

THE DEATH PENALTY FOR DRUG KINGPINS: CONSTITUTIONAL AND INTERNATIONAL IMPLICATIONS

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In 1994 Congress enacted the Federal Death Penalty Act (FDPA) with provisions permitting the imposition of the death penalty on Drug Kingpins.¹ The FDPA is unprecedented in American legal history in that the death penalty can be imposed in cases where the Drug Kingpin does not take a human life.² To qualify for the death penalty under the act, a Drug Kingpin has to have directed a "continuing criminal enterprise" involving either large quantities of controlled substances or 20 million dollars in gross receipts from the enterprise over a one year period.³ The specific controlled substances enumerated in the act are very large quantities or mixtures of heroin, cocaine, ecgoine, phencyclidine (PCP), lysergic acid diethylamide (LSD), marijuana, or methamphetamine.⁴

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1. Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591-3597 (1994).

2. See generally Neil C. Schur, *Assessing the Constitutionality and Policy Implication of the 1994 Drug Kingpin Death Penalty*, 2 TEX. F. ON CIV. LIBERTIES & CIV. RTS. 141 (1996) (providing extensive history of the FDPA); 137 CONG. REC. S8497 (1991) (statement of Senator Biden about the validity of new extension of the death penalty to drug kingpins who do not murder); 140 CONG. REC. S4187 (1994) (statement of Senator Hatch on the new provision of the "Drug Kingpin" bill extending the death penalty for the first time to certain cases where death does not directly result from the activities of the Drug Kingpin).

3. 18 U.S.C. § 3591(b) provides:

a defendant who has been found guilty of (1) an offense referred to in section 408(c)(1) of the Controlled Substance Act (21 U.S.C. § 848(c)(1)), committed as part of a continuing criminal enterprise offense under the conditions described in subsection (b) of that section which involved not less than twice the quantity of controlled substance described in subsection (b)(2)(A) or twice the gross receipts described in subsection (b)(2)(B) . . . shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

Id.

"Continuing criminal enterprise" is described in The Controlled Substance Act, 21 U.S.C. § 848(c) (1988) as violations: "(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management and (B) from which such person obtains substantial income or resources." *Id.*

4. See 18 U.S.C. § 3591(b). This part requires twice the controlled substances referred to in 21 U.S.C. § 848(b)(2)(A), which in turn refers to 300 times the amount of controlled substances listed in 21 U.S.C. § 841(b)(1)(B), which lists the following controlled substances and amounts (these amounts are multiplied by four to arrive at the threshold quantities, for example 400 grams of heroin):

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

The judge or jury may use eight aggravating factors and eight mitigating factors to determine whether a death sentence is justified.⁵ The office of the Attorney General must follow specific procedures before determining whether the government should seek the death penalty.⁶ These include personal involvement by the Attorney General and written notice to the defendant.⁷ A separate sentencing hearing is required by either the judge or jury to assess the statutory aggravating and mitigating circumstances.⁸ A death sentence

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- (ii) 500 grams or more of a mixture or substance containing a detectable amount of (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salt have been removed; (II) cocaine, its salts, optical and geometric isomers, and salts of isomers; (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or (IV) any compound, mixture, or preparation which contain any quantity of any of the substances referred to in subclauses (I) through (III);
 - (iii) 5 grams or more of a mixture or substance described in clause (ii) which contains a cocaine base;
 - (iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);
 - (v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
 - (vi) 40 grams or more of a mixture or substance containing detectable amounts of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;
 - (vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or
 - (viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

Id.

5. See 18 U.S.C. § 3592(a). Mitigating factors are impaired capacity, duress, minor participation, equally culpable defendants, no prior criminal record, severe mental or emotional disturbance at the time of the offense, victim's consent, and other factors in the defendant's background, record, or character or any other circumstance of the offense that mitigates against imposition of the death penalty. See 18 U.S.C. § 3592(d). Aggravating factors are previous conviction of offense for which a sentence of death or life imprisonment was authorized, previous conviction of other serious offenses, previous serious drug felony conviction, use of a firearm in commission of the offense, distribution to person under twenty-one, distribution near schools, using minors in trafficking, and the existence of a lethal adulterant. See *id.*

6. See 18 U.S.C. § 3593(a) (requiring written notice to the defendant that the government intends to seek the death penalty, and setting forth the aggravating factor or factors which the government believes justifies a death sentence). See also *United States v. Colon-Miranda*, 985 F. Supp. 36, 37 (D. P.R. 1997) (disallowing government's notice to seek death sentence because it was filed less than two weeks before trial).

7. See 18 U.S.C. § 3593(a). See generally *Nichols v. Reno*, 931 F. Supp. 748 (D. Colo. 1996) (outlining the procedures of the United States Attorney's Manual which requires each United States attorney to obtain prior written approval from the Attorney General before seeking the death penalty in any case). See U.S. DEP'T OF JUSTICE, *United States Attorney's Manual*, 9-10.040 (1997) (containing death penalty evaluation procedures).

8. See 18 U.S.C. § 3593(b).

may not be imposed unless the judge or jury finds, beyond a reasonable doubt, the existence of at least one aggravating circumstance.⁹

Since the FDPA does not require the killing of a human being as a prerequisite for imposing the death penalty on a Drug Kingpin, the issue arises whether the Act prescribes cruel and unusual punishment, and thus violates the Eighth Amendment of the United States Constitution.¹⁰ Some legal scholars have concluded that the decisions in *Coker v. Georgia* and *Enmund v. Florida* stand as an absolute bar to imposition of the death penalty in any non-homicide case.¹¹ In *Coker*, the Court found that the death penalty for rape of an adult woman is "grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."¹² Similarly, the *Enmunds* decision stated that the use of the death penalty for unintentional felony-murder is cruel and unusual punishment.¹³ Both decisions based their cruel and unusual punishment findings on the indicia of public opinion toward the death penalty for those offenses as evidenced by state legislation and jury verdicts.¹⁴ Those two cases are at odds with earlier decisions by the Court

9. See 18 U.S.C. § 3593(c)-(d). The government must prove the existence of an aggravating factor beyond a reasonable doubt, while the defendant can establish a mitigating factor by a preponderance of the information. See *id.*

10. See U.S. CONSTIT. amend. VIII.

11. See generally Jeffrey C. Matura, *When Will It Stop? The Use of the Death Penalty for Non-Homicide Crimes*, 24 J. LEGIS. 249 (1998) (advancing that any non-homicide death penalty statute imposes a grossly disproportionate punishment); Emily Marie Moeller, *Devolving Standards of Decency: Using the Death Penalty to Punish Child Rapists*, 102 DICK. L. REV. 621 (1998) (stating that the very essence of the Court's ruling in *Coker* is that the death penalty should only be used for crimes involving the death of a victim); Lynn D. Wittenbrink, *Overstepping Precedent? Tison v. Arizona Imposes the Death Penalty on Felony Murder Accomplices*, 66 N.C. L. REV. 817 (1988) (stating that *Enmund* and *Coker* meant to categorically prohibit the death penalty for those defendants who do not kill).

12. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

13. See *Enmund v. Florida*, 458 U.S. 782 (1982).

Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as *Enmund* who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.

Id. at 797.

14. See *Coker*, 433 U.S. at 592.

Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective view of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence-history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.

Id. See also *Enmund*, 458 U.S. at 788. Following the criteria set in *Coker*, the Court looked to the

allowing the imposition of the death penalty for the non-homicide offenses of treason and espionage.¹⁵

In addition to constitutional law questions raised by the FDPA, the Act also has international implications. Most of the illegal narcotics covered by the Act are distributed into the United States through the continuing criminal enterprise of a foreign national Drug Kingpin who resides in a country such as Colombia¹⁶ or Mexico.¹⁷ For the FDPA to have the desired impact on illegal drug distribution and use in the United States, it must be imposed on foreign Drug Kingpins. However, physical custody of the Drug Kingpin must be obtained before a prosecution can proceed under the FDPA in a United States court.¹⁸ The death penalty provisions of the FDPA place the United States in a legal and diplomatic dilemma in terms of obtaining physical custody of potential foreign national defendants.¹⁹ Many of the countries whose Drug Kingpins supply illegal narcotics into the United States have domestic laws prohibiting the death penalty, or have entered into extradition treaties with the United States which create serious legal road blocks to formal extradition for death penalty eligible crimes.²⁰ Those countries may have grounds in international law to deny extradition requests by the United States on the basis of the FDPA death penalty provisions.²¹ Therefore, the United States may have to resort to irregular methods of seizing foreign Drug Kingpins such as forcible abduction or luring.²² Those techniques are highly controversial and raise significant issues of violation of the sovereign rights of other nations.²³

Part One of this article will assess the constitutionality of the FDPA as applied to Drug Kingpins who do not take human life, and conclude that the Act is constitutional and does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. That conclusion will be based on the following: (a) the use of the death penalty for non-homicide crimes of treason

historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions of juries. *See id.*

15. *See Kawakita v. United States*, 343 U.S. 717 (1952) (upholding the death sentence for treasonable acts for conduct toward American prisoners amounting to torture that did not involve any loss of life). *See also Rosenberg v. United States*, 346 U.S. 273, 293 (1953) (denying a stay of execution for the crime of espionage where no killing occurred because sentence is permitted by law).

16. *See infra* notes 96, 124, 126 and accompanying text.

17. *See infra* notes 96, 125, 127, 128 and accompanying text.

18. *See* JORDAN J. PAUST ET AL., *INTERNATIONAL CRIMINAL LAW* 281-496 (1996) (outlining United States law on obtaining a person abroad for U.S. prosecution).

19. *See infra* note 162.

20. *See infra* notes 143, 146, 148, 150, 152-161 and accompanying text.

21. *See infra* note 162.

22. *See infra* notes 95, 96 and accompanying text.

23. *See infra* note 196 and accompanying text.

and espionage is constitutional and has not been disturbed by later decisions of the Court; (b) the use of the death penalty for Drug Kingpins who do not take human life is analogous to use in cases of treason and espionage and is therefore constitutional; and (c) the imposition of the death penalty for Drug Kingpins who do not take human life is consistent with the Court's decisions in *Coker* and *Enmunds* and is not grossly disproportionate to the crime charged.

Part Two will address the international implications of the death penalty provisions of the FDPA on the ability of the United States to obtain custody of foreign Drug Kingpins for prosecution in the United States. Part Two will demonstrate that prosecution of these Drug Kingpins under the Act is very likely to be prohibited by international law and diplomatic realities.

I. ASSESSING THE CONSTITUTIONALITY OF THE FDPA FOR DRUG KINGPINS

A. *The Death Penalty For Treason and Espionage: Still Constitutional After Furman*

Treason against the United States is the only crime specifically mentioned in the Constitution.²⁴ Article III, section 3 also specifically states: "[T]he Congress shall have Power to declare the Punishment of Treason."²⁵ The first Congress used the power conferred by Article III to establish the penalty for treason: death by hanging.²⁶

Congressional acts authorizing the death sentence for treason and espionage cases have been in continuous effect since 1790.²⁷ At no time in

24. U.S. CONST. art. III, § 3 states:

Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Id.

25. *Id.*

26. 1 STAT. 112 (1790). See generally James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. PITT. L. REV. 99 (1983) (providing a detailed history of the treason statute).

27. See generally Paul D. Kamnjar, *Death Penalty Legislation For Espionage and Other Federal Crimes is Unnecessary: It Just Needs A Little Re-enforcement*, 24 WAKE FOREST L. REV. 881 (1989). The current Treason statute is found at 18 U.S.C. § 2381 (1994):

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid . . . is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less

the history of the United States has there been a period when Congress has not authorized the death penalty for treason.²⁸ The Court has never ruled that the death penalty for treason or espionage is unconstitutional where no killing occurs.²⁹

Perhaps the most famous contemporary case involving the use of the death penalty for treason and espionage is the 1952 case of Julius and Ethel Rosenberg.³⁰ The Rosenbergs were convicted of conspiracy to violate the Espionage Act by communicating secret government information to Russia.³¹ The communications involved were documents, writings, sketches, notes, and information relating to the national defense of the United States.³² The Rosenbergs did not commit any criminal act which involved the killing of a human being.³³ Nevertheless, the Second Circuit concluded that the death sentence for treason and espionage was not cruel and unusual punishment because it did not shock the conscience and sense of justice of the people of the United States.³⁴ The Court refused to hear the appeal on the cruel and unusual punishment issue.³⁵

In 1972, the United States Supreme Court in *Furman v. Georgia* struck down death penalty statutes in Georgia and Texas.³⁶ The Court collectively issued a one paragraph five to four *per curiam* opinion finding that the imposition of the death penalty in these cases constituted cruel and unusual punishment.³⁷ Each Justice issued his own concurring or dissenting opinion.³⁸ Justices Marshall and Brennan concluded that the Eighth Amendment prohibited capital punishment in all cases.³⁹ Justice Douglas stated the statutes were unconstitutional because the sentencing procedures allowed for

than \$10,000.00; and shall be incapable of holding any office under the United States.

Id. The current espionage statute is found at 18 U.S.C.A. § 793 (1994). See generally Elizabeth B. Bazan, *Espionage and the Death Penalty*, 41 FED. B. NEWS & J. 615 (1994) (giving an overview of the Espionage Act and the death penalty).

28. See Wilson, *supra* note 26; Kamenar, *supra* note 27; Bazan, *supra* note 27.

29. See Wilson, *supra* note 25; Kamenar, *supra* note 26.

30. United States v. Rosenberg, 195 F.2d 583 (2nd Cir. 1952). See generally William Cohen, *Justice Douglas and the Rosenberg Case: Setting the Record Straight*, 70 CORNELL L. REV. 211 (1985) (listing a detailed chronology of the Rosenberg case).

31. See *Rosenberg*, 195 F.2d at 588.

32. See *id.*

33. See Cohen, *supra* note 30.

34. See *Rosenberg*, 195 F.2d at 608.

35. See *Rosenberg v. United States*, 346 U.S. 273, 293 (1953). The Court ruled that the death penalty for the offense was "permitted by law." *Id.* The Rosenbergs were executed on June 19, 1953. See Cohen, *supra* note 29.

36. *Furman v. Georgia*, 408 U.S. 238 (1972).

37. *Id.* at 239-40.

38. See *id.* at 240.

39. See *id.* at 305, 371.

the imposition of the death sentence for impermissible reasons such as race, religion, wealth, social position, or class.⁴⁰ Justice Stewart concluded that the infliction of the death penalty is unconstitutional under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.⁴¹ Justice White concurred in the opinion and stated the penalty was imposed infrequently out of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty.⁴² The essence of the *Furman* case was that the statutes lacked procedural safeguards which would prevent the imposition of the death penalty in an arbitrary or capricious manner.⁴³

In response to the *Furman* decision, many states amended their statutes in an attempt to comply with the *Furman* mandate of procedural safeguards.⁴⁴ In 1976, in the case of *Gregg v. Georgia*, the Court reviewed the new capital punishment procedure enacted by the Georgia legislature.⁴⁵ The new procedures required a guilt stage and a sentencing stage.⁴⁶ The statute also required a finding beyond a reasonable doubt of at least one statutorily defined aggravating circumstance before death became a possible penalty.⁴⁷ The Georgia statute allowed the jury unlimited discretion to consider any non-statutory mitigating factor.⁴⁸ Lastly, the statute provided for an automatic appeal of any death sentence to the Georgia Supreme Court.⁴⁹ The Court upheld the new statutory death penalty provisions and the death sentence against *Gregg*.⁵⁰ The Court held that the Georgia sentencing procedures eliminated concerns that the death sentence could be imposed in an arbitrary and capricious manner.⁵¹

The *Furman* and *Gregg* cases did not specifically address the use of the death penalty for treason and espionage. However, due to the perceived lack of *Gregg*-type procedural safeguards in the Treason and Espionage Acts, the

40. *See id.* at 242.

41. *See id.* at 310.

42. *See id.* at 313.

43. *See generally* Thomas J. Walsh, *On the Abolition of Man: A Discussion of the Moral and Legal Issues Surrounding the Death Penalty*, 44 CLEV. ST. L. REV. 23, 26 (1996) (summarizing the holding in *Furman* that the death penalty could not be imposed under sentencing guidelines that created a substantial risk that it would be imposed in an arbitrary or capricious manner).

44. *See generally* *Gregg v. Georgia*, 428 U.S. 153 (1976) (demonstrating that Georgia amended its death penalty statute in accordance with the *Furman* decision).

45. *Id.*

46. *See id.* at 163.

47. *See id.* at 164-65.

48. *See id.* at 165.

49. *See id.* at 170.

50. *See id.* at 169.

51. *See id.* at 187; *see also* *Blaystone v. Pennsylvania*, 494 U.S. 299 (1990) (summarizing the principles from *Furman v. Georgia*, 408 U.S. 238 (1972)).

government effectively abandoned the use of the death penalty for those crimes.⁵² That lack of use by the Department of Justice was by choice and not in response to any federal cases that ruled the death penalty per se unconstitutional for treason and espionage cases.⁵³

In 1983, a district court judge addressed the issue of the viability of the death sentence against James Harper for the crime of espionage and treason.⁵⁴ Harper was charged with obtaining secret national defense information and transporting it to the Polish Intelligence Service.⁵⁵ He received \$250,000 for the information.⁵⁶ The case did not involve the killing of any human being. Judge Conti issued a pretrial ruling that the availability of the death penalty for peace-time espionage was not per se unconstitutional.⁵⁷ He also ruled that the imposition of the death penalty would not violate the Eighth Amendment.⁵⁸ The Ninth Circuit reversed the decision on the basis that the Espionage Act did not contain adequate procedural safeguards.⁵⁹ The decision did not disturb Judge Conti's ruling concerning the per se constitutionality of the death penalty for espionage.⁶⁰

The FDPA as it relates to the crimes of treason and espionage contains procedural safeguards against imposition of the death penalty in an arbitrary or capricious fashion.⁶¹ The Act requires a judge or jury to find beyond a reasonable doubt the existence of at least one statutory aggravating circumstance before the death sentence can be imposed.⁶² Those aggravating circumstances are: (1) the defendant has previously been convicted of another offense involving treason or espionage for which life imprisonment or death was authorized; (2) in the commission of the offense, the defendant knowingly created a grave risk of substantial danger to the national security;

52. See Kamemar, *supra* note 27. Until October 1, 1988, the official Justice Department position was that federal death penalty provisions were unenforceable in view of the Court's decision in *Furman*.

53. See *United States v. Harper*, 729 F.2d 1216, 1226 (9th Cir. 1984) (citing the Justice Department's view that *Furman* rendered section 794 of the death penalty provisions unconstitutional).

54. See *id.*

55. See *id.* at 1218.

56. See *id.*

57. See *Harper*, 729 F.2d at 1218-19.

58. See *id.*

59. See *Harper*, 729 F.2d at 1217. The government actually agreed with the appellant Harper that the death penalty provision of the Espionage Statute was unconstitutional. The government's brief conceded that the death penalty provision for espionage was unenforceable because it set forth no legislative guidelines to control the fact finder's discretion. *Id.* at 1217.

60. See *id.* at 1226. The court confined its ruling to a lack of essential statutory safeguards.

61. See 18 U.S.C. §§ 3591, 3592(b).

62. See 18 U.S.C. § 3591. See also *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994) (noting that to render a defendant eligible for the death penalty in a homicide case, the trier of fact must convict the defendant of murder and find one aggravating circumstance, or its equivalent, at either the guilt or penalty phase).

(3) in the commission of the offense, the defendant knowingly created grave risk to another person.⁶³

No federal court has ruled on the issue of the adequacy of the procedural safeguards in the FDPA as related to the crimes of treason and espionage. However, there have been several cases upholding the overall sentencing procedures of the Act for other crimes.⁶⁴

Because the FDPA procedural safeguards mirror the statutory safeguards upheld as constitutional by the *Gregg* ruling, the use of the death penalty for espionage and treason cases brought under the FDPA is currently considered constitutional.⁶⁵ The only possible remaining avenue of challenge for a defendant sentenced to death under the FDPA for the crimes of treason and espionage would be to convince the Court that the imposition of the death sentence is unconstitutional as a violation of the Eighth Amendment. For the Court to agree, it would have to ignore over 200 years of history allowing for the death penalty for espionage and treason.

B. The FDPA Allowance of the Death Penalty for Drug Kingpins is Analogous to its Use in Cases of Treason and Espionage and is Therefore Constitutional.

If it can be established that the FDPA for Drug Kingpins covers criminal behavior of the same degree of public harm and/or reckless indifference to human life as treason or espionage, then it should pass the test of proportionality. It is readily apparent that a primary reason for the United States' history of use of the death penalty for the crimes of treason and espionage is because these offenses cause great public harm.⁶⁶ Selling military secrets or acting as a foreign spy are crimes against the United States as a whole.⁶⁷ Even in cases of treason and espionage that do not involve the

63. 18 U.S.C. § 3592(b).

64. See *United States v. Jones*, 132 F.3d 232, 252-53 (5th Cir. 1998) (ruling the procedural safeguards for the charge of kidnapping brought under the FDPA were constitutional); *United States v. Chanthadara*, 928 F. Supp. 1055 (D. Kan. 1996) (murder); *United States v. Nguyen*, 928 F. Supp. 1525, 1537 (D. Kan. 1996) (allowing the government to define aggravating factors after the crime occurred).

65. Compare 18 U.S.C. §§ 3591-3598 (using aggravating and mitigating factors to guide the jury's discretion and providing for appellate review), with *Gregg v. Georgia*, 428 U.S. at 195 (recommending the use of bifurcated guilt and sentencing procedures).

66. See *Stephan v. United States*, 133 F.2d 87 (6th Cir. 1943), *cert. denied*, 318 U.S. 781 (1943) (holding treason is the most serious offense against the United States).

67. See *In re Charge to Grand Jury - Neutrality Laws and Treason*, 30 F. Cas. 1024, 1025 (C.C. Mass. 1851) (No. 18,269):

Under the laws of the United States the highest of all crimes is treason. It must be so in every civilized state; not only because the first duty of a state is self preservation, but because this crime naturally leads to and involves many other[s], [that are] destructive of the safety of individuals and of the peace and welfare of our

killing of a human being, the court may deem that the degree of public harm is sufficient to permit the death sentence.⁶⁸

The FDPA for Drug Kingpins also involves criminal activity which causes great public harm and demonstrates reckless indifference to human life. To qualify for the death sentence under the FDPA, a Drug Kingpin must be a member of a continuing criminal enterprise distributing large amounts of illegal narcotics.⁶⁹ The following statistics reveal that a Drug Kingpin does indeed cause great public harm by distributing dangerous narcotics in the United States:

1. There are an estimated four million chronic drug users in America: (3.6 million chronic cocaine users and 810,000 chronic heroin users).⁷⁰
2. About 9,000 Americans per year die of drug overdoses from illegal drugs.⁷¹
3. In the United States, there are approximately 500,000 medical emergencies per year due to illegal drug abuse.⁷²
4. Half of all new HIV cases in America occur among injection drug users.⁷³

The United States Supreme Court has also recognized the public harm caused by the drug dealers. In the 1989 case of *National Treasury Employees Union v. Van Raab*, the Court stated that the importation, sale, and use of illegal drugs is one of the greatest problems affecting the health and welfare of our population.⁷⁴

Other federal courts have stated that the harm to society caused by distribution of illegal drugs may far exceed the harm involved in a case of a killing of a human being. In *Terrebonne v. Butler*, Judge Gee of the Fifth Circuit stated eloquently:

society. This crime is defined by the constitution itself, and its magnitude, as well as the importance of a fit and rigid definition of it, may be inferred from the fact it is the only offense defined by that instrument.

Id. See also 133 CONG. REC. E9328 (1987) (statement of Congressman James A. Traficant, Jr. calling for an amendment to 18 U.S.C. § 794 to provide for the death penalty for treason or espionage because "safety and security of our nation is at stake").

68. See *In re Charge to Grand Jury*, 30 F. Cas. at 1025. See also Traficant Statement, *supra* note 65.

69. See 18 U.S.C. § 3591(b).

70. See *FY2000 Treasury Appropriations: Hearing Before the Senate Appropriations Comm., Subcomm. on Treasury, Gen. Gov't, and Civil Serv.* (March 4, 1999) (statement of General Barry R. McCaffrey, Director of the Office of National Drug Control Policy), available at 1999 W.L. 114562. Mr. McCaffrey is the Director of the Office of National Drug Control Policy. The statistics cited are from 1997.

71. See *id.*

72. See *id.*

73. See S.D. Holmberg, *The Estimated Prevalence and Incidence of HIV in 96 Large U.S. Metropolitan Areas*, 86 AM. J. PUB. HEALTH 642 (1996).

74. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989).

[E]xcept in rare cases, the murderer's red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image-others who create others still, across our land and down our generation, sparing not even the unborn.⁷⁵

In *Young v. Miller*, the Sixth Circuit upheld a sentence of life imprisonment without parole for possession with intent to sell 1300 grams of heroin.⁷⁶ The court stated that the crime of large scale distribution of drugs is one of the gravest a person can commit today and that the effect on society of such a large quantity of heroin is staggering to contemplate.⁷⁷ The statistical data along with the judicial comments establish that the criminal activities of a Drug Kingpin cause great public harm equal to or greater than that caused by violation of the Treason or Espionage Act.

The concept of reckless indifference to human life became important in death penalty constitutional analysis with the Court's decision in *Tison v. Arizona*.⁷⁸ In upholding the death sentence for felony-murder where the defendant was not the triggerman, the Court stated: "reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.'"⁷⁹ Although *Tison* did not specifically address the use of the death sentence in non-homicide cases involving great public harm, it does illustrate the Court's willingness to treat cases of reckless indifference to human life in the same way as intentional killings.⁸⁰

The Drug Kingpin of the FDPA and the spy or traitor under the Treason and Espionage Acts commit crimes of reckless indifference to human life. The spy or traitor who reveals secrets to foreign countries jeopardizes national security. The information provided may lead to a compromise in national readiness and ultimate loss of American lives in battle. The Drug Kingpin engages in criminal activity even more certain to cause death. It is a scientific certainty that a percentage of persons using the illegal narcotics listed in the FDPA will die of drug overdoses.⁸¹ Yet that knowledge does not stop the Drug Kingpin from distributing large quantities of dangerous narcotics. Such callous and reprehensible behavior amounts to "reckless indifference to

75. *Terrebonne v. Butler*, 848 F.2d 500, 504 (5th Cir. 1988) *cert. denied*, 489 U.S. 1020 (1989).

76. *See Young v. Miller*, 883 F.2d 1276, 1283 (6th Cir. 1989).

77. *See id.*

78. *Tison v. Arizona*, 481 U.S. 137 (1987).

79. *Id.* at 157.

80. *See id.* at 154. "Substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill'." *Id.*

81. *See McCaffrey statement, supra* note 70.

human life" within the definition set forth by the *Tison* court.⁸² As a consequence, the imposition of the death penalty on Drug Kingpins would not be disproportionate to the crime charged.

C. The Court's Decisions in Coker and Enmund Do Not Establish a Bar to the Imposition of the Death Penalty in all Non-homicide Cases.

Some legal scholars have concluded that the Court's decisions in the *Coker* and *Edmund* cases stand as an absolute bar to the use of the death penalty in all non-homicide cases.⁸³ That position does not survive close scrutiny of the Court's reasoning in those two cases. In *Coker*, the Court held that the sentence of death for the crime of rape of an adult woman is grossly disproportionate to the crime charged.⁸⁴ The Court adopted an objective standard to determine the indicia of public opinion towards the death penalty for the rape of an adult woman.⁸⁵ The factors utilized by the Court for application of the objective test were: (1) a review of state legislation to determine the number of states allowing for the death sentence for the rape of an adult woman, and (2) verdicts of juries when given an opportunity to impose the death sentence for the crime of rape of an adult woman.⁸⁶

Since a majority of state jurisdictions did not have legislation imposing the death sentence for the rape of an adult woman, and a majority of juries given an opportunity did not impose the death sentence for rape of an adult woman, the court concluded that the indicia of public opinion was against use of the death sentence for that crime.⁸⁷ The Court also stated that in its subjective view, "in terms of moral depravity and of the injury to the person and to the public, [rape] does not compare with murder," and that "rape by definition does not include the death of or even the serious injury to another person."⁸⁸

In *Enmund*, the Court held that a defendant convicted of a felony-murder who did not actively participate in the actual killing, but merely aided and abetted, could not be subjected to the death penalty.⁸⁹ The Court applied similar standards to those utilized in *Coker*—historical development of the punishment at issue, legislative judgments, international opinions, and the

82. See *Tison*, 481 U.S. at 157.

83. See *supra* note 10.

84. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

85. See *id.* at 596 & n.10.

86. See *id.* at 594-96 (nine out of ten juries have not imposed the death penalty).

87. See *id.* at 596-97.

88. *Id.* at 598.

89. *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

sentencing decisions of juries.⁹⁰ The Court found that because few jurisdictions authorized the death sentence for felony-murder and juries did not historically impose the death sentence for a felony-murder, the death sentence was "disproportionate" to the crime charged.⁹¹ Commenting further upon the imposition of the death penalty for the offense of robbery (the underlying felony committed by *Enmund*), the Court stated in dicta that robbery is not a "crime so grievous an affront to humanity that the only adequate response may be the penalty of death,"⁹² and that robbery is not a crime where "death so frequently occurs . . . that the death penalty should be considered as a justifiable deterrent to the felony itself."⁹³ The Court acknowledged that "it would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony."⁹⁴

The use of the death sentence for Drug Kingpins under the FDPA can be harmonized with the *Coker* and *Enmund* decisions. The most important factor is the inherent difference in the crimes of rape and felony-murder as compared with the criminal enterprise of a Drug Kingpin. While rape and felony-murder are very serious crimes, they do not cause serious injury beyond the victim and into society at large. By contrast, a Drug Kingpin who distributes dangerous narcotics into society causes great harm by way of increased crime, serious bodily injury and death due to drug overdoses, increased cases of AIDS in adults and new-born babies due to intravenous drug use, and economic damages.⁹⁵

The FDPA also passes the *Coker* and *Enmund* objective test measuring the indicia of public opinion regarding the use of the death penalty for Drug Kingpins. The first part of the test, a review of state legislative action, is of little value since the FDPA is federal legislation. However, since the Act was passed by Congress through a majority of the elected representatives in the

90. See *id.* at 796 & n.22.

91. *Id.* at 796.

92. *Id.* at 797, quoted in *Gregg v. Georgia*, 428 U.S. at 184 (1976).

93. *Id.* at 799.

94. *Id.* The *Coker* and *Enmund* decisions also cast doubt upon the continuing viability of *Williams v. State*, 358 U.S. 576 (1959). In *Williams*, the Court upheld the imposition of the death sentence against a defendant who, convicted of murder and sentenced to life in prison, later pled guilty to kidnapping his murder victim and received the death penalty. See *id.* at 586. The Court summarily concluded that neither the Fourteenth Amendment's Due Process Clause nor any other constitutional provision "require[s] a state to fix or impose any particular penalty for any crime it may define. . . ." *Id.* Such reasoning, however, is plainly inconsistent with the Court's current view that "to be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment." *Tuilaepa v. California*, 512 U.S. 967, 971 (1994).

95. See *supra* notes 69-72.

House and Senate, it reflects that the U.S. public approves of the death sentence for Drug Kingpins.

The second part of the *Coker/Enmund* test, decisions by juries when given the opportunity to impose a death sentence, is inapplicable to the FDPA because no jury has ever been given an opportunity to impose the death sentence under the Act. That lack of history should not diminish the potential constitutionality of the Act.

II. THE INTERNATIONAL IMPLICATIONS OF THE FDPA FOR DRUG KINGPINS

A. Extradition of Foreign National Drug Kingpins under the FDPA

A majority of the illegal drugs that are listed in the FDPA are distributed into the United States from foreign countries.⁹⁶ Therefore, many of the Drug Kingpins that would be eligible for the death penalty under the FDPA are foreign nationals. For the FDPA to have the desired impact on illegal narcotics sales and consumption in the United States, it must be applied to foreign national Drug Kingpins. Physical custody of a foreign national Drug Kingpin must be lawfully obtained before any prosecution can proceed in a United States court. The internationally recognized method of extradition of a charged defendant from another country is through a bilateral extradition treaty.⁹⁷ Other methods which have been used by the United States and other countries include forcible abduction⁹⁸ and luring.⁹⁹ Part two of this article will analyze the international implications of gaining physical custody of a foreign national Drug Kingpin for prosecution in the United States.

96. See Presidential Determination No. 98-15, 63 Fed. Reg. 12937 (1998) [hereinafter Narcotics Report]. This annual report is filed pursuant to 22 U.S.C. § 2291(f) and outlines all major illicit drug countries which are a direct source of illegal narcotics significantly affecting the United States.

97. See *General Assembly Resolution on a Model Treaty on Extradition*, G.A. Res. 45/116, U.N. GAOR 3d Comm., 45th Sess., U.N. Doc. A/Res/45/116 (1991) (containing a model form of a bilateral extradition treaty). See also M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER I (1974) (outlining extradition in international law). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 474 (1987) (explaining the evolution of the use of extradition treaties in the United States).

98. See Paust, *supra* note 18, at 441. "Where extradition is not possible because of the lack of a treaty or for some other reason, states have sometimes resorted to abductions without the consent of the state in which the fugitive is located." *Id.*

99. See *id.* at 426. "Governments use deceit, fraud and tricks to lure individuals from the country of their residence to a location where there is jurisdiction to arrest the suspects." *Id.* "Unlike abductions by force, weapons are not used to get the suspect to the location where the arrest will occur." *Id.* "The United States has consistently upheld the legitimacy of the practice of luring, contrary to the beliefs of many other nations throughout the international community." *Id.*

The first step in analyzing the impact of the FDPA on securing physical custody of a foreign national Drug Kingpin is ascertaining the country wherein a foreign national Drug Kingpin is likely to reside. The 1998 International Narcotics Control Strategy Report, issued by the United States, identifies twenty-eight countries as "major illicit drug countries."¹⁰⁰ A "major illicit drug country" is one that (a) is a significant direct source of illicit narcotics or psychotropic substances significantly affecting the United States or (b) through which are transported drugs or substances.¹⁰¹ Pursuant to Section 490(k) of the Foreign Assistance Act, President Clinton has notified Congress that the following countries have been identified as major illicit drug countries: Afghanistan, Aruba, Colombia, Dominican Republic, Ecuador, Guatemala, Haiti, Hong Kong, India, Jamaica, Laos, Mexico, Nigeria, Pakistan, Panama, Paraguay, Peru, Taiwan, Thailand, Venezuela, and Vietnam.¹⁰² Those are the countries from which the United States will have to obtain custody of foreign national Drug Kingpins for prosecution in the United States under the FDPA.

The United States has a bilateral extradition treaty with the following countries who are identified as major illicit drug countries: Bahamas,¹⁰³ Belize,¹⁰⁴ Bolivia,¹⁰⁵ Brazil,¹⁰⁶ Bermuda,¹⁰⁷ Colombia,¹⁰⁸ Dominican

100. See Narcotics Report, *supra* note 96.

101. See Foreign Assistance Act, 22 U.S.C. § 2291 (1961) amended by 22 U.S.C. § 2291 (e)(5) (1994).

102. See Narcotics Report, *supra* note 96.

103. Extradition Treaty Between the United States of America and Great Britain, Dec. 22, 1931, U.S.-Gr. Brit., 47 Stat. 2122. The treaty was continued by the parties by exchange of notes. Extradition: Continued Application to the Bahamas of the United States-United Kingdom Treaty of December 22, 1931, Aug. 17, 1978, U.S.-Bah., TIAS 9185 [hereinafter U.S.-Gr. Brit. Treaty].

104. Extradition Treaty Between the United States and the Government of the United Kingdom of Great Britain and Northern Ireland, June 8, 1972, U.S.-U.K., 28 U.S.T. 227 [hereinafter U.S.-U.K. Treaty].

105. Treaty of Extradition, Apr. 21, 1900, U.S.-Bol., 32 Stat. 1857 [hereinafter U.S.-Bol. Treaty].

106. Treaty of Extradition Between the United States of America and the United States of Brazil, Jan. 13, 1961, U.S.-Braz., 15 U.S.T. 2093 [hereinafter U.S.-Braz. Treaty].

107. Extradition Treaty, Dec. 22, 1931, U.S.-Berm., 47 Stat. 2122.

108. Extradition Treaty Between the United States of America and the Republic of Colombia, Sept. 14, 1979, U.S.-Colom., reprinted in I.I. KAVASS & A. SPRUDZ, EXTRADITION LAWS AND TREATIES: UNITED STATES 140.3 (1985) (the treaty entered into force on March 4, 1982) [hereinafter U.S.-Colom. Treaty].

Republic,¹⁰⁹ Ecuador,¹¹⁰ Guatemala,¹¹¹ Haiti,¹¹² Jamaica,¹¹³ Mexico,¹¹⁴ Nigeria,¹¹⁵ Pakistan,¹¹⁶ Panama,¹¹⁷ Paraguay,¹¹⁸ Peru,¹¹⁹ Thailand,¹²⁰ and Venezuela.¹²¹ The remaining countries of Afghanistan, Aruba, Cambodia, China, Hong Kong, India, Taiwan, and Vietnam have no extradition treaty with the United States and, therefore, there is no opportunity for formal extradition of Drug Kingpins who reside in those countries.¹²²

The United States has encountered great difficulties in obtaining custody of foreign drug traffickers through use of extradition treaties.¹²³ These difficulties are exemplified by two of the major illicit drug countries who together supply the majority of cocaine and opium narcotics coming into the United States—Colombia¹²⁴ and Mexico.¹²⁵ Colombia is the world's leading

109. Convention for the Mutual Extradition of Fugitives, June 19, 1909, U.S.-Dom. Rep., 36 Stat. 2468 [hereinafter U.S.-Dom. Rep. Treaty].

110. Extradition Treaty Between the United States of America and the Republic of Ecuador, June 28, 1872, U.S.-Ecuador, 18 Stat. 756, Supplemented Sept. 22, 1939, 55 Stat. 1196.

111. Treaty for the Mutual Extradition of Fugitives from Justice, Feb. 27, 1903, U.S.-Guat., 33 Stat. 2147, amended, Feb. 20 1940, 55 Stat. 1097 [hereinafter U.S.-Guat. Treaty].

112. Convention for the Mutual Extradition of Fugitives from Justice, Aug. 9, 1904, U.S.-Haiti, 34 Stat. 2858 [hereinafter U.S.-Haiti Treaty].

113. Extradition Treaty, Dec. 22, 1931, U.S.-Jam., 47 Stat. 2122.

114. Extradition Treaty Between the United States of America and United Mexican States, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059 [hereinafter U.S.-Mex. Treaty].

115. U.S.-Gr. Brit. Treaty, *supra* note 103.

116. *See id.*

117. Treaty Between the United States of America and the Republic of Panama Providing for the Mutual Extradition of Criminals, May 25, 1904, U.S.-Pan., 34 Stat. 2851 [hereinafter U.S.-Pan. Treaty].

118. Extradition Treaty Between the United States and Paraguay, May 24, 1973, U.S.-Para., 25 UST 967 [hereinafter U.S.-Para. Treaty].

119. Treaty of Extradition, Nov. 28, 1899, U.S.-Peru, 31 Stat. 1921 [hereinafter U.S.-Peru Treaty].

120. Treaty for the Extradition of Fugitives from Justice, Dec. 30, 1922, U.S.-Thail., 43 Stat. 1749.

121. Treaty of Extradition, Jan. 19-21, 1922, U.S.-Venez., 43 Stat. 1698 [hereinafter U.S.-Venez. Treaty].

122. *See generally* 18 U.S.C. § 3181 (1992) (stating that the United States will not extradite without a valid treaty); *Factor v. Laubheimer*, 290 U.S. 276 (1933) (stating that nations are under no obligation to surrender a fugitive in the absence of a treaty); *Valentine v. United States ex. rel. Neidecker*, 299 U.S. 5 (1936) (explaining that the United States may extradite only pursuant to the extradition treaty). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 475 cmt. b. (1987).

123. *See generally* Gregory Wilson, *The Changing Game: The United States Evolving Supply-Side Approach to Narcotics Trafficking*, 26 VAND. L. J. TRANSNAT'L L. 1163 (1994) (focusing on failed U.S. attempts to extradite drug dealers from Colombia); Ethan A. Nadelman, *The Evolution of United States Involvement In the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT'L L. & POL. 813 (1993) (containing historical overview of U.S. extradition); Kellee A. Brown & Sophia A. Muirhead, *Extradition: Divergent Trends in International Cooperation*, 33 HARV. INT'L. L.J. 223 (1992) (discussing U.S. efforts to extradite a Thai national from Hong Kong and a U.S. soldier from the Netherlands); Gregory B. Richardson, *Major Contemporary Issues In Extradition Law*, 84 AM. SOC'Y INT'L L. PROC. 389 (1990) (dealing with current issues in extradition law).

124. *See generally* J. Peter Kelley, *United States-Colombia Extradition Treaty: Efforts to Prosecute Drug Lords*, 14 SUFFOLK TRANSNAT'L. L.J. 161 (1990) (detailing the history of the U.S.-

producer and distributor of cocaine and the primary distributor of heroin into the United States.¹²⁶ Mexico is the principal transit route to the United States for cocaine produced in South American countries.¹²⁷ United States agencies estimate that almost 60% of the Colombian cocaine sold in the United States passes through Mexico.¹²⁸ A review of the history of success, or lack thereof, of the bilateral extradition treaties with these two countries is instructive as to the problems associated with international extradition and the potential impact of the FDPA on those proceedings.

The extradition treaty between the United States and Colombia was signed on September 14, 1979 and entered into force on March 4, 1982.¹²⁹ The treaty requires extradition of each parties' nationals "where the offense involves acts taking place in the territory of both states with the intent that the offense be consummated in the requesting state."¹³⁰ Extraditable offenses are listed on a schedule in the appendix and include "offenses against the laws relating to the traffic in, possession, or manufacture of narcotic drugs, cannabis, hallucinogenic drugs, cocaine, and its derivatives, and other substances which produce physical or psychological dependence."¹³¹

In the years following the treaty entering into force, Colombia extradited approximately seventeen Colombian national drug traffickers to face charges in the United States.¹³² The extradition caused acts of retaliation from drug cartels in Colombia, culminating in the 1985 seizure of the Colombian Palace of Justice where eleven of the twenty-four Colombian Supreme Court Justices were killed.¹³³ It is estimated that drug cartel members, led by the late Pablo

Colombia extradition treaty); Luz E. Nagle, *The Rule of Law or the Rule of Fear*, 13 LOY. L.A. INT'L & COMP. L.J. 851 (1991) (a viewpoint on extradition from a former Colombian judge); Steven Y. Otero, *International Extradition and the Medellin Cocaine Cartel; Surgical Removal of Colombian Cocaine Traffickers for Trial in the United States*, 13 LOY. L.A. INT'L & COMP. L.J. 955 (1991) (addressing Medellin Cartel specifically).

125. See generally Bruce Zagaris & Julia Padierna Peralta, *Mexico-United States Extradition and Alternatives: From Fugitive Slaves to Drug Traffickers-150 Years and Beyond the Rio Grande's Winding Courses*, 12 AM. U.J. INT'L L. & POL'Y 519 (1997) (discussing the history and development of the United States-Mexico extradition treaty).

126. See Narcotics Report, *supra* note 96.

127. See *id.*

128. See *id.*

129. See U.S.-Colom. Treaty, *supra* note 108.

130. *Id.* at art. 8. See also SENATE COMMITTEE ON FOREIGN AFFAIRS, 97th Cong., 2d Sess., Report on the extradition treaty With Colombia, reprinted in I.I. KARASS & A. SPRADZ, EXTRADITION LAWS AND TREATIES: UNITED STATES 140.16 (1985) (noting that an example used to illustrate art. 8 is the export of narcotics from Colombia to the United States by Colombian nationals).

131. See U.S.-Colom. Treaty, *supra* note 108, at app.

132. See L.A. TIMES, Aug. 19, 1989, at 11.

133. See *A Law In Limbo*, THE ECONOMIST, April 18, 1987, at 38 (2). Colombian Justices refused to sit on extradition hearings following the killing of 11 Supreme Court Justices. See *id.*

Escobar, directed the killing of 5,000 Colombians during this period.¹³⁴ The drug traffickers who waged this terror referred to themselves as "The Extraditables."¹³⁵

On December 12, 1986, the newly appointed Supreme Court invalidated the Colombian law which contained the extradition treaty, ostensibly due to a procedural defect in the signing of the law by the President of Colombia.¹³⁶ The new President of Colombia at the time, Virgilio Barco, attempted to cure the defect by giving his presidential approval to the treaty law.¹³⁷ On June 25, 1987, the Colombian Supreme Court ruled the President's new approval of the treaty bill was a legal nullity because it applied to a non-existent law.¹³⁸ That decision effectively terminated all extraditions from Colombia to the United States.¹³⁹

The extradition treaty between the United States and Colombia remained dormant until December of 1997 when Colombia, responding to intense pressure from the United States, reinstated the treaty.¹⁴⁰ However, in October of 1998, the Colombian Constitutional Court ruled that the law reinstating the extradition treaty could not be applied retroactively.¹⁴¹ That ruling eliminated the possibility of extradition of members of the infamous Cali cartel currently incarcerated in Colombian prisons.¹⁴² The United States made its first extradition request under the new regime in December 1998.¹⁴³

The above enforcement history of the extradition treaty between the United States and Colombia must be given great weight in evaluating the viability of the death penalty provisions of the FDPA as applied to Colombian Drug Kingpins. Bloodshed and loss of life has already occurred within Colombia under the current extradition treaty which does not specify use of the death penalty for any of the enumerated extraditable offenses. In fact, Article 7 of the treaty specifically states:

134. See *Court Bars Drug-Cartel Extraditions*, SEATTLE POST-INTELLIGENCER, Oct. 2, 1998, at A2.

135. *Id.*

136. See Nagle, *supra* note 124, at 868.

137. See *id.*

138. See COLOMBIA: SUPREME COURT DECISION ON LAW CONCERNING THE EXTRADITION TREATY BETWEEN COLOMBIA AND THE UNITED STATES, 27 I.L.M. 492 (1988).

139. See *id.* at 504.

140. See *Cartel Heads Spared U.S. Jail*, BOSTON GLOBE, Oct. 2, 1998, at A13.

141. See Jared Cotler, *U.S. Plans to Extradite Drug Suspect*, THE ASSOCIATED PRESS, Aug. 27, 1998, available in 1998 W.L. 6714152. Interestingly, the article also references the possible extradition of Fernando Jose Flores, a Venezuelan, who reportedly visited Cali Cartel Kingpins Miguel and Gilberto Rodriguez 17 times at La Picata prison in Colombia. The United States has contended that Cali Kingpins have continued to operate from prison and hope that Flores will provide the link allowing the extradition of the two brothers for crimes occurring after the reinstatement of the extradition treaty. See *id.*

142. See *id.*

143. See Narcotics Report, *supra* note 96.

When the offense for which extradition is requested is punishable by death under the laws of the requesting state and the laws of the requested state do not permit such punishment for that offense, extradition may be refused unless, before extradition is granted, the requesting state furnishes such assurances as the requesting state considers sufficient that the death penalty shall not be imposed or, if imposed, shall not be executed.¹⁴⁴

Furthermore, the Colombian constitution does not allow the imposition of the death penalty for any crime.¹⁴⁵ To actually impose the death penalty provisions of the FDPA on a Colombian national Drug Kingpin brought to the United States through normal extradition procedures, the United States would have to exert sufficient political and economic pressure on Colombia to enter into a new bilateral extradition treaty. This would provide for extradition under the FDPA and require a corresponding change in the Colombian constitution to permit extradition for death penalty eligible crimes.¹⁴⁶ In light of the continued influence of drug traffickers on the Colombian judicial and political system, and the prohibition against the death penalty in the Colombian Constitution, neither of those changes are likely to take place. Even an attempt to do so by the Colombian government would create a grave risk of renewed violence by the Colombian drug traffickers.

Mexico is another country the United States has had problems with in the area of extradition.¹⁴⁷ The U.S.-Mexican extradition treaty poses two significant obstacles to the extradition and prosecution of Mexican Drug

144. U.S.-Colom. Treaty, *supra* note 108, at art. 7.

145. See COLOMBIAN CONST. art. 11. The article reads: "el derecho a la vida es inviolable. No habra' pena de muerte." [The right to life is inviolable. There is no death penalty.] *Id.*

146. The "certification" process is the primary means the United States has to apply pressure to "major illicit drug countries." See 22 U.S.C. § 2291(e) (1961) (amended 1994). The President is required to file an annual report identifying those countries that are major illicit drug countries and then must certify that each country has complied with a laundry list of U.S. directives aimed at reduction in narcotics trafficking. See *id.* Included in the criteria is cooperation with United States narcotics control efforts through the extradition of drug traffickers and, where appropriate, a description of the status on a new or updated extradition treaty. See *id.* at d. A "decertification means that 50% of United States assistance is withheld and the Secretary of Treasury must vote no on international bank loans for that country." *Id.* at h. Colombia was "decertified" by the President in 1996 and 1997. See *Country Profile Colombia 1998/1999*, THE ECONOMIST INTELLIGENCE UNIT LIMITED, Sept. 18, 1998, available in 1998 W.L. 1989128. Colombian President Ernesto Samper called the certification process "unilateral, ineffective, and contrary to human rights." *U.S. to Assess Latin American States Illegal Drug Performance*, AGENCY FRANCE-PRESSE, Feb. 26, 1998, available in 1998 W.L. 2230903. Senators Christopher Dodd and John McCain proposed a bill in 1997 that would end the certification process because, in their view, it was unfair to judge other nations on anti-drug strategies that have failed in the United States. See *id.* The bill was voted down by a vote of 60-38. See *id.*

147. See Zagaris & Padierna Peralta, *supra* note 125.

Kingpins under the FDPA. The first is found in Article 9 of the treaty, which leaves the decision of whether to extradite nationals within the executive authority of the requested party.¹⁴⁸ Mexico has been reluctant to deliver its own nationals for prosecution in the United States.¹⁴⁹

The second major obstacle to the extradition of Drug Kingpins charged under the FDPA from Mexico is Article 8 of the treaty. This article is identical to Article 7 of the U.S.-Colombian Treaty in that it permits the requested party, in death penalty cases, to require the requesting party to furnish assurances that the death penalty shall not be imposed or, if imposed, not be executed.¹⁵⁰ This provision has been used by the Mexican government to require the United States to provide assurances that the death penalty will not be imposed before extradition will be granted.¹⁵¹ Mexican domestic law on international extradition also states a preference for life in prison rather

148. U.S.-Mex. Treaty, *supra* note 114, at 5065, art. 9.

1. - Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.

2. - If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

Id.

149. See Narcotics Report, *supra* note 96. In 1998 Mexico extradited 12 fugitives to the U.S. including three Mexican traffickers, one of whom was a narcotics trafficker sought for the murder of a U.S. Border Patrol agent. See *id.* However, in two cases, the Mexican appellate court overturned the government of Mexico's decision to extradite Mexican national narcotics traffickers. See *id.* The courts ruled that the Mexican Penal Code requires that Mexican nationals wanted for crimes abroad be prosecuted in Mexico. See *id.*

150. U.S.-Mex. Treaty, *supra* note 114, at 5065, art. 8.

When the offense for which extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offense, extradition may be refused unless the requesting Party furnishes such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

Id.

151. A case which has sparked considerable controversy involves the Florida prosecution of Texas native Jose Luis Del Toro Jr. He has been charged with the Sarasota murder of Sheila Bellush. He was arrested in Mexico and the United States requested extradition. Mexico required, and received, an assurance from the Sarasota County prosecutor that no death sentence would be imposed. That position has spurred a Senate resolution to renegotiate the extradition treaty with Mexico to allow for extradition for death penalty eligible cases. See *Around the State*, ST. PETERSBURG TIMES, Oct. 3, 1998, at 5B. See also *Senator Urges U.S. to Renegotiate Extradition Pact: Mexico Won't Return Suspect in Slaying of Quad's Mom if Death Penalty Sought*, DALLAS MORNING NEWS, Oct. 3, 1998, at 22A, available at 1998 W.L. 13107429. Based on concern over the Jose Luis Del Toro Jr. case, Senator Robert Torricelli introduced a resolution urging the Clinton administration to negotiate the extradition treaty with Mexico. See *id.* See also 144 CONG. REC. S11346, (daily ed. Oct. 2, 1998). Senate Resolution 284 passed, and called on President Clinton to renegotiate the extradition treaty with Mexico based on Mexico's refusal to extradite Mr. Del Toro. The resolution states that the sense of the Senate is that the new treaty should require extradition for death penalty eligible offenses. See *id.*

than the death penalty.¹⁵² These provisions apply to any extradition request, regardless of the nationality of the defendant. The Mexican government can deny extradition requests for death penalty eligible crimes even where a U.S. citizen has committed a crime in the United States and fled to Mexico. The death penalty provisions of the FDPA could not be implemented through the extradition process with Mexico for either foreign or domestic Drug Kingpins arrested in Mexico. As in the case with Colombia, extradition from Mexico under the FDPA would require a new extradition treaty and changes in Mexican domestic laws.¹⁵³

Other countries on the "major illicit drug country" list which have obstacles to extradition similar to Colombia and Mexico are:

- (1) Bahamas¹⁵⁴ (treaty does not provide for extradition of either parties' nationals);
- (2) Belize¹⁵⁵ (extradition may be refused in death penalty cases);
- (3) Bolivia¹⁵⁶ (treaty does not require the contracting parties to deliver up its own nationals);
- (4) Brazil¹⁵⁷ (requested state can require assurances that the death penalty will not be imposed and neither party is obligated to surrender its own nationals);
- (5) Dominican Republic¹⁵⁸ (neither of the contracting parties is obligated to deliver up its own nationals);
- (6) Guatemala¹⁵⁹ (neither party is required to deliver up its own nationals);

152. See Guillermo Collin Sanchez, *Pracdimientas Para La Extradicion* 69 (MEXICO EDITORIAL DURREA 1993). The Mexican Law's preference for incarceration over the death penalty in international extradition is found at note 52, art. 10(v). See *id.*

153. The "certification" procedure outlined in *supra* note 146 are applicable to Mexico. There were political pressures applied to the Clinton Administration not to certify Mexico. See Tim Golden, *White House Says Mexico Aiding in Drug Fight*, PORTLAND OREGONIAN, Feb. 27, 1998, at A03. See also 144 CONG. REC. H7777 (daily ed. Sept. 15, 1998). Congressman Gilman's statements in support of House Resolution 381 assert that the President should renegotiate the extradition treaty with Mexico so that the possibility of capital punishment will not interfere with the timely extradition of criminal suspects from Mexico to the United States. The congressman's remarks outline his frustration with Mexico's failure to extradite Jose Luis Del Toro Jr. to Florida and his fears that Mexico is a "safe haven" for criminals who need not fear extradition. Congressman Hamilton notes that the measure in Mexico is futile because of constitutional prohibitions against the death penalty. The Resolution passed by a 2/3 majority vote. See *id.* at H7779.

154. See U.S.-Gr. Brit. Treaty, *supra* note 103.

155. See U.S.-U.K. Treaty, *supra* note 104, at 230.

156. See U.S.-Bol. Treaty, *supra* note 105, at 1860.

157. See U.S.-Braz. Treaty, *supra* note 106, at 2102.

158. See Convention for the Mutual Extradition from Fugitives, U.S.-Dom. Rep. Treaty, *supra* note 109, at art. 8.

159. See U.S.-Guat. Treaty, *supra* note 111, at 2152.

- (7) Haiti¹⁶⁰ (neither party is required to deliver up its own nationals);
- (8) Panama¹⁶¹ (neither party is required to deliver up its own nationals);
- (9) Peru¹⁶² (neither party is required to deliver up its own nationals); and
- (10) Venezuela¹⁶³ (requires assurances of no death penalty and neither party is required to deliver up its own nationals).

To proceed with extradition of foreign national Drug Kingpins from the major illicit drug countries for prosecution under the FDPA, the United States would have to negotiate new extradition treaties with each country to allow (1) extradition of each parties' nationals, and (2) extradition for death penalty eligible offenses including those enumerated in the FDPA. In attempting to enter into bilateral extradition treaties with those provisions, the United States would face opposition not only from each country individually, but also from the international community as a whole.¹⁶⁴ An example of the growing international opposition to the death penalty in the context of extradition is the *Soering* case decided by the European Court of Human Rights.¹⁶⁵

In 1985, Mr. Jens Soering, a German national, was charged with the stabbing deaths of William and Nancy Haysom.¹⁶⁶ The murders occurred in Bedford County, Virginia.¹⁶⁷ The victims were the parents of Soerings's girlfriend, Elizabeth Haysom.¹⁶⁸ In 1986, both Soering and Haysom were arrested in England on bad check charges.¹⁶⁹ Soering, after his arrest, was interviewed by police investigators from Virginia and confessed to the killings.¹⁷⁰ The charges then filed from Virginia included two counts of capital murder.¹⁷¹

160. See U.S.-Haiti Treaty, *supra* note 112, at 2860.

161. See U.S.-Pan. Treaty, *supra* note 117, at 2855.

162. See U.S.-Peru Treaty, *supra* note 119, at 1924.

163. See U.S.-Venez. Treaty, *supra* note 121, at 1702. See also Cong. Res. Serv., Lib. of Cong., March 19, 1998. (memorandum from Larry M. Eig., Am. L. Div.) (stating that after examination of United States Bilateral Extradition Treaties he determined the following had death penalty restrictions: Argentina, Australia, Bahamas, Belgium, Bolivia, Brazil, Canada, Colombia, Denmark, Finland, Hong Kong, Hungary, Iceland, Israel, Italy, Malaysia, Mexico, Netherlands, New Zealand, Norway, Paraguay, Philippines, Spain, Sweden, Switzerland, United Kingdom, and Uruguay).

164. See generally Craig R. Roocks, *Extradition, Human Rights, and the Death Penalty: When Nations Must Refuse to Extradite a Person Charged With a Capital Crime*, 25 CAL. W. INT'L L.J. 189 (1994) (focusing on a view of a portion of the international community that the death penalty is a violation of basic human rights and is a legitimate basis for denial of extradition).

165. Judgment in *Soering Case*, 161 Eur. Ct. H.R. (ser. B) (1989).

166. See *id.* at 1071.

167. See *id.*

168. See *id.*

169. See *id.*

170. See *id.*

171. See *id.*

In 1986, the United States government requested the extradition of Mr. Soering under the extradition treaty between the United States and the United Kingdom.¹⁷² The British Embassy in Washington requested assurances that the death penalty would not be carried out in Mr. Soering's case.¹⁷³ The State Attorney for Bedford County then replied:

I hereby certify that should Jens Soering be convicted of the offence of capital murder as charged in Bedford County, Virginia . . . a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out.¹⁷⁴

The Secretary of State of the United Kingdom then approved the extradition of Soering to the United States.¹⁷⁵ The United Kingdom agreed to submit the case to the European Court of Human Rights after Soering filed a complaint with the European Commission on Human Rights.¹⁷⁶ Soering alleged a violation of Article 3 of the European Convention on the Protection of Human Rights, which states: "No one shall be subject to torture or inhumane treatment or punishment."¹⁷⁷

The European Court of Human Rights ruled that extradition of Soering to the United States would violate Article 3 of the Convention because of the length of time Soering would have to spend on death row in such "extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty."¹⁷⁸ The court referred to the delay between sentencing and execution as "the death row phenomenon."¹⁷⁹

United Nations resolutions have also stated the international opposition to the death penalty. The 1990 General Assembly Resolution on a model treaty of extradition allows for the optional refusal of extradition if the offense for which extradition is requested carries the death penalty.¹⁸⁰ A 1989

172. *See id.* at 1072.

173. *See id.*

174. *Id.* at 1073.

175. *See id.* at 1075.

176. *See id.* at 1069.

177. European Convention on the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1990, 213 U.N.T.S. 221.

178. Judgment in *Soering Case*, 161 Eur. Ct. H.R. (ser. B) at 1100 (1989).

179. *Id.* at 1093, 1094. *See also* Richard B. Lillich, *The Soering Case*, 85 AM. J. INT'L L. 128 (1991).

180. *General Assembly Resolution On a Model Treaty on Extradition*, G.A. Res. 45/116 U.N. GAOR 3rd Comm., 45th Sess. U.N. Doc. A/Res/45/116 (1991). It states an optional ground for refusal: "If the offense for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurance as the requested State considers sufficient that the death

United Nation resolution mandated that each state take all necessary measures to abolish the death sentence within its jurisdiction.¹⁸¹

Other international conventions for the abolition of the death penalty include the 1983 Council of Europe Protocol for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty,¹⁸² and the 1990 Protocol to the American Convention on Human Rights to Abolish the Death Penalty approved by the Organization of American States General Assembly.¹⁸³

The strong opposition to the death penalty demonstrated in the above cases, resolutions, and protocols signifies the great difficulty the United States might have in modifying a significant number of bilateral extradition treaties with major illicit drug countries.¹⁸⁴ As a result, there is also little chance for the meaningful implementation of the FDPA through normal extradition procedures against foreign national Drug Kingpins.¹⁸⁵ The FDPA will not be used to prosecute foreign national Drug Kingpins unless the United States can use irregular rendition techniques as a means of obtaining custody of the defendant.

B. Irregular Rendition of Foreign National Drug Kingpins by Forcible Abduction

"Irregular rendition" is obtaining physical custody of a defendant residing in another country, not by the use of a bilateral extradition treaty, but by the forcible abduction or luring of the defendant.¹⁸⁶ Although none of the

penalty will not be imposed or, if imposed, will not be carried out." *Id.*

181. *General Assembly Resolution On the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, G.A. Res. 44/128, U.N. GAOR 3rd Comm., 44th Sess., Agenda Item 98, U.N. Doc. A/Res/44/128 (1990). Article 1 states: "Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction." *Id.*

182. Council of Europe: Protocol No. 6 To the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, reprinted in 22 I.L.M. 539 (1983). Article 1 states: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." *Id.*

183. Organization of American States: Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Organization of American States, Res. 1042, 20th Sess., June 8, 1990, reprinted in 29 I.L.M. 1447 (1990). Article 1 states: "The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction." *Id.* at 1448.

184. See Laurence A. Grayer, *A Paradox: Death Penalty Flourishes in U.S. While Declining World Wide*, 23 DENV. J. INT'L L. & POL'Y 555 (1995); Laurence A. Grayer, *Against the Global Trend: Support For the Death Penalty Continues to Expand within the United States*, 7 INT'L LEGAL PERSP. 1 (1995).

185. See CONG. REC. *supra* note 149; CONG. REC. *supra* note 151. That reality has not stopped the House and Senate from passing resolutions for President Clinton to renegotiate the extradition treaty with Mexico to include extradition for death penalty crimes. See *id.*

186. See PAUST, *supra* note 18, at 426.

bilateral extradition treaties allow for these methods of obtaining custody, United States courts have held they do not violate the Constitution.¹⁸⁷

The Court most recently addressed the issue of constitutionality of the abduction of a foreign national defendant in the case of *United States v. Alvarez-Machain*.¹⁸⁸ Humberto Alvarez-Machain, a Mexican resident and citizen, was indicted in the United States in 1991 for his participation in the kidnapping and murder of a United States Drug Enforcement Administration special agent.¹⁸⁹ It was alleged that Alvarez-Machain, a medical doctor, participated in the murder by prolonging the agent's life so that others could further torture him.¹⁹⁰ He was forcibly abducted from his medical office in Guadalajara, Mexico and taken to the United States for prosecution.¹⁹¹ The Court held that the extradition treaty between the United States and Mexico did not expressly or by implication prohibit abductions.¹⁹²

Another case involving the forcible abduction of a foreign national defendant is *United States v. Matta-Ballesteros*.¹⁹³ The defendant was abducted from his home in Tegucigulpa, Honduras.¹⁹⁴ Four United States Marshals bound his hands and put a black hood over his head, thrust him on the floor of a car, and drove him to a United States Air Force base in Honduras.¹⁹⁵ The Marshals then moved him to the United States via the Dominican Republic and he was ultimately placed in a federal penitentiary at Marion, Illinois.¹⁹⁶ The Ninth Circuit, following the Court's decision in *Alvarez-Machain*, held that where terms of an extradition treaty do not specifically prohibit the forcible abduction of foreign nationals, the treaty does not divest federal courts of jurisdiction over the foreign national.¹⁹⁷ Since the extradition treaty between the United States and Honduras did not sufficiently specify extradition as the only way in which one country may gain

187. See e.g., *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). See also *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990) (upholding the arrest of General Noriega in Panama to face drug trafficking offenses in the United States).

188. *United States v. Alvarez*, 504 U.S. 655 (1992).

189. See *id.* at 657.

190. See *id.*

191. See *id.*

192. See *id.* at 666. "The language of the Treaty, in the context of its history, does not support the proposition that the Treaty prohibits abductions outside of its terms." *Id.* "In sum, to infer from this Treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice." *Id.* at 668-69.

193. *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995).

194. See *id.* at 761.

195. See *id.*

196. See *id.*

197. See *id.* at 762.

custody of a foreign national for purposes of prosecution, the abduction was ruled valid.¹⁹⁸

As in the case of the continued use of the death penalty, most of the international community has denounced forcible abduction used as a substitute for use of an extradition treaty.¹⁹⁹ In 1985 the United Nations Security Council adopted a resolution condemning unequivocally all acts of hostage taking and abductions.²⁰⁰

Opponents of forcible abductions also point to Article 2(4) of the United Nations' Charter for the proposition that abductions violate international law.²⁰¹ It states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the [p]urpose of the United Nations."²⁰²

Additionally, even the Restatement (Third) of Foreign Relations Law of the United States seems to oppose abductions unless the other state consents.²⁰³ It provides: "A state's law enforcement officers may exercise

198. See *id.* at 762-63. The court went on to say that "kidnaping does not rise to the level of other *ius cogens* norms, such as torture, murder, genocide, and slavery." *Id.* at 764. See also *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886). Both cases stand for the proposition that the manner by which a defendant is brought to trial does not affect the government's ability to try him. That principle has come to be known as the "Ker-Frisbie" doctrine. Cf. *United States v. Toscanino*, 500 F.2d 267 (2nd Cir. 1974) (dismissing a case against a defendant abducted from Uruguay who was pistol-whipped, bound, blindfolded, brutally tortured, and then interrogated for 17 days).

199. The presidents of Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay all issued statements denouncing the *Alvarez-Machain* case. On June 15, 1992, the government of Colombia issued a statement that the *Alvarez-Machain* decision imperils the legal stability of all treaties. See *Kidnaping Suspects Abroad: Hearings Before the Civil and Constitutional Rights Sub-Comm. of the House Comm. on the Judiciary*, 102nd Cong., 2nd Sess. 111-114 (1992). For other anti-abduction views see Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151 (1991); Michael Glennon, *State Sponsored Abduction: A Comment On United States v. Alvarez-Machain*, 86 AM. J. INT'L L. 746 (1992); Jimmy Gurulé, *Terrorism, Territorial Sovereignty, and the Forcible Apprehension of International Criminals Abroad*, 17 HASTINGS INT'L & COMP. L. REV. 457 (1994); John Quigley, *Government Vigilantes at Large: The Danger to Human Rights From Kidnaping of Suspected Terrorists*, 10 HUM. RTS. Q. 193 (1988); but see Charles Kallenbach, *Plomo O Plata: Irregular Rendition as a Means of Gaining Jurisdiction Over Colombian Drug Kingpins*, 23 N.Y.U. J. INT'L L. & POL. 169 (1990) (advocating the use of forcible abductions against Colombian drug cartels).

200. *Security Council Resolution Condemning Hostage Taking*, S.C. RES. 579, U.N. SCOR, 2637th mtg., U.N. Doc. S/Res/579 (1985).

201. See U.N. CHARTER art. 2, para. 4.

202. *Id.* Legal scholars have long debated whether art. 2(4) is 1) restrictive (in prohibiting the use of force regardless of motive); 2) too broad (in that it does not limit the right to use force to protect nationals abroad) or; 3) self-defense based (justifying the use of force to protect nationals as a right of self defense). For a discussion of these different views, see Oscar Schachter, *The Right of States to Use Armed Forces*, 82 MICH. L. REV. 1620, 1632 (1984) (restrictive approach); Jordan J. Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad*, 8 WHITTIER L. REV. 711, 720-21 (1986) (broad approach); D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 89-91 (1958) (self defense approach).

203. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 (2) (1987).

their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state."²⁰⁴

Based on the Court's decision in *Alvarez-Machain* and the Ninth Circuit's in *Matta-Ballesteros* the United States could legally adopt a policy of abduction of foreign national Drug Kingpins. Courts would then be free to impose the death penalty provisions of the FDPA in appropriate cases. However, any benefits of such actions are outweighed by the damage the United States would suffer in terms of its international reputation as well as diplomatic relations with other countries.

C. Irregular Rendition of Foreign National Drug Kingpins by Luring

The leading United States case on "luring"²⁰⁵ is *United States v. Yunis*.²⁰⁶ The U.S. government had information that Yunis was the ringleader of a small band of men who had hijacked and later blew up a Royal Jordanian aircraft at the Beirut International Airport.²⁰⁷ Under the leadership of the FBI, the United States used an informant to "lure" Yunis from his home country of Lebanon to a location in the international waters of the Mediterranean Sea off the coast of Cyprus.²⁰⁸ Yunis was deceived and tricked into believing that a lucrative drug deal would take place on the high seas.²⁰⁹ While the vessel was in international waters, two federal agents engaged in a "take down" of Yunis by kicking his feet from under him, throwing him to the deck of the ship, and handcuffing him.²¹⁰ He was then taken to the front of the ship where he was strip-searched, placed in a harness, re-handcuffed, and shackled with metal leg irons.²¹¹ After five days at sea, Yunis was flown to Andrews Air Force Base and subsequently arraigned on aircraft piracy charges by a United States Magistrate.²¹²

Yunis contended that the U.S. government violated the terms of the extradition treaty with Lebanon and Cyprus by using a clever and elaborate scheme to lure him out of Lebanon and then arrest him in international

204. *Id.* See also 138 CONG. REC. E23697, (1992) (daily ed. August 12, 1992) reprinted in 192 W.L. 194231 (Congressman Leon Panetta stating that abduction of *Alvarez-Machain* violated international law).

205. See PAUST, *supra* note 18, at 426.

206. *United States v. Yunis*, 681 F. Supp. 909 (D.D.C. 1988), *rev'd on other grounds*, 859 F.2d 953 (D.C. Cir. 1988).

207. See *id.* at 912. The plan to abduct Yunis was called "Operation Golden Rod." *Id.*

208. See *id.* at 911.

209. See *id.* at 912.

210. *Id.* at 913. Yunis sustained two fractured wrists during the "take down." See *id.*

211. See *id.* Yunis confessed during the time on the ship. See *id.* at 914.

212. See *id.* at 915.

waters.²¹³ Citing "accepted principles of international law," the District Court for the District of Columbia held that Yunis did not have standing to object because "only sovereign nations have the authority to complain about violations of extradition treaties."²¹⁴

The *Yunis* case illustrates the distinction between "luring" and "abduction" as a means of securing custody of foreign national defendants. Mr. Yunis was "lured" out of Lebanon and "abducted" once he reached international waters. The practice of "luring" in its purist sense does not involve any use of physical force.²¹⁵ The defendant is "lured" out of his country by trickery and deceit to a place where a legal arrest may occur.²¹⁶ Although "luring" does not involve actual invasion of other countries' sovereign territory, the international community views these practices as a violation of international law.²¹⁷

The *Yunis* court's reasoning concerning the lack of standing of an individual to raise a violation of the terms of an extradition treaty has been effectively mooted by the Court's decision in *Alvarez-Machain*. Since the *Alvarez-Machain* court allowed the abduction despite the objection of the contracting party to the treaty,²¹⁸ the issue of whether an individual or state is objecting has been rendered irrelevant. The controlling determination is whether the treaty itself has specific prohibitions to the questioned governmental conduct. Since the Court had determined that abductions are not prohibited by extradition treaties absent an expressed prohibition, it follows that the less intrusive method of "luring" is also constitutionally permissible even over the objection of the contracting state. The remaining issue is whether "luring" presents a viable option for obtaining physical custody of a foreign national Drug Kingpin for prosecution under the FDPA.

213. See *id.* Yunis also contended that U.S. agents knew full well that he resided in Beirut and therefore was obligated at the outset to initiate an extradition request to Lebanon. See *id.*

214. *Id.* at 916. (citing cases in support of its position that Yunis did not have standing under general principles of international law). See, e.g., *United States v. Cordero*, 668 F.2d 32, 37 (1st Cir. 1981) ("[E]xtradition treaties are made for the benefit of governments concerned. And, under international law, it is the contracting foreign government, not the defendant, that would have the right to complain about a violation.") *Id.*; *United States v. Valot*, 625 F.2d 308 (9th Cir. 1990) (defendant abducted in Thailand to stand trial in Hawaii; failure to comply with extradition treaty did not bar prosecution); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 61-78 (2nd Cir. 1975) (Bolivian citizen abducted by United States officials lacked standing to assert violations of extradition treaty absent protest by offended state). See generally Carlos Manuel Vasquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992) (discussing the rights of individuals to assert violations of international treaties).

215. See PAUST, *supra* note 18.

216. See *id.*

217. See *id.* at 433. "The international community has often disapproved of luring as a means to bring a person into a jurisdiction, and finds it as unacceptable as forcible abduction." *Id.*

218. See Brief for The United Mexican States as Amici Curiae in Support of Affirmance in *United States v. Alvarez-Machain*, 31 I.L.M. 934 (1992).

Since the international community views "luring" as an affront to national sovereignty equivalent to abductions, the United States would suffer harm to its international reputation and diplomatic relations if "luring" was used for apprehension of foreign national Drug Kingpins. That damage would magnify if the United States "lured" a foreign national Drug Kingpin from a nation whose laws did not permit the death penalty, and proceeded with the prosecution and execution of that person under the FDPA. However, international comity is a two way street. Objections to "luring" as a violation of international law from countries, such as Mexico and Colombia, ring hollow when those nations have continually refused to grant the United State's extradition requests for drug traffickers. Countries cannot ignore extradition treaties on the one hand and then use them to support accusations of violations of international law when the United States uses irregular methods to obtain custody of foreign national defendants. Nonetheless, the practice of "luring" does not provide a long term viable solution to the problem of obtaining custody of foreign national Drug Kingpins for prosecution under the FDPA. The benefits of possibly securing custody of a few foreign national Drug Kingpins through "luring" are outweighed by corresponding problems from the breakdown of diplomatic relations with other nations.²¹⁹

CONCLUSION

The absence of a constitutional prerequisite for the taking of human life through the imposition of the death penalty is best evidenced by: (1) the Court continuing to define eligibility for the death penalty in terms of proportionality to a given offense, and (2) the Court's tacit approval of the death penalty for crimes of espionage and treason even where no death occurred.

The FDPA for Drug Kingpins encompasses criminal activity which causes great public harm, and thus the death penalty is a proportionate punishment for such individuals. The criminal enterprise of a Drug Kingpin is designed to distribute massive amounts of dangerous narcotics into society. Such distribution inevitably causes "great public harm" by way of death by overdose, diseases such as AIDS, crimes associated with drugs, and economic costs such that the imposition of the death penalty is not "grossly disproportionate" to the crime charged.

Despite the constitutionality of the FDPA, its potential benefits are significantly weakened by the international difficulties of applying the death penalty to foreign national Drug Kingpins. The process of obtaining physical

219. See PAUST, *supra* note 18, at 438.

custody of foreign national Drug Kingpins through regular or irregular rendition is riddled with pitfalls ranging from provisions of bilateral extradition treaties to the increasing opposition to use of the death penalty in the international community. Although foreign national Drug Kingpins richly deserve execution for the great public harm and deaths they create in the United States, the legal and political realities associated with obtaining physical custody for prosecution are too great to overcome.