A CASE FOR THE DUE PROCESS RIGHT TO A SPEEDY EXTRADITION

ARTEMIO RIVERA†

ABSTRACT

Some lower courts have held that there is no due process right to a speedy extradition. Courts ground this conclusion on categorical and formalistic arguments that ignore the current realities of extradition proceedings and the modern jurisprudence on procedural due process. These arguments are also similar to doctrines in immigration and national security law that have fallen out of favor with the Court.

This Article argues that the categorical distinctions used to consider due process challenges in extradition proceedings are inconsistent with current developments in the law of due process. It also argues that courts should apply the balancing test of Mathews v. Eldridge *when considering procedural safeguards in international extradition just as the Court has done in recent immigration and national security cases. Applying* Mathews *to issues of extradition delay shows that procedural safeguards similar to those the Court has adopted for criminal cases in* Barker v. Wingo *and* United States v. Lovasco *are appropriate in international extradition.*

† LL.M., Georgetown University (2001). Member, Criminal Justice Act Panel, District of Puerto Rico; former adjunct professor at Inter-American University Law School; admitted to practice in Puerto Rico and Washington, D.C.

Delay is the deadliest form of denial.

—C. Northcote Parkinson

I. INTRODUCTION

In *Martinez v. United States*,[1] the United States Court of Appeals for the Sixth Circuit held that treaty language in the United States-Mexico Extradition Treaty does not provide for a speedy extradition. The debate in *Martinez* focused mainly on the interpretation of a "lapse of time" provision in that treaty, and on whether that provision incorporates by reference the Speedy Trial Clause of the Sixth Amendment. Similar to the Sixth Circuit in *Martinez*, this Article discusses the right to a speedy proceeding in extradition, but not through the interpretation of treaty language. This Article argues that the Due Process Clause of the Fifth Amendment confers that right directly.

1. 828 F.3d 451 (6th Cir. 2016).

Courts acknowledge that relators, or those subject to extradition proceedings,[2] have due process rights.[3] These same courts, however, refuse to extend such rights to protect relators from the prejudices of government delay. When faced with due process issues, extradition courts generally avoid applying balancing tests, such as the one from *Mathews v. Eldrige,*[4] and instead make formalistic or categorical distinctions to reach their conclusions.[5] These categorical distinctions have led courts to hold that certain procedural safeguards demanded by relators are not required by due process. Thus, courts have refused to consider evidence of torture brought up by relators, have held that the government may establish its case partially or totally on hearsay evidence, and have refused to protect relators from pre-accusation delay.[6]

In contexts other than international extradition, however, courts regularly consider liberty interests by applying *Mathews* and similar balancing tests.[7] This Article argues that balancing is the best alternative to consider due process issues in international extradition and that its application to issues of government delay leads to the adoption of procedural safeguards similar to those adopted by the Court in *Barker v. Wingo*[8] and *United States v. Lovasco*[9] for criminal cases.

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2. The term "relator" is often used to refer to those subject to an international extradition proceeding. *See* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (6th ed. 2014). I exclude from the scope of this Article individuals who are either illegally or temporarily in the United States because these individuals do not have the same liberty interests of citizens and permanent residents to remain in the United States, and thus the Due Process Clause should not protect them with equal force. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly. Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation . . . ."). For an in-depth explanation of the differing rights of citizens and aliens in the United States see DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 1-82 (1st ed. 2003) and David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002). *See also* Zaydivas v. Davis, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

3. *See infra* note 123.

4. 424 U.S. 319 (1976).

5. *See infra* note 135 and accompanying text.

6. *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 957 (9th Cir. 2012) (holding that extradition magistrates have no duty to consider evidence of torture at the requesting country); *In re* Burt, 737 F.2d 1477, 1486 (7th Cir. 1984) (concluding that due process does not protect relators from pre-accusation delay); United States v. Kin-Hong, 110 F.3d 103, 120 (1st Cir. 1997) (concluding that there is no due process right against the admissibility of hearsay evidence in international extradition).

7. Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 890-91 (2015).

8. 407 U.S. 514 (1972).

9. 431 U.S. 783 (1977).

After briefly introducing the field of international extradition in Part II, this Article discusses in Part III the tests devised by the Court in *Barker* and *Lovasco* to consider the constitutionality of government delay in criminal proceedings. *Barker*'s test is further discussed in Part IV, but this time as part of this Article's argument that a similar test must be adopted as a procedural safeguard against the prejudices of post-accusation delay in extradition proceedings. This part argues that *Mathews v. Eldridge* should be applied to consider due process issues in international extradition, and that the application of *Mathews* to the issue of post-accusation delay suggests a *Barker*-type test as the appropriate safeguard.

Finally, Part V discusses the issue of pre-accusation delay in international extradition and argues that a *Lovasco*-type test should be adopted. Applying *Mathews* to the issue of pre-accusation delay suggests that a balancing of the government's and the relator's interests requires the application of a procedural safeguard such as *Lovasco*'s, which provides criminal defendants with some minimal protection against the harms of delayed charges.

The issue of pre-accusation delay confronts the courts with substantial conflicts of interests between the government and the relator. Of particular importance is the government interest that courts do not inquire into the legal processes of requesting countries. Non-inquiry is a legitimate legal concern, but it should not be used as the basis for a categorical denial of due process protection against pre-accusation delay. Instead, the interest in non-inquiry should be balanced against the relator's interest not to be surrendered to a foreign country for criminal prosecution and imprisonment without due process.

II. INTERNATIONAL EXTRADITION IN BRIEF

Extradition proceedings are *sui generis*.[10] They are neither civil nor criminal,[11] and thus the Federal Rules of Criminal Procedure and the Federal Rules of Evidence are not directly applicable.[12] Requests for extradition are regularly presented by the Department of Justice for the benefit of requesting countries,[13] whereas extradition hearings are normally presided over by federal magistrates or district court judges, acting on behalf of the Executive.[14] The magistrate's main du-

10. *See* BASSIOUNI, *supra* note 2, at 880 ("The hearing, though *sui generis* in nature, is similar to a probable cause hearing in federal criminal cases . . . .").

11. BASSIOUNI, *supra* note 2, at 880.

12. United States v. Kin-Hong, 110 F.3d 103, 120 (1st Cir. 1997); Martin v. Warden, Atlanta Pen, 993 F.2d 824, 828 (11th Cir. 1993).

13. BASSIOUNI, *supra* note 2, at 823-24.

14. Patterson v. Wagner, 785 F.3d 1277, 1279 (9th Cir. 2015); Hilton v. Kerry, 754 F.3d 79, 83 (1st Cir. 2014); Harshbarger v. Regan, 599 F.3d 290, 292 (3d Cir. 2010)

ties are to ensure that the requesting country has complied with all treaty requirements and that no valid defenses or exceptions should stop the extradition request.

As part of the extradition process, the government must at least establish: (1) probable cause that the relator committed the alleged offense at the requesting country;[15] (2) the offense upon which extradition is requested is extraditable according to the applicable treaty;[16] (3) the offense in question constitutes a crime at both the requesting country and the United States ("dual criminality");[17] (4) an enforceable extradition treaty exists between the United States and the requesting country;[18] and (5) the arrested individual is the person sought by the requesting country.[19]

If the government meets its burden, then the magistrate must consider any valid defenses raised by the relator. Several affirmative defenses or grounds to deny extradition have been recognized by the courts as stemming from United States extradition treaties, such as statutes of limitations,[20] double jeopardy,[21] and political offense.[22] The right to a speedy extradition has been asserted as a defense in different forms by relators, but so far unsuccessfully.[23]

Affecting the relator's chances to validly raise the speedy extradition defense is the so called rule or doctrine of "non-inquiry." Non-

("Extradition is an executive rather than a judicial function."); *Martin*, 993 F.2d at 828 ("The power to extradite derives from the President's power to conduct foreign affairs," and thus, in extradition the magistrate judge provides "an independent review function delegated to it by the Executive . . . and defined by statute.").

15. Eain v. Wilkes, 641 F.2d 504, 507-08 (7th Cir. 1981).

16. Prasoprat v. Benov, 421 F.3d 1009, 1014 (9th Cir. 2005).

17. *Kin-Hong*, 110 F.3d at 114 ("The purpose of the dual criminality requirement is simply to ensure that extradition is granted only for crimes that are regarded as serious in both countries.").

18. *Id.* at 111.

19. Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976) ("The purpose is to inquire into the presence of probable cause to believe that there has been a violation of one or more of the criminal laws of the extraditing country, that the alleged conduct, if committed in the United States, would have been a violation of our criminal law, and that the extradited individual is the one sought by the foreign nation for trial on the charge of violation of its criminal laws."). *See also* Linda Friedman Ramirez, *Evolving Extradition*, THE CHAMPION, Sept.-Oct. 2009, at 44.

20. *See* Patterson v. Wagner, 785 F.3d 1277, 1280-83 (9th Cir. 2015); Jhirad v. Ferrandina, 536 F.2d 478, 480 (2d Cir. 1976); Nezirovic v. Holt, 990 F. Supp. 2d 606, 613-19 (W.D. Va. 2014).

21. *See* Sindona v. Grant, 619 F.2d 167, 177-78 (2d Cir. 1980); Galanis v. Pallanck, 568 F.2d 234, 238-39 (2d Cir. 1977).

22. *See* Meza v. United States, 693 F.3d 1350, 1358-60 (11th Cir. 2012); Barapind v. Enomoto, 400 F.3d 744, 750-53 (9th Cir. 2005); Escobedo v. United States, 623 F.2d 1098, 1104 (5th Cir. 1980); *Nezirovic*, 990 F. Supp. 2d at 619-21; Ahmad v. Wigen, 910 F.2d 1063, 1066 (2d Cir. 1990) ("Whether an extraditee is accused of an offense of a political nature is an issue for judicial determination.").

23. *See infra* note 122.

inquiry prohibits the requested court from questioning the fairness of the requesting state's legal system[24] by "preclud[ing] extradition magistrates from assessing the investigative, judicial, and penal systems of foreign nations when reviewing an extradition request."[25] By applying this doctrine, courts have avoided consideration of the legal systems of requesting countries, even in cases where relators have claimed that they are likely to be tortured if extradited,[26] and where relators have been convicted *in absentia* at the requesting country previous to their extradition requests.[27]

Once an extradition magistrate decides that the government has complied with all statutory and treaty requirements, and that no grounds exist to deny extradition, the magistrate must certify to the Secretary of State that the relator is extraditable.[28] The Secretary of State, in turn, must use its discretion to decide whether to extradite the relator or not.[29]

One ground sometimes argued by relators is that a delay from the requesting country in filing criminal charges, or in requesting extradition, affects their right to a speedy extradition. So far this argument has been unsuccessfully underpinned on treaty rights,[30] as well as on the Fifth Amendment's Due Process Clause.[31] This Article focuses on the due process argument. To explain why the Due Process Clause should protect relators from government delay, this Article will begin discussing how delay is considered in criminal proceedings.

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24. *Martin*, 993 F.2d at 829 (stating the rule of non-inquiry "precludes extradition magistrates from assessing the investigative, judicial, and penal systems of foreign nations when reviewing an extradition request"); United States v. Howard, 996 F.2d 1320, 1329 (1st Cir. 1993) (explaining that the rule of non-inquiry requires courts to refrain from "investigating the fairness of a requesting nation's justice system").

25. *Martin*, 993 F.2d at 829-30 n.10 (stating that factors such as foreign relations or humanitarian concerns may only be considered by the Secretary of State after the court certifies the relator's extraditability).

26. Mironescu v. Costner, 480 F.3d 664, 672-73 (4th Cir. 2007).

27. *See* Gallina v. Fraser, 278 F.2d 77, 78-79 (2d Cir. 1960); Haxhiaj v. Hackman, 528 F.3d 282, 291 (4th Cir. 2008).

28. *See* 18 U.S.C. § 3184 (2012); Cornejo Barreto v. Seifert, 218 F.3d 1004, 1009 (9th Cir. 2000).

29. *Martin*, 993 F.2d at 829.

30. *See* Yapp v. Reno, 26 F.3d 1562, 1566 (11th Cir. 1994); *but see* Martinez v. United States, 793 F.3d 533, 548 (6th Cir. 2015) (holding that lapse of time protections in U.S. law are incorporated by a provision of the United States-Mexico Extradition treaty, and that the same protects relators from post-accusation prosecutorial delay), *rev'd on other grounds en banc*, 828 F.3d 451 (6th Cir. 2016).

31. *See In re* Extradition of Drayer, 190 F.3d 410, 415 (6th Cir. 1999); *In re* Burt, 737 F.2d 1477, 1486 (7th Cir. 1984).

III. CONSTITUTIONAL PROTECTIONS AGAINST GOVERNMENT DELAY IN CRIMINAL PROCEEDINGS

Federal law provides due process protection from government delay in various sources, including the Constitution, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and statutes of limitations. These protections work in tandem to create the proper effect.[32] Because these constitutional and statutory protections are specifically meant to provide criminal defendants with due process, the Fifth Amendment's Due Process Clause only protects criminal defendants in limited fashion to compliment those specific protections.[33] Thus, the Due Process Clause's protection against pre-accusation delay is very limited.[34] The Speedy Trial Clause of the Sixth Amendment, on the other hand, offers protection for delay occurring after the accusation or arrest[35] that is more generous than the one afforded by the Due Process Clause for pre-accusation delay.

Statutes of limitations form part of the mix of safeguards that shield the public from the harms of delayed prosecutions. They are legislative devices meant to protect the innocent from being charged at a time when they no longer have access to exculpatory evidence,[36] and to shield the public from untimely and ineffective prosecutions.[37] Statutes of limitations, however, are not the only means criminal defendants have to protect themselves from prejudicial delay. As the United States Court of Appeals for Eleventh Circuit explains in *Stoner v. Graddick*:[38]

> The statute of limitations is the principal device, created by the people of a state through their legislature, to protect against prejudice arising from a lapse of time between the commission of a crime and an indictment or arrest. Statutes of limitation represent legislative assessment of relative interest of the state and the defendant in administering and receiving justice. Limitations statutes, however, are not the only available protection against prejudice. The particular provisions of the Speedy Trial Clause of the Sixth Amendment are available with respect to prejudicial delay after formal indictment or information, or actual arrest.[39]

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32. *See* Medina v. California, 505 U.S. 437, 443-44 (1992).

33. *Medina*, 505 U.S. at 443-44.

34. United States v. Lovasco, 431 U.S. 783, 789 (1977) ("[T]he Due Process Clause has a limited role to play in protecting against oppressive delay.").

35. United States v. McDonald, 456 U.S. 1, 6-7 (1982); United States v. Marion, 404 U.S. 307, 320 (1971); Stoner v. Graddick, 751 F.2d 1535, 1540-41 (11th Cir. 1985).

36. *Marion*, 404 U.S. at 322.

37. *Id.*

38. 751 F.2d 1535 (11th Cir. 1985).

39. *Stoner*, 751 F.2d at 1540-41 (citations omitted) (quotations omitted).

In a case where no statute of limitations applies, or when the applicable statute of limitations has not lapsed, the Fifth Amendment's Due Process Clause protects the accused from government delay occurring from the commission of the crime to the time of the arrest or charge.[40] Due process protection, however, depends upon compliance with an onerous test first announced in *United States v. Lovasco*[41] by the United States Supreme Court.[42] Next, this Article discusses the guarantees provided by the Speedy Trial Clause for post-accusation delay and the protection afforded by the Due Process Clause when pre-accusation delay occurs. These discussions should provide a better understanding of the nature of these rights, which in turn must help in considering how government delay must be treated in international extradition.

A. Speedy Trial Rights in Criminal Proceedings

The Speedy Trial Clause of the Sixth Amendment requires that criminal defendants be promptly tried of the charges against them.[43] Federal statutes, such as the Speedy Trial Act,[44] provide further protection against delay in criminal proceedings after the arrest or the filing of charges. To determine when the Sixth Amendment demands the dismissal of charges for post-accusation delay, the Court adopted a test in *Barker v. Wingo*[45] that requires a balancing of the interests of criminal defendants and the government.[46] The test has been widely adopted by the lower courts.[47]

The constitutional right to a speedy criminal trial—a fundamental right—is based on broad due process concerns.[48] The Sixth Amendment provides in its relevant part that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."[49] The expediency required runs from the time of "arrest, indictment, or other official accusation"[50] up to the start of trial.[51] It serves as "an important safeguard to prevent undue and oppressive incarceration

40. *Marion*, 404 U.S. at 324.
41. 431 U.S. 783 (1977).
42. *See Lovasco*, 431 U.S. at 789, 795-97.
43. U.S. Const. amend. VI.
44. 18 U.S.C. § 3161 (2012).
45. 407 U.S. 514 (1972).
46. Barker v. Wingo, 407 U.S. 514, 531-33 (1972).
47. *See* United States v. Souza, 749 F.3d 74, 81-82 (1st Cir. 2014); United States v. Battis, 589 F.3d 673, 678-83 (3d Cir. 2009); United States v. Oriedo, 498 F.3d 593, 596-601 (7th Cir. 2007); United States v. Sandoval, 990 F.2d 481, 482-84 (9th Cir. 1993).
48. *See Barker*, 407 U.S. at 515 ("[T]he right to a speedy trial is 'fundamental' and is imposed by the Due Process Clause of the Fourteenth Amendment on the States.").
49. U.S. Const. amend. VI.
50. Doggett v. United States, 505 U.S. 647, 655 (1992).
51. United States v. Marion, 404 U.S. 307, 313 (1971); *Battis*, 589 F.3d at 678.

prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself."[52] Of these prejudices, impairment to the defense is considered the most important.[53]

But, not all types of delay give rise to a speedy trial defense. Delay resulting from the defendant's own actions, such as when the defendant is a fugitive or avoiding justice, is normally not counted.[54] Delay that may be attributed to reasonable efforts by the government to prosecute the defendant, or by the court to manage the case, is not counted either.[55] Ultimately, the speedy trial inquiry must be done on an *ad hoc* or case-by-case basis,[56] keeping in mind that the primary burden for providing a speedy trial is on the prosecution and the courts, not the defendant.[57]

In *Barker v. Wingo*, the Supreme Court adopted a four-factor test to evaluate speedy trial claims under the Sixth Amendment.[58] The four factors are: "[l]ength of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[59] These four factors are not exclusive of other potential considerations, and none of them are either necessary or sufficient to establish a speedy trial defense.[60] Courts must consider all factors, and all other relevant circumstances, on a case-by-case basis.[61]

The first *Barker* factor, "length of the delay," is generally measured from the time of the indictment or arrest to the time the trial begins.[62] It may be the most important factor because it acts as a "triggering mechanism."[63] "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."[64] Delays as short as one year have

52. United States v. Ewell, 383 U.S. 116, 120 (1966).
53. *Doggett*, 505 U.S. at 654.
54. *Barker*, 407 U.S. at 529 ("[I]f delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine . . . ."); *Sandoval*, 990 F.2d at 484; United States v. Blanco, 861 F.2d 773, 778-81 (2d Cir. 1988) (holding that a ten-year delay is not a cause for a speedy trial violation when the defendant remained in Colombia under an assumed name and the government diligently attempted to bring him to trial).
55. *Barker*, 407 U.S. at 531 ("[A] valid reason, such as a missing witness, should serve to justify appropriate delay.").
56. *Id.* at 530.
57. *Id.* at 529.
58. *Id.* at 529-30.
59. *Id.* at 530.
60. *Id.* at 533.
61. *Doggett*, 505 U.S. at 657-58 n.9.
62. United States v. Mendoza, 530 F.3d 758, 762 (9th Cir. 2008) ("We find that this ten-year delay creates a presumption of prejudice that triggers an inquiry into the other three factors.").
63. *Barker*, 407 U.S. at 530.
64. *Id.*

been considered presumptively prejudicial,[65] but what constitutes prejudicial delay depends on the factual context.[66] The longer delay is attributable to the government, the more weight this factor will carry for the defendant.[67] In evaluating this factor, the court must subtract the amount of delay caused by the defendant from the delay caused by the government.[68]

The second *Barker* factor considers the reasons asserted by the government to justify the delay. Different weights must be given to different types of delay. If the delay is based on a valid reason, such as that the government has been looking for a missing witness, or if the delay is attributable to the defendant, the delay will likely be justified and not considered against the government.[69] At the other extreme, delay deliberately caused by the government to hinder the defense must be weighed heavily against it.[70] In the middle of these extremes lie:

> more neutral reason[s] such as negligence or overcrowded courts[, which] should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.[71]

Government negligence is thus a sufficient basis for a speedy trial defense, but as it is less reprehensible than intentional delay, delay caused by negligence must be longer to trigger a dismissal of charges.[72] As explained by the Court in *Doggett v. United States*:[73]

> *Barker* made it clear that "different weights [are to be] assigned to different reasons for delay." Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And

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65. *See Mendoza*, 530 F.3d at 762 ("Generally, a delay of more than one year is presumptively prejudicial."); United States v. Oriedo, 498 F.3d 593, 597 (7th Cir. 2007) ("We have considered delays that approach one year presumptively prejudicial"); *Doggett*, 505 U.S. at 652 n.1. For a list of cases finding different lengths of delay sufficient to trigger the *Barker* inquiry, see Joseph Wylie, *Preliminary Proceeding: Speedy Trial*, 86 GEO. L.J. 1493, 1497 n.1272 (1998).

66. *Barker*, 407 U.S. at 522, 530-31.

67. *Doggett*, 505 U.S. at 657; *Oriedo*, 498 F.3d at 597 ("In determining the weight to give the length of the delay, we must look to the extent to which it exceeds the minimum necessary to trigger the analysis.").

68. *Doggett*, 505 U.S. at 657-58.

69. *Barker*, 407 U.S. at 531.

70. *Doggett*, 505 U.S. at 656.

71. *Barker*, 407 U.S. at 531. *See also Battis*, 589 F.3d at 679; *Doggett*, 505 U.S. at 656-57.

72. *Doggett*, 505 U.S. at 656-57.

73. 505 U.S. 647 (1992).

> such is the nature of the prejudice presumed that the weight that we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness, and its consequent threat to the fairness of the accused's trial.[74]

The third *Barker* factor weighs the defendant's assertion of speedy trial rights.[75] Demands by defendants to have their trials, or to have their charges dismissed on speedy trial grounds, weigh in their favor.[76] The defendant is expected to request trial if the delay is truly prejudicial.[77] The more insistent the defendant is on requesting a speedy trial, the more likely prejudice is to be found.[78] Failure to assert this right will weigh heavily against finding a Sixth Amendment violation, but the failure alone does not preclude constitutional protection.[79]

Finally, the fourth *Barker* factor considers whether the defendant has suffered any "prejudice" because of the delay.[80] Prejudice can take various forms, including oppressive pre-trial incarceration, anxiety and concern suffered by the accused while awaiting trial, and impairment to the defense due to dimming memories and the loss of exculpatory evidence.[81] Of these prejudices, impairment to the defense is the most harmful to a defendant, and thus important to the speedy trial analysis.[82] Under *Barker*, the defendant is not necessarily required to establish actual prejudice by proving a specific harm; prejudice may be presumed if the prosecution has been delayed for a significant period of time.[83] For instance, delay causing one year of incarceration has been presumed prejudicial.[84]

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74. *Doggett*, 505 U.S. at 657 (citation omitted).

75. *Barker*, 407 U.S. at 531-32.

76. *Id.*

77. *Id.* at 531.

78. *See* Roberto Iraola, *Due Process, the Sixth Amendment, and International Extradition*, 90 NEB. L. REV. 752, 769 (2012).

79. *Battis*, 589 F.3d at 681.

80. *Barker*, 407 U.S. at 532-33.

81. *Doggett*, 505 U.S. at 654; *Barker*, 407 U.S. at 532.

82. *Doggett*, 505 U.S. at 654 ("Of these forms of prejudice, 'the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'" (quoting *Barker*, 407 U.S. at 532)).

83. *Barker*, 407 U.S. at 530-31; *Doggett*, 505 U.S. at 651-52 ("[T]o trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay . . . ."); United States v. Pomeroy, 822 F.2d 718 (8th Cir. 1987) (citing Smith v. Hooey, 393 U.S. 374, 378-79 (1969)).

84. *Mendoza*, 530 F.3d at 762; United States v. Oriedo, 498 F.3d at 597. *See Doggett*, 505 U.S. at 652 n.1.

When the case for speedy trial protection is strong on other factors, there may be no need to prove specific instances of prejudice.[85] This is particularly important because the "impairment of one's defense is the most difficult form of speedy trial prejudice to prove as time's erosion of exculpatory evidence and testimony 'can rarely be shown.'"[86] As the Court explained in *Doggett*:

> Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay.[87]

The *Barker* test is a high bar for criminal defendants, but at least it provides a balancing scheme that allows some protection against unfair trials. Protection against the harms of pre-accusation delay, however, is much more limited.

B. Due Process Rights Against Pre-Accusation Delay in Criminal Cases

The Court has recognized due process protection against some forms of pre-accusation delay in two cases, *United States v. Lovasco*[88] and *United States v. Marion*.[89] The test that has emerged from these two cases, though, is a high bar. In *Lovasco*, the Court held that a due process defense for pre-accusation delay required proof of actual prejudice by the defendant, reasoning that it was in society's best interest not to force prosecutors to file charges as soon as they have gathered enough evidence to establish probable cause.[90] Recognizing the contextual nature of pre-accusation delay, the Court left it to the lower courts to develop a due process doctrine for considering different types of delay according to its ruling.[91] After *Lovasco*, most lower courts have applied a demanding test for pre-accusation delay that

85. *Doggett*, 505 U.S. at 655 ("[A]ffirmative proof of particularized prejudice is not essential to every speedy trial claim.").

86. *Id.* (citing *Barker*, 407 U.S. at 532).

87. *Id.* at 655-56 (citations omitted).

88. 431 U.S. 783 (1977).

89. 404 U.S. 307 (1971).

90. United States v. Lovasco, 431 U.S. 783, 789-90 (1977); United States v. Huntley, 976 F.2d 1287, 1290 (9th Cir. 1992). *See* Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 Wm. & Mary L. Rev. 607, 619 (1990).

91. *Lovasco*, 431 U.S. at 796-97.

requires proof of actual prejudice suffered by the defendant, and evidence that the government delayed the case intentionally.[92]

The Court first discussed the availability of due process protection against pre-accusation delay in *United States v. Marion*. In *Marion*, the Court held that the Sixth Amendment's Speedy Trial Clause is not applicable to pre-accusation delay, or delay accruing from the time of the offense to the time of the arrest or accusation.[93] The Court reversed the judgment of the district court, which had dismissed the charges upon motion by the defendants on due process and Sixth Amendment grounds. The defendants argued that a delay of approximately three years from the commission of the crime to the return of the indictment was unconstitutionally prejudicial, but the Court disagreed. It reasoned that because the defendants had not presented evidence of actual prejudice to the district court, they had not complied with the initial requirement to establish a due process violation.[94]

When there is only evidence of potential prejudice by the defendant, the applicable statute of limitations operates to protect the accused from charges that "may have become obscured by the passage of time . . . ."[95] Because the defendants in *Marion* failed to introduce evidence of actual prejudice, the Court ruled that they did not trigger a due process inquiry, and it refrained from adopting a due process test for pre-accusation delay. In the course of its reasoning, it did note the defendants failed to establish that "the Government intentionally delayed to gain some tactical advantage" over the defendants or "to harass them."[96] Based on this language, various lower courts have developed tests for pre-accusation delay which consist mainly of two prongs: first, proving actual prejudice by the defendant; and second, proving that the government intentionally delayed the prosecution to gain a tactical advantage over the defendant.[97] The way courts have construed actual prejudice under *Marion* requires defendants not only to show that they lost the opportunity to present witnesses or evidence, but also that the lost testimony or evidence would have benefitted them.[98] This is a very high bar.

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92. *See* United States v. Bater, 594 F.3d 51, 54 (1st Cir. 2010). *See also* 3B CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE § 805 (4th ed. 2013); Goldfarb, *supra* note 90, at 622.

93. United States v. Marion, 404 U.S. 307, 313 (1971).

94. *Marion*, 404 U.S. at 323-24.

95. *Id.* at 323.

96. *Id.* at 325.

97. Eli Dubosar, *Pre-Accusation Delay: An Issue Ripe for Adjudication by the United States Supreme Court*, 40 FLA. ST. U. L. REV. 659, 668-69 (2013).

98. *See* United States v. Corona-Verbera, 509 F.3d 1105, 1113 (9th Cir. 2007) ("Corona-Verbera's arguments are based on generalized speculation as to what lost or de-

Following *Marion*, in *Lovasco* the Court had the opportunity to clarify what exactly the due process test for pre-accusation delay should be, but it did not. The Court reaffirmed *Marion*'s holding that evidence of actual prejudice is required to establish a due process violation,[99] but failed again to define the second prong, the reason for the delay.[100] It limited its analysis to the particular facts by concluding that delay resulting from reasonable investigatory efforts by the government does not suffice to make out a due process defense.[101] The Court did cite the dictum in *Marion* regarding the value of evidence of intentional delay by the government in assessing potential due process violations for pre-accusation delay,[102] but held that the scarcity of judicial decisions on this issue disallowed it to establish a fixed test.[103] The Court thus left it to the lower courts to make that determination on a case-by-case basis.[104]

Most lower courts have construed *Marion* and *Lovasco* to require a two-prong test.[105] This test requires the defendant to prove actual prejudice, and then demands evidence that the government intentionally delayed the prosecution to gain a tactical advantage.[106] Some circuits,[107] and some state courts,[108] however, have different requirements.[109] The United States Courts of Appeals for the Fourth and Ninth Circuits have opted to balance the defendant's evidence of prejudice with the government's proffered reasons for the delay.[110] For instance, a case with strong evidence of prejudice would demand

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ceased witnesses would have said."); United States v. Wallace, 848 F.2d 1464, 1470 (9th Cir. 1988) (explaining defendant failed to establish what potential witness would have testified for the defense).

99. *Lovasco*, 431 U.S. at 789.

100. *Id.* at 796-97.

101. *Id.* ("We simply hold that in this case the lower courts erred in dismissing the indictment.").

102. *Id.* at 795. *See* United States v. Moran, 759 F.2d 777, 781 (9th Cir. 1985); Dubosar, *supra* note 97, at 670-71.

103. *Lovasco*, 431 U.S. at 796-97.

104. *Id. See Moran*, 759 F.2d at 781; Dubosar, *supra* note 97, at 670-71, 676-82.

105. *See* Dubosar, *supra* note 97, at 668-71; Goldfarb, *supra* note 90, at 623 (providing a list of circuit court decisions adopting *Marion*'s second prong).

106. Dubosar, *supra* note 97, at 668-71.

107. *Id.* at 670-71 (highlighting federal courts such as the United States Courts of Appeals for the Fourth and Ninth Circuits).

108. *Id.* at 676-77 (referring to state courts such as Alaska, California, Florida, Hawaii, Illinois, Louisiana, Maine, Montana, New Hampshire, North Dakota, Ohio, Oregon, South Carolina, Washington, and West Virginia).

109. *See id.*

110. *See* United States v. Uribe-Rios, 558 F.3d 347, 358 (4th Cir. 2009) ("First, we ask whether the defendant has satisfied his burden of proving 'actual prejudice.' Second, if that threshold requirement is met, we consider the government's reasons for the delay, 'balancing the prejudice to the defendant with the Government's justification for the delay.'") (citations omitted). *See also* Dubosar, *supra* note 97, at 670-71.

less of a showing of culpability or negligence from the government.[111] It must be remembered that neither *Marion* nor *Lovasco* held that a defendant must prove bad faith or recklessness by the government to establish a due process violation for pre-accusation delay.[112]

The government does not violate the Fifth Amendment, even if it harms the defendant, when it reasonably protracts the investigation to obtain evidence of guilt beyond reasonable doubt or to investigate other suspects.[113] The Court supports this conclusion on policy arguments that the public must be protected from unwarranted charges, and that the government has the right to prosecute those suspected of crimes.[114] Forcing the government to file charges as soon as it obtains enough evidence to prove probable cause is likely to "increase the likelihood of unwarranted charges," "would add to the time during which defendants stand accused but untried[,]"[115] and would cause "potentially fruitful sources of information to evaporate before they are fully exploited" by the government.[116] Additionally, requiring the government to file charges immediately "would cause scarce resources to be consumed on cases that prove to be insubstantial, or that involve only some of the responsible parties or some of the criminal acts."[117]

Unlike the *Barker* safeguard for post-accusation delay, the due process test for pre-accusation delay is yet to be settled. Most lower courts in the federal system apply the rigid two-prong test originally suggested in *Marion*, but the same is not consistently applied by all federal circuits and state courts.[118]

Issues of delay in international extradition should be informed by the relevant doctrines of criminal law as extradition is a quasi-criminal procedure,[119] but distinguished by the particular context of extradition proceedings. Ultimately, principles of due process should control the treatment of government delay in international extradition because of the substantial deprivation of liberty interests involved.

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111. *See* Dubosar, *supra* note 97, at 670-71.
112. *Moran*, 759 F.2d at 781.
113. *Lovasco*, 431 U.S. at 790-92.
114. Goldfarb, *supra* note 90, at 655-56 (arguing that the *Lovasco* test violates the principles of due process adopted and explained in *Mathews*).
115. *Lovasco*, 431 U.S. at 791.
116. *Id.* at 792.
117. *Id.*
118. Dubosar, *supra* note 97, at 668-71.
119. *See* BASSIOUNI, *supra* note 2, at 780.

IV. DUE PROCESS REQUIRES PROTECTION AGAINST POST-ACCUSATION DELAY IN INTERNATIONAL EXTRADITION

Constitutional clauses addressing criminal defendants do not protect relators because extradition is not a criminal procedure.[120] More specifically, lower courts have held that the Sixth Amendment's right to a speedy trial, and *United States v. Lovasco*'s[121] due process right against pre-accusation delay, are limited to criminal proceedings and do not apply to international extradition.[122] Most courts, however, have held that relators enjoy due process rights.[123] Relators must be afforded due process protection against pre-accusation and post-accusation delay mainly because of the heavy liberty interests involved in international extradition,[124] and because passage of time affects the

120. Martin v. Warden, 993 F.2d 824, 828 (11th Cir. 1993); Sabatier v. Dabrowski, 586 F.2d 866, 869 (1st Cir. 1978); Jhirad v. Ferrandina, 536 F.2d 478, 485 n.9 (2d Cir. 1976).

121. 431 U.S. 783 (1977).

122. *In re* Extradition of Drayer, 190 F.3d 410, 415 (6th Cir. 1999) (regarding post-accusation delay); McMaster v. United States, 9 F.3d 47, 49 (8th Cir. 1993) (concerning post-accusation delay); *In re* Burt, 737 F.2d 1477, 1486 (7th Cir. 1984) (regarding pre-accusation delay); *Jhirad*, 536 F.2d at 485 n.9; *In re* Ortiz, No. 10-MJ-2016, 2011 U.S. Dist. LEXIS 87426, at *17 (S.D. Cal. Feb. 9, 2011). *But see In re* Mylonas, 187 F. Supp. 716, 721 (N.D. Ala. 1960) ("[L]apse of time" provision in extradition treaty incorporates "speedy trial as spelled out in the Sixth Amendment"); Martinez v. United States, 793 F.3d 533, 555 (6th Cir. 2015) (holding that extradition treaty with Mexico incorporates the speedy trial protection of the Sixth Amendment), *rev'd on other grounds en banc*, 828 F.3d 451 (6th Cir. 2016); BASSIOUNI, *supra* note 2, at 780 ("Extradition is *sui generis*, but partakes of a criminal nature and, therefore, [speedy trial rights] should apply.").

123. *Martinez*, 793 F.3d at 556 ("Courts have unanimously held that the government is bound by principles of due process in its conduct of extradition proceedings."), *rev'd on other grounds en banc*, 828 F.3d 451 (6th Cir. 2016); Valenzuela v. United States, 286 F.3d 1223, 1229 (11th Cir. 2002) ("[T]he judiciary must ensure that the constitutional rights of individuals subject to extradition are observed."); United States v. Kin-Hong, 110 F.3d 103, 106 (1st Cir. 1997) ("[E]xtradition proceedings before United States courts [must] comport with the Due Process Clause of the Constitution."); *Martin*, 993 F.2d at 829; Sayne v. Shipley, 418 F.2d 679, 686 (5th Cir. 1969); *In re* Gonzalez, 52 F. Supp. 2d 725, 740 (W.D. La. 1999); Maguna-Celaya v. Haro, 19 F. Supp. 2d 1337, 1342 (S.D. Fla. 1998); *In re* Koskotas, 127 F.R.D. 13, 27 (D. Mass. 1989) ("Koskotas is certainly entitled to a hearing prior to extradition under the Due Process Clause . . . ."); *In re* Singh, 123 F.R.D. 108, 125 (D.N.J. 1987) ("*Sayne* and *Escobedo* confirm that a defendant in an extradition proceeding has a due process right to a hearing before being extradited."). *See* Artemio Rivera, *Probable Cause and Due Process in International Extradition*, 54 AM. CRIM. L. REV. 131, 147 (2017); Jacques Semmelman, *The Rule of Non-Contradiction in International Extradition Proceedings: A Proposed Approach to the Admission of Exculpatory Evidence*, 23 FORDHAM INT'L L.J. 1295, 1300 (2000) ("The extradition magistrate is charged with protecting the accused's due process rights, and the extradition hearing is the primary vehicle through which the accused is accorded due process."). *But see McMaster*, 9 F.3d at 48-49 (disclaiming due process rights in extradition unless government requests extradition on the basis of race, sex, creed, or other exceptional constitutional limitation); Kamrin v. United States, 725 F.2d 1225, 1227 (9th Cir. 1984).

124. Demjanjuk v. Petrovski, 10 F.3d 338, 353 (6th Cir. 1993).

opportunity of relators to defend against an extradition request. When considering the propriety of any procedural safeguard against extradition delay, courts must assess it through the balancing test of *Mathews v. Eldridge*[125] as it is the generally accepted means to assess procedural due process challenges.

Just as in criminal proceedings, extradition delay may be divided into two main types: the one that occurs in the requesting country prior to the filing of criminal charges, or pre-accusation delay, and the one that takes place afterwards, or post-accusation delay. Relators have argued for protection against post-accusation and pre-accusation delay based on the Fifth Amendment's Due Process Clause[126] and on treaty language.[127] So far, the lower courts have denied protection against extradition delay regardless of the basis for relief, and the Supreme Court has yet to rule on the issue. Recently, the United States Court of Appeals for the Sixth Circuit considered whether the "lapse of time" clause of the United States-Mexico Extradition Treaty incorporates speedy extradition rights from the Sixth Amendment.[128] After one of its panels construed the clause to provide such rights,[129] the circuit court, sitting *en banc*, vacated[130] the panel decision and later construed the treaty's lapse-of-time clause not to provide relief for post-accusation delay.[131] Both opinions engage in lengthy discussions on treaty construction to base their conflicting decisions.

When considering issues of due process and extradition delay, however, courts have engaged in little or no analysis, applied formalistic distinctions, and avoided balancing the conflicting interests of government and relator.[132] Next, this Article argues that safeguards similar to those adopted in *Barker v. Wingo*[133] and *Lovasco* for delay in criminal cases must also be implemented in international extradition.

A. Courts Should Apply *Mathews*'s Balancing Test in International Extradition

Balancing is the appropriate method to assess the constitutionality of procedural safeguards in extradition proceedings because it con-

125. 424 U.S. 319 (1976).
126. *See In re Drayer*, 190 F.3d at 415 (citing *Martin*, 993 F.2d at 830); *McMaster*, 9 F.3d at 48-49; *In re Burt*, 737 F.2d at 1487.
127. Martinez v. United States, 828 F.3d 451 (6th Cir. 2016) (en banc); *In re Burt*, 737 F.2d at 1485-86.
128. *Martinez*, 793 F.3d at 548.
129. *Id.*
130. *See id.*
131. *Martinez*, 828 F.3d at 458.
132. *See infra* note 135 and accompanying text.
133. 407 U.S. 514 (1972).

siders the constitutionally protected liberty interests of relators and allows courts to evaluate if a proposed procedural safeguard impinges excessively on the government's interests. Past are the days when courts deferred blindly to the executive in all matters touching on national security, mostly when the issue is procedural.[134]

As lower courts have done in international extradition,[135] the Court has addressed issues of procedural due process in immigration and national security cases by applying formalistic and categorical distinctions, rather than balancing conflicting interests.[136] While this has been true for over a century, recently the Court has adopted the balancing test of *Mathews v. Eldridge*[137] in various immigration and national security cases.[138] International extradition, however, remains to benefit from such developments.

While extradition proceedings afford very little process,[139] relators face tremendous limitations to their liberty.[140] In this context, protection from the consequences of stale charges is an imperative of due process.[141] The balancing test adopted in *Mathews* has been ap-

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134. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 528-29 (2004) (applying *Mathews* to consider whether military detainee was afforded sufficient process through habeas corpus); Landon v. Plasencia, 459 U.S. 21, 34 (1982) (stating *Mathews* applied in exclusion proceeding to assess sufficiency of procedure).

135. Trinidad y Garcia v. Thomas, 683 F.3d 952, 983 (9th Cir. 2012) ("The process due here is that prescribed by the statute and implementing regulation . . . .") (internal quotations omitted); United States v. Kin-Hong, 110 F.3d 103, 120 (1st Cir. 1997) (holding that relators are afforded due process because their "liberty interests are protected by the very existence of 'an unbiased hearing before an independent judiciary'" (citing *In re* Kaine, 55 U.S. (14 How.) 103, 113 (1852))); *In re* Burt, 737 F.2d 1477, 1486 (7th Cir. 1984) (holding that no due process right exists in extradition against prejudice from pre-accusation delay because roles of the executive in extradition and criminal proceedings are different); Schmeer v. Warden of the Santa Rosa County Jail, No. 3:14cv285, 2014 U.S. Dist. LEXIS 150726, at *11-12 (N.D. Fla. Aug. 25, 2014) (denying relator's due process claim by asserting doctrine that relators are not allowed to contradict the government's case, without any discussion of constitutional law); Hidalgo v. Holder, No. 2:11-CV-308, 2011 U.S. Dist. LEXIS 123777, at *11 (D. Utah Oct. 25, 2011). The court in *Hidalgo* stated:

> Petitioner's due process claim fails because . . . the Supreme Court has held that petitioners do not have a right to introduce evidence at an extradition proceeding because, if this were recognized as the legal right of the accused in extradition proceedings, it would give petitioners the option of insisting upon a full hearing and trial of their case in the United States.

Hidalgo, 2011 U.S. Dist. LEXIS 123777, at *11; Gill v. Imundi, 747 F. Supp. 1028, 1039-41 (S.D.N.Y. 1990) (denying due process claim without any constitutional analysis).

136. *See* Landau, *supra* note 7, at 885 ("The Supreme Court's application of *Mathews* and subsequent developments have undermined much of the exceptionalism that defined more than a century of prior immigration and national security rulings.").

137. 424 U.S. 319 (1976).

138. *See* Landau, *supra* note 7, at 885.

139. *See infra* notes 215-220 and accompanying text.

140. *See infra* note 209 and accompanying text.

141. *See* Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 536 (2009) (arguing that the Court's construction of the Sixth Amend-

plied by the Court to a variety of procedures where liberty interests are at stake,[142] including criminal procedure,[143] the involuntary confinement of mental patients,[144] prison discipline,[145] deportations,[146] and national security.[147] Additionally, the military and the Department of Justice ("DOJ") have recently adopted *Mathews* to decide issues of "targeted killing."[148] The decision to attack an individual suspected of being an enemy of the state depends less now on whether the individual belongs to a certain enemy group, such as the Islamic State of Iraq and Syria ("ISIS"), and more on the weight of the evidence pointing to the target's individual guilt.[149] *Mathews*'s wide adoption by the Court, the military, and the DOJ, shows its reliability as a due process test to assess liberty interests, and suggests its propriety in international extradition.

1. The Trend from Categorical Approaches to Balancing in Immigration and National Security Cases

The Court has used categorical approaches to consider due process claims in immigration cases[150] similar to the ones regularly used in extradition. Instead of balancing interests, immigration's "plenary power doctrine" defers to Congress the procedural rights of aliens.

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ment is protective of the accuracy of the criminal judicial system and concerned with prejudice for the defendant, rather than just intent on providing a right to a speedy trial; and that such construction has entangled the Speedy Trial Clause of the Sixth Amendment with the Due Process Clause of the Fifth Amendment).

142. *See* Landau, *supra* note 7, at 890-91.

143. Ake v. Oklahoma, 470 U.S. 68, 70 (1985) (deciding whether due process requires the government to provide legal assistance and access to a psychiatric examination to an indigent defendant who seeks to use the insanity defense at trial).

144. Zinermon v. Burch, 494 U.S. 113, 129 (1990); Addington v. Texas, 441 U.S. 418, 425 (1979).

145. Wilkinson v. Austin, 545 U.S. 209, 211 (2005).

146. *See Plasencia*, 459 U.S. at 34 ("In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures, rather than additional or different procedures." (citing Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976))); Khouzan v. Chertof, 549 F.3d 235, 257 (3d Cir. 2008) ("First, an alien facing removal 'is entitled to factfinding based on a record produced before the decisionmaker and disclosed to him or her.' This includes a 'reasonable opportunity to present evidence on [his or her] behalf.'") (citations omitted). *See also* Landau, *supra* note 7, at 890-91; Rivera, *supra* note 123, at 152.

147. *See Hamdi*, at 537; Boumediene v. Bush, 553 U.S. 723, 734 (2008).

148. *See* Landau *supra* note 7, at 927-28 (citing DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 2, 5-6 (Nov. 8, 2011), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dept-white-paper.pdf.).

149. *Id.*

150. *Id.* at 894-95 ("Court rulings emphasized categorical questions of territoriality, citizenship, and sovereignty to resolve whether non-citizens could claim the law's protection.").

This approach has much to do with the expertise of the political branches in matters of immigration, and the Court's interest not to interfere with their political judgments.[151] In *United States ex rel Knauff v. Shaughnessy*,[152] for example, the United States Supreme Court approved of the process afforded to an immigrant by declaring that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien . . . is concerned."[153] The plenary power doctrine has been applied by the courts for more than a century based on the premise that Congress has almost unlimited power to decide over the well-being of immigrants,[154] and on the national security and foreign relations foundations of immigration law.[155] Despite these considerations, the Court has recognized the weight of immigrants' liberty interests and is moving away from categorical distinctions in the consideration of their due process rights.[156]

In *Landon v. Plasencia*,[157] the United States Supreme Court considered whether the Immigration and Naturalization Service ("INS") afforded due process to an alien at an exclusion hearing.[158] Plasencia, a permanent resident alien, travelled from the United States to Mexico for two days.[159] During her brief stay in Mexico, Plasencia met with several Mexican and Salvadoran nationals and agreed to assist them in entering illegally to the United States.[160] When Plasencia attempted to cross the international border into the United States, the INS found six non-resident aliens inside her car. At Plasencia's exclusion hearing, the immigration law judge placed the burden of proof on her to establish that she was not excludable.[161] The hearing was held

151. *Id.* at 894-95. *See generally* Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507 (2011) (supporting deference to the executive in matters of foreign relations law); Derek Jinks & Neal Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1234 (2007) (criticizing "increased judicial deference to the executive in the foreign relations domain . . . .").

152. 338 U.S. 537 (1950).

153. United States *ex rel.* Knauff v. Shaughnessey, 338 U.S. 537, 544 (1950).

154. *See* Landau, *supra* note 7, at 890-91.

155. *Id.* at 892-93 (citing Fong Yue Ting v. United States, 149 U.S. 698, 705-06 (1893)).

156. *Id.* ("A decade after *Goldberg*, however, the Supreme Court transplanted *Mathews*'s core balancing test to cases of removal and, two decades after that, to the question of habeas access for Guantanamo detainees and the judicial review of their status hearings.").

157. 459 U.S. 21 (1982).

158. Landon v. Plasencia, 459 U.S. at 25 ("The deportation hearing is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission.").

159. *Plasencia*, 459 U.S. at 23.

160. *Id.*

161. *Id.* at 24.

the same day that she was detained at the international border,[162] and even though she was told by the judge of her right to legal representation, the judge did not inform her that there was free legal counsel available.[163]

In holding that Plasencia enjoyed due process rights at her exclusion hearing, the Court considered the conflicting interests of the parties.[164] Citing *Mathews v. Eldridge*, it recognized the weight of the government's "interest in efficient administration of the immigration laws at the border" and concluded that the United States's sovereign prerogative, "largely within the control of the Executive and the Legislature[,]" must weigh heavily in the government's favor.[165]

Balancing conflicting interests must not be cause to displace congressional choices of policy, the Court concluded.[166] "The role of the judiciary is limited to determining whether the *procedures* meet the essential standard of fairness under the Due Process Clause . . . ."[167] In *Plasencia,* the Court did not establish the precise contours of the procedure that the INS owed Plasencia, or whether the process she was afforded complied with due process. It did make clear, however, that *Mathews* is a proper method to assess liberty interests in the context of an exclusion hearing.[168] The categorical doctrine of plenary power was recognized as a heavy weight in the balancing analysis, but was reduced to a factor rather than the only consideration.[169] *Plasencia* is a good example of how courts may balance government and liberty interests without recurring to archaic-categorical doctrines.

In the military detention context, one case that applies *Mathews* to circumstances somewhat similar to those of international extradition is *Hamdi v. Rumsfeld*.[170] *Hamdi* deals with a request for habeas relief by an individual charged as an "enemy combatant" by the military. As relators in international extradition, detainees in military

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162. *Id.* at 39.

163. *Id.* at 36.

164. *Id.* at 34 ("In evaluating the procedures in any case, the court must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.").

165. *Id*. at 34.

166. *Id.* at 35.

167. *Id.* at 34-35 (emphasis added).

168. *Id.* at 34.

169. *Id.*

170. 542 U.S. 507 (2004). *See also* Boumediene v. Bush, 553 U.S. 723, 781 (2008) ("The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context.").

detention are initially processed by the executive, face considerable constraints on their liberty, and are afforded very little process.[171] The Court's plurality in *Hamdi* applied *Mathews* to the habeas review of military detention proceedings and held that the military owed the detainees a meaningful opportunity to contest the government evidence.[172] In the opinion, authored by Justice O'Connor, she concluded:

> The *ordinary* mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law" . . . is the test that we articulated in *Mathews v. Eldridge* . . . .[173]

In addition to the Court's opinions in *Hamdi* and *Plasencia*, the armed forces and the DOJ have adopted *Mathews* to determine when to use lethal force on individual targets.[174] For example, one DOJ report recognizes that when the government targets a United States citizen in a lethal operation, *Mathews* is the proper standard to assess the interests of individuals on their life against the government interest "in forestalling the threat of violence and death to other Americans . . . ."[175] The DOJ's use of *Mathews* to consider use-of-lethal-force issues shows one more time the propriety of balancing to assess the liberty interests of individuals against the national security interests of the government.

2. Mathews *in Criminal Procedure*

While courts have applied *Mathews* to a wide variety of contexts, criminal procedure remains an exception. In criminal proceedings, *Mathews* has been adopted,[176] but in limited fashion.[177] The Court has taken the position that the Due Process Clause should not be directly applied to criminal proceedings because criminal defendants are already protected by those clauses in the Bill of Rights specifically

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171. Note that both military detention and international extradition are executive proceedings. For a discussion of habeas corpus in international extradition and *Hamdi*'s implications on extradition habeas see Artemio Rivera, *The Consideration of Factual Issues in Extradition Habeas*, 83 U. CIN. L. REV. 809 (2015).

172. *Hamdi*, 542 U.S. at 537.

173. *Id.* at 528-29 (emphasis added) (quoting U.S. CONST. amend. V).

174. *See* Landau, *supra* note 7, at 928-29.

175. *Id.* at 927-28 (citing DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 2, 5-6 (Nov. 8, 2011), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dept-white-paper.pdf.).

176. *See* Ake v. Oklahoma, 470 U.S. 68, 77 (1985); United States v. Raddatz, 447 U.S. 667, 677 (1980).

177. *See* Medina v. California, 505 U.S. 437, 443-44 (1992).

addressed at them.[178] The Constitution protects only procedural infractions that violate "fundamental fairness," and those procedural infractions are addressed by clauses in the Bill of Rights specifically concerned with criminal procedure.[179] As the United States Supreme Court explained in *Medina v. California*:[180]

> In our view, the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process . . . .
>
> In the field of criminal law, we "have defined the category of infractions that violate 'fundamental fairness' very narrowly" based on the recognition that, "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order. As we said in *Spencer v. Texas*, 385 U.S. 554, 564, 87 S. Ct. 648, 653, 17 L. Ed. 2d 606 (1967), "it has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure."
>
> *Mathews* itself involved a due process challenge to the adequacy of administrative procedures established for the purpose of terminating Social Security disability benefits, and the *Mathews* balancing test was first conceived to address due process claims arising in the context of administrative law. Although we have since characterized the *Mathews* balancing test as "a general approach for testing challenged state procedures under a due process claim," and applied it in a variety of contexts . . . [,] we have invoked *Mathews* in resolving due process claims in criminal law cases on only two occasions.[181]

Medina shows that the Court's reluctance to apply *Mathews* to criminal procedure is based on its idea that courts should avoid tinkering with the balance struck in the Constitution between protecting the liberty interests of criminal defendants and allowing the government to enforce criminal laws. The limitations imposed in *Medina*,

178. *See Medina*, 505 U.S. at 443 ("Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." (citing Dowling v. United States, 493 U.S. 342, 352 (1990))).

179. *Id.*

180. 505 U.S. 437 (1992).

181. *Medina*, 505 U.S. at 443-44 (internal citations omitted).

however, are not applicable to international extradition. Because extradition is not a criminal procedure, the only provision of the Bill of Rights directly applicable is the Due Process Clause. [182] Thus, unlike in criminal proceedings, applying *Mathews* and the Due Process Clause in international extradition creates no conflict with other provisions of the Bill of Rights. [183]

3. Extradition Courts Should Adopt Mathews*'s Balancing Scheme When Considering Due Process Claims*

A few courts have considered whether due process demands protection from extradition delay.[184] These courts have generally applied categorical distinctions, rather than interest balancing, to deny relators' requests for procedural protection.[185] The distinctions drawn are based either on premises that ignore the current realities of international extradition, or on analyses that improperly focus on the criminal proceeding at the requesting country. Proper consideration of the realities of extradition procedure and an adequate focus on the extradition proceeding in the United States suggest that a *Mathews*-type balancing scheme should be used to consider any proposed procedural safeguard.

One means used by courts to deny due process claims is by distinguishing extradition from criminal cases and concluding that constitutional provisions specifically addressed at criminal defendants do not protect relators.[186] Because international extradition is not a criminal proceeding, courts have concluded that relators should not be provided through the Fifth Amendment what the Sixth Amendment cannot provide directly.[187] This argument is partially correct; international extradition is not a criminal procedure. But precisely because extradition is not a criminal procedure, the argument is misplaced. By expanding the reach of the Sixth Amendment through the Fifth Amendment in a criminal proceeding, a court may disrupt the balance established by the Constitution,[188] but applying the Fifth Amendment in extradition to protect relators from government delay would disrupt nothing about the Sixth Amendment as the Sixth Amendment is not applicable to extradition in the first place. Another

182. *See supra* note 123 and accompanying text.
183. The dissenters' opinions in *Hamdi*, however, criticized the adoption of *Mathews* in the national security setting. *See Hamdi*, 542 U.S. at 575-76 (Scalia, J., dissenting); *see id*. at 579, 594 n.5 (Thomas, J., dissenting).
184. *See infra* notes 231, 286-287, and accompanying text.
185. *Id.*
186. Martin v. Warden, 993 F.2d 824, 829 (11th Cir. 1993).
187. *Martin*, 993 F.2d at 829.
188. *See* Medina v. California, 505 U.S. at 443-44.

means to deny due process requests is the misguided-categorical rule that adding any procedural safeguard to the extradition process would turn international extradition into a trial-like process.[189] While the interest of not turning the extradition process into a criminal trial is legitimate, requesting countries are afforded vast procedural advantages in international extradition. Thus, requesting countries are allowed to present their cases totally or partially through hearsay evidence; the evidence of criminality introduced by the parties is assessed through a low level standard of proof—probable cause; relators are not allowed to contradict the government's evidence; compliance with the Federal Rules of Criminal Procedure and the Federal Rules of Evidence is not required; and if the extradition request is denied, the government may refile its request because the doctrines of double jeopardy and *res judicata* are not applicable.[190] These tremendous advantages ease the extradition process for the requesting country. Their existence would normally deny the argument that adding a simple safeguard would turn the extradition proceeding into a trial-like procedure.

Government-delay issues are not a particularity of extradition proceedings. Courts deal with these regularly in criminal cases.[191] Thus, any objection that a court would be unduly interfering with foreign relations by applying a procedural safeguard against extradition delay should be viewed with skepticism. Because courts are properly equipped to handle procedural issues, and extradition magistrates have wide discretion in conducting their proceedings,[192] it should not be a concern that the courts' application of a test similar to those of *Barker v. Wingo*[193] or *United States v. Lovasco*[194] would constitute interference with matters in which the executive branch has more expertise.

Due process rights accrue whenever the government intends to deprive people of substantial liberty or property interests. Even though no court to date has categorically applied *Mathews* to assess due process compliance in international extradition, the nature of ex-

189. *See infra* note 221.

190. *See infra* notes 215-220.

191. *See supra* notes 43-47, 88-89, 97 and accompanying text.

192. *See* Santos v. Thomas, 830 F.3d 987, 992 (9th Cir. 2016) (en banc) ("The '[a]dmission of evidence proffered by the fugitive at an extradition proceeding is left to the sound discretion of the court, guided of course by the principle' that a fugitive's right to introduce evidence rebutting probable cause is limited to introducing evidence that is 'explanatory,' but not 'contradictory.'" (quoting Hooker v. Klein, 573 F.2d 1360, 1369 (9th Cir. 1978))).

193. 407 U.S. 514 (1972).

194. 431 U.S. 783 (1977).

tradition proceedings demands its application.[195] *Mathews* is generally applied to consider procedural legitimacy when liberty interests are at issue,[196] and the strong liberty interests of relators, who face imprisonment and criminal prosecution at the requesting country,[197] suggest its applicability. Unlike criminal procedure, which is guided and constrained by various constitutional provisions,[198] constitutional protection in the extradition process is, so far, only afforded by the Fifth Amendment's Due Process Clause.[199] Applying the Due Process Clause in international extradition creates no conflict with other constitutional provisions, and thus there is no reason to deny its protections in matters of government delay.

By balancing the parties' conflicting interests, a court may assess the pros and cons of a proposed safeguard and whether adding it to the already-available process would convert an extradition process into a trial-like procedure. A categorical approach that simply rejects a proposed-procedural safeguard on the grounds that extradition is not a criminal procedure, or that extradition proceedings must not be converted into trial-like processes, is inadequate to protect the strong liberty interests of relators and is based on the false assumption that relators already receive substantial procedural protections.

B. Due Process Requires Applying a *Barker*-Type Safeguard Against Post-Accusation Delay

"The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'"[200] In practice, the question of whether the process afforded provides the individual the required opportunity to contest the government's case arises when the individual requests some procedural safeguard, such as the application of a higher standard of proof or the opportunity to endeavor in some sort of discovery. To determine whether the process afforded provides the required op-

195. *But see* Parretti v. United States, 122 F.3d 758, 778 (9th Cir. 1997) (balancing governmental and individual interests to conclude that relators enjoy a due process right to bail under the Fifth Amendment and stating, "[s]uch carefully limited exceptions [to liberty, which is the norm,] are permitted only when the government's interest is 'sufficiently weighty' to subordinate 'the individual's strong interest in liberty' to 'the greater needs of society.'"), *withdrawn, and dismissed on other grounds*, 143 F.3d 508 (9th Cir. 1998). For additional discussion on the applicability of *Mathews* to international extradition, see Rivera, *supra* note 123.

196. *See supra* notes 141-146.

197. *See infra* note 209 and accompanying text.

198. *See supra* notes 178-181 and accompanying text.

199. *See supra* note 123.

200. Mathews v. Eldridge, 424 U.S. 319, 348-49 (1976) (citing Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)).

portunity, the *Mathews v. Eldridge*[201] test balances the interests of government and individual, and assesses the costs and benefits of adopting the proposed safeguard.[202] Applying *Mathews* to international extradition suggests that the heavy liberty interests of relators, combined with the little procedural protections they are afforded, requires courts to apply a test similar to *Barker v. Wingo*'s[203] to protect relators from the prejudices of post-accusation delay.

Mathews first requires that the court weigh the type of loss that the individual would suffer because of the intended governmental action and the likely permanence of that loss.[204] Second, the court must consider the risk of erroneously depriving the individual's private interests through the currently available procedures and the probable value, if any, of the proposed procedural safeguard.[205] Finally, *Mathews* requires consideration of the government's interest in depriving the individual's liberty or property.[206] This final factor includes an assessment of the governmental function involved and the fiscal and administrative burdens that would be required to provide the proposed procedural safeguard.[207]

Applying the first *Mathews* factor to international extradition shows that relators have extraordinary liberty interests at risk.[208] Relators normally suffer hardships similar to those experienced by criminal defendants, but additionally they suffer the anxiety, stigma, and difficulties that come from losing their jobs or means of income, being separated from family members and friends in the United States, and being forcefully transferred to a foreign country.[209] Because these hardships—including being forced out of the country for criminal prosecution and imprisonment—are not mere inconveniences, but substantial losses of liberty, the first factor clearly weighs in favor of applying *Barker*.

Consideration of *Mathews*'s second factor[210]—the risk of erroneously depriving the individual's private interests through the currently available procedures and the probable value, if any, of the

201. 424 U.S. 319 (1976).
202. *Mathews*, 424 U.S. at 328-33.
203. 407 U.S. 514 (1972).
204. *Mathews*, 424 U.S. at 335; Santosky v. Kramer, 455 U.S. 745, 758 (1982).
205. *Mathews*, 424 U.S. at 335.
206. *Id*.
207. *Mathews*, 424 U.S. at 335.
208. *See* Demjanjuk v. Petrovski, 10 F.3d 338, 353 (6th Cir. 1993). *See also* United States v. Marion, 404 U.S. 307, 320 (1971) (explaining that a formal accusation may "interfere with the defendant's liberty, . . . disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends.").
209. *Id.*
210. *Mathews*, 424 U.S. at 335.

proposed procedural safeguard—also lends support to the conclusion that a *Barker*-type test is the right fit to consider post-accusation delay in extradition. Courts have consistently held that government delay can affect the reliability of criminal proceedings and may cause wrongful convictions.[211] Government delay can have a similar effect to the reliability of an extradition proceeding by diminishing the relator's ability to introduce treaty-based defenses,[212] or to confront the government's evidence of probable cause.[213] Requiring the Executive and the requesting country to speed up their extradition procedures reduces the risk of both fading memories and lost documents and witnesses, thus increasing the reliability of the whole extradition process.

Courts should apply *Barker* in international extradition because the current process is insufficient for the tremendous liberty interests at stake, and the dearth of process promotes unreliability. A quick view at extradition procedure shows the unusual advantages afforded to requesting countries while relators receive little process.[214] For example, extradition case law allows the government to prove its case through a low standard of proof, "probable cause";[215] the case may be proven, in whole or in part, through hearsay evidence;[216] relators are not allowed to contradict the government's evidence;[217] the government may refile its case if it is denied certification because the doctrines of double jeopardy and *res judicata* are not applicable;[218] and

211. *See* Barker v. Wingo, 407 U.S. 514, 532 (1972) (explaining that among the harms produced by unreasonable delay between formal accusation and trial is "the possibility that the [accused's] defense will be impaired" by dimming memories and loss of exculpatory evidence); Doggett v. United States, 505 U.S. 647, 654 (1992) (concluding that the most serious form of prejudice arises when the accused's defense is impaired by unreasonable government delay).

212. *In re* Mylonas, 187 F. Supp. 716, 721 (N.D. Ala. 1960).

213. *See generally* Rivera, *supra* note 123.

214. Sayne v. Shipley, 418 F.2d 679, 685 (5th Cir. 1969) ("[T]he procedural framework of international extradition gives to the demanding country advantages most uncommon to ordinary civil and criminal litigation.") (internal quotations omitted).

215. I add the quotation marks because the standard actually used by extradition magistrates is lower than the probable cause standard used in the preliminary hearings of criminal cases in federal courts, which itself is a low standard of proof. *See* Rivera, *supra* note 123, at 166-67.

216. Collins v. Loisel, 259 U.S. 309, 317 (1922) (stating evidence at an extradition hearing may consist entirely of hearsay).

217. Santos v. Thomas, 779 F.3d 1021, 1024 (9th Cir. 2015) ("A person facing extradition may present evidence that 'explains away or completely obliterates probable cause . . . whereas evidence that merely controverts the existence of probable cause, or raises a defense, is not admissible.'") (citation omitted); *see* Semmelman, *supra* note 123; Rivera, *supra* note 123 (arguing the unconstitutionality of the doctrine of non-contradiction).

218. Collins v. Loisel, 262 U.S. 426, 429 (1923) (concluding that doctrine of double jeopardy is not applicable to international extradition); Brown v. Allen, 344 U.S. 443, 458 (1953) (concluding that doctrine of *res judicata* is not applicable to habeas proceedings).

the Federal Rules of Criminal Procedure and of Evidence are not mandatory.[219] Applying a *Barker*-type test would lower the risk of erroneous extraditions by disallowing it where there is evidence of substantial government delay and of bad faith or negligence by the requesting or requested governments.

Finally, the third *Mathews* factor requires the court to weigh the nature of the government's interest in extraditing the relator and the fiscal and administrative burdens that applying *Barker* to international extradition would entail. In international extradition the government's main interest is to fulfill its treaty duties, which include not forcing the requesting country into a trial-like procedure in the United States.[220] Facilitating the extradition of those accused or convicted of crimes in requesting countries is without question a valid interest. That interest, however, is more than served by the current process, which provides the requesting country substantial procedural advantages and allows relators very little process.[221]

Barker would require the requesting country to answer why it delayed in requesting extradition and would demand that it be reasonably expeditious. This is not a burden substantial enough to counter the strong liberty interests of relators and the added reliability that *Barker* adds to the proceedings. The requesting country can always excuse its delay on reasonable grounds. What is a reasonable delay for a particular case should be decided on a case-by-case basis as is the case in American criminal law.[222] A delay of three years to request an extradition, for example, may be reasonable in one case but not in another. All the requesting country has to do is to explain its reasons. If the requesting country has no justified reasons, then that factor will

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219. *See supra* note 12 and accompanying text.

220. *See Collins*, 259 U.S. at 316-17 (citing *In re* Wadge, 15 F. 864, 866 (C.C.S.D.N.Y. 1883)); *In re* Oteiza y Cortes, 136 U.S. 330, 334 (1890) (stating that extradition proceedings are not "in the nature of a final trial."); *Santos*, 779 F.3d at 1024; Jhirad v. Ferrandina, 536 F.2d 478, 484 (2d Cir. 1976) ("Appellant does not dispute the well-entrenched rule that extradition proceedings are not to be converted into a dress rehearsal trial."); *In re* Bonilla, No. 1:13-MJ-62, 2014 U.S. Dist. LEXIS 27904, at *27-28 (E.D. Tex. Mar. 4, 2014) ("[E]vidence that merely contradicts the government's evidence, such as competing stories, is not admissible . . . . The underlying rationale is that an extradition hearing is neither a criminal trial nor an adjudication of the charges.") (internal citations omitted); *In re* Singh, 123 F.R.D. 108, 115 (D.N.J. 1987); *see* Semmelman, *supra* note 123, at 1298 ("The Rule of Non-Contradiction stems from the premise that an extradition hearing is not a trial on the merits."); Rivera, *supra* note 123, at 152-60 (discussing application of *Mathews* to the doctrine of non-contradiction). This interest mirrors the United States Government's interest in not having to try its cases in foreign countries when it seeks to extradite an individual to the United States.

221. *See supra* notes 215-220 and accompanying text.

222. *Doggett*, 505 U.S. at 657-58 n.9.

be assessed against it, but the extradition request does not have to be denied for that reason alone.[223]

The issue of post-accusation delay in international extradition is a matter of American transnational or national law, and not one of foreign law or policy. This means that the doctrine of non-inquiry[224] is inapplicable to issues of post-accusation delay. American courts have no reason to shy away from inquiring why a requesting country delayed in requesting extradition under a treaty. Unlike digging into the reasons why a requesting country delayed in charging a relator, the delay that accrues between the time the relator is charged and the moment the request for extradition is made is totally fair game for American courts as the inquiry delves exclusively on the extradition process. In the case of an extradition request made to the United States, the post-accusation delay issue is covered by the applicable extradition treaty, the extradition statute, and the United States Constitution.[225] There is no need for American courts to intrude into foreign laws or policies to determine whether the due process rights of relators are violated by delays in requesting extradition.

The *Barker* test, initially adopted for criminal cases, already has been used in civil proceedings.[226] In *United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850)*,[227] the United States Supreme Court applied the *Barker* test to consider whether an eighteen-month delay incurred by the government in filing a civil suit for forfeiture violated the claimant's due process rights.[228] The constitutional right to a speedy proceeding has also been acknowledged in the administrative context.[229] Such adoptions of *Barker* in civil and administrative contexts pave the way for applying a similar test in international extradition.

When a foreign country delays in making an extradition request, it often diminishes the relator's chances to oppose it. Passage of time may affect a relator's opportunity to oppose an extradition request because time erases and confuses memories, witnesses may die or become unavailable, and probative documents may be lost.

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223. *See Barker*, 407 U.S. at 533.

224. *See supra* notes 24-27 and accompanying text.

225. *See* BASSIOUNI, *supra* note 2, at 70-71.

226. United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850), 461 U.S. 555, 556 (1983).

227. 461 U.S. 555 (1983).

228. *Eight Thousand Eight Hundred & Fifty Dollars ($8,850)*, 461 U.S. at 555.

229. *See* Barry v. Barchy, 443 U.S. 55, 66 (1979) (holding suspension of horse-trainer license unconstitutional under the Due Process Clause of the Fourteenth Amendment because of delay in holding a final hearing). *See also* Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 547 (1985) ("At some point, a delay in the post-termination hearing would become a constitutional violation.").

Constitutional due process should prohibit extradition in some cases where the passage of time is substantial. Applying *Mathews* to extradition proceedings shows that the test adopted by the Court in *Barker* is an adequate safeguard against the prejudices of post-accusation delay.

C. The Jurisprudence on Post-Accusation Delay is Based on Misconceptions of the International Extradition Process and a Failure to Apply Due Process Principles

A few courts have considered the issue of whether relators have a constitutional right against unreasonable post-accusation delay.[230] While these courts have concluded that no such right exists,[231] their decisions are based on incorrect assumptions about the nature of international extradition proceedings and on over-simplistic categorical distinctions. None of these courts have applied the test in *Mathews v. Eldridge*[232] or any other balancing test to reach their conclusions.[233]

In *Martin v. Warden,*[234] the United States Court of Appeals for the Eleventh Circuit discussed the issue of due process rights in post-accusation delay.[235] Thomas Martin, the relator, fled the United States to Canada in 1969 to avoid the Vietnam draft. In December 1974, while in Canada, he was involved in a car accident in which he hit and killed a seven-year-old boy named Joey Bellanie. At the scene of the accident, Martin stopped when he heard a noise as if he had hit something. Two girls and a gentleman who were eyewitnesses allegedly shouted at Martin that there was a boy underneath his car, and declared that Martin must have heard them, but Martin retook to the road, kept driving, and dragged the body of the boy for approximately six hundred feet before leaving the scene.[236] A few days after the accident, Canadian authorities charged Martin with "criminal negligence causing death and leaving the scene of an accident."[237] Martin immediately fled from Canada to the United States.

The circuit court did not explain whether Canada attempted to extradite Martin at the time, but it did state that the then existing

230. *See In re* Extradition of Drayer, 190 F.3d 410, 415 (6th Cir. 1999) (citing Martin v. Warden, Atlanta Pen, 993 F.2d 824, 830 (11th Cir. 1993)); McMaster v. United States, 9 F.3d 47, 48-49 (8th Cir. 1993); *Martin*, 993 F.2d at 830; *In re* Burt, 737 F.2d 1477, 1485-86 (7th Cir. 1984).

231. *Id.*

232. 424 U.S. 319 (1976).

233. *See In re Drayer*, 190 F.3d at 415 (citing *Martin*, 993 F.2d at 830); *McMaster*, 9 F.3d at 48-49; *Martin*, 993 F.2d at 830; *In re Burt*, 737 F.2d at 1485-86.

234. 993 F.2d 824 (11th Cir. 1993).

235. *Martin*, 993 F.2d at 826.

236. *Id.*

237. *Id.*

treaty between Canada and the United States did not allow extradition for the offense with which Martin was charged.[238] In 1988, however, the extradition treaty between the two countries was amended, entering into effect in 1991. The newly amended treaty did allow for the extradition of Martin, and in 1992, Canada formally requested his extradition from the United States.

Martin opposed his extradition, arguing that he had a due process right to a speedy extradition that was infringed by Canada's seventeen-year delay in requesting it. The Eleventh Circuit disagreed. In its opinion, the circuit court recognized that the Executive is subject to the constraints of the Constitution when engaged in extradition proceedings, and the due process rights of individuals are superior to treaty obligations.[239] The court, however, distinguished between constitutional rights, such as the Speedy Trial Clause of the Sixth Amendment, which are meant to protect only criminal defendants, and other constitutional rights. It concluded that because the Speedy Trial Clause is addressed specifically at criminal defendants, it does not apply to international extradition, and thus, the Due Process Clause should not do indirectly what the Speedy Trial Clause cannot do directly.[240] The circuit court additionally concluded that the delay in requesting Martin's extradition was not a proper issue for its consideration because American courts had no right to meddle in the proceedings of foreign courts or to decide on the due process to be afforded to those accused in Canada's courts.[241]

The Eleventh Circuit is partially right. The court properly concluded that the Sixth Amendment does not protect relators directly,[242] but it does not follow that the Fifth Amendment's Due Process Clause cannot provide similar protections in international extradition.

The circuit court erred in its due process analysis by assessing the issue of post-accusation delay as one of *speedy trial at the requesting country* instead of one of *speedy proceeding or extradition in the United States*.[243] Instead of focusing its due process analysis on the sufficiency of process in the United States, the court focused on the crimi-

238. *Id.* at 827.

239. *Id.* at 829.

240. *Id.* ("It would make little sense to provide an extradition defendant indirectly with a right to a speedy trial under the Fifth Amendment when he enjoys no such right directly under the Sixth Amendment.").

241. *Id.* at 830.

242. *Id.* at 829.

243. *See id.* at 830 ("Recognizing a right to a speedy extradition would simply be an oblique method of forcing treaty partners to adhere to the speedy trial guarantee contained in the United States Constitution.").

nal proceedings in Canada,[244] arguing that the United States should not inquire into Canada's criminal processes.[245] Arguing that the United States should not inquire into Canada's legal proceedings[246] has some merit,[247] but the argument is misplaced. Whether the relator will be properly prosecuted at the requesting country, and whether the extradition process complies with American due process, are different issues that should not be mixed.[248] While the issue of whether the individual will be afforded a due process of law in Canada is one of foreign law, any issues of delay in the extradition request or in prosecuting the extradition case in the United States are issues of United States national or transnational law.

In cases of pre-accusation delay, where the delay accrues from the moment of the alleged crime to the filing of criminal charges at the requesting country, it may be unavoidable for the court to inquire into the requesting country's legal processes and criminal investigations.[249] But, the legality of post-accusation delay, including any delay in extradition proceedings in the United States, are clearly matters of American national or transnational law that ought to conform with the Fifth Amendment's Due Process Clause. By failing to require due process in the timeliness with which requesting countries demand extradition, the courts are abdicating their duty to apply the Constitution and to protect its people from erroneous or arbitrary deprivations of their liberty by the Executive.

Additionally, the argument made by the court in *Martin* that the Due Process Clause cannot do indirectly what the Speedy Trial Clause cannot do directly,[250] might be correct in the context of a criminal proceeding,[251] but not in the context of extradition. While it could be argued that in criminal proceedings the Fifth Amendment should not intrude into matters covered by the Sixth Amendment, because that would disrupt the balance crafted by the Constitution and the applicable federal statutes,[252] extradition is not a criminal proceeding, and thus the Sixth Amendment does not apply directly.

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244. *Id.* at 830 ("There is no due process violation if Martin is tried in Canada according to Canadian law and procedure for his actions while in Canada.").

245. *Id.* at 829 ("[R]ecognizing a Fifth Amendment right to a speedy extradition would conflict directly with the rule of non-inquiry which precludes extradition magistrates from assessing the investigative, judicial, and penal systems of foreign nations when reviewing an extradition request.").

246. *Id.*

247. *See supra* notes 24-27 and accompanying text.

248. *Id.*

249. *Martin*, 993 F.2d at 829-30.

250. *See id.*

251. *See supra* notes 178-181 and accompanying text.

252. *See supra* notes 178-181 and accompanying text.

In *Martin*, the true issue before the court was whether post-accusation delay affected Martin's due process rights in the United States, but the court failed to confront it. Relators' strong liberty interests are clearly protected by the Due Process Clause, as the court correctly recognized. Once the court recognized this, the next step was to consider whether the procedural safeguard proposed by the relator, a speedy extradition, was required by due process. To assess it the court should have balanced the interests of the relator and the governments. This analysis was neither prevented by nor relevant to the Sixth Amendment, as the court made it to be, because the Sixth Amendment is concededly inapplicable to international extradition. Providing speedy extradition protection under the Due Process Clause would not have been anomalous. Courts already provide speedy proceeding protection in contexts other than criminal procedure.[253]

Another extradition case dealing with issues of post-accusation delay is *McMaster v. United States*.[254] In *McMaster* the United States Court of Appeals for the Eighth Circuit considered the constitutionality of an extradition request made by Canada thirteen years after the relator was originally accused in that country. The court concluded that no due process right analogous to that in *United States v. Lovasco*[255] exists in international extradition.

Canada wanted to extradite relator McMaster for his alleged involvement in three first-degree murders that occurred in Canada between 1978 and 1979. At the time of the extradition request, in 1979, McMaster was serving a life sentence in the United States for the unrelated murder of a police officer in Minnesota. McMaster pled guilty to the murder of the Minnesota policeman in 1978, and the next year Canada requested his extradition. Because McMaster was at the time imprisoned in Minnesota, the United States denied Canada's extradition request and both countries engaged in negotiations to determine the appropriate time to extradite him.[256] Thirteen years passed until Canada submitted an "updated extradition request." A year later, a U.S. magistrate held an extradition hearing and certified McMaster's extraditability.[257]

McMaster argued that the "United States violated his Fifth Amendment due process rights by refusing to facilitate his extradition . . . ."[258] He analogized the due process rights of relators to those afforded to criminal defendants by *Lovasco*, but the circuit court dis-

253. *See supra* notes 227-230 and accompanying text.
254. 9 F.3d 47 (8th Cir. 1993).
255. 431 U.S. 783 (1977).
256. *McMaster*, 9 F.3d at 48.
257. *Id.*
258. *Id.*

agreed. Relying on *In re Burt*,[259] the court concluded that the roles of the United States as prosecutor in criminal cases, and as extraditer in international extradition, are distinguishable and thus the *Lovasco* test is inapplicable to relators.[260] The court reasoned that it is not the duty of American courts to consider the difficulties the relator will face when confronting the requesting country's criminal system.[261]

Just as the Eleventh Circuit in *Martin*, the *McMaster* court erred by focusing the due process analysis on the criminal proceeding at the requesting country rather than at the extradition process in the United States. The court's exclusive focus on the question of whose duty it is to ensure a fair procedure at the requesting country, which arguably belongs only to the requesting country,[262] is at least incomplete. The focus of the analysis should have been on the extradition proceeding in the United States, and on whether the procedural safeguard proposed by the relator, *Lovasco*'s in this case, was required by due process to protect him from Canada's thirteen-year delay in requesting his extradition.

V. DUE PROCESS DEMANDS THE APPLICATION OF A *LOVASCO*-TYPE TEST TO PROTECT RELATORS FROM PRE-ACCUSATION DELAY

Pre-accusation delay is substantially different from post-accusation delay. Pre-accusation delay occurs prior to charging the relator at the requesting country, and thus the matter is more likely to be affected by considerations of law and policy of the requesting country. Those considerations add complexity to any due process analysis of the extradition process, but should not lead to the categorical conclusion that relators have no due process right to challenge the pre-accusation stage of their proceedings. Relators do have that right because pre-accusation delay affects their ability to confront the extradition request. Just as pre-accusation delay can have a devastating effect on a defendant's ability to defend from criminal charges,[263] it can also seriously affect a relator's opportunity to defend at an extradition hearing.

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259. 737 F.2d 1477 (7th Cir. 1984).

260. *McMaster*, 9 F.3d at 48-49.

261. *Id.*

262. The Convention Against Torture and its implementing statutes, however, require requested countries to assess whether the relator is likely to be tortured at the requesting country. *See generally* Trinidad y García v. Thomas, 683 F.3d 952 (9th Cir. 2012).

263. *See* Goldfarb, *supra* note 90, at 617 ("Delay at the pre-accusation phase represents the sharpest threat to the fact-finding integrity of the criminal process because the opportunity to preserve sources of evidence never arises.").

A. Applying *Mathews* to International Extradition Suggests *Lovasco* as a Proper Safeguard to Consider Pre-Accusation Delay

As with post-accusation delay, the extradition court must focus the pre-accusation inquiry on the extradition process in the United States, rather than on the criminal proceedings of the requesting country. Applying *Mathews v. Eldridge*[264] to the interests of government and relators shows that the test adopted by the Court in *United States v. Lovasco*[265] is an adequate procedural safeguard to consider pre-accusation delay in international extradition.

The considerations for applying *Mathews*'s first factor[266] to issues of pre-accusation delay are the same as those of post-accusation delay.[267] Relators have a strong liberty interest not to be surrendered to a foreign country for criminal prosecution and imprisonment. Through an extradition process relators are regularly incarcerated in the United States and the requesting country. Relators lose their liberty to engage in their professions, jobs, and hobbies, and lose their liberty to relate with family and friends in the United States. Thus the first factor is heavily weighed in relators' favor.

The second *Mathews* factor[268] applies differently in pre-accusation delay, however. For instance, the risk of erroneously extraditing the relator is higher. People who ignore that they are being accused of a crime are less likely to prepare for their defense by gathering and preserving evidence.[269] Just as criminal defendants benefit from preserving documents and witnesses that may help them to establish their innocence, relators need to preserve evidence to explain away or rebut the government's evidence for probable cause, and to raise affirmative defenses available by the extradition treaty.[270] These added opportunities make for a more reliable extradition proceeding.

The second part of the second *Mathews* factor considers the probable value of the proposed procedural safeguards. The probable value of applying *Lovasco* to international extradition is very high because

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264. 424 U.S. 318 (1976).

265. 431 U.S. 783 (1977).

266. *Mathews*'s first factor considers the type of loss that the individual would suffer because of the intended governmental action, and the likely permanence of that loss.

267. *See supra* notes 209-210 and accompanying text.

268. The second *Mathews* factor considers the risk of erroneously depriving the individual's private interests through the currently available procedures, and the probable value, if any, of the proposed procedural safeguard.

269. *See* Goldfarb, *supra* note 90, at 617.

270. Some of the affirmative defenses regularly available through treaty are: that the charged offense is a political offense, statutes of limitations, double jeopardy, and that the charged conduct must constitute a crime in the requesting as well as the requested country (double criminality). *See* Rivera, *supra* note 123, at 176-78.

its requirements—that the individual proves actual prejudice from the delay and that the cause of the delay be at least gross negligence or bad faith by the government[271]—ensure that the relator has been severely affected in its opportunity to contest the extradition case and that the requesting country was at fault for the delay. Applying *Lovasco* to cases of pre-accusation delay would protect relators only from extreme injustices, since the main protection for pre-accusation delay comes from statutes of limitations, if there is one applicable.[272] Not all extradition treaties, however, afford the protection of statutes of limitations.[273] In those cases, a *Lovasco*-type test, or a more liberal one, is more important to safeguard due process rights.

Finally, *Mathews*'s third factor considers the government's interest in depriving the individual's liberty or property.[274] This includes evaluating the governmental function involved, and assessing the fiscal and administrative burdens that providing the requested procedural safeguard would require.[275] In international extradition the government's main interest is to avoid forcing the requesting country into a trial-like procedure in the United States.[276] This is more than accomplished by extradition procedure, however, which grants requesting countries vast procedural advantages, and provides relators very little process.[277] Affording relators the opportunity to challenge their extradition by applying *Lovasco* would not significantly change the heavy tilt of extradition procedure in favor of requesting countries.

It is also an interest of the government that courts not inquire into the legal processes and policies of the requesting country.[278] This interest may be affected by *Lovasco*'s requirement that the government explain its reasons for delaying in the filing of criminal charges. Any consideration by an American court of the appropriateness of a measure by a requesting country that results in pre-accusation delay would normally require an inquiry into the requesting country's laws, policies, or conduct. And that is precisely what the doctrine of non-inquiry tries to avoid.[279]

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271. *See supra* notes 100-112 and accompanying text.

272. *See supra* notes 36-40 and accompanying text.

273. *See* Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland art. 6, Mar. 31, 2003, 35 U.S.T. 3197, TIAS 10850 ("The decision by the Requested State whether to grant the request for extradition shall be made without regard to any statute of limitations in either State.").

274. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

275. *Mathews*, 424 U.S. at 335.

276. *See supra* note 221.

277. *Id.*

278. *See supra* notes 24-27 and accompanying text.

279. *Id.*

Acknowledging that the doctrine of non-inquiry is a legitimate and settled doctrine, however, should not stop courts from protecting individuals' liberty interests.[280] Not inquiring into the legal processes of the requesting country must be assessed as one of the many important factors at stake, and not as the only factor. *Mathews* and the principles of procedural due process require that individuals be afforded a meaningful opportunity to contest the government's case before they are deprived of their liberty, and that such meaningfulness be assessed by considering a variety of factors, and not just the government's. There is no reason, other than practice, to apply a rigid categorical approach that fails to consider relators' strong liberty interests.

The second part of the third *Mathews* factor requires consideration of the fiscal and administrative burdens that providing the additional procedural safeguard would require. The main fiscal or administrative burden imposed by the application of *Lovasco* would be forcing the requesting country to explain its reasons for delaying the filing of criminal charges. As an administrative or fiscal burden, this should not be significant because all the requesting country would have to do is have one of its officers explain the factual, legal, or policy reasons for the delay.[281] An extradition request may be completely supported on hearsay, and thus the filing of a sworn statement by an officer of the requesting country could fulfill this burden.[282]

A balancing of the three *Mathews* factors in international extradition suggests that applying a *Lovasco*-type safeguard to issues of preaccusation delay strikes a fair balance between the interests of relators and the government. Relators' strong liberty interests, and the high probability that applying *Lovasco* would improve the reliability of the extradition process, overcome the government's interest to avoid inquiries into the requesting country's legal procedures. Additionally, the fiscal and administrative burdens of applying *Lovasco* are insignificant.

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280. *See infra* note 314.

281. *See In re* Extradition of Jarosz, 800 F. Supp. 2d 935, 945-48 (N.D. Ill. 2011) (allowing evidence of witnesses' testimonies, submitted through summaries prepared by foreign prosecutors); *In re* Lanzani, No. CV 09-07166, 2010 U.S. Dist. LEXIS 14044, at *18-19 (C.D. Cal. Feb. 18, 2010); Bovio v. United States, 989 F.2d 255, 259-61 (7th Cir. 1993) (allowing a statement by an investigator).

282. *Id.*

B. The Case Law on Pre-Accusation Delay Misconstrues Principles of International Extradition And Fails to Consider all Relevant Interests

As with cases of post-accusation delay, extradition courts have denied process in cases of pre-accusation delay by misconceiving the law of international extradition and by failing to recognize relators' liberty interests. *In re Burt*[283] and *Kamrin v. United States*[284] exemplify these problems.

In *In re Burt*, the United States Court of Appeals for the Seventh Circuit considered whether the charging of a relator in West Germany, fifteen years after the commission of a crime, violated the relator's due process rights.[285] In 1980, West Germany requested the United States to extradite two American citizens, John Burt and Moyer Plaster, for the murder of Kurt Pfeuffer in 1965. Pfeuffer was murdered in West Germany while Burt and Plaster were stationed as service men at an American military base in that country. Soon after the murder, Burt and Plaster left West Germany without authorization and traveled to Madison, Wisconsin. In Madison, they were arrested and later convicted of committing armed robbery and another murder. While under state custody in Wisconsin, Burt and Plaster were questioned by military investigators about the Pfeuffer murder. Burt signed a written confession admitting to shooting Pfeuffer and Plaster signed another accepting his role as an accessory-after-the-facts.

The United States assured West Germany that it would prosecute Burt and Plaster for Pfeuffer's murder. Based on such assurances, West Germany waived its right under the parties' Status of Force Agreement[286] to obtain jurisdiction over the men and prosecute them. The Army eventually charged Burt and Plaster for Pfeuffer's murder, but the prosecution was halted after the United States Supreme Court decided *Miranda v. Arizona*.[287] Because Burt and Plaster's admissions were made without the previous warnings required in *Miranda*, the Army believed it was impeded from continuing with its prosecution.

When Germany learned about the Army's halting of Burt's and Plaster's cases, it sought to recall its previous waiver of jurisdiction under the Status of Force Agreement to prosecute them. The United

283. 737 F.2d 1477 (7th Cir. 1984).
284. 725 F.2d 1225 (9th Cir. 1984).
285. *In re* Burt, 737 F.2d 1477, 1482 (7th Cir. 1984).
286. A Status of Force Agreement (SOFA) is a treaty between a host nation and a foreign country to maintain military forces of the foreign country in the host country.
287. 384 U.S. 436 (1966).

States, however, denied the request to avoid establishing the precedent of allowing Germany to recall its waiver after such a long period. To complicate matters, Burt and Plaster could not be extradited to Germany because the then-existing extradition treaty between West Germany and the United States was construed not to allow the United States to surrender its own citizens.[288] So, after serving twelve years in a Wisconsin prison, Burt was paroled in 1977. Burt's freedom did not last, though. In 1978, West Germany and the United States agreed on a new extradition treaty, which did allow the parties to extradite their own citizens. This set the stage for West Germany to charge both men and request their extradition for Pfeuffer's murder.

In opposing extradition, Burt argued that extradition to West Germany violated his due process rights because of the fifteen-year gap between the crime and the filing of charges in Germany.[289] The Seventh Circuit disagreed. In assessing Burt's claim, the court considered whether relators enjoy a due process right analogous to the one recognized in *United States v. Lovasco*[290] for criminal defendants.[291] The court flatly held that there was no such analogous right,[292] even though it conceded that relators enjoy due process rights in extradition.[293]

The circuit court reached this conclusion by categorically distinguishing extradition from criminal proceedings. *Lovasco* does not apply to international extradition because it only protects criminal defendants, according to the court.[294] As explained by the Seventh Circuit:

> [T]he role of the executive branch as prosecutor and as extraditer . . . implicat[e] different standards of conduct vis-a-vis a criminal accused. While it may be fundamentally unfair for the government as enforcer of its criminal statutes to compel an accused to respond to and stand trial for charges when the government's delay in bringing the charges has resulted in actual prejudice to the accused, . . . we do not believe that the government necessarily acts unfairly when as extraditer it makes decisions responsive to diplomatic concerns that

288. *See In re Burt*, 737 F.2d at 1480-81 n.7.

289. *Id.* at 1486.

290. 431 U.S. 783 (1977).

291. *In re Burt*, 737 F.2d at 1486.

292. *Id.*

293. *Id.* at 1484 ("It is well settled . . . that the United States government must, in carrying out its treaty obligations, conform its conduct to the requirements of the Constitution, and that treaty obligations cannot justify otherwise unconstitutional governmental conduct.").

294. *Id.* at 1486.

> may secondarily affect the accused's ability to respond to criminal charges brought by a foreign state.[295]

The court's reasoning was mainly that the United States should not be concerned with the process afforded to a relator by a requesting country prior to the filing of criminal charges. Accordingly, all the harm that delay in the requesting country may cause to an extradition proceeding in the United States should be irrelevant to any due process analysis by an extradition court in the United States. The problem with such reasoning is that it avoids the real issue: whether preaccusation delay affects a relator's opportunity to meaningfully and timely defend against an extradition request in the United States.[296] As in *Martin v. Warden*,[297] and *McMaster v. United States*,[298] *Burt* focused its due process analysis incorrectly on the criminal proceedings at the requesting country rather than on the extradition process in the United States.[299] This perspective creates the illusion that there are no liberty interests at stake at the extradition hearing that may be affected by the delay, and thus no due process need be afforded.

Other arguments made by the Seventh Circuit in *Burt* are equally unfounded. The circuit court incorrectly concluded that the government could extradite Burt according to "the discretion in foreign affairs vested in the executive branch."[300] The Executive is indeed afforded discretion in the extradition process,[301] but only after the relator has been duly certified as extraditable by a magistrate.[302] An extradition magistrate possesses no discretion to extradite.[303] The magistrate's duty in international extradition is to apply the mandates of the extradition treaty and United States statutes to the facts to determine whether the relator is extraditable.[304] The Executive's

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295. *Id.* (internal citation omitted).

296. We note that the circuit court initially committed to address that issue, but it failed to do so. *See id.* ("As we see it, therefore, the real issue is whether there exists a due process right analogous to the one articulated in *Lovasco* that makes it fundamentally unfair for the United States to decide not to return a serviceman pursuant to a status of forces agreement and then subsequently decide to extradite him pursuant to a separate extradition request after considerable time has transpired.").

297. 993 F.2d 824 (11th Cir. 1993).

298. 9 F.3d 47 (8th Cir. 1993).

299. *See supra* notes 244-247, 250, 264 and accompanying text.

300. *Burt*, 737 F.2d at 1486.

301. Lopez-Smith v. Hood, 121 F.3d 1322, 1326 (9th Cir. 1997).

302. *Lopez-Smith*, 121 F.3d at 1326.

303. Martinez v. United States, 793 F.3d 533, 552 (6th Cir. 2015), *rev'd on other grounds*, 828 F.3d 451 (6th Cir. 2016).

304. *Martinez*, 793 F.3d at 552.

> Although courts do not inquire into the fairness of criminal procedure or punishment under the laws of the country seeking extradition, it is plainly a court's role to determine whether extradition is permissible under the terms of the governing treaty. Similarly, the executive's discretion to grant or deny extradi-

discretionary powers that the Seventh Circuit referred to in *Burt* come into play only *when* the case gets to the Department of State, and *after* the extradition magistrate exercises the non-discretionary duty to apply the treaty and the extradition statute at the hearing.[305] Thus, extradition magistrates lack the discretion upon which the Seventh Circuit, at least partially, based its decision.

Burt is an example of a good case making bad law. Surely, finding a balance between the interests of the government and the relator in matters of pre-accusation delay is challenging as both sides have substantial interests in conflict, but the analysis should not be one-sided. The categorical conclusion that there is no due process right against pre-accusation delay because the liberty interests of relators must be the exclusive concern of requesting countries is untenable. This conclusion is the result of the wrongful assumption that relators only have their liberty interests affected when they face the requesting country's criminal system. In other words, *Burt*'s due process analysis incorrectly assumes that delay in the filing of criminal charges at the requesting country does not affect the reliability or fairness of the extradition hearing.[306]

Another extradition case that discusses the issue of pre-accusation delay is *Kamrin v. United States*. In *Kamrin* the relator did not claim to be directly protected by the Constitution, but by a statute of limitations and a clause in the extradition treaty between the United

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> tion arises only after a person has been certified as extraditable under the governing treaty.

Id. (internal citations omitted).

> The statute says that if the magistrate judge "deems the evidence sufficient to sustain the charge," then the magistrate judge "shall" certify that to the Secretary of State, and "shall" issue a warrant for the commitment of the accused. The magistrate judge has no discretionary decision to make . . . . The procedure established by statute requires the magistrate judge to issue a certificate, if extradition is permissible. The Secretary of State may not extradite unless and until the certificate is issued.

Lopez-Smith, 121 F.3d at 1326 (internal citations omitted).

> In the United States, the procedures for extradition are governed by statute. The statute establishes a two-step procedure which divides responsibility for extradition between a judicial officer and the Secretary of State . . . . This bifurcated procedure reflects the fact that extradition proceedings contain legal issues peculiarly suited for judicial resolution, such as questions of the standard of proof, competence of evidence, and treaty construction, yet simultaneously implicate questions of foreign policy, which are better answered by the executive branch.

United States v. Kin-Hong, 110 F.3d 103, 109-10 (1st Cir. 1997) (internal citation omitted).

305. Extradition magistrates enjoy discretion in the manner that they conduct the hearing, but such discretion must not be confused with their non-discretionary duty in determining the extraditability of the relator by applying the extradition treaty and applicable United States law to the facts.

306. *See supra* notes 245, 248-253 and accompanying text for a similar analysis in *Martin*.

States and Australia. After ruling that relator Kamrin did not enjoy the direct protection of any statute of limitations, the United States Court of Appeals for the Ninth Circuit considered Kamrin's second argument: because the treaty affords him the "remedies and recourses" of United States law, the Due Process Clause protects him from pre-accusation delay.[307] Disagreeing with Kamrin, the court held that "due process rights cannot be extended extraterritorially" to protect relators from the delay incurred by foreign governments in charging them,[308] and then opted not to inquire into the investigation of the alleged crime in Australia.

The court's analysis is consistent with the long-standing doctrine of non-inquiry, which establishes that courts should avoid inquiring into the legal processes and policies of requesting countries,[309] but the analysis is incomplete as it fails to consider the relator's interests. Non-inquiry prohibits a requested country from questioning the fairness of the requesting state's legal system.[310] It "precludes extradition magistrates from assessing the investigative, judicial, and penal systems of foreign nations when reviewing an extradition request."[311] Because non-inquiry is settled law, it must be afforded substantial weight under any constitutional assessment—but it cannot trump the Constitution.[312]

To make out a *Lovasco*-type defense in international extradition the relator would have to first prove actual—not just potential—prejudice suffered by the relator, and that the requesting country delayed in charging the crime in gross negligence or intentionally to affect the relator's chances to fight extradition. Such a high bar would exempt extradition only in extreme cases. Applying *Lovasco* would properly balance the government's interests in applying non-inquiry and in avoiding a trial-like litigation with the relator's strong liberty interests. Even though the extradition magistrate would have to in-

307. Kamrin v. United States, 725 F.2d 1225, 1227 (9th Cir. 1984).

308. *Kamrin*, 725 F.2d at 1228 (citing Neely v. Henkel, 180 U.S. 109 (1901)).

309. Martin v. Warden, 993 F.2d 824, 829 (11th Cir. 1993) (stating the rule of non-inquiry "precludes extradition magistrates from assessing the investigative, judicial, and penal systems of foreign nations when reviewing an extradition request"); United States v. Howard, 996 F.2d 1320, 1329 (1st Cir. 1993) (stating the rule of non-inquiry requires that courts refrain from "investigating the fairness of a requesting nation's justice system").

310. *Martin*, 993 F.3d at 829.

311. *See id.* at 829-30 n.10 (explaining factors such as the implications of the extradition on foreign relations or humanitarian concerns may only be considered by the Secretary of State after the court certifies the relator's extraditability).

312. *See Martin*, 993 F.2d at 829 ("The United States' actions in reviewing a request for extradition are, of course, subject to the constraints of the Constitution. The constitutional rights of individuals, including the right to due process, are superior to the government's treaty obligations.").

quire somewhat into the endeavors of the foreign country in investigating the case, this burden or inconvenience would be balanced against the benefit of increasing the reliability of the extradition process, reducing the probability of an erroneous extradition, and recognizing the strong liberty interests of the people.

VI. CONCLUSION

International extradition is not a criminal procedure; it is *sui generis*. Because it is not a criminal procedure, courts have held that relators are not directly protected by the Speedy Trial Clause of the Sixth Amendment and by other constitutional provisions specifically addressed at criminal defendants. These same courts, however, have consistently held that relators have due process rights. Due process should protect relators from the prejudices of government delay because of the strong liberty interests involved in international extradition and because the passage of time may deprive relators of evidence necessary to fend off an extradition request.

Due process mainly requires that people be afforded a meaningful and timely opportunity to oppose the government when the government intends to deprive them of their life, liberty, or property. A meaningful opportunity to confront the government's evidence may be missed when exculpatory evidence is lost with the passage of time. To ensure due process in criminal proceedings, the Sixth Amendment's Speedy Trial Clause and the Fifth Amendment's Due Process Clause protect defendants from certain instances of government delay in the investigation and prosecution of criminal charges. Similar safeguards are needed in international extradition to ensure that relators' strong liberty interests are protected.

Relators face tremendous liberty losses. Through extradition, the government attempts to surrender them to the jurisdiction of foreign countries for imprisonment and criminal prosecution. Such strong limitations on liberty demand the application of *Mathews v. Eldridge*[313] so that courts may properly evaluate whether procedural safeguards proposed by relators are required by due process. The categorical analyses adopted by the courts to deny relators procedural safeguards—because the United States should not force the requesting country into a trial-like procedure—are unsupported by the realities of extradition procedure, which allow requesting countries a plethora of procedural advantages. Requesting countries are afforded so many procedural advantages in international extradition, that any given proposed procedural safeguard should be evaluated separately

313. 424 U.S. 319 (1976).

through *Mathews* to assess whether its adoption would singlehandedly convert the extradition proceeding into a trial-like procedure.

Also unsupported is the categorical approach that denies relators protection against government delay because extradition is not a criminal procedure, and thus the Speedy Trial Clause is not applicable. Even though relators are not directly protected by the Speedy Trial Clause, courts should recognize that relators have a due process right to defend against the damaging effects of government delay. Government delay may cause the loss of exculpatory evidence, which in turn affects the reliability of extradition proceedings. Courts already acknowledge that relators have due process rights, and thus it follows that extradition proceedings should not be unfairly delayed.

Mathews's balancing test is generally applied to assess the constitutionality of procedural safeguards in cases of liberty interests. *Mathews* should be applied in international extradition, as it is applied in so many other contexts, because it is an effective means to balance relators' strong liberty interests with the legitimate interests of the government not to convert the extradition process into a trial-like procedure and not to inquire into the requesting country's legal procedures. Courts should follow the lead of the Supreme Court in immigration and national security cases where the Court has applied *Mathews* to balance the conflicting interests of government and individuals.

Applying *Mathews* to issues of post-accusation and pre-accusation delay suggests that the procedural safeguards adopted by the Court in *Barker v. Wingo*[314] and *United States v. Lovasco*[315] are appropriate to consider specific instances of delay in extradition. Both safeguards add some fairness to the procedure without converting it into a trial-like process or intruding excessively into the requesting country's discretion to investigate and prosecute. The current categorical analyses that courts are applying to issues of government delay fail to consider the liberty interests of relators. By balancing, courts could consider these interests, and only through balancing may courts properly assess whether a proposed procedural safeguard tilts the balance too much toward the individual.

314. 407 U.S. 514 (1972).
315. 431 U.S. 783 (1977).