme Court noted that it has "never provided a full explanation of the basis for [its] practice of giving weight to the Executive's interpretation of a treaty. Nor [has it] delineated the limitations of this practice."[69] As it is generally understood that United States' compliance with extradition treaties is beneficial to U.S. foreign policy, the executive branch's interpretation of an extradition treaty that favors a relator's extradition has considerable influence in extradition court proceedings.[70]

D. DUE PROCESS IN THE EXTRADITION PROCESS

Relators who are physically present in the United States and who a foreign government wishes to extradite are subject to the Due Process Clause of the Fifth Amendment of the U.S. Constitution.[71] Relators are also the beneficiaries of due process under international law. It is worthwhile to explore the domestic and international understandings of due process: both understandings of due process apply to extradition proceedings that occur in the United States.

Procedural due process "asks whether the government has followed the proper procedures when it takes away life, liberty or property."[72] Due process is contextually dependent on the type of liberty interests over which a court or agency is ruling.[73] In considering due process claims, courts, depending on their context, are often compelled to balance the following factors established by the Court in *Mathews v. Eldridge*:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function

68. *In re* Assarsson, 635 F.2d 1237, 1241 n.5 (7th Cir. 1980).

69. GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC, 590 U.S. 432, 444 (2020) (noting that although the Court has never provided a full explanation for the basis of executive deference, the Court's "textual analysis aligns with the Executive's interpretation so there is no need to determine whether the Executive's understanding is entitled to 'weight' or 'deference.' ").

70. Artukovic v. Rison, 784 F.2d 1354, 1356 (9th Cir. 1986) ("Such proper compliance promotes relations between the two countries, and enhances efforts to establish an international rule of law and order.").

71. Rivera, *Interpreting Extradition Treaties*, *supra* note 17, at 237–38; U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); Zadvydas v. Davis, 533 U.S. 678, 693 (2001); Valenzuela v. United States, 286 F.3d 1223, 1129 (11th Cir. 2002) ("[T]he judiciary must ensure that the constitutional rights of individuals subject to extradition are observed."); Martinez v. United States, 793 F.3d 533, 556 (6th Cir. 2015) ("Courts have unanimously held that the government is bound by principles of due process in its conduct of extradition proceedings."), *rev'd on other grounds en banc*, 828 F.3d 451 (6th Cir. 2016).

72. Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999).

73. Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961))).

> involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[74]

Although the extradition process is neither a criminal proceeding nor a trial, the extradition process affects relators' liberty interests; relators do enjoy Constitutional rights, albeit in a different capacity than those protections the courts recognize for criminal defendants.[75] Given that extradition in the United States is a "bifurcated procedure" between the executive and judiciary branches, extradition is considered an executive process under the executive branch of the government[76], and the judiciary is tasked with applying its expertise in statutory interpretation, evidentiary requirements, and understandings of probable cause as well as other related legal concepts.[77] The Ninth Circuit has found that extradition courts have discretion in conducting their proceedings—as relators are not criminal defendants in United States criminal courts, the courts do not need to follow the procedural safeguards enforced in criminal proceedings, such as the Federal Rules of Civil Procedure and the Federal Rules of Evidence.[78] Rather, their role is limited to "ensur[ing] that the government complies with the requirements of the extradition treaty and the extradition statute."[79] The judiciary is mindful that the extradition process is an executive function, and thus attempts to balance the interests of the relators with the interests of the executive branch.[80]

74. *Mathews*, 424 U.S. at 335; *see also* Toledo v. U.S. Dep't of State, No. 23-627, 2023 U.S. Dist. LEXIS 53048, at *23–24 (D.D.C. Mar. 28, 2023); Rivera, *Speedy Extradition*, *supra* note 6, at 265.

75. Artemio Rivera, *Probable Cause and Due Process in International Extradition*, 54 AM. CRIM. L. REV. 131, 167, 169 (2017) [hereinafter Rivera, *Probable Cause and Due Process*] (noting that "the process afforded to relators in extradition hearings is much lower than the one required by extradition treaties," and that "magistrates at preliminary hearings afford criminal defendants much more process than relators are allowed at extradition hearings").

76. United States v. Lui Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997); Harshbarger v. Regan, 599 F.3d 290, 292 (3d Cir. 2010).

77. *Kin-Hong*, 110 F.3d at 110 ("This bifurcated procedure reflects the fact that extradition proceedings contain legal issues peculiarly situated for judicial resolution, such as questions of the standard of proof, competence of evidence, and treaty construction, yet simultaneously implicate questions of foreign policy, which are better answered by the executive branch. Both institutional competence rationales and our constitutional structure, which places primary responsibility for foreign affairs in the executive branch . . . support this division of labor.").

78. Rivera, *Probable Cause and Due Process*, *supra* note 75, at 135.

79. *Id.*

80. *In re* Burt, 737 F.2d 1477, 1487 (7th Cir. 1984) ("We are reminded that before placing constraints on the executive branch's foreign policy decision making, 'we must move with the circumspection appropriate when [a court] is adjudicating issues inevitably entangled in the conduct of our international relations. To constrain the government by placing it on the duty to undertake its extradition decisions with an eye not only toward the legitimate international interests of the United States as determined by the branch charged with that responsibility, but also toward the prejudice that might result to an individual accused because of the amount of time that has elapsed, would be to distort the aims of the diplomatic effort." (quoting Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 383 (1959)).

The Due Process Clause is applicable to the liberty interests of relators, as "the consequences of extradition—the forceful surrender of a relator to a foreign country for criminal prosecution and imprisonment—affect" a relator's Constitutional rights.[81] This is because "[r]elators face tremendous liberty losses" upon extradition, as the process is aimed at surrendering a relator to a foreign jurisdiction for criminal prosecution and imprisonment.[82] Therefore, the court hearing the extradition case must ensure that the extradition proceeding comports with a relator's right to due process "in a manner consistent with the Constitution."[83]

As the purpose and structure of an extradition hearing differs from those of domestic criminal and civil proceedings, courts have deemed that the amount of procedures, and therefore due process, owed to relators differs from the procedures that are owed to criminal defendants.[84] Unlike its application of the *Mathews* analysis to other categories of cases that involve the deprivation of liberty, extradition courts do not uniformly apply the *Mathews* analysis factors of due process to determine whether the relator has sufficient due process.[85] In reviewing challenges to the constitutionality of extradition proceedings, the judiciary has found that "the totality" of the proceedings conducted by both judicial and executive branch "comports with the requirements of the Fifth Amendment, in light of the substantial process

81. Rivera, *Probable Cause and Due Process*, *supra* note 75, at 149; *see* U.S. CONST. amend. V.

82. Rivera, *Speedy Extradition*, *supra* note 6, at 252, 292 (arguing that courts should more often utilize the balancing test from *Mathews v. Eldridge* in considering the due process rights of relators); United States v. Lui Kin-Hong, 110 F.3d 103, 106 (1st Cir. 1997) ("There is the ultimate safeguard that extradition proceedings before United States courts comport with the Due Process Clause of the Constitution.").

83. Kent Wellington, Note, *Extradition: A Fair and Effective Weapon in the War on Terrorism*, 51 OHIO ST. L.J. 1447, 1452 (1990); *see* Grin v. Shine, 187 U.S. 181, 184 (1902) ("[Extradition] treaties should be faithfully observed, and interpreted with a view to fulfill our just obligations to other powers, without sacrificing the legal or constitutional rights of the accused."); BASSIOUNI, *supra* note 3, at 115; 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, 1300 (2000) ("The extradition magistrate is charged with protecting the accused's due process rights, and the extradition hearing is the primary vehicle through which the accused is accorded due process.").

84. Rivera, *Speedy Extradition*, *supra* note 6, at 276–77 ("[E]xtradition case law allows the government to prove its case through a low standard of proof, 'probable cause'; the case may be proven, in whole or in part, through hearsay evidence; relators are not allowed to contradict the government's evidence; the government may refile its case if it is denied certification because the doctrines of double jeopardy and *res judicata* are not applicable." (footnotes omitted)); Vo v. Benov, 447 F.3d 1235, 1247 (9th Cir. 2006) ("[A]n extradition court's decision not to consider evidence, or not to make findings relevant to a discretionary exception, does not violate due process."); Collins v. Loisel, 262 U.S. 426, 429 (1923); *In re* Extradition of D'Monte, No. 22-MJ-230, 2023 U.S. Dist. LEXIS 202356, at *12 (D.P.R. Nov. 9, 2023) ("The full panoply of due process rights available to criminal defendants is *not available* to fugitives because an extradition proceeding culminates in a surrender to the foreign government, rather than in criminal punishment of any sort.").

85. Rivera, *Speedy Extradition*, *supra* note 6, at 265 (arguing that courts should more often utilize the balancing test from *Mathews v. Eldridge* in considering the due process rights of relators); Toledo v. U.S. Dep't of State, No. 23-627, 2023 U.S. Dist. LEXIS 53048, at *24–25 (D.D.C. Mar. 28, 2023).

afforded in the judicial phase and the executive's broad discretion to decide matters of foreign policy."[86] Courts find that the procedural requirements of 18 U.S.C. § 3186 and § 3184 are sufficiently protective of a relator's due process rights and commensurate with the due process owed to relators to ensure that a relator is not extradited entirely "by Executive whim," as the executive branch exercises its discretion "only if the magistrate determines that there is 'evidence sufficient to sustain the charge under the provisions of the proper treaty.' "[87] The D.C. District Court rationalized the adequacy of the procedural due process given to relators in extradition proceedings:

> [T]he risk of an erroneous deprivation absent an additional hearing conducted by the State Department and the furnishing of any unclassified documents relied upon is minimal . . . given [the relator's] active role . . . in developing the record in his judicial proceedings and challenging the key determinations there, not to mention his ability to supplement the record in whatever way he wished before the State Department. Further, requiring the State Department to provide the additional opportunities for participation . . . would unnecessarily overtax Department resources without meaningfully expanding the scope of information considered and risks chilling the Department's ability to freely obtain information and assurances from relevant foreign governments, which might be less willing to speak frankly if the information disclosed was not kept confidential.[88]

International law also affords due process rights to relators in the extradition process; due process is a fundamental human right under customary international law.[89] For context, customary international law can be defined as the "general and consistent practice of states followed by them from a sense of legal obligation."[90] The United States has signed the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on Torture, the Hostage Convention, and, along with "other treaties, the United States has agreed, with certain reservations, to be bound by their provisions and to incorporate them into U.S. law."[91] Within the United States, the federal judiciary has "applied rules

86. *Toledo*, 2023 U.S. Dist. LEXIS 53048, at *24–25. Toledo appealed the decision of the district court, and the Ninth Circuit's judgment in Toledo's case is discussed in Part II.

87. Escobedo v. United States, 623 F.2d 1098, 1105 (5th Cir. 1980); 18 U.S.C. §§ 3184, 3186.

88. *Toledo*, 2023 U.S. Dist. LEXIS 53048, at *23–24.

89. *See* BASSIOUNI, *supra* note 3, at 2, 54 (noting that "states have protected human rights by giving legal rights to individuals, entitling them to certain rights and placing limitations on the powers of the respective states" and "if the breach [of an extradition treaty by a state] is of an internationally protected right, or the result of lack of fairness or good faith by the parties in the application of rights stipulated in favor of third parties, or conceded to individuals as third-party beneficiaries under the particular treaty, then there is a violation of international law").

90. RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 102(2) 1987.

91. Powers, *supra* note 4, at 295–96.

of customary international law in countless cases since the founding of the Republic . . . treating customary international law rules in the same manner as U.S. treaties and other international agreements."[92] The United States is bound by customary international law on its treatment of human rights, as human rights standards "are binding [on the federal judiciary] as *jus cogens* (i.e., overriding principles) under international law"—human rights treaties "may provide guidance in determining contemporary human rights norms that should inform a court's decisions in extradition proceedings."[93] For the most part, as the judiciary has "treated rules of customary international law as rules of federal law," the judiciary is compelled to uphold customary international law.[94]

On the other hand, the principles of international law are made up of "rules of international law" that are "accepted as such by the international community of states . . . by derivation from general principles common to the major legal systems of the world.[95] Under principles of customary international law, due process is defined as "procedural norms . . . that are applicable to . . . limit governmental powers"—these norms include "[t]he right of equal access to courts, the right to equal treatment of litigants, the right to an effective remedy and the right to a fair hearing."[96] Other aspects of the due process under international law include that "there shall be no common interest between the parties and the judge"[97] and that each party has a "reasonable opportunity of presenting [their] case . . . under conditions

92. Gary Born, *Customary International Law in United States Courts*, 92 WASH. L. REV. 1642, 1644 (2017).

93. Powers, *supra* note 4, at 295; *see id.* at 320 ("[E]xtradition is a criminal proceeding, and the standards of domestic criminal proceedings, as well as international human rights precepts, should inform the process."); 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, 415–16 (1990) ("In the mid-twentieth century . . . the law of human rights emerged as a body of law binding on states. That body of law is held by courts of the United States to be binding on them, even apart from any treaty obligation that the United States has assumed. Human rights law is relevant to extradition law in that among the human rights norms binding on states are prohibitions against prolonged arbitrary detention and against torture or other cruel, inhuman, or degrading treatment or punishment. International human rights law requires states to provide fair trials with a presumption of innocence and the rights to present a defense and to be represented by counsel.").

94. Born, *supra* note 92, at 1644; Powers, *supra* note 4, at 295 ("[H]uman rights law as derived from human rights treaties is superior to, and controlling over, other treaties, including extradition treaties, under public international law. Moreoever, even if the formal provisions of an extradition treaty are not violative of human rights norms, the application of those provisions might be . . . .").

95. CHARLES T. KOTUBY JR. & LUKE A. SOBOTA, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES 21 (Ronald A. Brand ed. 2017) (citing RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 102(1) (AM. L. INST. 1987)).

96. Andrea Marilyn Pragashini Immanuel, *Did Shamima Begum Receive Her Due Process under International Law?*, OPINIOJURIS (Apr. 13, 2021), https://opiniojuris.org/2021/04/13/did-shamima-begum-receive-her-due-process-under-international-law [https://perma.cc/V2DN-GLAW].

97. KOTUBY & SOBOTA, *supra* note 95, at 71.

which do not place [them] at substantial disadvantage vis-à-vis [their] opponent."[98] Importantly, as explored in Part III, another element of international due process is the "assurance that 'the judiciary [is not] dominated by the political branches of government or by an opposing litigant . . . .' "[99] Charles T. Kotuby, Jr. and Luke Sobota, in *General Principles of Law and International Due Process*, outline the human rights conventions that affirm the obligation of sovereign nations to uphold the fundamental due process right of individuals:

> The Inter-American Convention on Human Rights (IACHR)—building upon the principles set forth in "the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights"—imposes upon States the obligation to "respect the rights and freedoms" it enshrines "without any discrimination." Included is the "right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law." The European Convention for the Protection of Human Rights and Fundamental Freedoms follows a similar pattern, providing . . . that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[100]

Within the U.S., the intersection of extradition and due process is especially poignant under the rule of non-inquiry. Non-inquiry is the concept that the judiciary is not compelled to inquire into the adequacy of the foreign proceedings to ensure that the proceedings in the foreign jurisdiction preceding the extradition request comport with "fundamental rights to due process"—this rule raises concerns about the judiciary's role in complying with international due process requirements when responding to extradition requests from foreign jurisdictions.[101] In reviewing the procedures of the requesting country, the Ninth Circuit has said that it gives "credence to foreign proceedings" and that it declines "to rule on the procedural requirements of foreign law out of respect for other nations' sovereignty."[102] In doing so, the Ninth Circuit has understood the risk of "erroneous interpretation" of a foreign country's legal system.[103] Courts generally see that the Secretary of State's understanding of the treaty and of foreign

98. Kaufman v. Belgium, App. No. 10938/84, 50 Eur. Comm'n H.R. Dec. & Rep. 98, 115 (1986).

99. Charles T. Kotuby Jr., *General Principles of Law, International Due Process, and Modern Role of Private International Law*, 23 DUKE J. COMP. & INT'L L. 411, 427 (2013) (quoting RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 482 cmt. b (1987)); *see infra* Part III.

100. KOTUBY & SOBOTA, *supra* note 95 , at 61.

101. Powers, *supra* note 4, at 314–16. *But see* Munaf v. Geren, 553 U.S. 674, 700–01 (2008) ("[I]t is for the political branches, not the judiciary, to assess practices in foreign countries . . . .").

102. Sainez v. Venables, 588 F.3d 713, 717 (9th Cir. 2009).

103. Emami v. U.S. Dist. Ct. for the N. Dist. of Cal., 834 F.2d 1444, 1449 (9th Cir. 1987).

criminal procedure should be considered as part of its considerations when interpreting a treaty document. This becomes especially important when questions regarding the foreign country's political intentions for extraditing individuals are brought before the U.S. judiciary.

Relators often argue that the extradition proceedings lack due process even though the extradition process is not considered a full-fledged criminal trial.[104] These complaints relate to the statutes of limitations of crimes committed in foreign countries, the discretion of the court to consider whether the requesting country might torture the relator, the admissibility of hearsay evidence in extradition proceedings, and other findings that the procedure owed to relators is inadequate.[105] However, relators have little redress when they argue that extradition proceedings are violative of due process, as the standard for finding a procedural defect in the process is high: this is due to the unique nature of an extradition proceeding as a proceeding akin to a preliminary hearing. The judiciary often finds that extradition processes should not be encumbered by more procedure.[106] The judiciary has found that,

> [S]o long as the United States has not breached a specific promise to an accused regarding his or her extradition, and bases its extradition decisions on diplomatic considerations without regard to such constitutionally impermissible factors as race, color, sex, national origin, religion, or political beliefs, and in accordance with such other exceptional constitutional limits as may exist because of particularly atrocious procedures or punishments employed by the foreign jurisdiction, those decisions will not be disturbed.[107]

Accordingly, as the discretion to extradite lies with the executive branch, "[t]he judiciary has no authority to impose requirements on the decision-making process that go beyond the scope of what is required under the Constitution."[108]

104. *See* Sridej v. Blinken, No. 2:23-cv-00114, 2023 U.S. Dist. LEXIS 117727 (D. Nev. July 10, 2023) (dismissing relators' argument that the extradition process is an "unfair adversarial process" that violates due process).

105. *See id.*; *Emami*, 834 F.2d at 1446–47; Venckiene v. United States, 929 F.3d 843, 861–62 (7th Cir. 2019); Powers, *supra* note 4; *In re* Burt, 737 F.2d 1477, 1487 (7th Cir. 1984) ("We hold that no standards of fair play and decency sufficient to trigger due process concerns are automatically implicated when, in undertaking its foreign policy mission, a governmental extradition decision subjects a citizen accused of committing crimes in a foreign jurisdiction to prosecution in the foreign state after a substantial time has elapsed since the commission of the crime."); Trinidad y Garcia v. Thomas, 683 F.3d 952, 957 (9th Cir. 2012).

106. *See Sridej*, 2023 U.S. Dist. LEXIS 117727, at *17–19; Rivera, *Interpreting Extradition Treaties*, *supra* note 17, at 204.

107. *In re* Burt, 737 F.2d at 1487 (citation omitted).

108. *Venckiene*, 929 F.3d at 863–64 (7th Cir. 2019).

II. INTERPRETING THE "CHARGING DOCUMENT"

A. OVERVIEW OF THE CIRCUIT SPLIT

Part II of this Note explores the difference in treatment of the phrase the "charging document" which the U.S. has included in at least twenty-eight bilateral extradition treaties.[109] Part I outlined the history and reasoning behind the different tools of interpretation courts utilize in interpreting extradition treaties, and the due process rights that relators are afforded in the extradition process. Part II will cover how these interpretation tools have been implemented by the judiciary in its treatment of extradition treaties that include "the charging document" requirement in 2023.

In 2023, the Ninth and Fourth Circuits were charged with interpreting the phrase "the charging document" in two bilateral extradition treaties: the Ninth Circuit analyzed a bilateral extradition treaty between the U.S. and Peru, and the Fourth Circuit analyzed a bilateral extradition treaty between the U.S. and Lithuania.[110] These cases, *Vitkus v. Blinken* and *Manrique v. Kolc*, involved foreign nationals residing in the U.S. who were wanted by foreign countries for crimes allegedly committed by the foreign nationals in their respective countries of nationality. Both cases rose to the federal circuit courts after the foreign nationals petitioned for stays and preliminary injunctions on their extradition requests. The relators in each case argued that they were not extraditable as the foreign countries did not provide "the charging document," a document listed under the required documents section of the relevant extradition treaties that a requesting country must provide in its extradition request. The two courts diverged over how to interpret the phrase, or even whether there was a need to interpret the phrase and apply the default rule. The implications of this divergence will be explored in Part III of this Note.[111]

B. *MANRIQUE V. KOLC*

In 2023, the Ninth Circuit reviewed a petition filed by former president of Peru, Alejandro Toledo Manrique,[112] to stay Toledo's extradition from the U.S. to Peru while appealing the denial of his petition for writ of habeas by the U.S. District Court for the Northern District of California.[113] Peruvian

109. See the list of treaties, *supra* note 5, for a complete overview.

110. Vitkus v. Blinken, 79 F.4th 352 (4th Cir. 2023); Manrique v. Kolc, 65 F.4th 1037 (9th Cir. 2023).

111. *Infra* Part III.

112. Individuals often have two last names in Latin America. When referred to by only one of the last names, the first of the two last names is used. Accordingly, this Note refers to Alejandro Toledo Manrique as Toledo.

113. *Manrique*, 65 F.4th at 1040.

prosecutors sought to extradite Toledo to Peru from the United States after they alleged that Toledo had committed money laundering and collusion, specifically "taking $20 million in bribes from Odebrecht, a giant Brazilian construction company that has admitted to U.S. authorities that it bribed officials to win contracts throughout Latin America for decades."[114] The Peruvian investigators had investigated or put on trial almost every living former president of Peru while conducting sweeping investigations of those who might have participated in the bribery with the Odebrecht company.[115]

Peru brought the accusations against Toledo in "two Prosecutor's Decisions, documents that summarize the ongoing investigation, and in an *Acusación Fiscal*, a document produced at the end of an investigation that lays out the crimes allegedly committed and supporting evidence."[116] After the Supreme Court of Justice of Peru approved an extradition request for Toledo, the Peruvian government filed an extradition request with the United States in 2018 and sent a supplemental request in August 2020.[117]

In July 2019, a United States federal prosecutor filed a criminal complaint against Toledo, and two years later, a United States magistrate judge in the U.S District Court for the Northern District of California certified Toledo's extradition.[118] Separately, Toledo filed suit in the D.C. District Court to enjoin the U.S. Department of State from extraditing him to Peru, claiming that his extradition was politically motivated and that the decision to extradite him violated due process because the Secretary of State "did not 'disclose the unclassified bases for its decisions' or 'afford Dr. Toledo and his counsel an opportunity to rebut those bases in a full and fair exchange of views.' "[119] The District Court rejected Toledo's arguments and wrote that the Secretary of State's decision to extradite Toledo was based on considerations of international law on political extradition and that Toledo had been afforded adequate due process in the proceedings prior to the Secretary of State's decision to extradite Toledo.[120] Following multiple appeals, the Ninth Circuit heard Toledo's appeal of the denial of his writ of

114. Olga R. Rodriguez, *US Judge Orders Peru Ex-leader Detained for Extradition*, AP NEWS (Apr. 19, 2023, 2:16 PM) https://apnews.com/article/peru-expresident-extradition-court-aedb5ca6e502e505648944ebddea523d [https://perma.cc/U64Z-SU5L]; *see Manrique*, 65 F.4th at 1040.

115. Rodriguez, *supra* note 114.

116. *Manrique*, 65 F.4th at 1040.

117. *Id.*

118. Manrique v. O'Keefe, No. 21-CV-08395, 2022 WL 1212018, at *2 (N.D. Cal. Apr. 22, 2022); *Manrique*, 65 F.4th at 1040.

119. Toledo v. U.S. Dep't of State, No. 23-627, 2023 U.S. Dist. LEXIS 53048, at *1, 6, 15–16 (D.D.C. Mar. 28, 2023) (quoting Complaint for Injunctive and Declaratory Relief, *Toledo*, 2023 U.S. Dist. LEXIS 53048, at ¶¶ 55, 59).

120. *Id.* at *7–8, 24–25.

habeas corpus in April 2023.[121]

Toledo asserted that "he was not 'charged with' an extraditable offense because the extradition treaty requires a formal charge" and that "the 'charging document' Peru submitted was insufficient."[122] In reviewing Toledo's appeal, the Ninth Circuit took a holistic approach to Toledo's assertions regarding the charging document requirement within the United States-Peru Extradition Treaty. First, the Ninth Circuit analyzed the purpose of the United States-Peru Extradition Treaty, noting that "Article I of the United States-Peru Extradition Treaty provides for extradition of 'persons whom the authorities in the Requesting State have charged with, found guilty of, or sentenced for, the commission of an extraditable offense.' "[123] Next, the Ninth Circuit provided background on Peruvian criminal procedure:

> [A] Peruvian criminal proceeding has three phases: (1) preliminary or investigative, (2) intermediate or examining, and (3) trial. First, during the investigative phase, a prosecutor examines the facts and presents allegations to a judge of the Preliminary Investigation Court. When the investigation ends, the prosecutor must decide whether to dismiss the case or to issue an *Acusación Fiscal* and then seek a formal charge. Once a formal charge is sought, the prosecutor cannot further investigate. Second, during the examining phase, a judge of the Preliminary Investigation Court holds a preliminary hearing, during which the accused may object and present exculpatory evidence. At the end of this hearing, if the judge believes a formal charge is warranted, the judge issues an *Orden de Enjuiciamiento*. Finally, if an *Orden de Enjuiciamiento* issues, the parties proceed to a trial presided over by the Criminal Judge or the President of the Collegiate Court.[124]

As Peru had issued an *Acusación Fiscal* in the corruption case against Toledo, the parties fought over "whether the accusations contained in the *Acusación Fiscal* suffice to 'charge' Toledo 'with' an extraditable offense under the Treaty."[125] Toledo argued "that the United States-Peru treaty . . . requires 'a copy of the charging document' in addition to an arrest warrant."[126] In rebutting Toledo's assertion that a charging document was necessary and was not satisfied by the *Acusación Fiscal,* the U.S. government supported its argument by noting that the provision "charged

121. *Manrique*, 65 F.4th at 1040.
122. *Id.* at 1041.
123. *Id.* (citing Extradition Treaty Between the United States of America and the Republic of Peru, Peru-U.S., July 26, 2001, T.I.A.S. NO. 03-825).
124. *Id.* at 1041–42.
125. *Id.* at 1042.
126. *Id.*; Extradition Treaty Between the United States of America and the Republic of Peru art. VI(3), Peru-U.S., July 26, 2001, T.I.A.S. NO. 03-825.

with" elsewhere in the treaty was sufficient for the extraditing country to argue that a relator could be extradited without providing any specific document or official charge—therefore, the *Acusación Fiscal* satisfied the charging document.[127]

The Ninth Circuit looked at the text of the treaty to determine the significance of the "charging document" provision within the United States-Peru Extradition Treaty in its entirety. The court found that the addition of "the charging document" was not necessary to find that Peru satisfied the requirements of the extradition treaty, finding support in *Emami v. United States District Court for the Northern District* and *In re Assarsson*. In both *Emami* and *Assarsson*, there was no "formal charge" listed in the U.S.-Sweden and U.S.-Federal Republic of Germany treaties to find that a relator might be extraditable, and as such, the requirement that there be "formal charges" in the foreign jurisdiction before the foreign country filed an extradition request was not a necessary requirement to find that the relators were extraditable.[128] The court utilized these cases even though neither case dealt with a "charging document" requirement. In Toledo's case, the court found that "the Treaty does not mention formal charges or the *Orden de Enjuiciamiento* anywhere. And the requirement of a 'copy of the charging document'—which specifies no particular document—does not define the level of formality [they] should read into 'charged with.' "[129] The court found that such a reading would allow the *Acusación Fiscal* to be permitted as a "charging document" given that language elsewhere in the U.S.-Peru treaty equated "charged with" to "sought for prosecution," and that the documents indicating an individual was "sought for prosecution" could encompass documents submitted before the *Orden de Enjuiciamiento* in Peruvian criminal proceedings—that is, the *Acusación Fiscal*—therefore satisfying the treaty's requirements.[130]

The Ninth Circuit furthered its analysis, finding that if "the charging document" was ambiguous, then the treaty's drafting history and judicial precedents would assist the court in determining how to interpret the provision. The court stated that "charged with" could be broadly interpreted to mean any warrant-backed accusation presented by the Peruvian or United States governments, essentially making "the charging document" requirement null.[131] The court looked to the Technical Analysis of the United

127. *Manrique*, 65 F.4th at 1043.

128. *Id.* at 1042–43; Emami v. U.S. Dist. Ct. for the N. Dist. of Cal., 834 F.2d 1444 (9th Cir. 1987); *In re* Assarsson, 687 F.2d 1157, 1160 (8th Cir. 1982).

129. *Manrique*, 65 F.4th at 1043.

130. *Id.* at 1042.

131. *Id.* at 1043.

States-Peru Extradition Treaty, which stated:

> [T]he negotiating delegations intended that "charged" persons include those who are sought for prosecution for an extraditable offense based on an outstanding warrant of arrest, regardless of whether such warrant was issued pursuant to an indictment, complaint, information, affidavit, or other lawful means for initiating an arrest for prosecution under the laws in Peru or the United States.[132]

The court further noted that "[their] rules of interpretation militate against reading in a requirement of particular formal charges where the treaty makes no such specification."[133] Critically, the Ninth Circuit applied the default rule of treaty interpretation to Toledo's case. Utilizing support from Supreme Court precedents, the court found that it should defer to the government agencies who were charged with negotiating and enforcing the treaty, as "such a construction enlarges the rights of the signatories and respects the interpretations given by [the] Executive Branch and the Peruvian government."[134] The court found that because the treaty does not require that the requesting country provide formal charges to satisfy the extradition treaty's requirements when submitting an extradition request, the *Acusación Fiscal* was sufficient to satisfy "the charging document" mandate. Moreover, in analyzing Peruvian criminal procedure, the court found that the *Acusación Fiscal* was a "charging document" as it provided a plethora of evidence, serving "the important purpose in the Peruvian system of signaling the end of discovery and moving the case from the prosecutor's office to a judge of the Preliminary Investigation Court."[135]

In summary, the Ninth Circuit found that "the charging document" was an ambiguous term; properly interpreting it required extrinsic evidence and consideration of the two sovereign countries' rights. Accordingly, the court relied on the draft treaty provisions and the Peruvian government's standards around criminal procedure to analogize the *Acusación Fiscal* to a document that would satisfy "the charging document" requirement of the United States-Peru Extradition Treaty. It did so under the standard default rule. Because the Treaty was meant to expand the rights of the parties involved

132. *Id.* (citing S. EXEC. DOC. NO. 107-12, at 4 (2002), https://www.congress.gov/107/crpt/erpt12/CRPT-107erpt12.pdf [https://perma.cc/KCE7-74BX]).

133. *Id.*

134. *Id.*; E. Airlines, Inc. v. Floyd, 499 U.S. 530, 535 (1991); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982).

135. *Manrique*, 65 F.4th at 1043. Interestingly, the Ninth Circuit's approach in *Manrique v. Kolc* hints at a break from its "giving credence to foreign proceedings." Sainez v. Venables, 588 F.3d 713, 717 (9th Cir. 2009) (stating that the court was unwilling to "analogize a Mexican arrest warrant to an American indictment," as the Court believed it was "adhering to [its] established approach of giving credence to foreign proceedings. . . . [It has] declined to rule on the procedural requirements of foreign law out of respect for other nation's sovereignty.").

(in this case, the United States and Peru) to encourage extradition and the Treaty did not specify what document was required to extradite Toledo under the "charging document" requirement, *Acusación Fiscal* could be construed to be the charging document. However, as mentioned earlier in this Note, the Ninth Circuit had historically found that this approach might be prone to error.[136]

Notably, as previously discussed, the Ninth Circuit utilized two cases regarding two treaties which did not include "the charging document" requirement to find that the Secretary of State had satisfied the requirements to extradite Toledo. By doing so, the court diminished the requirement that Peru provide a "charging document" when it found that the treaty had allowed for the extradition of individuals who were simply "charged with" extraditable offenses. Ultimately, this approach to "the charging document" requirement in the United States-Peru Extradition Treaty hints at the judiciary's use of the default rule to ensure that the rights of sovereign nations are not infringed upon when they file an extradition request with the United States. After the Ninth Circuit's decision, Toledo surrendered to be extradited to Peru in April 2023.[137]

C. *VITKUS V. BLINKEN*

In 2023, the Fourth Circuit heard an appeal of a denial of preliminary injunction brought by Darius Vitkus, a citizen of the Republic of Lithuania.[138] Vitkus sought to prevent Lithuania from extraditing him for crimes he allegedly committed in 2008 and 2009 by filing for preliminary injunctive relief and a petition for writ of habeas corpus.[139] Vitkus owned a real estate business in Lithuania, and after it fell into bankruptcy proceedings, the Lithuanian authorities investigated him for various financial crimes between 2008 and 2010.[140] Notably, following the Lithuanian authority's summons for questioning, Vitkus testified "that the Lithuanian police officers tied him to a chair, beat him, deprived him of water . . . , burned him with cigarettes" and asked about his political activities.[141]

136. *Sainez*, 588 F.3d at 717.

137. *Peru Ex-Leader Toledo Surrenders to be Extradited from US*, AP NEWS (Apr. 21, 2023, 11:01 AM), https://apnews.com/article/peru-expresident-extradition-court-417bb6255a550ed01ddded474b3de47b [https://perma.cc/R2CR-UAEE].

138. Vitkus v. Blinken, 79 F.4th 352, 352 (4th Cir. 2023).

139. *Id.* at 354–56.

140. *Id.* at 355–56.

141. *Id.*

Vitkus received three "Notification of Suspicion" documents during Lithuania's criminal investigations, which all separately informed Vitkus that (1) he was a suspect in the Lithuanian authorities' investigation of him, (2) he allegedly violated specific "Lithuanian code provisions," and (3) he had engaged in "suspected criminal conduct."[142] After Vitkus left Lithuania, the Lithuanian authorities issued two orders of arrest for Vitkus.[143] The Lithuanian prosecutors created a document called a "Decision to Recognize D. Vitkus as a Suspect," which "described Vitkus's suspected criminal conduct and identified the implicated provisions of the Lithuanian criminal code"—this was allegedly decided based on the evidence the Lithuanian prosecutor gathered.[144] After moving to the United States, Vitkus applied for asylum and protection under the Convention Against Torture given his treatment by the Lithuanian government, which the Board of Immigration Appeals certified.[145]

In May 2015, the Lithuanian government requested that the United States extradite Vitkus to Lithuania, advising the Department of State that Vitkus was a suspect in a criminal investigation and "wanted for prosecution in Lithuania in connection" with the various criminal investigations.[146] Lithuanian prosecutors provided supporting documents for their allegations against Vitkus that "summarized evidence gathered during the three investigations, along with copies of three orders for Vitkus's arrest issued in connection with those investigations."[147] Lithuania provided three Notifications of Suspicion and two Suspect Decisions to the United States, which later became the subjects of debate in the Secretary of State's argument for extraditing Vitkus.[148]

In response to Lithuania's request, "the Secretary of State filed an extradition complaint in the Southern District of Florida, where Vitkus was then residing," and extradition proceedings commenced in the Southern District of Florida.[149] During the proceeding, Vitkus argued that the Notifications of Suspicion and Suspect Decision did not "satisfy the charging document mandate" of the United States-Lithuania Extradition Treaty.[150] Vitkus also utilized the evidence provided by a Lithuanian attorney "who testified that, under Lithuanian law, only one document—an 'indictment'—

142. *Id.* at 356.
143. *Id.*
144. *Id.*
145. *Id.* at 356–57.
146. *Id.* at 357.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 357–58.

can be a 'charging document' for purposes of the charging document mandate."[151] The extradition court found that "deference was warranted to the Treaty interpretation of the Secretary of State and supported by Lithuania" and "ruled that the Notifications of Suspicion and Suspect Decisions 'are sufficient to meet the requirements of' the charging document mandate."[152] The court analyzed the extradition treaty between Lithuania and the United States, and utilized the executive branch's argument to deny Vitkus's argument that Lithuania did not comply with "the charging document" requirement of the extradition treaty:

> The Secretary argued that the only purpose of the charging document mandate is to identify the charges for which Lithuania seeks to extradite Vitkus, and that the mandate does not require the initiation of any criminal charges. According to the Secretary, the charging document mandate is satisfied by the Notifications of Suspicion and Suspect Decisions. The Secretary supported that position with an affidavit of an attorney at the Department of State . . . and with a letter from a Lithuanian official called the Prosecutor General . . . . The State Department Affidavit averred that the Notifications of Suspicion and the Suspect Decisions are sufficient to satisfy the charging document mandate. And the Prosecutor General Letter maintained that the Notifications of Suspicion and Suspect Decisions 'would be the equivalent of the charging documents referred to in' the charging document mandate. The Letter also asserted that the proof required to identify a person as a suspect—and thus issue a Notification of Suspicion or Suspect Decision—'should not be of the same level as necessary to substantiate the judgment of conviction *or bringing charges* (this occurs at a later stage of the criminal proceedings).' "[153]

In a separate procedure following his transfer to Virginia, Vitkus filed a petition for a writ of habeas corpus and sought declaratory and injunctive relief in the Eastern District of Virginia. The court rejected Vitkus's charging document argument, as it stated "that it gave 'great weight' to the Treaty interpretation presented by the Secretary of State," and found that, along with the affidavits provided by the State Department and Prosecutor, the charging document mandate "can be satisfied by a document identifying 'the violations of Lithuanian law that form the basis of Mr. Vitkus's extradition, and . . . describ[ing] the facts underlying those alleged violations.' "[154]

The Eastern District of Virginia summarized the Secretary of State's argument in support of Vitkus's extradition:

151. *Id*. Additionally, in a footnote in the opinion, the Lithuanian attorney "testified that only an indictment could initiate a prosecution in Vitkus's case." *Id.* at n.5.

152. *Id.* at 358.

153. *Id.*

154. *Id.* at 360 (alteration in the original).

> Lithuania has complied with the charging document mandate. Similar to Vitkus, the Secretary maintains that the language of the charging document mandate is plain and unambiguous. The Secretary maintains, however, that the charging document mandate does not require production of any particular type of charging document, and that it does not demand production of an indictment or something similar. According to the Secretary, the charging document mandate only requires the Requesting State to produce documents that sufficiently detail the alleged criminal violations and conduct, such as the Notifications of Suspicion and Suspect Decisions. The Secretary argues that the federal courts have consistently interpreted other treaties made by the United States to allow for extradition of persons who have not actually been criminally charged. Finally, the Secretary insists that, if the relevant text of the Treaty is ambiguous, his proposed construction thereof—that the charging document mandate requires only a document detailing suspected criminal conduct—adheres to the Treaty's requirements and is entitled to deference.[155]

The Fourth Circuit overturned the Eastern District of Virginia's judgment. The majority of the Fourth Circuit found that "the Secretary's construction of the charging document mandate does not 'follow from the clear Treaty language' " and, therefore, the district court erred in utilizing it in its decision to reject Vitkus's petition for a preliminary injunction.[156] The Court of Appeals for the Fourth Circuit first looked to the text of the treaty, finding that "if the [treaty's] textual meaning is plain and cannot reasonably bear the government's construction, then [the court] must reject that construction."[157] The court looked to Article 8 § 3 of the Treaty, which requires that the Requesting State produce "a copy of the charging document."[158] The Fourth Circuit noted that the "Secretary of State is not entitled to extradite Vitkus unless Lithuania first produces . . . a copy of 'the charging document.' "[159] Looking at the grammatical structure of the phrase "the charging document," the court found that the treaty required a "discrete document that initiates criminal charges" and that "the charging document mandate is plain and unambiguous, and it cannot be fulfilled by some document (or set of documents) that fails to perform the charging function—even if it or they contain similar information to '*the* charging document.' "[160]

155. *Id.* at 361.
156. *Id.* at 362.
157. *Id.* (citing Aguasvivas v. Pompeo, 984 F.3d 1047, 1058 (1st Cir. 2021)).
158. *Id.* at 363; Protocol on the Application of the Agreement on Extradition Between the United States of America and the European Union to the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Lithuania, Lith.-U.S., art. 8, June 15, 2005, T.I.A.S. No. 10-201.14.
159. *Vitkus*, 79 F.4th at 363.
160. *Id.*

Moreover, the court utilized extrinsic evidence and looked to the Federal Rules of Criminal Procedure to analyze the "charging document" requirement in the treaty between the United States and Lithuania and analogize documents that the Lithuanian prosecutors produced in their investigation of Vitkus to relevant documents in U.S. criminal procedure.[161] The Fourth Circuit found that the charging document mandate required that a requesting country produce a document "that performs the same function as an indictment, information, or complaint" in the United States.[162] The court found that the documents that the Lithuanian government produced were akin to the "subject letters" and "target letters" which are used by federal prosecutors in the United States to inform individuals that they "are either a 'subject' or a 'target' of a federal criminal investigation."[163] The Fourth Circuit summarized their findings on the matter by stating:

> Critically, those identified as federal "subjects" and "targets" of criminal investigations have not been charged—unless and until they become defendants by virtue of an indictment, an information, or a complaint. The Notifications of Suspicion and Suspect Decisions relied on by the Secretary of State did not initiate criminal charges against Vitkus. They simply characterize him as a suspect, and thus do not satisfy the plain and unambiguous language of the Treaty's charging document mandate.[164]

The court also relied on the evidence provided by the Lithuanian attorney supporting this argument, noting that the documents provided by the Lithuanian government "remain in a pretrial investigation stage" and that there is a difference "between the sufficiency of evidence needed to confer the status of 'suspect' and that needed to 'bring[] charges,' which 'occurs at a later stage of the criminal proceedings.' "[165] The Fourth Circuit acknowledged the Secretary of State's argument that the United States had extradited individuals who had not been formally charged in the requesting country prior to the extradition request.[166] The Fourth Circuit compared the United States-Lithuania treaty to other treaties which show either the absence of "the charging document" requirement—in a form of *expressio unius* interpretation—or contain the requirement that requesting countries produce "a copy of the charging document, *if any*" to indicate the importance of a specific charging document in extradition proceedings between Lithuania and the United States.[167] Additionally, the Fourth Circuit found

161. *Id.* at 363–64.
162. *Id.* at 364.
163. *Id.*
164. *Id.*
165. *Id.* at 365 (alteration in the original).
166. *Id.*
167. *Id.* at 365–66.

that the inclusion of the charging document requirement was intentional, and that "the Treaty language agreed to by the parties must be adhered to and carry the day."[168] The Fourth Circuit stated that Lithuania could not proceed with the extradition without producing the charging document, as Lithuania "cannot produce 'the charging document' when no criminal charges have been filed."[169]

The Fourth Circuit explicitly rejected the Ninth Circuit's statement that "the charging document mandate 'makes no difference' " given its arguments regarding the grammatical structure of the phrase, the evidence provided by both parties, and the text of the treaty.[170] The Fourth Circuit also denied the Secretary of State's interpretation of the treaty, arguing that as the charging document mandate was clear and unambiguous, the court "do[es] not owe deference to the Secretary."[171] In doing so, it found that the Notifications of Suspicion and Suspect Decisions produced by the Lithuanian prosecutors did not initiate criminal charges against Vitkus and were insufficient to satisfy the extradition treaty's requirements.

Judge Quattlebaum, writing the dissenting opinion in *Vitkus v. Blinken*, highlighted the majority's unwillingness to utilize the default rule. Judge Quattlebaum noted that "the district court's decision to side with the Secretary's interpretation over Vitkus' faithfully applies Supreme Court precedent requiring deference to the Secretary."[172] Judge Quattlebaum found that "the Secretary produced evidence supporting a broader interpretation of [the charging document] in the context of an international extradition treaty," by providing context regarding the nature of the Lithuanian prosecutor's documents in support of its extradition of Vitkus to Lithuania.[173] Judge Quattlebaum also appeared to be persuaded by an affidavit written by a State Department attorney, who noted that the treaty between Lithuania and United States includes provisions for extraditing individuals who are "sought for prosecution," and "that a formal indictment cannot be sought under Lithuanian law until the prosecution receives Vitkus' position on the notification of suspicion documents."[174]

Judge Quattlebaum found both the Secretary's interpretation of the treaty and Vitkus's interpretation of the treaty plausible.[175] He found that

168. *Id.* at 366.
169. *Id.*
170. *Id.*
171. *Id.* at 367.
172. *Id.* at 369 (Quattlebaum, J., dissenting).
173. *Id.*
174. *Id.* at 370–71.
175. *Id.* at 371.

within the extradition treaty between the United States and Lithuania,

> Article 8, the section setting forth the required documentation that must accompany an extradition request, refers to individuals 'sought for prosecution.' [W]hile . . . 'charged with' may suggest a formal charge, 'sought for prosecution' is broader. It could also be plausibly read . . . to include persons wanted for prosecution by Lithuania, such as Vitkus, who are wanted to stand trial for specific crimes, but for whom a formal charging document akin to the ones used in the United States may not have been issued.[176]

In stating that the Secretary's argument was plausible, Judge Quattlebaum utilized the default rule to argue that the judiciary should defer to the executive branch's interpretation of a treaty when two possible interpretations are apparent.[177] Judge Quattlebaum found that the Ninth Circuit's opinion in *Manrique v. Kolc* was persuasive, given that the Ninth Circuit similarly analyzed "the charging mandate" within the extradition treaty between the United States and Peru, and that Vitkus presented the same argument that Toledo presented to the Ninth Circuit.[178] Judge Quattlebaum noted that the court denied Toledo's argument, as the treaty between Peru and the United States did not have explicit language mentioning "formal charges or the *Orden de Enjuiciamiento*," and that the court "noted that documents submitted by Peru sufficiently identified the crimes that the petitioner was accused of and summarized the supporting evidence."[179] Judge Quattlebaum also found the court's deference to the executive branch indicative of how the treaty between Lithuania and the United States should be interpreted.[180] Finally, in concluding, Judge Quattlebaum stated, "the Secretary's view that documents submitted by Lithuania satisfy the treaty's charging document requirement is, at the very least plausible. When that is the case, we must defer to the Executive Branch's interpretation of treaties that it has been charged with negotiating and enforcing."[181]

Given the discrepancy between the foreign criminal court procedures in Peru and Lithuania, it is unclear whether the Fourth Circuit would have found that Peru satisfied the requirements of its extradition request. However, the Fourth Circuit's opinion sheds light on the relationship between the executive and judiciary branches in extradition proceedings: it

176. *Id.* (citation omitted) (internal quotation omitted).
177. *Id.* at 369.
178. *Id.* at 372–73.
179. *Id.* at 372.
180. *Id.* at 372–73.
181. *Id.* at 373.

is apparent that the Secretary of State's influence on extradition is substantial, especially when the judiciary analyzes treaty agreements. When the court in *Vitkus v. Blinken* acknowledged the default rule, it noted the competing interests at stake in Lithuania's extradition request, namely the executive's interest in maintaining foreign relations and the public's interest "in seeing its governmental institutions follow the law."[182] Nevertheless, by determining that the "charging document" lacked the requisite ambiguity to apply the default rule, and accordingly, finding the executive's interest did not outweigh the public's interest in seeing the government follow the law, the Fourth Circuit upheld Vitkus's fundamental due process rights by following the procedures outlined in the treaty as written and ensuring that the extradition proceeding was fair. The Fourth Circuit's decision and its implications will be explored further in Part III.

III. INTERNATIONAL RELATIONS AND DUE PROCESS

A. DUE PROCESS AND TREATY INTERPRETATION

Although not directly stated in the circuit courts' opinions, the analyses of the Lithuania-United States and Peru-United States extradition treaties shed light on the due process rights afforded to relators in the United States. The constitutional rights of relators, vested in them by their presence in the United States, are at odds with the executive branch's responsibility to uphold relations between the United States and foreign nations.[183] The Fourth Circuit's interpretation of "the charging document" upheld Vitkus's due process rights—the Fourth Circuit deferred to the plain language of the treaty, and finding the executive branch's argument unpersuasive, ensured that the executive's influence did not overshadow the judiciary's role in the extradition process.

Legal scholars have analyzed the intersection of due process and the extradition process, focusing on the rule of non-inquiry, the possibility of double jeopardy, the rule of specialty, and hearsay exceptions. Additionally, due process concerns intersect with the appropriateness of a court's use of the default rule to interpret provisions of extradition treaties because broadening of the rights of the nations who sign extradition treaties affects the liberty of a person sought for extradition.[184]

International due process encompasses "the assurance that 'the judiciary [is not] dominated by the political branches of government,' "[185]

182. *Id.* at 368 (citing Roe v. Dep't of Def., 947 F.3d 207, 230–31 (4th Cir. 2020)).
183. *See supra* Part I.
184. *See* Rivera, *Probable Cause and Due Process*, *supra* note 75, at 159.
185. Kotuby, *supra* note 99, at 427 (2013) (quoting RESTATEMENT (THIRD) OF FOREIGN RELS. L.

and implicitly in accordance with this principle, the Fourth Circuit limited the executive's political objective by enforcing its statutorily granted power to deny extradition. Powerless to change the structure of the United States-Lithuania treaty, the Fourth Circuit, in its decision in *Vitkus v. Blinken*, highlights not only the importance of specificity in extradition treaties but also the risk of harming an individual's fundamental right to due process by giving undue deference to the executive branch's interpretation of extradition treaties.

The default rule of treaty interpretation, as addressed in Part I of this Note, has been criticized by scholars for being outdated: it was formed before human rights concerns of relators were properly addressed by courts in considering whether to certify the relators' extradition to the requesting country.[186] The judiciary implemented the default rule at a time when human beings were not subjects of international law—when the Supreme Court issued its *Laubenheimer* decision in 1933, sovereign countries, not individuals, were considered the beneficiaries of rights that flowed from treaties.[187] The default rule upheld the sovereign signatories' right to extradite individuals wanted for prosecution, and continues to be upheld in some form by the Vienna Convention on the Law of Treaties.[188] The default rule continues to exert influence over the extradition interpretation process even as the human rights of relators have become a prominent and important consideration in the extradition process.[189]

The Ninth Circuit's understanding of Peruvian criminal procedure and the deference it afforded the United States executive branch bring to light the potential risks of applying the default rule. The court in *Manrique v. Kolc* considered the evidence provided by both the Peruvian prosecutors and the State Department to understand "the charging document" requirement in the Peru-United States Extradition Treaty, and in doing so, the court contextualized the requirements of the treaty.[190] This analysis favored the Secretary of State's interpretation—as noted previously, extradition

§ 482 cmt. b (1987)).

186. *Supra* Part I; *see* Rivera, *Interpreting Extradition Treaties*, *supra* note 17, at 202.

187. *See* KATE PARLETT, THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW 26 (2011); Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999, 2001 (2003) ("The nature of treatymaking . . . has changed, moving in a direction that should systematically protect against the diminishment of rights. Where international law was once blind to individuals as such, today we find an increasingly consequential umbrella of individual rights protections in the form of international human rights norms. . . . Where states were once free to bargain away individual rights . . . they now must account for them under other treaty and nontreaty norms.").

188. *See supra* note 54.

189. PARLETT, *supra* note 187, at 36–37.

190. Manrique v. Kolc, 65 F.4th 1037, 1042–43 (9th Cir. 2023).

proceedings are distinct from criminal trials, and the judiciary may be comfortable with some bias in a proceeding that does not determine the guilt or innocence of the accused.[191] However, the court's deference to the Secretary of State's interpretation of the "charging document" could be read as the court's inclination to uphold foreign relations with Peru at the potential expense of Toledo's liberty rights. As the court acknowledged, the risk of misinterpreting the requirements of the treaty was great: Toledo would be sent to Peru to face trial and be imprisoned, and his ability to file a habeas petition would be nullified by his presence in the Peruvian criminal justice system.[192]

Vitkus v. Blinken implicitly renounces the traditional application of the default rule: the Fourth Circuit alludes to the pressure the executive branch places on the judiciary to comply with the Secretary of States's understanding of a provision of a treaty—especially when the judiciary finds that the provision in question is clear and unambiguous.[193] In finding that "the charging document" mandate was clear and unambiguous in its requirement that a discrete document was to be produced by the Lithuanian government, the Fourth Circuit protected Vitkus from a questionable extradition request when it found that the treaty required that the requesting country produce a specific document charging him with a crime. By doing so, the Fourth Circuit found clarity in the procedural requirements established in the extradition treaty and potentially upheld Vitkus's Fifth Amendment due process rights. However, it is important to note that should the majority of the Fourth Circuit have found that "the charging document" requirement was an ambiguous provision in the treaty, then there would have been a possibility that the court would have applied the default rule.

The Fourth Circuit also implicitly respected principles of international law on due process by ensuring that the political branch did not dominate the proceeding by compelling the court to recognize its interpretation of "the charging document" requirement.[194] International due process requires that trials are "fair" and are not "dominated" by the political branch.[195] However,

191. United States v. Lui Kin-Hong, 110 F.3d 103, 120 (1st Cir. 1997) (citing *In re* Kaine, 55 U.S. (14 How.) 103, 113 (1852)).

192. *Manrique*, 65 F.4th at 1041.

193. Vitkus v. Blinken, 79 F.4th 352, 367 (4th Cir. 2023) ("[T]he Secretary of State maintains that we are obliged to defer to his interpretation of the Treaty, even if we would not adopt that construction de novo.").

194. Kotuby, *supra* note 99, at 427 (quoting RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 482 cmt. b (1987)).

195. *See id.*; BASSIOUNI, *supra* note 3, at 2, 54 ("[S]tates have protected human rights by giving legal rights to individuals, entitling them to certain legal rights and placing limitations on the powers of the respective states" and "if the breach [of an extradition treaty by a party] is of an internationally protected right, or the result of lack of fairness or good faith by the parties in the application of rights

as discussed previously, extradition proceedings are not trials, and a challenge against an extradition proceeding for being "unfair" was notably discounted by a Nevada District Court in 2023 in *Sridej v. Blinken*, in which the court referenced two cases from the 19th and early 20th centuries to note that the extradition procedure did not require the formalities of other judicial proceedings.[196] This case also underscores contemporary federal judiciary's deference to understandings of international law codified before the duties of upholding international due process became binding on the American judiciary. Accordingly, although Vitkus might have been able to raise that the executive branch's interpretation of "the charging document" would not be "fair," it would be unlikely to be held as a viable argument against the certification of his extradition by the judiciary.

The interpretive dissonance surrounding "the charging document" requirement could be remedied by diminishing deference to the executive branch in treaty interpretation: the judiciary is tasked with interpretation in the extradition process specifically because its legal acumen regarding interpretation is more developed than the executive branch's legal acumen. By not affording as much deference to the Secretary of State's interpretation of "the charging document" as the Ninth Circuit had afforded, the Fourth Circuit's approach to interpreting the U.S.-Lithuania treaty was more consistent with its obligations under international law: it sought to provide a fair hearing to Vitkus and did not near the point of acting "at the whim" of the executive branch.

Another consideration for remedying this tension between the judiciary and executive branch, with some limitations, would be to include more specific language in bilateral extradition treaties regarding a sovereign nation's criminal procedure. Although, as stated in Part I of this Note, the judiciary has no authority to alter bilateral extradition treaties that the United States executes with foreign governments, *Vitkus v. Blinken* exemplifies the kind of case that could incentivize the executive branch to negotiate extradition treaties that have specific language relevant to the parties' criminal procedures. By doing so, the U.S. and a sovereign signatory to a bilateral extradition treaty could prevent interpretive friction in the United States judiciary and allow for more expeditious extradition processing. Specifying the documents that better ascertain the level of probable cause

stipulated in favor of third parties, or conceded to individuals as third-party beneficiaries under the particular treaty, then there is a violation of international law."); Powers, *supra* note 4, at 415–16.

196. *See* Sridej v. Blinken, No. 23-cv-00114, 2023 U.S. Dist. LEXIS 117727, at *18 (D. Nev. July 10, 2023) ("Extradition proceedings are neither criminal trials nor full blown civil actions; they are administrative in character, and . . . are not burdened with legalism and formalities with which American courts are familiar." (citing Wright v. Henkel, 190 U.S. 40 (1903) and *In re* Kaine, 55 U.S. (14 How.) 103 (1853))).

established in a foreign proceeding could not only protect relators from extradition that invades their constitutional and international human rights but also the judiciary from breaching rules of non-inquiry and incorrectly interpreting a foreign country's criminal procedure.[197] However, this would not be a salve to the protection of international human rights of relators: a country without an independent judiciary could likely still satisfy the document requirement even if it were specified, and the risk of violating a relators' due process rights might still be an issue, albeit in a different form than the one at issue in this Note.

B. RELEVANT BACKGROUND

The two circuit opinions may also differ for reasons not explicitly stated by the published decisions. Although Toledo raised the possibility of maltreatment and suffering while awaiting trial in a Peruvian prison, his argument failed to trigger a humanitarian concern by the court.[198] Notably, courts in the United States may disavow the rule of non-inquiry should the relator raise the possibility of meeting human rights abuses by the requesting state in the event the extradition court certifies extradition—Toledo's argument regarding his ill health does not align with the circumstances the court considers in extradition.[199] On the other hand, Vitkus's testimony about his arrest in Lithuania does support a contention that he could be tortured should the U.S. certify Lithuania's extradition request, given that while applying for asylum, the "Board of Immigration Appeals (the 'BIA') found

197. The court in *Manrique v. Kolc* deliberated over whether an *Acusación Fiscal* or an *Orden de Enjuiciamento* satisfied "the charging document" requirement, opening a pandora's box of issues regarding the court's review of foreign criminal procedure. Manrique v. Kolc, 65 F.4th 1037, 1042 (9th Cir. 2023) ("The parties dispute whether the accusations contained in the *Acusación Final* suffice to 'charge[]' Toledo 'with' an extraditable offense under the Treaty. The United States claims it does. Toledo argues that the Treaty requires an *Orden de Enjuiciamiento* before extradition."). *See In re* Application for an Ord. for Jud. Assistance in a Foreign Proc. in the Lab. Ct. of Brazil, 466 F. Supp. 2d 1020, 1028 (N.D. Ill. 2006) ("American courts should treat foreign law the way American courts want foreign courts to treat American law: avoid determining foreign law whenever possible."); *In re* Bravo, No. 19-23851, 2023 U.S. Dist. LEXIS 177916, at *40–41 (S.D. Fla. Oct. 3, 2023) ("[A] foreign government should not be required to prove to a U.S. judge that it is properly construing its own laws.").

198. *Manrique*, 65 F.4th at 1041 ("Toledo has explained that he could be detained in Peru up to three years pending formal charges and that the conditions in Peruvian prisons are dire. Given his advanced age and preexisting health conditions, Toledo risks contracting a fatal illness or experiencing other serious health declines."); Toledo v. United States Dep't of State, No. 23-627 (BAH), 2023 U.S. Dist. LEXIS 53048, at *7–8 (D.D.C. Mar. 28, 2023).

199. Powers, *supra* note 4, at 315 ("The United States has recognized that, in some circumstances, it has an obligation to inquire into the treatment which an individual will receive if transferred to another nation."). Powers notes that as the United States ratified the 1979 International Convention Against the Taking of Hostages, extradition cannot be completed by the requested country if the requested party has "substantial grounds for believing: (a) That the request [for extradition] has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion . . . ." *Id.* (quoting International Convention Against the Taking of Hostages, art. 9, Dec. 17, 1979, 1316 U.N.T.S. I-21931).

in 2014 that Vitkus's 'credible testimony established that he was beaten, burned, and nearly asphyxiated by [Lithuanian] police officers, who inquired into his contributions to a political party."[200] The findings of the Board of Immigration Appeals did not preclude the extradition court from certifying Vitkus for extradition.[201] Vitkus's torture in Lithuania—allegedly related to his political involvement in Lithuania with a political group called "the Russia party"[202]—may have implicitly prompted the court to consider that the Lithuanian criminal proceedings would violate Vitkus's human rights upon returning to Lithuania. This concern might have informed the Fourth Circuit's view that "the charging document" requirement was a clear and unambiguous requirement that Lithuania provide a discrete charging document.

C. FOREIGN RELATIONS AND THE INTERPRETATION OF "THE CHARGING DOCUMENT" REQUIREMENT

The United States uses extradition treaties to prevent U.S. citizens and non-U.S. citizens alike from utilizing the United States as a safe haven when they have committed crimes on foreign soil, and are tools used by the United States to uphold its relationships with foreign countries.[203] The default rule of treaty interpretation supports the executive branch's role of upholding its treaty obligations as the governmental body responsible for foreign relations. Extradition treaties are entered into by the executive branch in its process of conducting foreign relations, creating international agreements regarding extradition unifies countries in a common, collaborative law enforcement apparatus.[204] There are many reasons for entering into a collaborative law enforcement apparatus, including "ensuring that fugitive criminals do not go

200. Vitkus v. Blinken, 79 F.4th 352, 356 (4th Cir. 2023) (alteration in the original).

201. *Id.* at 358 n.6.

202. *Id.* at 355.

203. Emily Edmonds-Poli & David Shirk, *Extradition as a Tool for International Cooperation: Lessons from the U.S.-Mexico Relationship*, 33 MD. J. INT'L L. 215, 217 (2018) ("[C]ountries are expected to abide by a treaty's established terms because failing to do so could undermine the prospect of future extraditions or cooperation in other areas of the international relationship.").

204. Wang v. Masaitis, 416 F.3d 992, 1002 (9th Cir. 2005) (Ferguson, J., dissenting) ("By virtue of wielding the power to make treaties, appoint ambassadors, and recognize foreign governments, all part of the President's extensive power to conduct foreign relations, the President is necessarily entrusted by the structure of the Constitution with the power to determine who makes a proper treaty partner."). In *Wang v. Masaitis*, the petitioner argued that the Treaty Clause of the United States Constitution (U.S. Const. art. II, § 2, cl. 2) did not include agreements made between the United States and Hong Kong, which is a non-sovereign state. *Id.* at 993–94. The Ninth Circuit rejected the argument in finding that "the United States' history of treaties with nonsovereign Indian nations fills in the silence of the Treaty Clause and the extradition statute with respect to the term 'treaty.' " *Id.* at 999. In rejecting the court's reasoning to justify the constitutionality of the treaty, the dissent noted that the "question of whether Hong Kong is a constitutionally cognizable treaty partner is committed to the political branches because it is inextricably linked to the President's broad authority in the field of foreign relations." *Id.* at 1001.

unpunished for their alleged crimes, discouraging crime throughout the world, and protecting nations from fugitive criminals by eliminating the possibility of safe havens for fugitive criminals."[205] Allowing countries to extradite individuals strengthens the relationship between the two countries, while not cooperating with an extradition request, especially when issues regarding erroneous treaty interpretation arise, hampers international relations between the countries.[206] When considering the factors for staying a pending appeal ("(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; "and (4) where the public interest lies"),[207] courts have noted that noncompliance with extradition requests diminishes the "force" of extradition treaties, and that "[i]f other countries lose confidence that the United States will abide by its treaties, the United States risks losing the ability to obtain the extraditions of people who commit crimes here and flee to other countries."[208] This may be the reason why the Secretary of State, who ultimately decides whether to proceed with an extradition request once the court certifies a relator for extradition, does not often refuse to surrender those sought by a foreign country for prosecution.[209]

In denying Lithuania's extradition request, the Fourth Circuit may have chipped at the United States' relationship with the Lithuanian government by rejecting the default rule.[210] Although the U.S. government does not rescind the entire extradition treaty when the requestor country fails to extradite an individual, failing to extradite prohibits the flow of criminals between countries, and can encourage the impression that the U.S. can be

205. David L. Gappa, Note, *European Court of Human Rights - Extradition - Inhuman or Degrading Treatment or Punishment, Soering Case, 161 Eur. Ct. H.R. (SER. A) (1989)*, 20 GA. J. INT'L & COMPAR. L. 463, 479 n.121 (1990).

206. Edmonds-Poli & Shirk, *supra* note 203, at 217 ("[C]ountries are expected to abide by a treaty's establish terms because failing to do so could undermine the prospect of future extraditions or cooperation in other areas of the international relationship."); *see* Koskotas v. Roche, 931 F.2d 169, 174 (1st Cir. 1991) ("Extradition proceedings are grounded in principles of international comity, which would be ill-served by requiring foreign governments to submit their purposes and procedures to the scrutiny of United States courts."); Artukovic v. Rison, 784 F.2d 1354, 1356 (9th Cir. 1986) ("[T]he public interest will be served by the United States complying with a valid extradition application . . . . Such proper compliance promotes relations between the two countries, and enhances efforts to establish an international rule of law and order.").

207. Nken v. Holder, 556 U.S. 418, 426 (2009).

208. Venckiene v. United States, 929 F.3d 843, 865 (7th Cir. 2019).

209. Parry, *supra* note 16, at 96 ("The Secretary of State is 'the ultimate decisionmaker' and has discretion to refuse surrender. In practice, however, the Secretary rarely exercises his discretion, perhaps because the needs of diplomacy outweigh the concerns of individuals who may have committed crimes.").

210. *See Venckiene*, 929 F.3d at 865.

held as a safe haven for criminals.[211] Moreover, international comity would be ill-served by the uncertainty a requesting country may face when summoning an individual from the United States, should the relevant treaty have a "charging document" requirement.

CONCLUSION

As the two circuit court opinions in 2023 demonstrate, the default rule of treaty interpretation continues to influence the judiciary's role in determining whether to certify a foreign nation's extradition request. In the Ninth Circuit opinion in *Manrique v. Kolc*, the court was partial to the Secretary of State's interpretation of "the charging document" requirement in its extradition of Toledo—the court found the "charging document" requirement to be relatively inconsequential in finding that the Peruvian government had satisfied its extradition request by providing an *Acusación Fiscal*. However, in *Vitkus v. Blinken*, the court was more dubious of the Secretary of State's interpretation of the treaty and disagreed that the documents that the Lithuanian government had provided to extradite Vitkus satisfied the requirements listed in the U.S.-Lithuania Extradition Treaty.

By continuing to find opportunities to utilize the default rule in interpreting extradition treaties, the judiciary is more likely to impinge on the constitutional due process rights of relators in an effort to appease the executive's concern with maintaining foreign relations with sovereign countries.[212] The divergence in interpretation of "the charging document" highlights the possibility of two diametrically opposite outcomes for those who face extradition, with important implications: the removal of an individual from the United States to a requesting country, and therefore, the removal of the constitutional rights afforded to them when they are physically in the United States. *Vitkus v. Blinken*, in acknowledging the default rule, noted that although there is a legitimate public interest in extraditing criminals to the countries that request them, the executive's obligations to follow the law should not be outweighed by its duty to maintain foreign relations; doing so honors the procedural safeguards written into a treaty.

The judiciary's continued use of the default rule is in tension with the development of international human rights. *Manrique v. Kolc* embodies the risk to internationally recognized due process rights when courts cite to the

211. Gappa, *supra* note 205, at 479 n.121.

212. *See* Powers, *supra* note 4, at 320 ("In the United States we have developed strong constitutionally based protections for those accused of crimes, and those norms should not be unquestioningly transgressed because of foreign-policy concerns. Instead, notions of due process and fundamental fairness should always guide the court.").

default rule of treaty interpretation: the court in *Manrique* appeared to interpret "the charging document" to conciliate the executive branch. Toledo is not the only relator who has argued that the extradition process did not comport with due process: relators have raised arguments about various components of the extradition process that violate fundamental due process rights. As precedents almost require that the judiciary does not consider these arguments, the judiciary should gradually reduce the weight of the default rule of treaty interpretation so that extradition proceedings align more closely with the fairness and juridical equality requirements of the fundamental human right to due process.

Because the United States is a party to at least twenty-eight bilateral extradition treaties that contain "the charging document" requirement, arguments as to its ambiguity will likely arise again. Accordingly, to better uphold the due process rights of relators, courts should defer to the executive branch and the plain text of the relevant extradition treaty proportionally to ensure that decisions are in line with customary international law on due process. By critically analyzing the default rule, the courts will be better equipped to uphold their obligations to the rights of relators: rights granted by the Constitution and by international law on the fundamental right to due process.