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United States v. Burns: Canada's Extraterritorial Extension of Canadian Law and Creation of a Canadian "Safe Haven" in Capital Extradition Cases

Andrea Cortland

NOTES

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Andrea Cortland*

* Juris Doctor Candidate, May 2009, University of Miami School of Law. B.A., Rutgers University. I would like to dedicate this article to my parents, Paul and Denise Cortland, and to my brother, Matthew Cortland. They were my constant source of support throughout law school and continue to be my biggest fans! I would also like to thank Professor David Abraham for his advice and assistance. Despite his differing ideology on the subject matter of this article, he encouraged and challenged me throughout the writing process, and for that I am very grateful.

I. INTRODUCTION

On February 15, 2001, the Canadian Supreme Court unanimously held that barring "exceptional circumstances," requests for extradition from Canada to another nation must be accompanied by assurances from the requesting nation against seeking or imposing capital punishment.[1] The Court determined that the extradition of an individual to a country where he or she may face the death penalty violates Section 1 of the Canadian Charter of Rights and Freedoms,[2] which encompasses the right to life.[3] With this holding, the Canadian Supreme Court reversed the position it held ten years earlier, and put an end to Canada's practice of extraditing individuals to the United States to face the death penalty.[4]

However, in holding that unconditioned extradition[5] is gener-

1. United States v. Burns, [2001] 1 S.C.R. 283, 296 (Can.).

2. Canadian Charter of Rights and Freedoms, s. 1, s. 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.), *as reprinted in* R.S.C., No. 44 (Appendix 1985) [hereinafter Charter].

3. *Burns*, [2001] 1 S.C.R. at 289.

4. *See generally* Kindler v. Canada, [1991] 2 S.C.R. 779 (Can.). In this case, the Canadian Supreme Court held that the decision by the Minister of Justice of Canada to allow the extradition of a suspect to the United States to face the death penalty did not violate the "right to life" provision of the Canadian Charter of Rights and Freedoms. *Id.* at 855. Canada subsequently extradited Joseph John Kindler, who had previously been convicted and sentenced to death by a Pennsylvania jury before he escaped to Canada, to the United States without assurances that the death penalty would not be imposed. See *infra* Part IV for a discussion of Canada's reversion of its common practice of extraditing people to the United States without seeking assurances against imposition or execution of the death penalty.

5. In this comment "unconditioned extradition" refers to extradition by a requested country to a requesting country without assurances from the requesting

ally unconstitutional, the Canadian Supreme Court failed to define "exceptional circumstances" or discuss the criteria necessary for a showing of exceptional circumstances.[6] Furthermore, the Court based a part of the rationale for its holding on the international attitude towards capital punishment, and stated that the international trend towards the abolition of capital punishment and the practical and philosophical difficulties associated with the death penalty, not the specific circumstances of the case at hand, had motivated its decision.[7] Also, the Canadian Supreme Court adopted a broader restriction on extradition than was necessary based on the facts of the case, in which the individuals requested for extradition were Canadian citizens.[8] In essence, the Court phrased its holding and rationale so broadly as to extend not just to Canadian citizens that are requested by the United States to stand trial for crimes committed in the United States, but also to American citizens and residents accused of committing crimes in America who thereafter fled to Canada.[9]

Section I of this comment will outline the practical history and constitutionality of the death penalty in the United States. It will also demonstrate how the United States Supreme Court had previously suspended the death penalty but, after reconsideration, decided to reinstate it, holding that capital punishment is constitutionally permissible. Section II will summarize the history of the death penalty in Canada. The history of capital punishment in both nations will be utilized in Section III to illuminate the practical and legislative history of extradition between Canada and the United States. This section will focus primarily on extradition in cases where the crimes allow for a potential sentence of death. Then, Section IV of the article will address the history of Canadian jurisprudence regarding extradition of criminals and accused criminals to the United States without assurances against the death penalty.

In Section V, this historical Canadian practice will be con-

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country that the death penalty will not be sought or imposed by the requesting country.

6. *Burns*, [2001] 1 S.C.R. at 290.

7. *See id.* at 287-88, 323.

8. Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 523 (2005).

9. *See id.* Compare *infra* Part VI.B for a discussion of the *Burns* holding and the potential extraterritorial extension of Canadian law to American citizens with *infra* Part VI.C for a discussion of the *Burns* holding and Canada's potential refusal to extradite suspected terrorists.

trasted with *United States v. Burns* — the 2001 landmark case that ended Canada's practice of unconditioned extradition to the United States. It will also examine how the Canadian Supreme Court reached its decision that extradition to a non-abolitionist country like the United States must be accompanied by assurances that the country to which the criminal is to be extradited will not seek or impose the death penalty, barring "exceptional circumstances." Section VI of this comment next explores the potentially problematic result of the Canadian Supreme Court's holding that unconditioned extradition is unconstitutional barring exceptional circumstances. It will discuss how this potential problem is heightened for the United States in light of the current political climate; specifically, during the war on terrorism. Finally, in Section VII, this article concludes by suggesting situations that should constitute the "exceptional circumstances" required by the *Burns* court.

II. The Practical History and Constitutionality of the Death Penalty in America

A. *The Origins of Capital Punishment*

To better understand the current state of United States-Canadian extradition in potential capital punishment cases, it is necessary to examine the history of the death penalty in both nations. When European settlers came to America, they brought with them the practice of capital punishment.[10] The first recorded execution in the new colonies was in 1608, and laws regarding the death penalty varied from colony to colony.[11] Throughout the nineteenth century, each state individually adopted its own laws regarding capital punishment — although some states abolished the death penalty, most states opted to retain it.[12] From the 1920s to the 1940s, there was a resurgence of the death penalty in the United States; however, in the 1950's, public sentiment began to turn away from capital punishment as many of the United States' allies abolished the death penalty.[13] In 1972, however, despite America's retention and utilization of the death penalty for almost

10. *See* Death Penalty Information Center, Part I: History of the Death Penalty, http://www.deathpenaltyinfo.org/article.php?scid=15&did=410 (last visited Jan. 5, 2008) [hereinafter DPIC Part I].

11. *Id.*

12. *Id.*

13. *Id.*

350 years, the United States Supreme Court issued a decision that essentially suspended capital punishment.

B. The Suspension of the Death Penalty in America as Unconstitutional

For many years, the Fifth, Eighth, and Fourteenth Amendments of the Constitution were interpreted as permitting the death penalty.[14] However, in the early 1960's, the fundamental legality of the death penalty was challenged on the grounds that it was a "cruel and unusual punishment" and thus unconstitutional under the Eighth Amendment.[15] This issue was resolved in the 1972 landmark case *Furman v. Georgia*, where the Supreme Court held that Georgia's death penalty statute, which gave the jury complete sentencing discretion, could result in arbitrariness and was therefore "cruel and unusual punishment" in violation of the Eighth Amendment.[16] Separate opinions by Justices Marshall and Brennan actually stated that the death penalty itself was unconstitutional; however, *Furman* narrowly held that specific state death penalty statutes, not capital punishment in general, were unconstitutional.[17] With this decision the Court voided forty states' death penalty statutes, thus commuting the sentences of 629 death row inmates and effectively suspending the death penalty in America.[18] This suspension would prove temporary, however, as lawmakers throughout the United States quickly made changes to state capital punishment statutes. Their goal was to create statutory standards that the Court would deem constitutional, thus enabling the death penalty to be reinstated.

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14. *Id. See generally* U.S. CONST. amends. V, VIII, & XIV.

15. DPIC Part I, *supra* note 10. The Eighth Amendment to the United States Constitution reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

16. Furman v. Georgia, 408 U.S. 238, 239-40 (1972). Note that *Furman v. Georgia*, 408 U.S. 238 (1972); *Jackson v. Georgia*, 409 U.S. 902 (1972); and *Branch v. Texas*, 409 U.S. 902 (1972), are known collectively as *Furman v. Georgia*. The Supreme Court consolidated *Jackson v. Georgia*, which was on certiorari to the Court, and *Branch v. Texas*, which was on certiorari to the Court of Criminal Appeals of Texas, with the *Furman* decision.

17. *Id.* In a per curiam decision expressing the views of five members of the Supreme Court, the Court held that "the imposition and carrying out of the death penalty in these [instant] cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* However, Justice White noted that whether the death penalty is unconstitutional per se is not at issue in this case, and thus need not be decided. *Id.* at 310-11 (White, J., concurring).

18. DPIC Part I, *supra* note 10.

C. *The Reinstatement of the Death Penalty in America as Constitutional*

The most significant issue that state lawmakers had to address was that of arbitrariness as cited in *Furman*. To eliminate these problems, states sought to limit jury discretion by providing sentencing guidelines for the judge and jury when faced with the task of deciding whether to impose the death penalty.[19] In the 1976 landmark decision *Gregg v. Georgia,*[20] the Supreme Court approved the state-guided discretion statutes. In *Gregg*, the Court held that the new death penalty statutes in Florida, Georgia, and Texas were constitutional. Significantly, the Court also went one step further and held that the death penalty itself was constitutional under the Eighth Amendment.[21]

D. *The Death Penalty in America Today*

The *Gregg* decision set the standard for capital punishment that the United States retains today.[22] In April 1999 the United Nations Human Rights Commission passed the Resolution Supporting Worldwide Moratorium on Executions,[23] which called on countries that still maintain the death penalty to progressively restrict the number of offenses for which the death penalty may be imposed and to establish a moratorium on executions.[24] The United States voted against the resolution and, although more than half of the countries in the international community have abolished the death penalty, the United States retains capital punishment as a viable sentence for various crimes.[25] Currently, thirty-six states have the death penalty, and ten of the states have actually carried out executions.[26]

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19. *Id.*

20. Gregg v. Georgia, 428 U.S. 153 (1976). Note that *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); and *Proffitt v. Florida*, 428 U.S. 242 (1976) are collectively referred to as the *Gregg* decision.

21. DPIC Part I, *supra* note 10; *see Gregg*, 428 U.S. at 177, in which the Court notes that "[i]t is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers."

22. *Gregg*, 428 U.S. at 177.

23. C.H.R. Res. 1999/61 (Apr. 28, 1999).

24. *Id. See also* Death Penalty Information Center, Part II: History of the Death Penalty, http://www.deathpenaltyinfo.org/article.php?scid=15&did=411 (last visited Feb. 11, 2008) [hereinafter DPIC Part II].

25. Death Penalty Information Center, Facts about the Death Penalty, http://www.deathpenaltyinfo.org/FactSheet.pdf (last visited Jan. 2, 2008) [hereinafter DPIC Facts].

26. *See* DPIC Facts, *supra* note 25.

The United States may have left itself in bad company: abolitionists remind us that most of the world's democracies have abolished capital punishment, and for some time only China and the Democratic Republic of the Congo executed more people than the United States.[27] In 2006, other countries that vigorously enforced the death penalty included Iraq, Iran, Pakistan, and the Sudan.[28] According to a statement by Amnesty International, 135 countries have abolished the death penalty,[29] and the entire Council of Europe — which includes forty-five nations, ranging from Iceland to Russia — now constitutes a death-penalty-free zone.[30]

Despite strong international opinion against capital punishment, in 2006 the overall support of the death penalty in the United States was sixty-five percent.[31] However, although there is national support for the death penalty and many individuals convicted of certain crimes in the United States remain eligible for death, the number of death sentences per year has been dropping dramatically since 1999.[32] Ultimately, and for whatever reasons, the United States retains the death penalty. Because individuals choosing to live in America are subject to its laws, the death penalty is currently a viable and constitutional method of punishment for certain crimes in the United States.

III. THE HISTORY OF THE DEATH PENALTY IN CANADA

Next, we turn to the history of capital punishment in Canada. At one time Canada imposed the death penalty, executing a total of 710 people between 1867 and December 11, 1962, the date on which the last execution was carried out.[33] However, on July 14, 1976, the death penalty was abolished in Canada (with the exception of certain crimes under the National Defence Act).[34] The decision to abolish the death penalty in 1976 came from the Canadian

27. Alan W. Clarke et. al., *Does the Rest of the World Matter? Sovereignty, International Human Rights Law and the American Death Penalty,*30 QUEEN'S L.J. 260, 263 (2004).

28. Infoplease.com, The Death Penalty Worldwide, http://www.infoplease.com/ipa/A0777460.html (last visited Jan. 12, 2008).

29. *Id.*

30. Clarke, *supra* note 27, at 262.

31. DPIC Facts, *supra* note 25. However, it is important to note that all statistics may vary according to the exact question asked.

32. *Id.*

33. Canadian Coalition Against the Death Penalty, The Death Penalty in Canada: Facts, Figures, and Milestones, http://www.ccadp.org/deathpenalty-canada.htm (last visited on Apr. 2, 2008) [hereinafter CCADP].

34. *Id.*

Parliament, not a ruling of unconstitutionality by the Canadian Supreme Court.[35] Interestingly, supporters of the death penalty almost undid abolition, as evidenced by a 1987 vote in the House of Commons where anti-death penalty supporters narrowly defeated supporters of reinstating the death penalty.[36] In effect, Canada officially became an abolitionist nation in the same year the United States reverted to its position as a retentionist nation.

IV. The History and Current Status of Extradition between the United States and Canada

Differences over capital punishment in Canada and the United States naturally play a role in extradition practices between the two nations, as extradition requests between the two nations often involve capital cases. Extradition has been defined as "'the surrender by one state, at the request of another [state], of a person who is accused or has been convicted of a crime committed within the jurisdiction of the requesting state.'"[37] Extradition is beneficial for both the requested and the requesting state. Primarily, as noted by a Canadian judge, extradition protects the public of the requesting country, as it allows that country to prosecute criminals who have escaped abroad.[38] Extradition can also deter criminals from seeking protection within the borders of another country.[39] Furthermore, in cooperating with extradition, the requested country might benefit from future reciprocity from the requesting country.[40] Overall, the extradition process is crucial to international relations, and thus, formalized extradition procedures between nations around the world are not only commonplace but essential.

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35. *See id.*

36. *See id.* In 1987, a vote regarding the reinstatement of the death penalty was held in the House of Commons. The result of the vote was in favor of maintaining the abolition of the death penalty, 148 to 127 – a margin of only 21 votes. *Id.*

37. James D. McCann, United States v. Jamieson: *The Role of the Canadian Charter in Canadian Extradition Law*, 30 Cornell Int'l L.J. 139, 141 (1997) (quoting Anne Warner La Forest, La Forest's Extradition to and from Canada (1991).

38. *See* United States v. Cotroni, [1989] 1 S.C.R.1469. Judge La Forest notes that the importance of extradition for the protection of the Canadian public against crime can scarcely be exaggerated. He continues by claiming that to afford that protection, there must be arrangements that ensure prosecution not only of those who commit crimes while they are physically in Canada and escape abroad, but also of those whose acts abroad have criminal effects in this country. *Id.* at 141-2; *see also* McCann, *supra* note 37.

39. *E.g.*, McCann, *supra* note 37.

40. *Id.* at 141.

A. *Extradition Procedures between the United States and Canada*

Naturally, the United States and Canada have formalized extradition procedures, which are necessary due to the ease of travel across their common border. The Extradition Treaty Between Canada and the United States[41] was amended by the 1988 Protocol,[42] forming what is now the current Extradition Treaty.[43] The Extradition Treaty provides a skeletal procedural framework for extradition, and Canada's Extradition Act[44] provides the specific mechanism by which fugitives are extradited from Canada.[45] The Extradition Treaty and Extradition Act involve a series of discrete steps, including a formal requisition by the requesting state, the attainment of a Canadian arrest warrant by the requesting state, and an extradition hearing in which substantive requirements must be met in order to extradite.[46]

In general, Canada and the United States have agreed to extradite to one another individuals who are found in their territory, but have been charged with or convicted of offenses within the territory of the other country.[47] As a result, extradition is quite common between Canada and the United States and has been for some time.[48] However, the Canadian Minister of Justice has some discretion in deciding whether to extradite particular individuals to the United States — in particular, this discretion is crucial with regard to capital cases.[49]

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41. Extradition Treaty, U.S.-Can., Dec. 3, 1971-July 9, 1974, 27 U.S.T. 983 [hereinafter 1971 Treaty]. This treaty entered into force on March 22, 1976 after multiple ratifications.

42. Protocol Amending the Extradition Treaty, U.S.-Can., Jan. 11, 1998, S. Treaty Doc. No. 101-17, 27 I.L.M. 422, [hereinafter1988 Protocol].

43. Hereinafter, Extradition Treaty refers to the 1971 Treaty as amended by the 1988 Protocol.

44. Extradition Act, R.S.C., ch. E-23 (1999) (Can.) [hereinafter Extradition Act]. The Extradition Act was repealed and replaced in both 1995 and 1999. Section 25 of the Extradition Act gives the Minister of Justice of Canada the discretion to order a fugitive to be surrendered for extradition. *Id.* at ch.E-25.

45. McCann, *supra* note 37, at 146.

46. *See generally id.* at 146-47.

47. Extradition Treaty, *supra* note 43, art. 1.

48. *See generally* McCann, *supra* note 37, at n.31.

49. *See generally* John Pak, *Canadian Extradition and the Death Penalty: Seeking a Constitutional Assurance of Life*, 26 CORNELL INT'L L.J. 239 (1993).

B. *United States-Canadian Extradition in Cases Involving the Death Penalty*

The Extradition Treaty directly addresses the issue of extradition in cases involving capital punishment and allows the requested state to refuse extradition unless the requesting state provides assurances against the death penalty.[50] This affords the Canadian Minister of Justice the discretion to refuse a formal extradition request by the United States when the United States does not provide assurances against capital punishment.[51] Still, the Minister's power is completely discretionary and for years had not been invoked.[52] In fact, Canada has consistently extradited criminals and accused criminals — both American citizens and non-American citizens — to America without requiring assurances against imposing or executing the death penalty.

V. CANADA'S HISTORICAL PRACTICE OF UNCONDITIONED EXTRADITION

A. *The Case of Joseph John Kindler*

One example of the Canadian practice of extraditing individuals to America without requiring assurances against imposing or executing the death penalty is the case of Joseph John Kindler. On November 15, 1983, a jury in Philadelphia, Pennsylvania, found Kindler, an American citizen, guilty of first degree murder, conspiracy to commit murder, and kidnapping.[53] Kindler beat his victim in the head with a baseball bat before dragging him to a

50. *See* Extradition Treaty, *supra* note 43, art. 6. Article 6 reads: "When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offense, extradition may be refused unless the requesting State provides assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed." It is interesting to note that at the time of the Treaty's negotiation in 1971, Canada retained the death penalty and the United States did not (the United States Supreme Court had ruled capital punishment unconstitutional in the *Furman* case). *See* Furman v. Georgia, 408 U.S. 238, 239-40. However, when the Treaty went into effect in 1976, the United States had reinstated the death penalty (the Court had subsequently ruled capital punishment constitutional in the *Gregg* decision), while Canada had since abolished it. *See* Gregg v. Georgia, 428 U.S. 153 (1976). Ironically, the very clause that has created a barrier for the United States with regard to Canadian extradition is a clause that the United States itself requested be included in the Extradition Treaty.

51. Pak, *supra* note 49, at 240.

52. See *infra* Part IV for a discussion of Canada's history of extraditing individuals to the United States without the Minister of Justice requesting assurances against the imposition or execution of the death penalty.

53. *See* Kindler v. Canada, [1991] 2 S.C.R. 779, 794 (Can.).

nearby river, where Kindler tied a cinder block to the victim's neck and threw him in the river still alive.[54] However, in September 1984, before formal imposition of the death sentence, Kindler escaped from prison in Pennsylvania and successfully fled to Canada.[55]

Kindler was subsequently arrested by Canadian authorities near St. Adele, Quebec after living undetected for some time as a fugitive, and on July 3, 1985, the United States formally requested that Canada extradite Kindler pursuant to the Extradition Treaty.[56] Although Kindler attempted to secure a request for Article 6 assurances against imposition or execution of the death penalty from the United States, the Minister of Justice of Canada, in his discretion, refrained from seeking such assurances.[57] Ultimately, Kindler's final appeal to the Canadian Supreme Court was dismissed, and on September 26, 1991, the court affirmed the Minister's order for the unconditioned extradition of Joseph John Kindler to the United States.[58]

Importantly, the *Kindler* case stood for the broad holding that the extradition of an individual to America to face the death penalty did not violate either the "cruel and unusual punishment" or the "right to life" provisions of the Canadian Charter of Rights and Freedoms.[59] In making this determination, the Canadian Supreme Court considered factors such as the attitude of Canada towards the death penalty and extradition, as well as the need to preserve an effective extradition policy and to deter American criminals from fleeing to Canada to avoid prosecution.[60] The court concluded that although Canada had abolished capital punishment, the imposition of the death penalty by a foreign state for a

54. *Id.* at 835.

55. *Id.* at 794.

56. *See id. See generally* Extradition Treaty, *supra* note 43.

57. *See* Pak, *supra* note 49, at 250. In this comment, "Article 6 assurances" refers to Article 6 of the Extradition Treaty, which provides that a country which has received an extradition request from another nation may require assurances against imposition or executing of the death penalty before acquiescing to extradition. *See also* Extradition Treaty, *supra* note 43, art. 6.

58. *Kindler*, [1991] 2 S.C.R. at 780.

59. *See id.* at 846-59; Waters, *supra* note 8, at 520. *See generally* Charter, *supra* note 2, s.7, s.12. Section 7 of the Charter reads, "Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 12 of the Charter reads, "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." Note that the rights in the Charter, unlike the rights in the United States' Bill of Rights, are subject to explicit limitation and override.

60. *Kindler*, [1991] 2 S.C.R. at 850.

crime committed in foreign territory did not "shock the conscience" of the Canadian people.[61] This was the first time that the Canadian Supreme Court addressed the issue of whether assurances against the death penalty must be sought by Canadian authorities before extradition.[62] Kindler, however, was not the only individual extradited by Canada to the United States without assurances against the death penalty; in fact, Kindler was one of many individuals extradited without conditions.

B. The Case of Charles Chitat Ng

Another example of past unconditioned Canadian extradition is the case of Charles Chitat Ng. On July 6, 1985, Ng, a former United States marine, was apprehended by security guards in Calgary who caught him shoplifting.[63] Not only did Ng resist arrest and ultimately shoot and injure one of the security guards, but at the time of his arrest Ng was carrying a mask, a knife, a rope, cyanide capsules, a gun, and extra ammunition.[64] It subsequently became clear that Ng was a serial killer responsible for at least twelve gruesome murders in California, and had escaped incarceration and fled to Canada in order to evade multiple charges of murder, conspiracy to commit murder, attempted murder, and kidnapping.[65] The United States formally requested that Canada extradite Ng pursuant to the Extradition Treaty so that Ng could stand trial in the United States.[66] Although representations to request assurances against the death penalty were made to the Minister of Justice on Ng's behalf, the Minister, in his discretion, chose not to seek the requested assurances from the United States and ordered Ng's unconditioned extradition.[67]

The Canadian Supreme Court discussed Ng's situation in the *Kindler* opinion, and also concluded that extraditing Ng to the United States to face the death penalty did not violate either the "cruel and unusual punishment" or the "right to life" provisions of the Canadian Charter of Rights and Freedoms.[68] As in *Kindler*,

61. *Id.* at 849-53.

62. Robert Harvie & Hamar Foster, *Shocks and Balances:* United States v. Burns, *Fine-Tuning Canadian Extradition Law and the Future of the Death Penalty*, 40 GONZ. L. REV. 293, 304-05 (2004-2005).

63. *Reference re Ng Extradition*, [1991] 2 S.C.R. 858, 863 (Can.). This case was a companion case to *Kindler*, as noted by Justice McLachlin in the *Kindler* opinion.

64. *Id.*

65. *Id.*

66. *Id. See generally* Extradition Treaty, *supra* note 43.

67. *Ng*, [1991] 2 S.C.R. at 863-64; *see also* Pak, *supra* note 49, at 251.

68. *See Kindler*, [1991] 2 S.C.R. at 826-59.

the court confirmed the order by the Minister of Justice for the unconditioned extradition of Charles Chitat Ng on September 26, 1991.[69]

C. *The Case of Roger Judge*

As Kindler and Ng were in extradition proceedings, Roger Judge, an American citizen, was serving 10 years in a British Columbia prison for the beating and robbery of two people in Vancouver.[70] Judge had fled to Canada in 1987 after being convicted of a double murder in Philadelphia, receiving a jury-imposed death sentence, and fleeing from a Pennsylvania prison.[71] Judge, like Kindler and Ng, attempted to block his extradition by claiming that unconditioned extradition to face the death penalty violated provisions of the Canadian Charter.[72] However, in keeping with the precedent set by the Canadian Supreme Court, the Quebec Superior Court denied Judge's argument. On August 7, 1988, Judge was handed over to American federal and state authorities without a Canadian request for assurances from the United States against imposing or executing the death penalty.[73]

VI. *UNITED STATES v. BURNS*

One landmark case halted Canada's practice of unconditioned extradition to the United States: *United States v. Burns*. On July 12, 1994 in Bellevue, Washington, Glen Sebastian Burns and Atif Ahmad Rafay, both eighteen-year old Canadian citizens and friends from high school, bludgeoned to death Rafay's mother, father, and sister in their home.[74] After the murders, Burns and Rafay left the United States and traveled to Canada, where they were eventually arrested.[75] The Attorney General of British Columbia decided not to prosecute Burns and Rafay for the Washington murders; however, the State of Washington chose to prosecute the two men for the heinous crimes committed on American soil. United States' authorities initiated proceedings to extradite

69. *See* Pak, *supra* note 49, at 252.

70. L. Stuart Ditzen, *Canada Hands over Escaped Philadelphia Killer to U.S. Authorities*, PHIL. INQ., Aug. 8, 1998, at B03.

71. *See id.*

72. *See id. See generally* Charter, *supra* note 2, s.7, s.12. As aforementioned, Section 7 is the "right to life" provision, and Section 12 is the "cruel and unusual punishment" provision.

73. *See* Ditzen, *supra* note 70.

74. United States v. Burns, [2001] S.C.R. 283, 284 (Can.).

75. *Id.*

Burns and Rafay to the United States.[76] The Minister of Justice of Canada took Burns' and Rafay's age and Canadian citizenship into consideration,[77] but still decided to order their unconditioned extradition pursuant to the Extradition Act.[78] This decision by the Minister was in line with previous extradition decisions by former Ministers, which had also been affirmed by the Canadian Supreme Court.[79]

However, in a departure from precedent, the British Columbia Court of Appeal ruled that the Minister's unconditioned extradition violated the rights of Burns and Rafay under Section 6 of the Canadian Charter of Rights and Freedoms.[80] Subsequently, the Canadian Supreme Court affirmed the Court of Appeal's broad holding, and unanimously held that barring exceptional circumstances, extradition requests must be accompanied by assurances against seeking or imposing capital punishment.[81]

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76. *Id.*

77. Burns and Rafay, unlike Kindler and Ng, are Canadian citizens. Kindler is an American citizen, and Ng, although a Hong Kong national and British subject, is a former United States marine and had resided in the United States for many years. For a discussion of Burns' and Rafay's attempt to distinguish their situation from the *Kindler* and *Ng* cases, see Harvie & Foster, *supra* note 62, at 314. The Minister of Justice of Canada rejected this argument, as well as an argument based on Burns' and Rafay's age, and determined that neither the age nor the nationality of the accused constituted "exceptional circumstances" or the sort of situation contemplated by the *Kindler* court that would shock the conscience of the Canadian people. For a discussion of how it was previously determined that unconditioned extraditions do not shock the conscience of the Canadian public, see *supra* Part IV.A.

78. *Burns*, [2001] 1 S.C.R. at 284-85. The Minister of Justice, in the discretion provided to him by Section 25 of the Extradition Act, chose not to seek assurances against imposition or execution of the death penalty from the United States under Article 6 of the Extradition Treaty. *Id.*

79. *See generally* Kindler v. Canada, [1991] 2 S.C.R. 779 (Can.); *Reference re Ng Extradition*, [1991] 2 S.C.R. 858 (Can.). *See supra* Part IV.A-B for a discussion of these cases.

80. *Burns*, [2001] 1 S.C.R. at 285. The Court of Appeal held that the Minister's unconditioned extradition order would violate the mobility rights of Burns and Rafay under Section 6(1) of the Charter. Section 6(1) reads, "Every citizen of Canada has the right to enter, remain in, and leave Canada." Charter, *supra* note 2, s.6(1).

81. *Burns*, [2001] 1 S.C.R. at 285-90. The Canadian Supreme Court declined to affirm the Court of Appeal's narrow holding that the Minister's unconditioned extradition order would violate the mobility rights of Burns and Rafay under Section 6(1) of the Charter, stating that on its own, Section 6(1) of the Charter does not invalidate an extradition without assurances against capital punishment. Instead, the court noted that the analysis was appropriate under Section 7 of the Charter, which provides everyone not only the right to life, but also the right not to be deprived of life unless it is in accordance with the principles of fundamental justice. The court explained that factors for and against extradition without assurances must be balanced under Section 7, and ultimately held that after such a balancing test an extradition of Burns and Rafay could not be justified. More broadly, the court held

A. *The* Burns *Balancing Test*

In *Burns*, the Canadian Supreme Court engaged in a balancing process, weighing factors for and against extradition without assurances under Section 7 of the Charter.[82] This balancing test, which the court states is the proper analytical approach for such a situation, was initially mandated by *Kindler* and *Ng*, neither of which, as the court noted, provides a blanket approval on unconditioned extraditions.[83] The Court noted that since the balancing process is a flexible instrument, it is possible that some circumstances may tip the balance against extradition of a suspect without assurances against imposing or executing the death penalty.[84]

In *Burns*, the Canadian Supreme Court discussed the factors in favor of extradition without assurances. Specifically, the court mentioned the following: (1) if assurances are sought by the Canadian government and refused by the United States, it is possible that the accused would never stand trial, which would fly in the face of the commonly recognized principle that those accused of a crime should be brought to trial to determine the truth of the charges; (2) justice is best served by a trial within the jurisdiction where the crime allegedly occurred and the harmful impact was felt; (3) in choosing to leave Canada for a foreign state, people effectively relinquish themselves of the protections of Canadian law, and must accept the local law of the foreign state to which they travel, even if that law differs from Canadian law and includes capital punishment; and (4) extradition is an important aspect of comity and fairness between cooperating states that share the common goal of bringing fugitives to justice with a fair trial.[85] However, these considerations were ultimately dismissed, as the Court made clear that it believed the factors against unconditioned extradition to be weightier.[86] In fact, the Court's discussion of the four main factors in favor of unconditioned extradition occupy only a few paragraphs in the case, while over fifty paragraphs in *Burns* are dedicated to discussing the factors

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that unconditioned extradition is unconstitutional in all but exceptional cases. *Id.* This broad holding further departed from the Court of Appeal's holding, which had its roots in Section 6(1) of the Charter, because the Canadian Supreme Court's holding applied to all individuals, not just Canadian citizens.

82. *Id.* at 289.

83. *Id.* at 323.

84. *Id.* at 323, 355-56.

85. *Id.* at 286-87.

86. *See generally id.*

against unconditioned extradition.[87]

According to the Canadian Supreme Court in *Burns*, the factors in favor of extraditing only with assurances against the death penalty tilt the balance in the opposite direction of the *Kindler* and *Ng* cases.[88] Among the considerations discussed by the Court were Canada's own abolition of the death penalty and the "death row phenomenon," in which the final nature of the death penalty combines with a lengthy appeal process to exacerbate the psychological trauma to death row inmates.[89] However, the bulk of the Court's opinion focuses on the possibility of wrongful convictions and the declining domestic and international toleration of capital punishment.[90]

Regarding the possibility of wrongful convictions, the Canadian Supreme Court stated that concern over such mistakes had become more significant since *Kindler* and *Ng* were decided.[91] The Court listed and discussed multiple Canadian cases from the past decade in which the accused was wrongfully convicted and served jail time unnecessarily.[92] The Court then moved to discuss the United States' experience with capital punishment and analyzed problems in the American judicial system that could play a role in wrongful convictions, such as racial bias and poverty.[93] The Court listed a litany of American organizations and individuals that have called for a moratorium on the death penalty, among them the American Bar Association, the state or local bars of nine different states, the then-Governor of Illinois, and the Senator of Wisconsin, and mentioned multiple cases in which convicts on death row in the United States were subsequently exonerated.[94]

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87. Harvie & Foster, *supra* note 62, at 317.

88. *Id.* at 315-16.

89. *Burns*, [2001] 1 S.C.R. at 287-88. These considerations are listed by the court in the first and fifth factors, respectively.

90. *See generally id. See also* Harvie & Foster, *supra* note 62, at 315-16.

91. *Burns*, [2001] 1 S.C.R. at 288.

92. *Id.* at 337-41. One of the situations discussed by the court involved a man named Donald Marshall, who served eleven years in prison for a conviction of manslaughter before being exonerated; however, this occurred before the *Ng* and *Kindler* cases. *Id.* at 337-38. The Court also discussed the case of David Milgaard, who served twenty-two years in prison before subsequently being found innocent. *Id.* at 338-39. The Court noted that Guy Paul Morin, Thomas Sophonow, and Gregory Parsons were all subsequently exonerated after serving time for murder convictions. *Id.* at 339-41. The Court alleged that had capital punishment been imposed in these cases, the miscarriage of justice would have been irreparable and in violation of the principles of fundamental justice. *Id.* at 341; *see also* Harvie & Foster, *supra* note 62, at 320 n.209.

93. *Burns*, [2001] 1 S.C.R. at 342.

94. *Id.* at 342-45. The Court noted that local or state bars in California,

The overall problem with capital punishment, as noted by the Court, is that despite everyone's best efforts, the judicial system remains fallible; however, incarceration within the judicial system is reversible while a death sentence is not.[95] The Canadian Supreme Court stated that its knowledge of the extent of wrongful convictions was not understood at the time it decided *Kindler* and *Ng*; however, its current understanding of the situation was cited as a significant factor in tipping the balancing test against unconditioned extradition.[96]

Regarding the declining domestic and international acceptance of the death penalty, the Canadian Supreme Court utilized and discussed a variety of international sources and information.[97] Primarily, the Court permitted written interventions by organizations such as the International Centre for Criminal Law & Human Rights and the Senate of the Italian Republic and allowed counsel for Amnesty International to speak at the hearing.[98] The

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Connecticut, Ohio, Virginia, Illinois, Louisiana, Massachusetts, New Jersey and Pennsylvania have called for a moratorium on executions. *Id.* at 342. The court also noted that then-Governor George Ryan of Illinois declared a moratorium on executions in Illinois, while Senator Russ Feingold of Wisconsin introduced a bill to Congress in April 2000 that called on the federal government and all states that impose the death penalty to suspend executions while a national commission reviewed the administration of capital punishment in America. *Id.* at 343-44. The court also mentioned the case of Anthony Porter, an American sitting on death row in Illinois, who came within forty eight hours of being executed for a crime he did not commit. *Id.* at 344.

95. *Id.* at 355-56.

96. *See id.* at 337.

97. Reliance on international statutes and policies demonstrates a difference between the Canadian Supreme Court and the United States Supreme Court, as the United States Supreme Court is hesitant to look to international law and attitudes, and generally utilizes only American case law, statutory law, and precedent when asserting a claim. Recently, the Court has begun to incorporate international considerations into its decisions, acknowledging the overwhelming weight of the international opinion against the juvenile death penalty to find that the death penalty is a disproportionate punishment for juvenile offenders. *See Roper v. Simmons*, 543 U.S. 551, 578 (2005). Still, this reliance on international attitudes is not entirely accepted by the Court. *Id.* at 624. In fact, the *Roper* decision was decided by a margin of only one vote, with Justice Scalia dissenting against the majority's reliance on the opinions and initiatives of other countries. *Id.* See generally Cindy G. Buys, *Burying Our Constitution in the Sand? Evaluating the Ostrich Response to the Use of International and Foreign Law in U.S. Constitutional Interpretation*, 21 BYU J.PUB. L. 1 (2007) for a detailed discussion of the Court's recent issuance of several high-profile opinions that utilize international and foreign law. Buys' article also examines the controversy that has been sparked among the Justices, legal scholars, and politicians over the proper use of international and foreign law in Supreme Court jurisprudence. *Id.*

98. *See Burns* [2001] 1 S.C.R. at 294; *see also* Harvie & Foster, *supra* note 62, at 316 n.179.

Court noted that there is currently an international trend against the death penalty, drawing upon various international treaty provisions and United Nations' resolutions as an illustration of the international momentum towards abolition of capital punishment.[99] The Court conceded that this data does not establish an international law norm or mandate against capital punishment or extradition involving capital punishment.[100] However, as Canada has done in the past, the Court here treated international law and opinion on the death penalty as compelling authority.[101]

The tendency of Canadian courts to consider developments in international law in reaching a decision can be explained by the fact that until the 1980's Canada was not formally separated from its British motherland.[102] Thus, Canada has continuously looked to the European community in defining its social and legal character, specifically with regard to Canada's relations with other nations.[103] In *Burns*, the Court's consideration of the international movement against capital punishment, combined with Canada's abolitionist attitude, outweighed the individualized facts of the situation.[104] As the Canadian Supreme Court noted, "[t]he outcome of this appeal [from the Minister's decision to allow the unconditioned extradition of Burns and Rafay] turns more on the practical and philosophic difficulties associated with the death penalty that have increasingly preoccupied the courts and legislators in Canada, the United States and elsewhere rather than on the specific circumstances of the respondents in this case."[105]

B. Beyond Merely a Balancing Test to a Per Se Rule and an Unnecessarily Broad Holding

In the six years since *Burns,* scholars have noted that notwithstanding the Canadian Supreme Court's discussion and utilization of a balancing test, in actuality, the Court moved towards a per se rule.[106] It has been suggested that the *Burns* holding is

99. *See Burns* [2001] 1 S.C.R. at 356, 332-34; *see also* Waters, *supra* note 8, at 523 n.163.

100. *See Burns* [2001] 1 S.C.R. at 334.

101. *See* Thomas Rose, *A Delicate Balance: Extradition, Sovereignty, and Individual Rights in the United States and Canada,* 27 YALE J. INT'L L. 193, 195 (2002).

102. *Id.*

103. *Id.*

104. *See Burns* [2001] 1 S.C.R. at 323.

105. *Id.*

106. *See* Alan Clarke, *Justice in a Changed World: Terrorism, Extradition, and the Death Penalty,* 29 WM. MITCHELL L. REV. 783, 799 (2003); *see also* Harvie & Foster,

much like a conclusive presumption, and that although the Court's language is consistent with an ad hoc approach, the rationale underlying the holding is absolutist.[107] Many of the reasons provided by the Court as support for its refusal to allow the unconditioned extradition of Burns and Rafay revolve around issues — such as the international trend against capital punishment — that could not reasonably be fixed by any retentionist nation.[108] Furthermore, many of the reasons provided by the Court that theoretically could be fixed essentially create a Hobson's choice for a retentionist nation.[109] Essentially, an argument can be made that although *Burns* discusses a balancing test, it relies on an absolutist foundation and thus provides for the per se approach that an agreement by Canada to extradite to a retentionist nation must always be accompanied by assurances against the death penalty.[110]

The fact that the *Burns* holding potentially creates a bright-line rule against unconditioned Canadian extradition makes its effect even stronger. For example, after engaging in the balancing process, the Court pronounced its general holding that assurances against imposing or executing the death penalty are constitutionally necessary for extradition in all but exceptional circumstances.[111] As such, in *Burns*, the Minister of Justice's decision to allow the unconditioned extradition of Burns and Rafay to the United States constituted a violation of the Canadian Charter of Rights and Freedoms.[112] However, the Court specifically declined to explain what constitutes exceptional circumstances, stating

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supra note 62, at 322 (arguing that through the *Burns* holding "Canada has gone from a rule that was highly deferential to executive decision-making, requiring assurances only in exceptional extraditions, to [a rule] that, as a matter of constitutional law, requires assurances in all extraditions, leaving only a bare possibility that there might be exceptions.").

107. Clarke, *supra* note 106, at 801.

108. *Id.* at 799.

109. *Id.* at 800-03. Clarke notes that in focusing on both the innocence argument and the "death row phenomenon," the Canadian Supreme Court presents a conundrum in *Burns* because "[t]he [two] criteria cut against each other such that if you satisfy one, you are forced to violate the other – repair the length of stays on death row at the expense of increasing the probability of executing the innocent." *Id.* at 803. Harvie and Foster also note that "[b]ecause the heart of the court's reasoning [in *Burns*] is the innocence argument, it is difficult to imagine how a retentionist state might modify its capital punishment regime so as to fit into such an exception [of "exceptional circumstances."]" Harvie & Foster, *supra* note 62, at 322.

110. Clarke, *supra* note 106, at 803.

111. *Burns* [2001] 1 S.C.R. at 289-90.

112. *See id.* The Canadian Supreme Court held that extradition without assurances against imposing or executing the death penalty violates the "right to life"

that "[t]his case does not present the exceptional circumstances that must be shown."[113]

The Canadian Supreme Court adopted a broader restriction on extradition than was necessary based on the facts of the case.[114] This broad holding by the Canadian Supreme Court was a departure from the lower court's holding, which distinguished *Burns* from *Kindler* because Burns and Rafay were Canadian citizens, and as such, were entitled to view Canada as a safe haven — meaning Burns and Rafay, unlike Kindler and Ng, should be able to benefit from Canada's protections and its abolition of the death penalty.[115] The Court phrased its holding and rationale so broadly as to extend not only to Canadian citizens wanted for trial for crimes committed in the United States, but also to American citizens and residents accused of committing crimes in America and subsequently fleeing to Canada.[116] To say that this holding — specifically, the broad phrasing and even more sweeping application — is undesirable for the United States is an understatement. The reality of the situation is that the *Burns* holding is potentially disastrous for America and its jurisprudence.

VII. The Problematic Result of the *Burns* Holding for the United States

The Canadian Supreme Court's holding in *Burns* has opened the floodgates to problems for the United States. In holding that Canadian extradition to other countries must, barring exceptional situations, be accompanied by assurances that the receiving country will not seek or enforce the death penalty, the Canadian Supreme Court did not define what constituted "exceptional circumstances."[117] In fact, the Court purposefully refrained from attempting to anticipate any exceptional circumstances.[118] The Court's reluctance to define or describe "exceptional circumstances" could be explained as an attempt by the Canadian Supreme Court to maintain an open dialogue between itself and the elected branches of government.[119] Alternatively, the Court

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provision of Section 7 of the Charter, which is effectuated by Section 1 of the Charter. *Id.*

113. *Id.* at 290.

114. Waters, *supra* note 8, at 523.

115. *See Burns* [2001] 1 S.C.R. at 300; *see also* Waters, *supra* note 8, at 523.

116. *See* Waters, *supra* note 8, at 523.

117. *Burns* [2001] 1 S.C.R. at 290.

118. *Id.* at 323.

119. *See* Kent Roach, *Did September 11 Change Everything? Struggling to Preserve*

could have reasoned that since unforeseen or unconsidered circumstances might arise, constituting an exceptional case, it would be unwise either to state a per se rule or explicitly define what might constitute "exceptional circumstances."[120]

However, regardless of the Court's rationale, there remains no clear definition of what circumstances would permit an unconditioned Canadian extradition. As a result, a situation might arise in which the United States government requests the extradition of an individual from Canada and does not, for reasons that American governmental officials consider compelling, want to provide assurances against the imposition or execution of the death penalty. Thus, in awaiting a determination on the extradition status of that individual, the United States can merely speculate as to whether the Canadian Supreme Court will deem those particular circumstances to be "exceptional," and whether the Canadians will allow the individual to return to America to stand trial.

A. Canada's Potential Extraterritorial Extension of Its Laws to American Citizens

Not only does the definition of "exceptional circumstances" remain unclear, but after *Burns*, a question arises as to whether Canada's ban on unconditioned extraditions is a type of illicit extraterritorial extension of Canadian law to other countries.[121] The Court's holding in *Burns* is rooted in the "right to life" provision of the Canadian Charter of Rights and Freedoms.[122] However, the United States, as a sovereign nation, is not bound by the Canadian Charter; in fact, the Charter has no bearing whatsoever on American decisions and jurisprudence.

Canadian Values in the Face of Terrorism, 47 McGILL L.J. 893, 925 (2002). The effects of the September 11, 2001 terrorist attacks on New York City were felt by countries around the world, especially by nations contiguous to the United States. After these attacks, there was much discussion among Canadian scholars and politicians concerning communication between the appointed courts and the elected members of government. Although it is possible that in refusing to define "exceptional circumstances," the Canadian Supreme Court wanted to keep a channel open for dialogue, it has been suggested that such dialogue "should require the passage of legislation and resulting democratic debate about and accountability for the government's decision to limit or override rights." *Id.*

120. *Id.*

121. *See* Rose, *supra* note 101, at 207. In his comment, Rose states that "[i]n denying extradition, the Court [sic] also expanded the doctrine of extraterritoriality . . . [i]n the instant case, the [Canadian] Supreme Court looked to the U.S. penal system, compared it with the Canadian system, weighed the nation's perception of 'fundamental principles of justice,' and found the U.S. system deficient." *Id.*

122. *See Burns*, [2001] 1 S.C.R. at 289.

Of course, the United States is bound by the Constitution, which also discusses a right to life and states that no one is to be deprived of life without due process of law.[123] However, American jurisprudence recognizes the current American criminal justice system, albeit flawed at times, as due process of law, and also recognizes the death penalty as an appropriate and constitutional sentence imposed on people through due process. Thus, despite the views of some scholars,[124] an argument can be made that the *Burns* holding is an extension of Canadian law to American citizens. Such an extension is problematic, not only on its face, but also because American law is substantively different from Canadian law regarding a "right to life" and regarding when such a right can be curtailed.

B. Canada's Potential Refusal to Extradite Suspected Terrorists

Canada's potential extraterritorial extension of Canadian law to American citizens is not the only problematic result of the *Burns* holding. As previously discussed, situations that constitute the "exceptional circumstances" needed for unconditioned Canadian extradition are unknown, and America can only speculate as to what circumstances might suffice to enable an individual to be extradited from Canada to the United States without assurances against imposing or executing the death penalty. In a post-9/11 world and in light of the current political climate in America — specifically, America's prosecution of suspected terrorists[125] and al-Qaeda participants — the question of whether Canada will unconditionally extradite these individuals naturally arises. In other words, one wonders if suspected involvement in a terrorist attack would constitute the "exceptional circumstances" required by the *Burns* case.

Scholars and commentators differ on this issue. Some scholars believe that if the Canadian Supreme Court ever finds a situa-

123. U.S. CONST. amend. V. The Fifth Amendment provides in part, "No person shall . . . be deprived of life, liberty, or property, without due process of law." *Id.*

124. *See* Harvie & Foster, *supra* note 62, at 325. Harvie and Foster argue that "[t]echnically, the court has simply said that it would be a violation of section seven of the Charter for the Canadian government to send someone currently in Canada to another state to face possible execution. The Charter is therefore not being applied to a foreign government." *Id.*

125. In this comment, "suspected terrorists" refers to individuals who are suspected of involvement in an organization that has committed a capital crime, such as an act of terrorism.

tion in which the "exceptional circumstances" warrant unconditioned extradition, it is more likely than not that the situation will involve al-Qaeda suspects or other accused terrorists.[126] Other scholars note that most nations that have abolished the death penalty are unlikely to extradite anyone, even suspected members of al-Qaeda, if the accused faces a realistic possibility of receiving a death sentence in the United States.[127]

If Canada looks to European nations for guidance, as it has done in the past,[128] in deciding whether extradition requests for suspected members of al-Qaeda and other terrorist organizations constitute "exceptional circumstances," it is possible — and arguably likely — that the result will be undesirable for the United States. Spain has previously refused to extradite individuals supposedly linked to the terrorist attacks of September 11, 2001 unless the United States agreed not to seek the death penalty and not to use military tribunals.[129] Although British law bars extradition where the death penalty could be imposed, the British government has said that it will hand any key terrorists over to the Americas.[130] In some cases, British authorities have charged these individuals for crimes in Great Britain; in doing so, the British charges take precedence over the American extradition request. This allows British authorities to wait until after the trials in Britain have ended to deal with the potentially problematic situation raised by extradition to a country that retains the death penalty.[131]

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126. *See* Harvie & Foster, *supra* note 62, at 324.

127. *See* Clarke, *supra* note 106, at 807; Harvie & Foster, *supra* note 62, at 327. Harvie and Foster note that "[i]t remains to be seen . . . whether some new horror causes the Canadian court, in some future extradition case involving an appalling crime, to decide that assurances are not required," before concluding that such an event is not likely to occur any time soon. *Id.*

128. See *supra* Part V.B for a discussion of how Canada has continuously looked to the European community in defining its social and legal character, specifically with regard to Canada's international relations.

129. *See* Clarke, *supra* note 106, at 808; Sam Dillon & Donald G. McNeil, Jr., *A Nation Challenged: The Legal Front; Spain Sets Hurdle for Extraditions,* N.Y. TIMES, Nov. 24, 2001, at A1.

130. Kyle M. Medley, *The Widening of the Atlantic: Extradition Practices Between the United States and Europe*, 68 BROOK. L. REV. 1213, 1214 (2003). Although then-British Defense Secretary Geoff Hoon had originally announced that Britain would not hand anyone over to the United States to face the death penalty, including Osama bin Laden, the British government subsequently reversed its stance and publicly acknowledged that it would promptly hand over key terrorists to the Americans. *Id.* at 1213-14.

131. *See* Lizette Alvarez, *Britain Charges Muslim Cleric Sought by U.S.*, N.Y. TIMES, Oct. 20, 2004, at A14. Abu Hamza al-Masri, a radical Muslim cleric, was

Germany has also previously refused to extradite Islamic militants and accused terrorists to countries where they face the possibility of capital punishment.[132] Finally, although there was no extradition issue involved, France's strong opposition to the prosecution of French citizen and convicted al-Qaeda member Zacarias Moussaoui demonstrates that no terrorist will be extradited from France without assurances against capital punishment.[133] In sum, if Canada looks to European countries to determine how to handle extradition requests of suspected terrorists and al-Qaeda members, it is quite possible that Canada will determine that the "exceptional circumstances" necessitated by the *Burns* case are not present and will refuse to extradite suspected terrorists to the United States without assurances against the death penalty.

C. *The Ultimate Result of the* Burns *Holding: A Canadian "Safe Haven"*

Thus, it seems terrorists, American criminals, and other individuals who commit crimes in the United States that carry a potential capital sentence may flee to Canada to avoid the death penalty, thereby using Canada as a "safe haven." This possibility of a "safe haven" for American criminals is extremely problematic. Primarily, a Canadian "safe haven" allows American citizens and residents to circumvent the United States' judicial process, which in many states includes capital punishment. The possibility of a Canadian "safe haven" for convicted and accused criminals was discussed and ultimately dismissed by the Canadian Supreme Court in *Burns* as an unrealistic concern.[134] The Court felt that extradition to face the death penalty and extradition to face life in prison both equally prevented a fugitive from using Canada as a "safe haven."[135] However, despite the belief of the *Burns* Court, it

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arrested by the British antiterrorism police on a United States extradition warrant. *Id.* He faces eleven charges in the United States, including hostage taking and providing material support to al-Qaeda and its Taliban allies in Afghanistan. *Id.* In Britain, he was charged with sixteen offenses, including inciting racial hatred, possessing threatening or incendiary sound and video recordings, and having a terrorist document in his possession on the day he was arrested. *Id.*

132. *See* Clarke, *supra* note 106, at 807; *Germany Targets Muslim Groups*, BBC News, Dec. 12, 2001, http://news.bbc.co.uk/2/hi/europe/1705606.stm.

133. *See* Clarke, *supra* note 106, at 808.

134. *See Burns*, [2001] 1 S.C.R. at 289. See *supra* Part V.A. for a discussion of other factors for and against unconditioned extradition that were considered by the Canadian Supreme Court in *Burns*.

135. *See id.* In *Burns*, the Canadian Supreme Court stated that "[w]hether

seems clear that if an individual is simply trying to escape the imposition of the death penalty, the *Burns* holding creates a Canadian "safe haven" that enables him to achieve that goal.

It is not inconceivable that an individual would flee to Canada only to escape the death penalty. The aforementioned cases of Joseph John Kindler and Roger Judge[136] demonstrate that individuals have fled to Canada after being sentenced to death. In a post-*Burns* world, if an individual were to receive the death penalty through the American penal system and subsequently escape to Canada, such as Kindler or Judge, one wonders if that individual's situation would constitute the "exceptional circumstances" necessitated by the *Burns* court or if extradition of the individual would be refused by the Canadian government unless assurances against executing the death sentence were given by the United States. If the latter situation were to occur, then the individual would have succeeded in creating a Canadian "safe haven" for himself.

VIII. Can the Possible Extraterritorial Extension of Canadian Law and the Creation of a Canadian "Safe Haven" Be Halted?

As discussed, there is strong rationale for concluding that when the United States requests the extradition of an American citizen to stand trial for a capital case, Canada is extraterritorially extending its law to the American citizen. In other words, it is likely that Canada will refuse the American government's extradition request unless Canada has been provided assurances that the death penalty will not be sought once the individual has reached the United States. Canada will take this position because it has itself abolished the death penalty as a punishment for crimes — despite the fact that the requesting nation, here the United States, retains and utilizes the death penalty for individuals who have committed capital crimes within the United States. Furthermore, this article has demonstrated that there is clear support for concluding that Canada will even refuse to extradite convicted

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fugitives are returned to a foreign country to face the death penalty or to face eventual death in prison from natural causes, they are equally prevented from using Canada as a 'safe haven.' Elimination of a 'safe haven' depends on vigorous law enforcement rather than on infliction of the death penalty by a foreign state after the fugitive has been removed from this country." *Id.*

136. The cases of Joseph John Kindler and Roger Judge are discussed *supra* Parts IV.A. and IV.C., respectively.

and accused terrorists to the United States if capital punishment remains a feasible sentencing option for certain crimes.

These possibilities combine to create the realistic option of a Canadian "safe haven" for criminals. Convicted and accused criminals alike, both American citizens and nationals of other countries who are involved in terrorist activities, can rest assured in knowing that if they commit a gruesome crime on American soil or if they execute an act of terrorism that devastates thousands of American lives, they are free from the possibility of paying for that crime with their own lives simply by crossing the Canadian border. Such a situation creates a multitude of troubles for the United States. What is even more problematic for the Canadian government is that such a situation also gives rise to terrible consequences for America's northern neighbor.

The refusal of the Canadian government to extradite these individuals to the United States endangers Canadian citizens, as a Canadian "safe haven" makes it more likely that these violent and impenitent criminals, once they have fled to Canada, will migrate to Canadian towns and cities and attempt to live amongst the Canadian people. Often, these individuals retain their vicious and dangerous ways and put the Canadian public with whom they interact at risk. Skeptics may argue that any true risk posed by these individuals to the Canadian community is remote. However, although it may be infrequent that individuals who have fled to Canada to escape detection of their crime or to use Canada as a "safe haven" will then turn violent on the Canadian public, the fact remains that such instances do occur,[137] and can be extremely harmful to the lives of Canadian residents.

In the current post-*Burns* world, it is likely that Canada will refuse to extradite individuals to the United States to stand trial without American assurances against imposing or executing the

137. The case of Roger Judge illustrates one example in which an individual who had fled to Canada to escape the execution of a death sentence turned violent on the Canadian public. Judge, a convicted double murderer, beat and robbed two people in Vancouver. *See supra* Part IV.C. The case of Charles Chitat Ng presents another example in which an individual who fled to Canada to avoid detection of his crimes in the United States turned violent on the Canadian community. Ng shot and injured a security guard in Calgary. Even more frightening, however, was that at the time of Ng's arrest he was carrying a mask, a knife, a rope, cyanide capsules, a gun, and extra ammunition. It was later discovered that these materials were amongst the materials used by Ng in California to torture and murder at least twelve people, some of whom spent their final days in an underground bunker used by Ng as a torture chamber. Thus, it is not a far leap to infer that Ng planned to use these same materials to torture and murder potential Canadian victims. *See supra* Part IV.B.

death penalty. To do so would, as the *Burns* court noted, "shock the conscience" of the Canadian people.[138] Ultimately, the Canadian government has created a situation where criminals will not only remain in Canadian custody awaiting an extradition agreement that satisfies both nations, but the Canadian government has also created a circumstance where violent and dangerous individuals will flee from the United States and live amongst the Canadian public until they are detected by authorities or commit an act of violence against Canadian residents. Such an outcome begs the question of whether, if by allowing such a situation to persist and by continuously endangering the lives of the Canadian people, the actions of the Canadian government in this situation "shock the conscience" of the Canadian people.

However, there is a middle ground that can resolve the aforementioned: a narrower interpretation and application of "exceptional circumstances." Situations where the individual who has been requested by the United States for extradition from Canada to America is an American citizen should constitute the "exceptional circumstances" necessitated by the *Burns* Court. In other words, such a situation should not require assurances by the United States against imposing or executing the death penalty. This construction of "exceptional circumstances" would apply to any American citizen, regardless of whether they have been convicted of a crime in the United States and escaped to Canada[139] or are simply wanted to stand trial in the United States.[140]

Such an interpretation would respect the right of Canada to apply its own laws to its own citizens, such as Burns and Rafay, who commit crimes in America and return to Canada. Furthermore, such an interpretation would enable Canada to extend its laws to nationals of other countries who seek protection within Canadian borders. Nevertheless, this interpretation would bar the extraterritorial extension of Canadian law to American citi-

138. *See generally Burns*, [2001] 1 S.C.R. at 283. The *Burns* court determined that for Canada to extradite Burns and Rafay to the United States without assurances against the imposition or execution of the death penalty violated Canadian principles of fundamental justice, and as such, "[a]n extradition that violates the principles of fundamental justice will always shock the conscience." *Id.* at 325. See the case of Joseph John Kindler for a discussion of how the Canadian Supreme Court previously determined that the imposition of the death penalty in a foreign state for a crime committed in foreign territory did not shock the conscience of the Canadian people. *See supra* Part IV.A.

139. For example, individuals like Joseph John Kindler and Roger Judge. *See supra* Parts IV.A., IV.C.

140. For example, an individual like Charles Chitat Ng. *See supra* Part IV.B.

zens, thereby demonstrating that Canada respects the viewpoints of its southern neighbor, albeit a position different from its own on the issue of capital punishment.

Another situation that should constitute the "exceptional circumstances" necessitated by the *Burns* court is when the individual who has been requested by the United States for extradition from Canada to America is an individual who has been convicted of committing acts of terrorism or participating in a terrorist organization. Note that in contrast to the previously mentioned interpretation of "exceptional circumstances" regarding American citizens, the interpretation of "exceptional circumstances" regarding terrorists should only extend narrowly to those who have been convicted of a crime involving terrorism, not more broadly to those who are wanted to stand trial for charges of terrorism. Such a compromise demonstrates that the American government respects Canada's standpoint on capital punishment although dissimilar from the position of the United States, and proves that America is not extraterritorially extending American law unnecessarily. This compromise would also signify respect for America's war on terrorism[141] through attempts to bring convicted terrorists to justice.

Critics will argue that Canada, as a sovereign nation, is under no obligation to compromise with any other country regarding an individual who has both feet firmly planted on Canadian soil. Furthermore, some critics may claim that the United States presently extends American law and attitudes extraterritorially, drawing upon various situations in the current political climate as support for such a claim. Some may quickly dismiss the possibility that a broad construction of "exceptional circumstances" will result in a Canadian "safe haven." Such critics may, as the Canadian Supreme Court noted in the *Burns* opinion, claim that any American request for a narrower interpretation of "exceptional

141. Although the phrase "war on terrorism" has been used by the press to describe various governmental initiatives throughout history, President George W. Bush formally declared a war on terrorism in a speech given on September 20, 2001 by stating, "[o]ur war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated." George W. Bush, President, United States of America, Address to a Joint Session of Congress and the American People in Washington, D.C. (Sept. 20, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html. However, there remains a discrepancy among theorists, politicians, and even the American population as to whether a "war on terrorism" exists as a real, tangible war or whether "war on terrorism" is merely a descriptive phrase utilized by the Bush administration and Bush supporters.

circumstances" that is based in concern over a Canadian "safe haven" is pretextual and unlikely.

However, suggesting a narrower interpretation of "exceptional circumstances" is not an attempt by the United States to flex its muscles or to impose American laws and viewpoints on its neighbor. It is also not an underhanded effort by America to dissuade criminals from fleeing to Canada, with some mistaken hope that such a situation will make law enforcement and the criminal justice process in the United States easier. Rather, extending the "exceptional circumstances" necessitated by the *Burns* court to American citizens and convicted terrorists creates an environment that is safer for Canadian citizens, American citizens, and the international community as a whole. Ultimately, it is an attempt by one nation to reach a compromise with its neighboring nation, while not only respecting the laws and attitudes of both sovereign countries but also respecting the common goals of safety and justice for both nations' citizens.