STATUTORY ENHANCEMENT OF THE JUDICIAL ROLE IN THE INTERNATIONAL EXTRADITION OF THE AMERICAN CITIZEN

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I. INTRODUCTION

Judge Rugerro Aldisert served on the United States Court of Appeals for the Third Circuit from 1968 until his death in 2014.[1] Judge Aldisert maintained the same enthusiasm for judicial administration that he exhibited as a Major in the United States Marine Corps during World War II.[2] Aldisert's military service intensifies the impact of his lengthy dissent in *United States v. Stelmokas*.[3] The court in *Stelmokas* affirmed the denaturalization of a defendant who participated in atrocities during the Holocaust.[4] As the lone dissent, Judge Aldisert asserted the need to reform proceedings involving the denaturalization and extradition of American citizens.[5] The following excerpt inspired the writing and research behind this note:

> [A] precept demands full compliance with the letter and spirit of the American judicial process; it demands that a prosecution be held to every aspect of its burden of proof, particularly in so important a matter as a denaturalization proceeding . . . Thus, when we come to the intersection of such esteemed precepts, we must be especially vigilant to protect the procedures that lie at the heart of our judicial process, lest in our zeal . . . we unwittingly permit our judicial traditions to be victimized.
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> Those of us who sacrificed years of our youth in World War II to combat the forces of tyranny are understandably sensitive to these issues. We are sensitive to the danger that fundamental values of our glorious American tradition, including the protections guaranteed by our legal system which we fought to preserve, might be compromised in a fervor to punish one who may have aided the bestiality of our common enemy.[6]

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* Widener University Delaware Law School, J.D. 2016. The research and writing of this article was dedicated to Beverly, Mark, and Matthew Teti. Thank you to the Law Review Executive and Editorial Boards for their help and guidance throughout this process.

[1] *Aldisert, Ruggero John*, *Biographical Directory of the Federal Judges*, FED. JUDICIAL CTR. (2014), http://www.fjc.gov/servlet/nGetInfo?jid=21&cid=999&ctype=na&instate=na.

[2] *See* Joseph F. Weis, Jr., *Ruggero J. Aldisert, Longtime Colleague and Friend*, 48 U. PITT. L. REV. xviii, xxviii (1987); *see also Aldisert, Ruggero John*, *Biographical Directory of the Federal Judges*, *supra* note 1.

[3] United States v. Stelmokas, 100 F.3d 302, 327-43 (3d Cir. 1996) (Aldisert, J., dissenting)

[4] *Id.* at 322.

[5] *See id.* at 343.

[6] *Stelmokas*, 100 F.3d at 343.

United States citizens are guaranteed due process of law before the government deprives them of life, liberty, or property.[7] No matter how egregious the offense, the American citizen can be certain that "some kind of hearing is required at some time before a person is finally deprived of his property interests."[8] However, the constitutional guarantees that bind the United States government are generally inapplicable to foreign nations who maintain their own legal traditions.[9] Independent countries inevitably maintain diverse sets of values and practices that are unique to their individualized society and culture.

Extradition is "the formal surrender of a person by a State to another State for prosecution or punishment."[10] International extradition, or extradition from the United States to a foreign nation, is largely dependent upon individualized extradition treaties.[11] The United States has bilateral extradition treaties with over 100 countries.[12] These countries comprise industrialized western societies,[13] as well as less developed states with governments and legal systems that vastly differ from our own.[14]

International extradition is primarily a non-judicial function.[15] Nevertheless, federal judges and magistrates are required by statute to determine whether there is sufficient evidence within a foreign extradition request to sustain criminal charges under the proper treaty.[16] The standard of review for the determination is probable cause, or whether there exists reasonable grounds to believe the accused is guilty of the crimes charged.[17] Judicial certification of an extradition request is not a final determination of guilt or innocence.[18] It is the Secretary of State who ultimately determines whether the fugitive is surrendered to a foreign legal system.[19] However, the

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[7] U.S. CONST. amend. V.

[8] Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974).

[9] *See* Ian R. Connor, *Peoples Divided: The Application of United States Constitutional Protections in International Criminal Law Enforcement*, 11 WM. & MARY BILL RTS. J. 495, 508 (2002). A foreign sovereign may be bound to observe provisions of the Constitution during criminal enforcement actions through a Mutual Legal Assistance Treaty with the United States. *See id* at 507.

[10] MICHAEL JOHN GARCIA & CHARLES DOYLE, CONG. RESEARCH SERV., 98-958, EXTRADITION TO AND FROM THE UNITED STATES: OVERVIEW OF THE LAW AND RECENT TREATIES 1 (2010).

[11] *Id.*

[12] *Id.* at 35-42.

[13] *Id.* The countries that the United States maintains extradition treaties with include: Canada, France, Italy, Germany, and the United Kingdom. *Id.*

[14] *Id.* The countries that the United States maintains extradition treaties with also include: Congo, Cuba, Egypt, Iraq, Pakistan, and Turkey. *Id.*

[15] *See* Hilton v. Kerry, 754 F.3d 79, 84 (1st Cir. 2014) ("[e]xtradition 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."); Ordinola v. Hackman, 478 F.3d 588, 606 (4th Cir. 2007); Sidali v. I.N.S., 107 F.3d 191, 194 (3d Cir. 1997).

[16] *See* 18 U.S.C. § 3184 (2006).

[17] *Sidali*, 107 F.3d at 195.

[18] California v. Super. Ct. of Cal., San Bernardino Cnty., 482 U.S. 400, 407 (1987).

[19] Martin v. Warden, Atlanta Pen, 993 F.2d 824, 829 (11th Cir. 1993).

potentially severe consequences for the accused American citizen suggest that the current judicial role in the international extradition process is insufficient to ensure adequate due process.[20]

The international extradition hearing does not afford the accused certain protections that are considered fundamental to the American criminal proceeding under the Fifth Amendment.[21] Limited judicial inquiry, restricted habeas corpus review, and the absence of other traditional notions of fundamental fairness create the need to critically evaluate the international extradition proceeding.[22] The need for reform becomes more evident when the accused is an American citizen who faces trial and incarceration in a foreign nation. This note seeks to examine and highlight the procedural shortcomings of the international extradition process. Through reference and application of regulatory precedent in other areas of criminal law, this note ultimately proposes enhancement of the judicial role as a means to increase due process and provide the attorney with additional means to pursue creative arguments on behalf of his client. The proposed method of reform is then applied to two highly publicized case illustrations to demonstrate how an enhanced judicial role may benefit due process and increase the attorney's ability to effectively advocate for the accused American citizen.

Part II provides an overview of the current international extradition process in the United States. This section reviews the procedural requirements of the international extradition process and the nature of the extradition hearing pursuant to federal statutory law. The effect of federal law and international treaties on the extradition of American citizens is discussed.

Part III introduces two highly publicized case illustrations that involve the international extradition of American citizens. The case illustrations represent unique circumstances of American citizens who face grave consequences upon judicial certification of an extradition request.

Part IV suggests that an enhanced judicial role in the international extradition proceeding may increase due process and allow the attorney to more effectively advocate on behalf of the accused American. It proposes the use of statutory guided judicial dissolution in circumstances which suggest that extradition may be inappropriate or not in significant furtherance of legitimate government interest. Statutory and regulatory precedent from other areas of criminal law are applied to inspire statutory enhancement of the judicial role to afford the accused American citizen a more exacting review prior to judgment under a foreign legal system.

Part V applies the proposed method of reform through referencing case illustrations introduced in Part III. Part V seeks to demonstrate how statutory enhancement of the judicial role in the international extradition process of the accused American may provide the attorney with an enhanced ability to

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[20] *See Martin*, 993 F.2d at 829; *see also* GARCIA & DOYLE, *supra* note 10, at 20-21.
[21] *See* GARCIA & DOYLE, *supra* note 10, at 21-25.
[22] *Id.*

effectively advocate on behalf of his client. Strategic avenues of lawyering that may only be available under the reformed international extradition statute are discussed.

This note undoubtedly does not condone heinous crimes committed by American citizens subject to the international extradition process. All Americans are entitled to adequate due process of law under the Constitution, no matter how despicable the crime.

II. OVERVIEW OF THE INTERNATIONAL EXTRADITION PROCESS

A. Extradition from the United States to a Foreign Jurisdiction

The extradition process is set forth in 18 U.S.C. §§ 3181-96.[23] Extradition from the United States to a foreign nation is specifically addressed in 18 U.S.C. § 3184.[24] The international extradition process is initiated by a formal request for extradition, made by a foreign sovereign pursuant to an established treaty with the United States.[25] The Office of International Affairs (OIA) must review and approve every formal request for extradition.[26] Acting either directly or through the Department of State, OIA reviews any requests for the provisional arrest of a fugitive by the foreign sovereign pursuant to the extradition treaty.[27] If the extradition request is deemed sufficient, OIA files an extradition complaint in the appropriate court, charging the fugitive with an extraditable offense.[28]

Any United States judge or magistrate may issue a warrant for the apprehension of the suspected fugitive "that he may be brought before such judge . . . to the end that the evidence of criminality may be heard and considered."[29] If the judge or magistrate finds that the criminal complaint contains sufficient evidence to sustain the charge under the provisions of the proper treaty, he must certify his decision together with a copy of all testimony taken before him to the Secretary of State.[30] After the court forwards its certification for extradition, the Secretary of State conducts an independent review of the case to determine whether to issue a warrant of surrender for the fugitive.[31] The Secretary of State is empowered by

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[23] 18 U.S.C. §§ 3181-96 (2006).

[24] 18 U.S.C. § 3184 (2006).

[25] *Id.* A formal request for extradition is made in the form of a criminal complaint by the foreign sovereign under oath, charging a crime that is provided within the treaty and committed in the foreign jurisdiction. *Id.*

[26] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-15.210 (1997), http://www.justice.gov/usam/usam-9-15000-international-extradition-and-related-matters#9-15.210.

[27] *Id.*

[28] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-15.700 (1997), http://www.justice.gov/usam/usam-9-15000-international-extradition-and-related-matters#9-15.700.; *see also* 18 U.S.C. § 3181 (2006)*;* Sidali v. I.N.S., 107 F.3d 191, 194 (3d Cir. 1997).

[29] 18 U.S.C. § 3184 (2006).

[30] *Id.*

[31] Martin v. Warden, Atlanta Pen, 993 F.2d 824, 829 (11th Cir. 1993).

Congress to exercise sovereign discretion to extradite American citizens as the national interest dictates.[32] However, this empowerment is discretionary, and he or she is not required to do so.[33] Federal law simply empowers the Secretary of State to exercise the discretion reserved by a treaty to each independent sovereign.[34]

B. The United States Extradition Hearing[35]

The standard required for judicial certification of an international extradition request is low. The court must solely determine whether there is "evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt."[36] Judicial review may be limited to written statements by foreign prosecutors or judges summarizing the evidence expected to be used.[37] The standard of review is probable cause, or whether there exists reasonable ground to believe the accused is guilty of the crimes charged.[38]

The international extradition hearing does not afford the accused with certain protections that are fundamental to the American criminal proceeding. Neither the Federal Rules of Evidence nor the Federal Rules of Criminal Procedure are applicable.[39] The accused does not maintain a Sixth Amendment right to counsel.[40] Hearsay is fully admissible and the court may rely upon it exclusively.[41] The "non-inquiry" rule applies,[42] barring the court from evaluating the fairness and humaneness of another country's criminal justice system when considering whether to certify extradition.[43] Judicial certification for extradition does not represent a "final decision" under federal law.[44] Accordingly, the accused is not entitled to an appeal.[45] The

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[32] 9B FED. PROC., L. ED. § 22:2351 (2014).

[33] *Id.*

[34] *Id.*

[35] The topics and authorities discussed in the following sub-section are partially derived from GARCIA & DOYLE, *supra* note 10, at 21-25.

[36] United States v. Wiebe, 733 F.2d 549, 553 (8th Cir. 1984); Coleman v. Burnett, 477 F.2d 1187, 1202 (D.C. Cir. 1973).

[37] Rice v. Ames, 180 U.S. 371, 375-76 (1901).

[38] Sidali v. I.N.S., 107 F.3d 191, 195 (3d Cir. 1997).

[39] FED. R. EVID. 1101(d)(3) ("These rules-except for those on privilege-do not apply to the following . . . (3) miscellaneous proceedings such as: extradition."); FED. R. CRIM. P. 1(5)(a) ("Proceedings not governed by these rules include: (A) the extradition and rendition of a fugitive."); *see also* Afanasjev v. Hurlburt, 418 F.3d 1159, 1164-65 (11th Cir. 2005); United States v. Kin-Hong, 110 F.3d 103, 120 (1st Cir. 1997).

[40] DeSilva v. DiLeonardi, 181 F.3d 865, 868 (7th Cir. 1999).

[41] *See* Collins v. Loisel, 259 U.S. 309, 317 (1922); *Afanasjev*, 418 F.3d at 1165.

[42] Hilton v. Kerry, 754 F.3d 79, 84 (1st Cir. 2014); Koskotas v. Roche, 931 F.2d 169, 173-74 (1st Cir. 1991); Martin v. Warden, Atlanta Pen, 993 F.2d 824, 829 (11th Cir. 1993).

[43] Khouzam v. Att'y Gen., 549 F.3d 235, 253 (3d Cir. 2008).

[44] *See* 28 U.S.C. § 1291 (2006).

[45] *See* Collins v. Miller, 252 U.S. 364, 368 (1920); Sidali v. I.N.S., 107 F.3d 191, 195 (3d Cir. 1997).

accused may file a post-judgment writ of habeas corpus, however subsequent review is substantially narrowed to "whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty."[46]

Narrow judicial inquiry and other limitations on traditional notions of due process cause the extradition hearing to resemble a preliminary criminal hearing.[47] The similarity between the proceedings is not substantially unsettling when initially examined. In both circumstances, the court does not rule upon the accused's guilt or innocence, but solely determines whether there is sufficient probable cause to require the individual to appear for further proceedings.[48] However, certification of an international extradition request has the potential to produce more severe consequences than a finding of probable cause in a preliminary criminal hearing. While a finding of probable cause in a preliminary hearing does not deprive the accused of additional proceedings under the American legal system, judicial certification of an international extradition request eliminates the possibility of additional review beyond an independent assessment by the Secretary of State.[49] Although the Executive Branch undoubtedly acts in America's best interest, it is inherently subject to a greater degree of political, social, and diplomatic influence than the judiciary.

The extradition process affords the accused less opportunity for judicial review than the standard criminal defendant. Although judicial certification of international extradition is not determinative of guilt or innocence,[50] the accused is left at the mercy of an unfamiliar and unpredictable foreign legal system. Certification of an international extradition request can be a death sentence for Americans who are charged with culturally unpopular crimes, or who cannot physically withstand incarceration without special accommodations.

C. Extraditing the American Citizen

The international extradition of the American citizen is largely determined by individualized treaties and the discretion of the Secretary of State.[51] "[A] treaty mandate to extradite 'persons' without exception requires the

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[46] United States *ex rel.* Hughes v. Gault, 271 U.S. 142, 151-52 (1926); Fernandez v. Phillips, 268 U.S. 311, 312 (1925).

[47] *See Sidali*, 107 F.3d at 199; Sindona v. Grant, 619 F.2d 167, 175 (2d Cir. 1980); FED. R. CRIM. P. 5.1(e).

[48] *See* California v. Super. Ct. of Cal., San Bernardino Cnty., 482 U.S. 400, 407 (1987); *see also* FED. R. CRIM. P. 5.1(e);

[49] The accused may also file a post-judgment writ of habeas corpus, however additional review is substantially limited. *See Hughes*, 271 U.S. at 151-52; *Phillips*, 268 U.S. at 312.

[50] Super. Ct. of Cal., San Benardino Cnty., 482 U.S. at 407.

[51] *See* Rick Gene Boepple, Jr., *International Extradition and the Amanda Knox Case: What is a "Conviction" Anyway?*, 17 GONZ. J. INT'L L. 53, 56 (2013-14).

extradition of American citizens."[52] If the applicable treaty or convention does not obligate the United States to extradite its citizens to the foreign territory, the Secretary of State may nevertheless order the surrender to that country of a United States citizen whose extradition has been requested if the other requirements of the treaty or convention are met.[53] However, "in the absence of a treaty that authorizes extradition or if an extradition treaty excepts from its operation United States citizens charged with crimes committed in that foreign nation, federal authorities have no power to surrender to a foreign government a United States citizen whose extradition is sought, unless authorized by federal statute."[54] Therefore, United States nationals cannot be extradited pursuant to an extradition treaty that states that "neither party shall be bound to deliver up its own citizens" unless "a positive grant of authority to surrender United States citizens" also exists within the treaty.[55]

III. THE CONSEQUENCES OF INTERNATIONAL EXTRADITION: SELECTED CASE ILLUSTRATIONS

A. The Case of Johan Breyer

Johan Breyer lived in a brick rowhome in Northeast Philadelphia for nearly four decades.[56] Co-workers and neighbors described the Slovakian immigrant turned American citizen as a hardworking and kind man who enjoyed tending his lawn and barbequing in his backyard.[57] Despite his reputation among friends as an "amiable tool-maker," Breyer was eventually exposed as a participant in the mass genocide of thousands of innocent people.[58]

Breyer was born in 1925 in a small village in modern day Slovakia.[59] He eventually derived American citizenship from his mother, a native of Manayunk, Pennsylvania.[60] At seventeen, Breyer was inducted into the *Schutzstaffel* (*SS*) as an armed perimeter guard at the Nazi concentration

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[52] 9B FED. PROC., L. ED. § 22:2393 (2015) (citing Charlton v. Kelly**,** 229 U.S. 447, 467-68 (1912)).

[53] 18 U.S.C. § 3196 (2006).

[54] 9B Fed. Proc., L. Ed. § 22:2393 (2015) (citing Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 9 (1936)).

[55] *Id.*

[56] Jeremy Roebuck, *N.E. Man Faces Death-Camp Extradition*, PHILA. INQUIRER, June 19, 2014, at A1.

[57] Henry Goldman & Alan Sipress, *How Could He Not Have Known?; Experts Dispute Auschwitz Guard's Innocence*, PHILA. INQUIRER, Apr. 24, 1992, at B4.

[58] *Id*.

[59] United States v. Breyer, 41 F.3d 884, 886 (3d Cir. 1994).

[60] Breyer v. Meissner, No. 97–6515, 2001 WL 1450625, at *1 (E.D. Pa. Nov. 16, 2001); Breyer's father was ethnically German. *Id.*

camp in Buchenwald, Germany.[61] Breyer testified that he had a passive role at Buchenwald, often leaving his weapon unloaded and rarely coming into contact with prisoners.[62] He refused to renounce his faith or to have his blood type branded on his upper arm, common practices among members of the *SS*.[63] At the conclusion of his training period, Breyer was reportedly asked in the presence of over 100 men if he could ever shoot a person.[64] He responded that he could not.[65] In 1943, Breyer's superior officer allegedly told him that if he failed to return from a two-week standard home leave, his family would be gravely harmed.[66]

After returning from his leave, Breyer was transferred to rural Poland, where he continued his guard duties at the Nazi concentration camp at Auschwitz.[67] Auschwitz served as a vicious killing center throughout the war, providing the Nazi regime its principal backdrop for the inhuman extermination of at least 960,000 Jews.[68] Breyer testified that in continuing his duties at Auschwitz, he never harmed a prisoner but admitted to witnessing the large-scale genocide that was perpetuated by the Nazi regime.[69] Breyer supposedly requested leave every week during his time at Auschwitz.[70] After learning that his mother had fallen ill, he was eventually granted a two-week dispensation to return to his parents' farm.[71] He never returned to Auschwitz – an act of desertion punishable by execution.[72]

To avoid detection following his desertion, Breyer hid in the barns and woods surrounding his village.[73] He eventually fled in the face of the Soviet Army's advance into Slovakia, reuniting with German infantry engaged in combat on the eastern front.[74] In May of 1945, Breyer's unit surrendered to the Soviet army, whereupon he was shipped to a prisoner-of-war camp in the

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[61] Breyer v. Ashcroft, 350 F.3d 327, 329 (3d Cir. 2003). At the outbreak of World War II, Slovakia allied itself with Nazi-Germany and became a functional instrument of the Third Reich. *Id.* During the war, the *SS,* a Nazi political organization, was primarily responsible for guarding concentration camps, "where people were forcibly confined in inhumane conditions, subjected to unspeakable atrocities and executed because of their race, religion, national origin or political beliefs." United States v. Breyer, 41 F.3d 884, 886 (3d Cir. 1994).

[62] *Ashcroft*, 350 F.3d at 329.

[63] *Id.*

[64] *Id.* at 337.

[65] *Id.*

[66] *Id*. at 329.

[67] *Id.*

[68] UNITED STATES HOLOCAUST MEM'L MUSEUM, HOLOCAUST ENCYCLOPEDIA: AUSCHWITZ, http://www.ushmm.org/wlc/en/article.php?ModuleId=10005189.

[69] *Ashcroft*, 350 F.3d at 328-29.

[70] *Id.* at 329.

[71] *Id*.

[72] *Id.* at 329-30.

[73] *Id.* at 329-30.

[74] *Id.* at 330. The District Court found that Breyer rejoined infantry due to a legitimate fear of being discovered by the Germans and shot as a deserter. *Id.*

Czech Republic.[75] Following his release from prison, Breyer reunited with his family in Bavaria.[76]

Breyer lived in Germany until 1952, when he applied for a United States visa under the Displaced Persons Act of 1948 (DPA).[77] Breyer acknowledged his membership in the *SS* on his visa application, but denied a role in the atrocities that took place at both Buchenwald and Auschwitz.[78] He became eligible for a visa and immigrated to Philadelphia in 1952.[79] He filed a petition for naturalization and was declared a United States citizen in 1957.[80]

In 1992, the United States initiated denaturalization proceedings after discovering that Breyer misrepresented his role in the Holocaust on his visa application.[81] A twelve-year tug-of-war over his citizenship ensued, rising to the United States Court of Appeals for the 3rd Circuit on three separate occasions. In *Breyer v. Meissner*, Breyer argued that he was entitled to citizenship through his mother under the Immigration and Nationality Technical Corrections Act.[82] The court ruled in his favor despite the misrepresentations on his visa application, but refused to reinstate his citizenship.[83] Instead, the court remanded his case to the district court to determine whether he voluntarily revoked his citizenship by levying arms against the United States.[84] In *Breyer v. Ashcroft*, the Third Circuit upheld the district court's finding that Breyer did not voluntarily levy arms against the United States while serving in the *SS* during World War II.[85] After this decade long legal battle, Breyer was reinstated as an American citizen.[86] He retained this status until his death in 2014.[87]

Nearly ten years after the conclusion of his denaturalization proceedings, German authorities reinvestigated Breyer's role in the Holocaust, and on June 17, 2013, issued a warrant for his arrest.[88] Germany immediately filed a formal extradition request with the United States government.[89] In the summer of 2014, 89-year-old Breyer "shuffled into a federal courtroom . . . to account once again for his role in atrocities committed nearly a lifetime

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[75] *Ashcroft*, 350 F.3d at 329.

[76] *Id.* at 330.

[77] *Id.*; Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1010 (as amended by Pub. L. No. 81-555, 64 Stat. 219 (1950)).

[78] *Ashcroft*, 350 F.3d at 330.

[79] *Id.*

[80] *Id.*

[81] United States v. Breyer, 41 F.3d 884, 887 (3d Cir. 1994).

[82] Breyer v. Meissner, 214 F.3d 416, 418 (3d Cir. 2000).

[83] *Id.* at 429.

[84] *Id.* at 432.

[85] *Ashcroft*, 350 F.3d at 337. The court found that Breyer had a legitimate fear of harm to his family and keyed on his conduct following the desertion of his guard duties. *Id.*

[86] *Id.* at 338.

[87] *See* Jason Grant, *Phila. Man Accused of Nazi War Crimes Dies*, PHILA. INQUIRER, July 24, 2014, at B1.

[88] *In re* Extradition of Breyer, 32 F. Supp. 3d 574, 579 (E.D. Pa. 2014).

[89] *Id.* at 581.

ago."[90] During a court appearance, Breyer reportedly asked his attorney the identity of the woman sitting at the opposite table.[91] Breyer's attorney informed him that the woman was the United States Attorney assigned to prosecute his case.[92] However, the magistrate determined that Breyer understood the purpose of the proceedings, found that the German prosecutors established probable cause in their extradition request, and ordered his arrest pending extradition.[93] United States Marshalls detained Breyer pending extradition to Germany, where he would stand trial for aiding and abetting the murder of 216,000 European-Jews.[94] Breyer would be the oldest person in American history to be extradited for his crimes.[95] A war criminal, but an American nevertheless, his health rapidly deteriorated.[96] Breyer died in custody awaiting transportation to Germany.[97]

B. The Case of Amanda Knox

On Nov. 2, 2007, 21-year-old British student Meredith Kercher was found in her apartment under a blood-soaked duvet cover with her throat slashed.[98] Kercher was a temporary resident of Perugia, a scenic Italian city that attracts thousands of students from other countries every year.[99] Kercher's roommate, 20-year-old American college student Amanda Knox, was immediately arrested for what prosecutors believed was a sexual assault turned murder.[100] Knox's boyfriend, Italian Refaelle Sollecito, and Rudy Guede, a citizen of the Ivory Coast, were also arrested for the murder.[101] Italian prosecutors alleged that Knox, Guede, and Sollecito were responsible for killing Kercher in a drug-fueled sex game that went awry.[102] Prosecutors further alleged that Knox and Sollecito attempted to cover up the killing to make it appear as a robbery.[103] Rudy Guede requested a fast-track trial and was sentenced to 30 years of imprisonment after being convicted of Kercher's murder.[104]

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[90] Roebuck, *supra* note 56.

[91] *See id*.

[92] *See id.*

[93] *In re Extradition of Breyer*, 32 F. Supp. at 575.

[94] *Id.; See also* Roebuck, *supra* note 56.

[95] *See* Grant, *supra* note 87.

[96] *See id.*; *see also* Roebuck, *supra* note 56.

[97] *See* Grant, *supra* note 87, at B1. Breyer died at Thomas Jefferson University Hospital in Philadelphia while still under federal custody. *Id.*

[98] Ian Fisher et. al., *Grizzly Murder Case Intrigues Italian University City,* N.Y. TIMES, Nov. 21, 2007, at A9.

[99] *Id.*

[100] *Id.*

[101] *See* Ian Fisher, *German Police Arrest Third Suspect in Perugia Murder Case,* N.Y. TIMES, Nov. 13, 2007, at A4.

[102] Rachel Donadio, *Man Guilty of Killing of Briton in Italy,* N.Y. TIMES, Oct. 29, 2008, at A9.

[103] *Id.*

[104] *Id.* Guede made a limited confession, admitting to being present in the apartment on the night of the murder and to having sexual intercourse with Kercher. *Id.* Guede's sentence

Knox and Sollecito maintained innocence throughout their murder trial.[105] Knox testified to staying at Sollecito's residence the night of the murder, and that pressure from Italian investigators caused her to provide conflicting information in the initial investigation.[106] Forensic experts on behalf of the prosecution testified that a knife found at Sollecito's house had Kercher's DNA on the tip and Knox's on the handle.[107] The jury eventually found both Knox and Sollecito guilty of Kercher's murder.[108] Knox was sentenced to 26 years of incarceration in an Italian prison.[109]

Knox remained incarcerated in Italy for over three years during her appeals process.[110] The Italian appellate court eventually ruled that Knox's conviction was primarily based on circumstantial evidence, and that the validity of the prosecution's forensic evidence was thrown into doubt by highly critical reports on police handling and analysis of evidence following the murder.[111] The court reversed Knox's conviction and she returned home to the United States following her release from prison in 2011.[112]

Four months after Knox's release, Italian prosecutors and the victim's family filed an appeal seeking reversal of Knox's acquittal and a new trial before The Court of Cassation, Italy's highest judicial authority.[113] Knox

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was eventually reduced to 16 years' imprisonment, a common practice in Italian appeal trials. *See* Rachel Donadio, *Italy: Sentence Reduced in Murder*, N.Y. TIMES, Dec. 23, 2009, at A12.

[105] Rachel Donadio, *Italian Prosecutors Ask for Life Sentence in Trial of U.S. Student,* N.Y. TIMES, Nov. 22, 2009, at A14. Defense lawyers for Knox and Sollecito argued that DNA evidence was not strong enough to link the two students to the crime. *Id.* Knox testified that Kercher was a close friend and that prosecutors' theories were "absurd." *Id.*

[106] Rachel Donadio, *U.S. Student on Trial for Murder in Italy Reiterates Testimony*, N.Y. TIMES, June 14, 2009, at A12. Knox testified that she was pressed by police, who hit her twice and put ideas in her head to accuse her boss of the murder. *Id.* Knox's boss was eventually exonerated and subsequently sued her for defamation. *Id.*

[107] *Id.* Forensic experts also testified that they found DNA evidence of Knox's footprint in Kercher's blood in the house they shared, and several other traces of the two women's intermingled DNA elsewhere in the house. *Id.*

[108] Rachel Donadio, *Verdict in Italy, But the Case Doesn't End,* N.Y. TIMES, Dec. 6, 2009, at A10 [hereinafter Donadio, *Verdict in Italy*].

[109] *Id.*

[110] *See* Rachel Donadio, *Appeal of U.S. Student's Murder Conviction Opens in Italy,* N.Y. TIMES, Nov. 25, 2010, at A10. Unlike in the American system, where appeals center on issues of law, not fact, in the Italian system, appeals are automatic and defendants can ask to retry the entire case in a first round of appeals. Donadio, *Verdict in Italy*, *supra* note 108, at A10.

[111] Elisabetta Povoledo, *Italian Court Reverses American Student's '09 Murder Conviction,* N.Y. TIMES, Oct. 4, 2011, at A1. Sollecito's conviction was overturned for similar reasons. *Id.*

[112] Elisabetta Povoledo*, Italy Appeal Seeks Retrial of American in '07 Killing,* N.Y. TIMES, Feb. 15, 2012, at A6.

[113] Elisabetta Povoledo, *Italian Court Orders New Trial for Amanda Knox, Overturning Acquittal,* N.Y. TIMES, Mar. 27, 2013, at A10 [hereinafter Povoledo, *New Trial*]. Prosecutors may challenge the acquittal of a criminal defendant under Italian law. *Id.* This procedural step highlights the divide between the Italian and United States' legal system. *See id.* Besides a few narrow exceptions, the Double Jeopardy Clause of the Fifth Amendment generally prevents a defendant from being tried twice for the same crime following an acquittal. *See* Oregon v. Kennedy, 456 U.S. 667, 671-79 (1982).

publically vowed to never return to Italy should the court decide to reinstate her conviction.[114] In March 2013, The Court of Cassation annulled Knox's acquittal and ordered the case to be reheard at a new appeals court in Florence, Italy.[115] In January 2014, a jury sitting for the appellate court found Knox guilty again, reinstating her conviction and a twenty-six year prison sentence for Kercher's murder *in absentia*.[116] However, the Florence appeals court rejected Italian prosecutors' request to issue a warrant for Knox's arrest in the United States.[117]

Following the reinstatement of her conviction, Knox remained in the United States while exhausting the appellate process.[118] In March 2015, Knox's attorneys found themselves before the Court of Cassation for a final time, arguing against reestablishment of the prison sentence and the extradition proceedings that would inevitably follow.[119] After extensive deliberation, the Court of Cassation overturned the Florence appeals court, annulling Knox's murder conviction for a second time.[120] The court's decision removed the possibility of a complicated extradition battle that may have emerged in the case of reconviction.[121] If the Court of Cassation decided to affirm Knox's conviction, extradition from the United States would have subjected her to the remainder of a twenty-six year prison sentence.[122]

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[114] Elisabetta Povoledo, *Italy's Highest Court Set to Rule in American's Case*, N.Y. Times, Mar. 25, 2015, at A10 [hereinafter Povoledo, *Highest Court*].

[115] Povoledo, *New Trial*, *supra* note 113, at A10.

[116] *See* Elisabetta Povoledo, *American is Again Found Guilty in 2007 Murder of Her Roommate in Italy*, N.Y. TIMES, Jan. 31, 2014, at A10 [hereinafter Povoledo, *Again Found Guilty*].

[117] *Id.* After the Florence court's decision, Sollecito was ordered to surrender his passport and barred from leaving Italy. *Id.* Knox remained in America during trial after her attorneys warned her of the inevitable publicity that would result from her appearance potentially distracting the jury from a fair examination of the case. *See* Elisabetta Povoledo, *Ruling Looms in Italy for U.S. Student in '07 Killing*, N.Y. TIMES, Jan. 30, 2014, at A10. Knox was also advised to refrain from returning to Italy due to potential for immediate incarceration should her acquittal be reversed. *Id.* She was sentenced by the Florence court *in absentia*. Povoledo, *Again Found Guilty*, *supra* note 116, at A10.

[118] *See* Povoledo, *Again Found Guilty*, *supra* note 116, at A10.

[119] *See* Povoledo, *Highest Court*, *supra* note 114, at A10.

[120] Elisabetta Povoledo, *Court Clears Amanda Knox of All Charges in 2007 Killing*, N.Y. TIMES, Mar. 28, 2015, at A4.

[121] Giada Zampano and Deborah Ball, *Amanda Knox Murder Conviction Overturned; Italy's highest appeals court clears Ms. Knox and Raffaele Sollecito of murder and sexual assault charges*, WALL ST. J., Mar. 27, 2015.

[122] *See* Povoledo, *Again Found Guilty*, *supra* note 116, at A10.

IV. STATUTORY ENHANCEMENT OF THE JUDICIAL ROLE IN THE INTERNATIONAL EXTRADITION OF THE AMERICAN CITIZEN

A. The Need for Reform: Increasing Due Process Afforded to the Accused American

The United States Judiciary has consistently supported Congressional intent[123] that international extradition remains a predominantly non-judicial function reserved to the Executive Branch.[124] However, narrow judicial inquiry, restricted habeas corpus review, and other limitations on traditional notions of due process[125]create a more apparent need for reform when the accused is an American citizen. The potential consequences of international extradition suggest that the American citizen should be entitled to heightened due process prior to his surrender to a foreign sovereign.

The cases of Breyer and Knox illustrate the severe ramifications that may result from a judicial finding of probable cause in the international extradition hearing.[126] Despite his role in the atrocities at Buchenwald and Auschwitz, Breyer's American citizenship entitled him to greater due process before the issuing of a certification that ultimately amounted to a death sentence.[127] Knox's American citizenship should have entitled her to greater Constitutional protection had the Court of Cassation ruled to uphold the Florence Appeals Court's decision. As an American citizen facing conviction for a heinous crime in a foreign jurisdiction, Knox should be entitled to greater due process prior to her extradition and subjection to the remainder of a twenty-six year prison sentence.

Statutory enhancement of the judiciary's role in the international extradition proceeding serves as an effective and feasible way to increase due process for the American citizen. Furthermore, an enhanced judicial role may allow the attorney to more effectively advocate on behalf of the accused American. Permitting statutorily guided judicial discretion based on an

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[123] Congressional intent that the international extradition process remains a non-judicial function is implicitly exhibited through legislation. *See* 18 U.S.C. § 3184 (2006) ("If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b), he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State…"); *see also* Fed. R. Evid. 1101(d)(3) ("These rules-except for those on privilege-do not apply to the following: (3) miscellaneous proceedings such as: extradition."); Fed. R. Crim. P. 1(5)(a) ("Proceedings not governed by these rules include: (A) the extradition and rendition of a fugitive.").

[124] Hilton v. Kerry, 754 F.3d 79, 84 (1st Cir. 2014) ("[e]xtradition 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."); Ordinola v. Hackman, 478 F.3d 588, 606 (4th Cir. 2007); Sidali v. I.N.S., 107 F.3d 191, 194 (3d Cir. 1997).

[125] *See* GARCIA & DOYLE, *supra* note 10, at 21-25.

[126] Breyer died in federal custody awaiting the conclusion of his extradition proceedings. Grant, *supra* note 87, at B10. Knox would have faced over 20 years' imprisonment upon certification of extradition. Povoledo, *Again Found Guilty*, *supra* note 116, at A10.

[127] *See* Breyer v. Ashcroft, 350 F.3d 327, 329 (3d Cir. 2003).

individual's unique circumstances will provide a more individualized assessment to American citizens prior to their surrender as international fugitives. Increasing the court's role should the circumstances necessitate will promote fundamental fairness without placing a heavy burden on judicial resources.[128]

B. Legislative and Regulatory Inspiration for Enhancing the Judicial Role: 18 U.S.C. § 3553(a) and the U.S. Attorney's Manual § 9-27.230

The relatively recent increase in the court's discretionary ability to determine an appropriate sentence for criminal defendants provides a potential model for enhancing the judicial role in the international extradition proceeding.[129] In considering an appropriate term of incarceration for a criminal defendant, 18 U.S.C. § 3553(a) requires the court to impose a sentence that is "sufficient, but not greater than necessary" to comply with the purposes set forth in the statute.[130] Following the United States Supreme Court's decision in *United States v. Booker*, terms of incarceration under the United States Sentencing Commission Guidelines (Guidelines) are no longer mandatory, but are now considered along with numerous additional factors when determining an appropriate sentence.[131] Other relevant considerations include: the nature and circumstances of the offense, the history and characteristics of the defendant, the kind of sentences available, and the need for the sentence imposed to provide adequate deterrence, avoid sentencing disparities, protect the public, and provide just punishment for the offense committed.[132]

Judges may now exercise discretion by considering multiple factors in order to issue a sentence that is tailored to the individual defendant, regardless of whether it varies from the suggested Guidelines range.[133] Post-*Booker*, the attorney may customize arguments to benefit the accused without restriction from the Guidelines range.[134] The judiciary now maintains a broad ability to conduct an individualized assessment of each criminal defendant and issue a sentence outside the Guidelines range if deemed appropriate.[135]

The United States Attorney's Manual (Manual) also provides potentially well-suited considerations for reform of the international extradition proceeding.[136] § 9-27.220 of the Manual permits U.S. Attorneys to use

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[128] A complete overhaul of the extradition proceeding to provide the accused with all Constitutional protections typically afforded to the criminal defendant will inevitably lengthen the extradition process. Such drastic change may cause reform to become less feasible by imposing a heavier burden on judges with packed dockets and limited time to hear cases.

[129] *See* United States v. Booker, 543 U.S. 220, 258-65 (2005).

[130] *Id*. at 268 (quoting 18 U.S.C. § 3553(a)).

[131] *See id.* at 258-65 (2005).

[132] 18 U.S.C. § 3553(a).

[133] United States v. Gunter, 462 F.3d 237, 247 (3d Cir. 2006).

[134] *Id.*

[135] *See* Gall v. United States, 552 U.S. 38, 49-50 (2007).

[136] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL (2007).

discretion in declining prosecution of a criminal offense when no substantial federal interest will be served.[137] When determining whether prosecution serves a substantial federal interest, § 9-27.230 provides the U.S. Attorney with a plethora of considerations including: the nature and seriousness of the offense, the deterrent effect of prosecution, the person's culpability in connection with the offense, the person's history with respect to criminal activity, and the probable sentence or other consequences if the person is convicted.[138] These considerations enhance the discretionary independence of the U.S. Attorney, allowing prosecution to be declined in the interest of fundamental fairness when there is no apparently positive societal result to be achieved.

C. *Statutorily Guided Judicial Discretion in the Exceptional Circumstance*

The current statutory requirements for international extradition confine the court and the attorney by limiting judicial inquiry to a determination of probable cause.[139] Narrow judicial review and other characteristic restrictions of the international extradition process deny the American citizen adequate protections and fundamental fairness prior to standing judgment in a foreign jurisdiction.[140] An enhanced judicial role will provide the accused American citizen a more exacting review of individual circumstances under the United States' legal system before certification of extradition is forwarded to the Secretary of State.

The judicial role in the international extradition of the American citizen may be enhanced through statutorily guided judicial discretion. The court should be permitted to deny certification of international extradition upon a successful argument that the accused citizen represents an exceptional circumstance where extradition would be inappropriate based on legal factors similar to 18 U.S.C. § 3553(a) and § 9-27.230 of the U.S. Attorney's Manual.[141]

It may be ill served to adopt all legal considerations found in § 3553(a) and § 9-27.230 to reform the international extradition process. However, numerous discretionary factors are potentially applicable. Following a threshold showing that the accused is an American citizen, statutory judicial considerations may include: the individual characteristics of the accused, the circumstances of the offense, the severity of consequence to the accused if extradition is certified, the availability of other forms of punishment, the contents of the request for extradition, and other considerations of

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[137] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.220 (2007).

[138] *Id.* § 9-27.230.

[139] *See* 18 U.S.C. § 3184 (2006).

[140] *See* GARCIA & DOYLE, *supra* note 10, at 21-25.

[141] *See* 18 U.S.C. § 3553(a) (2006); U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.230 (2007).

fundamental fairness.[142] The attorney should have the opportunity to argue for the court to use its statutorily guided discretion to deny a formal request for extradition, despite the foreign sovereign establishing "evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt."[143] Statutory reform will allow the attorney to customize arguments to benefit the accused without being restricted by narrow judicial inquiry.

Denying certification of extradition based upon exceptional circumstance may be narrowly applied to the accused American in the international extradition proceeding. The reformed statute may emphasize the exercise of judicial discretion as a narrow exception to the general standard of probable cause, only to be utilized in a unique situation where extradition appears inappropriate or does not further a legitimate government interest. The statute may permit the attorney to argue on behalf of the accused, introducing information under the Federal Rules of Evidence for the narrow purpose of establishing that the client should be considered an exceptional circumstance.

Narrow statutory reform of the international extradition proceeding does not undermine congressional intent that extradition remain a primarily executive function.[144] When denying certification for extradition based upon the exceptional circumstance of the accused American, the court should remain bound by 18 U.S.C. § 3184 to forward its findings to the Secretary of State.[145] The reformed statute may require the court to provide the executive branch with a written summary of its findings, including why the accused represents an exceptional circumstance where international extradition is inappropriate. Whether or not judicial certification is provided, the Secretary of State retains final authority to surrender the American citizen in an exercise of sovereign power in furtherance of the national interest. However, an enhanced judicial role and the opportunity for increased legal discourse may ensure that the Secretary of State is adequately informed of the accused's circumstances before making a final determination.

A more exacting review under the American legal system will increase due process and allow the attorney to better advocate on behalf of the American citizen facing international extradition. A judicial recommendation denying extradition due to exceptional circumstance will provide the executive branch reason to more closely consider the decision to subject an American citizen to the custody and judgment of a foreign legal system.

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[142] The provided list does not exhaust potential judicial considerations.

[143] United States v. Wiebe, 733 F.2d 549, 553 (8th Cir. 1984); Coleman v. Burnett, 477 F.2d 1187, 1202 (D.C. Cir. 1973).

[144] *See supra* notes 123-24 and accompanying text.

[145] *See* 18 U.S.C. § 3184 (2006).

D. Implementation of Reform

International extradition is determined by statute and individualized treaty.[146] The most effective method to enhance the judicial role is to supplement statutory reform with treaty amendment. Congress may amend 18 U.S.C. § 3184 to expressly allow courts to exercise discretion when faced with exceptional circumstance where international extradition of the American citizen may be inappropriate. The reformed statute should contain a preamble that indicates the narrow boundaries of the exception, stating that reform is needed to provide the accused American enhanced due process of law prior to certification of international extradition. The reformed statute may include an exhaustive or non-exhaustive list of procedural changes and judicial considerations to determine the function and applicability of the proposed exception.

Statutory enhancement of the judicial role in the international extradition process should be simultaneously applied to international extradition treaties through treaty amendment. A treaty amendment should provide the language of the reformed extradition statute in full detail, including the Secretary of State's ability to deny extradition of the accused citizen based upon a judicial determination of exceptional circumstance where international extradition is inappropriate. However, because such amendments become binding only with the consent of the parties to the treaty, the implementation of reform through treaty amendments may not be feasible.[147]

V. APPLICATION OF THE REFORMED EXTRADITION STATUTE: ADVOCATING FOR THE ACCUSED AMERICAN UNDER THE ENHANCED JUDICIAL ROLE

A. Breyer Revisited

The unusual circumstances surrounding the extradition of Johan Breyer provide a strong illustration of how statutory enhancement of the judicial role may allow the attorney to effectively advocate on behalf of the accused American in the international extradition proceeding. As an American citizen,[148] Breyer fulfills the threshold requirement under the proposed statutory reform. Breyer's attorney may have had the opportunity to argue that his client's individual circumstances warranted the exercise of statutorily

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[146] *See* Boepple, *supra* note 51, at 56.

[147] *See* Vienna Convention on the Law of Treaties, art. 39, May 23, 1969, 1155 U.N.T.S. 331. Although the U.S. is not a party to the Vienna Convention, it "considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties." Vienna Convention on the Law of Treaties, U.S. Dept. of State, http://go.usa.gov/3pJDB (last visited September 9, 2015).

[148] *See* Breyer v. Ashcroft, 350 F.3d 327, 337 (3d Cir. 2003).

guided judicial discretion in denying certification of the international extradition request.

In advocating on behalf of his client under the reformed extradition statute, Breyer's attorney may have had several avenues to argue that his client represented an exceptional circumstance in which the exercise of judicial discretion to deny extradition was appropriate. Breyer's attorney may have introduced District Court and Third Circuit findings from Breyer's denaturalization proceedings to demonstrate that his client maintained a more passive role than many of his military counterparts, and did not voluntarily levy arms against the United States.[149] Considering that the veracity of Breyer's evidence and testimony had already been subject to judicial review, his attorney may have suggested that the nature of his client's offense warranted closer examination prior to extradition. Breyer's attorney may have also argued that his client's physical characteristics indicated that a form of punishment other than international extradition was more appropriate. His attorney may have argued that at 89-years-old, Breyer's deteriorating mental and physical health[150] made him unable to withstand incarceration or international transportation without special accommodation. The attorney may have suggested that Breyer would not survive the journey to Germany, let alone incarceration in a German prison during trial. Finally and most importantly, Breyer's attorney may have argued that his client's status as an American citizen entitled him to further due process of law, particularly because Breyer's physical condition made the potential consequences of international extradition extremely grave.

While the decision to issue final certification of Breyer's extradition would remain in the discretionary power of the Secretary of State, a reformed extradition statute may have allowed Breyer's attorney to more effectively advocate on his behalf. Despite Breyer's participation in the heinous atrocities of the Holocaust, a reformed international extradition process may have provided him with adequate protections of due process to which all Americans are entitled.

B. Knox Revisited

The hypothetical circumstances surrounding the narrowly avoided extradition request for Amanda Knox also provide an example of how statutory enhancement of the judicial role in the international extradition process may permit the attorney to pursue creative arguments on his client's behalf. As an American citizen,[151] Knox fulfills the threshold requirement under the proposed statutory reform. Therefore, her attorneys could argue that Knox's exceptional circumstances warranted the court to exercise its

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[149] *Breyer*, 350 F.3d at 337.
[150] *See* Roebuck, *supra* note 56, at A1; Grant, *supra* note 87, at B1.
[151] *See* Fisher, *supra* note 98.

statutorily guided judicial discretion, and deny certification of Italy's extradition request.[152]

Under a reformed statute, Knox's attorneys could argue that the reinstatement of Knox's conviction represents a drastic procedural difference between the United States and Italian legal systems.[153] Her extradition represented an exceptional circumstance because Italian prosecutor's ability to challenge the acquittal of a criminal defendant fundamentally contradicts the Double Jeopardy Clause of the Fifth Amendment.[154] Knox's attorneys could argue that the exceptionally severe consequences facing Knox upon extradition, based merely on a narrow determination of probable cause, warranted a closer examination by the court prior to certification.[155] Finally, his attorneys could assert that the circumstances surrounding her investigation and acquittal demonstrate the need for due process of law under the United States Legal system.

The highly publicized cases of Breyer and Knox strongly illustrate the potentially severe consequences of international extradition to the American citizen. The analysis of their unique situations demonstrates how a statutorily enhanced judicial role in the international extradition process provides the attorney with creative opportunities to effectively advocate on behalf of the accused American citizen. Breyer and Knox stand as examples of how the exercise of statutorily guided judicial discretion under the proposed statutory reform may increase due process afforded to the American citizen in the international extradition proceeding before judicial certification is forwarded to the Secretary of State.

VI. CONCLUSION

In light of the potentially severe consequences of international extradition to the accused American citizen, the extradition hearing does not afford sufficient due process prior to judicial certification of a foreign extradition request. Limited judicial inquiry, restricted habeas corpus review, and the absence of other traditional notions of fundamental fairness create a need to critically evaluate the international extradition proceeding in the United States. The current statutory requirements for international extradition shackle the court and the attorneys by limiting judicial review to a determination of probable cause. An enhanced judicial role may provide the American citizen a more exacting review of individual circumstances before being subjected to an unfamiliar legal system. Statutory reform will also allow the attorney to more effectively advocate on behalf of the accused.

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[152] *See* 18 U.S.C. § 3553(a) (2006); U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-27.230 (1997).

[153] *See* Boepple, *supra* note 51 at 71.

[154] *See* U.S. CONST. amend. V; Oregon v. Kennedy, 456 U.S. 667, 671 (1982).

[155] Knox will serve the remainder of a twenty-six year prison sentence upon extradition to Italy. *See* Povoledo, *Again Found Guilty*, *supra* note 116, at A10.

Statutory enhancement of the judicial role in the international extradition proceeding serves as a practicable way to increase due process afforded to the American citizen. Through consideration of elements similar to those found in 18 U.S.C. § 3553(a)[156] and § 9-27.230 of the U.S. Attorney's Manual,[157] the court should be permitted to deny certification for international extradition upon an attorney's successful argument that the accused represents an exceptional circumstance where extradition would be inappropriate. The attorney should have the opportunity to argue that the court use its statutorily guided discretion to deny a formal request for extradition, despite the foreign sovereign establishing probable cause. Narrow statutory reform of the international extradition proceeding does not undermine congressional intent. Extradition should remain a primarily executive function. However, an enhanced judicial role and the opportunity for increased legal discourse may ensure that the executive branch is more informed of the individual's circumstances prior to making a determination.

The unique context of the highly publicized cases of Johan Breyer and Amanda Knox provide a strong illustration of how a statutorily enhanced judicial role may allow the attorney to more effectively advocate on behalf of the American citizen in the international extradition proceeding. These cases demonstrate the potentially severe consequences of international extradition to the American citizen, and provide a basis with which to analyze the effect of the reformed statute on the attorney's ability to pursue creative arguments on behalf of his client.

All Americans are entitled to due process of law under the United States Constitution, no matter how despicable the crime. Statutory reform of the judicial role in the international extradition of the American citizen will help ensure that our zeal to punish those responsible for allegedly heinous acts will not serve to compromise the "fundamental values of our glorious American tradition, including the protections guaranteed by our legal system which we fought to preserve."[158]

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[156] *See* 18 U.S.C. § 3553(a) (2006).

[157] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.230 (2007).

[158] United States v. Stelmokas, 100 F.2d 302, 343 (3d Cir. 1996) (Aldisert, J., dissenting).