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## The Changing Game: The United States Evolving Supply-Side Approach To Narcotics Trafficking

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# The Changing Game: The United States Evolving Supply-Side Approach To Narcotics Trafficking

## ABSTRACT

*Despite over two decades of focused government efforts, drug use and related problems persist in the United States. Moreover, combatting narcotics trafficking now may be more difficult than ever as the sophisticated Cali Cartel has replaced the Medellin Cartel as the world's preeminent supplier of cocaine. Cali's advanced methods of operation have rendered traditional approaches to battling drugs even less effective than they were previously. Clearly, the United States must establish a new direction in drug law enforcement. This Note traces the development of Colombia's drug cartels from the rise of the Medellin Cartel to the emergence of Cali as the dominant drug syndicate. The Note then surveys several methods, some traditional, some novel, of combatting the drug trade, including extradition, military intervention, irregular rendition, and asset attachment. The Author concludes that asset attachment may be the most effective and efficient means of attacking the heart of Cali Cartel operations, its extensive money laundering networks. Finally, this Note discusses the Clinton administration's initial approach to the drug problem, concluding that it is not the shift in policy necessitated by the evolution of the drug underworld.*

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I. INTRODUCTION

On January 20, 1993, the Clinton administration entered the White House and inherited the formidable responsibility of waging a national battle against drugs. Richard Nixon first declared the United States war on drugs in 1971.<sup>1</sup> More recently,

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1. Joseph Treaster, *Echoes of Prohibition: 20 Years of War on Drugs, and No Victory Yet*, N.Y. TIMES, June 14, 1992, at 7. The United States established the Drug Enforcement Agency (DEA) in 1971. Since that time, various Federal "Drug Czars" have overseen DEA operations. *Id.*

George Bush pledged his administration's commitment to the cause; nevertheless, the drug crisis remains unresolved.<sup>2</sup> From the outset, President Clinton's new drug czar, Lee Brown,<sup>3</sup> faces a task arguably more challenging than that of his predecessor, Robert Martinez, because of reductions in the President's Executive Branch staff<sup>4</sup> and attempts by Congress to reduce already insufficient narco-spending by 400 million dollars.<sup>5</sup> The new administration certainly shoulders an unenviable burden.

The United States drug problem is out of control.<sup>6</sup> Drugs have had a devastating economic and social impact on the United States. In 1986 alone, drug abuse caused 100 billion dollars in economic losses including the costs of enforcement, insurance, decreased work productivity, and health care.<sup>7</sup> Americans spend

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2. Joseph Treaster, *The 1992 Campaign: Candidates Records; Four Years of Bush's Drug War: New Funds But an Old Strategy*, N.Y. TIMES, July 28, 1992, at A1. President Bush had more experience than President Clinton in stemming the flow of narcotics into the United States because Bush was Director of Central Intelligence and led the implementation of Ronald Reagan's anti-drug policy. Bush's anti-drug strategy comprised three components: (1) domestic law enforcement, (2) demand reduction through education, and (3) stricter border control and international ventures. *American Interests: A Drug War Scorecard with Robert Martinez*, FED. NEWS SERV., Sept. 6, 1991, at 1. None of these approaches was novel. Partly for that reason, drug trafficking and use did not decrease significantly during the Bush administration despite the dedication of considerable funds to the war on drugs. President Bush, however, achieved some success with an advertising campaign portraying cocaine as evil rather than glamorous. *Id.*

3. Lee Brown was formerly chief of police in New York City and Houston. *Id.*

4. Carl Rowan, *Drug Czar a Policeman, Not a Politician*, HOUSTON CHRON., May 1, 1993, at B14. Brown is losing 83% of his staff as Clinton effects his White House staff reductions. Although Brown's position has been elevated to cabinet level, a much smaller staff and lower funding make his anti-drug coordination efforts difficult. *Id.*

5. *Meeting of the International Narcotics Control Task Force of the House Foreign Affairs Committee*, 102nd Cong., 2nd Sess. 6989 (1992) (statement of Melvyn Levitsky, Assistant Secretary of State for International Narcotics Matters) [hereinafter *Narcotics Task Force*]. The spending cut proposals are a result of an apparent lack of success in DEA operations. However, Levitsky insisted that the Bush anti-drug program required four to five years before fruition. He also argued that results achieved under that program were encouraging, notwithstanding an increase in drug trafficking in the United States. *Id.*

6. During a discussion of the then upcoming Andean drug summit in Cartagena, Colombia, Bush administration White House Press Secretary Marlin Fitzwater conceded, "[W]e have a drug problem in the United States. We are a major user. . . ." Thomas Ferraro, *Bush Will Admit Nation's Drug Addiction*, UPI, Feb. 14, 1990, available in LEXIS, Nexis Library (All wire service materials cited throughout this Note are available in LEXIS, Nexis Library).

7. James R. Edmunds, Note, *Nonconsensual U.S. Military Action Against the Colombian Drug Lords under the U.N. Charter*, 68 WASH. U. L.Q. 129, 130 (1990).

at least twenty billion dollars on cocaine consumption each year.<sup>8</sup> In addition to creating an economic burden, drug use has exacted a staggering toll on human health and welfare. In 1986, deaths in the United States related to drug use numbered 4138, not including deaths from drug-related violence, which has devastated the country's inner cities.<sup>9</sup> While the number of persons using cocaine has decreased since 1988, 6.4 million Americans still used cocaine in 1991.<sup>10</sup> In that year, in fact, one in eighty Americans used cocaine each week.<sup>11</sup>

Colombia supplies eighty percent of the cocaine consumed in North America, according to the Drug Enforcement Agency (DEA).<sup>12</sup> Cocaine, in fact, is now Colombia's largest export product,<sup>13</sup> and the cocaine industry is booming.<sup>14</sup> The United States spends eight times more combatting drugs in Latin America, principally in Colombia, than it does in the rest of the world.<sup>15</sup> These efforts, however, result in the seizure of less than one percent of the twenty billion dollars in profits that Colombia's drug lords earn each year.<sup>16</sup> Although Colombian government

Moreover, 100 thousand emergency room admissions each year and numerous highway fatalities are drug related. *Id.*

8. Phillip Bennett, *Many Foes in the War on Drugs*, BOST. GLOBE, Aug. 24, 1989, at 5. This number increased to 50 billion dollars in retail sales in 1990, but decreased to 40 billion dollars in 1991 according to then Drug Czar Robert Martinez. *American Interests: A Drug War Scorecard with Robert Martinez*, *supra* note 2, at 1.

9. Edmunds, *supra* note 7, at 129-30. Thousands of people die and thousands more are injured each year in the United States from drug related violence. *Id.*

10. Treaster, *supra* note 2, at A1.

11. *Democrats Challenge Bush on Drug Claims*, N.Y. TIMES, Feb. 5, 1992, at A17.

12. *Colombia: United States May Request Escobar's Extradition*, INTER PRESS SERV., Jun. 19, 1991.

13. Bruce Bagley, *Colombia and the War on Drugs*, Council on For. Rel., 1988, at 70. Cocaine now ranks above coffee as Colombia's largest export. Steven Y. Otera, Note, *International Extradition and the Medellin Cartel: Surgical Removal of Colombian Cocaine Traffickers for Trial in the United States*, 13 LOY. L.A. INT'L & COMP. L.J. 955, 961 (1991).

14. The Colombian cocaine industry "is the Third World's first truly successful multinational [industry]. It is the most profitable business in the world." Tina Rosenberg, *Kings of Cocaine: Inside the Medellin Cartel*, NEW REP., Nov. 27, 1989, at 28.

15. Ronald J. Ostrow, *Remapping Latin America's Drug War from Bolivia to Mexico, Governments are Getting Aggressive. One Sign of Success Is Higher Street Prices for Cocaine*, L.A. TIMES, July 7, 1992, at A1.

16. See Douglas Farah & Steve Coll, *Cocaine Dollars Flow Via Unique Network*, WASH. POST., Sept. 19, 1993, at A1. Not only does the United States intercept only 1 out of 100 drug shipments, but some experts suggest that the Cali Cartel could operate profitably even if the United States were to increase its current efforts by 2500%. *Id.*

efforts have damaged the Medellin Cartel,<sup>17</sup> the sophisticated "gentlemen" Cali Cartel has more than filled the void left by Medellin's demise.<sup>18</sup> Under the domination of the Cali Cartel, the narcotics industry has developed increasingly sophisticated techniques for concealing from detection its illegal activities.<sup>19</sup> Extradition laws, consequently, which historically have been ineffective, have even less of an impact on Cali Cartel operations.<sup>20</sup> In order to combat this highly organized and efficient cartel, the United States and Colombian governments will have to attack both the central members of the Cali Cartel and the soul of the cartel: its money laundering ventures.<sup>21</sup>

The United States has already attempted three different multi-national operations to slow narcotics trafficking.<sup>22</sup> For the most part, however, these operations have fallen far short of achieving their initial goals, and new strategies tailored specifically to the Cali Cartel are necessary.<sup>23</sup>

President Clinton has pledged that he will develop a "carefully executed anti-drug" strategy that would focus more on domestic drug education and treatment, a departure from the enforcement-based drug strategy developed by former Drug Czar Robert Martinez under the Bush administration.<sup>24</sup> Drug Czar Lee Brown, however, continues to believe that law enforcement is and

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17. James Brooke, *Cali, the "Quiet" Drug Cartel, Profits by Accommodation*, N.Y. TIMES, July 14, 1991, at A1. The Medellin Cartel, under Pablo Escobar, previously controlled 70% to 80% of the cocaine leaving Colombia. The cartel's market share, however, has declined to roughly 40%. Jailing Escobar created internal factions within the cartel and also provided other cartels with the opportunity to increase their market shares. *Id.*

18. The Cali Cartel now provides 80% of the cocaine supply reaching the United States. Richard Boudreaux, *Chief of Cali Cartel Fills Spot Vacated by Escobar on Most-Wanted List*, L.A. TIMES, June 24, 1991, at A4. Another source, however, estimates the Cali Cartel share to be closer to 70% of the United States market. Linda Robinson, *New Target: The Cali Cartel*, U.S. NEWS & WORLD REP., Dec. 23, 1991, at 28. Whatever the actual share held by Cali, it is clear that the cartel has grown considerably in recent years and become an extraordinarily lucrative enterprise. See Boudreaux, *supra*.

19. Robinson, *supra* note 18, at 28.

20. See *id.*

21. See William Drozdiak, *World Crime Groups Expand Cooperation, Spheres of Influence*, WASH. POST, Oct. 5, 1992, at A12.

22. Operation Green Ice, Operation Blast Furnace, and the Andean Strategy are the three different operations that the United States has used to attempt to slow the drug trade. The operations have had varying degrees of success. See *infra* part VI.E for a discussion of Operation Green Ice.

23. *Narcotics Task Force*, *supra* note 5, at 59.

24. Greg McDonald, *Brown Picked as Drug Czar*, HOUSTON CHRON., Apr. 29, 1993, at A1. Clinton favors a system of "treatment on demand" for drug addicts in order to curb incarceration and police expenditures. *Id.*

must remain a vital component of a comprehensive anti-drug strategy.<sup>25</sup>

This Note examines Colombia's drug cartels, focusing first on the Medellin Cartel and second on the now dominant Cali Cartel and its advanced methods of operations. Next, the Note discusses extradition and the ineffectiveness of that procedure as a method of dealing with drug traffickers. The Note then focuses on several novel approaches to combatting the drug problem, including use of military force, irregular rendition, and asset attachment. The Note concludes that asset attachment may be the most effective and efficient strategy for attacking the heart of the Cali Cartel, its vast money laundering operations. Finally, the Note surveys the Clinton administration's initial plans for fighting drug use in the United States.

## II. COLOMBIA'S DRUG CARTELS

### A. *The Medellin Cartel*

#### 1. Historical Background

The Medellin<sup>26</sup> Cartel grew out of necessity, as small-time individual smugglers could not keep pace with the increasing demand for cocaine in the United States in the early 1970s.<sup>27</sup> Carlos Lehder Rivas, a former Detroit car thief, recognized the fantastic potential to make money if someone could organize Colombian drug production and use privately owned airplanes to smuggle tremendous amounts of cocaine into the United States and other states.<sup>28</sup> Lehder began to collaborate with drug operators in the city of Medellin and quickly amassed great wealth for himself and his associates.<sup>29</sup> Though linked through

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25. *Id.* President Clinton has focused on education and the plight of inner city residents when discussing the United States drug problem. However, as a former police chief, Lee Brown is likely to continue the Bush administration's emphasis on extradition and crop eradication. *Id.*

26. Medellin is Colombia's second-largest city with a population of about three million. Susan Benesch, *Messrs. Clean: Medellin—Postcard; Medellin, Columbia Anti-Drug Militias*, NEW REPUBLIC, Nov. 2, 1992, at 10.

27. See Bagley, *supra* note 13, at 73.

28. See *id.*

29. *Id.* at 74. Notable among Lehder's early partners in Medellin were Jorge Ochoa and Pablo Escobar, who became instrumental in the rise to power of the Medellin Cartel. See *id.*

this connection with Lehder, the drug leaders in Medellin initially were unorganized and competed directly with each other for a share of the profitable United States cocaine market.<sup>30</sup>

The competition among the Medellin factions did not last long, and its end may be traced to a single pivotal event.<sup>31</sup> In November of 1981, revolutionary guerrillas kidnapped the daughter of Jorge Ochoa, a key Medellin trafficker.<sup>32</sup> Rather than paying the one million dollar ransom, Ochoa called a meeting of Medellin's principal drug traffickers, who agreed with Ochoa that the fortunes they had made rendered them attractive targets to kidnappers.<sup>33</sup> The assembled leaders united to form an organization called *Muerte a los Sequestradores* (MAS) (Death to Kidnappers) to protect themselves.<sup>34</sup> Encouraged by the success of MAS, the drug kingpins recognized that cooperation could enhance their already profitable business.<sup>35</sup> With Lehder, Ochoa and his two brothers,<sup>36</sup> Pablo Escobar Gaviria, and Jose Gonzalo Rodriguez Gacha at its hub, the Medellin Cartel developed into a complex and extremely successful operation.<sup>37</sup>

The Medellin Cartel is not a cartel in the traditional sense.<sup>38</sup> A true cartel controls the price of its commodity by limiting

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30. *Id.* at 73. Miami, as the center of the wholesale cocaine market in the United States in the late 1970s and early 1980s, became the setting for much of the struggle for market control. *Id.* In 1981, the city witnessed 101 drug-related murders. *Id.*

31. Peter Kerr, *Colombia's Cocaine Lords: Conviction in U.S. Poses Little Threat to Power*, N.Y. TIMES, May 21, 1988, at I5.

32. Bagley, *supra* note 13, at 74. A group known as M-19 abducted Marta Nieves Ochoa Vasquez from the Medellin campus of the University of Antioquia where she was a student. Kerr, *supra* note 31, at I5.

33. Kerr, *supra* note 31, at I5.

34. *Id.* MAS quickly obtained the release of Ochoa's daughter by assassinating M-19 affiliates until they set her free. *Id.* The Medellin Cartel used MAS extensively in the following years to protect themselves and their families from leftist guerrillas and to ensure the unobstructed development of their business by terrorizing the Colombian judiciary. See Bagley, *supra* note 13, at 75, 79.

35. Kerr, *supra* note 31, at I5. An early act of cooperation was the construction of a common cocaine production complex capable of producing over seven thousand pounds of cocaine per month. *Id.*

36. Ochoa's two brothers are Fabio Jr. and Juan David. Bagley, *supra* note 13, at 74.

37. *Id.* The members of the cartel divided the labor among themselves so that one member was responsible for production, another for air transport, another for distribution, and yet another for security. The result was an operation infinitely more efficient than each of the drug traffickers had been on his own. See Bagley, *supra* note 13, at 74.

38. See Kerr, *supra* note 31, at I5.

supply.<sup>39</sup> The Medellin Cartel has been unsuccessful at controlling price and production,<sup>40</sup> and, in fact, many people refer to the group more aptly as the "Medellin Mafia."<sup>41</sup> Although the Medellin Cartel has been unable to control prices, the free market has provided huge profits to the cartel, which would rank highly among the world's Fortune 500 companies in both gross sales and net earnings.<sup>42</sup>

The majority of the Colombian population respects and honors the Medellin Cartel.<sup>43</sup> Although many people and organizations, including the Colombian government, fear the Medellin Cartel, many Colombians are willing to help the cartel, not out of fear, but out of respect.<sup>44</sup> The reasons for this reverence are readily apparent. Prior to the development of the cocaine industry, an oligarchy ruled Colombia.<sup>45</sup> Since the rise of the cartel, poor farmers have become wealthy by growing coca and processing coca paste.<sup>46</sup> Medellin Cartel members, moreover, donate millions of dollars to develop desperately needed and greatly appreciated housing projects and other infrastructure throughout Colombia.<sup>47</sup> Many Colombians, in fact, considered Escobar a modern day Robin Hood because of his campaign to house poor Colombians called "Medellin without Slums."<sup>48</sup>

39. *Id.* OPEC is an example of a true cartel. When it operates successfully, OPEC limits the quantity of oil produced, and the price of oil increases. See *Oil Prices Tumble Sharply as OPEC is Seen Faltering*, N.Y. TIMES, Nov. 24, 1993, at D13.

40. Kerr, *supra* note 31, at 15. From 1981 to 1988, the wholesale price of a kilogram of cocaine in the United States dropped over 60 thousand dollars to less than 15 thousand dollars. *Id.*

41. See, e.g., Tina Rosenberg, *Murder City: You Can Kill Someone for \$10 in Medellin Colombia*, ATLANTIC, Nov. 1988, at 20.

42. Bagley, *supra* note 13, at 70. By some estimates, the cartel earned profits of two billion to four billion dollars a year during the mid-1980s. *Id.*

43. See Joseph B. Treaster, *Columbia Turns Drug War into a Long Chase*, N.Y. TIMES, Nov. 10, 1989, at A10.

44. See *Id.* A senior Colombian official reportedly said, "Escobar and Rodriguez Gacha are not seen as the bad guys in these areas. They move as freely as fish in the sea. Nobody is going to help the police find them." *Id.*

45. *Id.*

46. *Id.* Approximately 500 thousand Colombians now work to support the narcotics industry. Ron Chepestuk, *Colombian Druglord Trying to Turn Wealth Into Respect*, ORLANDO SENTINEL TRIB., Nov. 10, 1991, at H1.

47. Joseph B. Treaster, *Seven Indicted in 1992 Slaying of a Journalist*, N.Y. TIMES, May 11, 1993, at A1. Cartel members have built housing complexes, roads, farms, and soccer fields. *Id.*

48. Sam V. Meddis & Twigg Mowatt, *Cocaine 'Godfather' Gives Up*, USA TODAY, June 20, 1991, at 6A.

## 2. Effects on the State and the Judicial System

Although the Colombian cocaine industry has allowed several drug lords to become among the wealthiest individuals in the world, generally, the narcotics industry has decimated the Colombian economy.<sup>49</sup> Colombia's cocaine industry costs Colombia two billion dollars annually in economic damages and law enforcement expenditures.<sup>50</sup> Moreover, Colombia's struggle to contain the industry has been bloody. In Medellin alone forty-five thousand people have been violently murdered.<sup>51</sup> The fight against drugs directly caused the deaths of 3 presidential candidates in 9 months,<sup>52</sup> 242 judges and other judicial employees during the 1980s,<sup>53</sup> 110 people on a Colombian Airliner,<sup>54</sup> an attorney general,<sup>55</sup> 400 Medellin policemen,<sup>56</sup> more than 50 journalists in the past decade,<sup>57</sup> and 16,200 Colombian civilians in 1987 alone.<sup>58</sup>

The Medellin Cartel, which maintained power and influence through extreme violence, was responsible for most of the adverse

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49. See Richard Boudreaux, *Colombia; All Eyes in Drug War Now Turn to Courts; but Even with Pablo Escobar Behind Bars, Few Expect the Flow of Cocaine to Dry Up*, L.A. TIMES, Jun. 21, 1991, at A5. In addition to creating several billionaires, the cocaine industry has provided Colombian farmers with the opportunity to earn significantly more than they would be able to earn growing coffee beans and other legal commodities for export. Rosenberg, *supra* note 14, at 29-30.

50. Boudreaux, *supra* note 49, at A5.

51. *Medellin Wins Battles in Campaign for Peace*, N.Y. TIMES, Oct. 31, 1993, at 14.

52. Douglas Farah, *Ruling Party Wins in Calm Colombia Vote; Threatened Violence Fails to Materialize*, WASH. POST, May 28, 1990, at A1. The list of assassinated presidential candidates includes Luis Carlos Galan, who was vehement in strengthening extradition laws, which greatly threatened the Medellin Cartel. *Id.*

53. Stan Yarbrow, *A New Face for Colombian Justice*, CHRISTIAN SCI. MONITOR, Dec. 10, 1991, at 12.

54. Edward Frost, *Escobar, Top Lieutenant Charged with Bombing Airliner*, REUTERS, Aug. 13, 1992. The United States indicted Pablo Escobar and Munoz Mosquera for the deaths of these passengers. Escobar allegedly bombed the airliner because a passenger on the flight was an informant. Robert Bonner, head of the DEA, called this act of narco-terrorism "a vile, despicable, cowardly terrorist act." Mosquera is currently in a United States prison awaiting trial. *Id.*

55. Twigg Mowatt, *Jailed Drug Lord Loses Perks, Faces Renewed Prosecution*, S.F. CHRON., Apr. 22, 1992, at A11. The Medellin Cartel killed Attorney General Carlos Mauro in 1988. *Id.*

56. Brooke, *supra* note 17, at 1. Pablo Escobar once offered a 4,000 dollar reward for each police officer murdered in Medellin. *Id.*

57. Rachel E. Stassen-Berger, *Two Charged in Anti-Drug Journalist's Death*, WASH. POST, May 11, 1993, at A3.

58. Bagley, *supra* note 13, at 72-73.

impacts on Colombian society.<sup>59</sup> When Colombia reinstated its extradition policy in 1989, the Medellin Cartel responded through lethal force.<sup>60</sup> This governmental decision led to the bloodiest period of narco-terrorism in history.<sup>61</sup> The kingpins of the Medellin Cartel, whom the Medellin press dubbed the "Extraditables," promptly embarked on a war against the Colombian government that raged until 1991.<sup>62</sup> More than two hundred bombings occurred in Medellin within six months in 1989 killing scores of people.<sup>63</sup> Total Medellin Cartel-related deaths during this bloody period numbered over sixteen thousand Colombians.<sup>64</sup> No one in Medellin was safe, and the risk was particularly high for judges, police officers, and other government officers.<sup>65</sup>

The quickest way to commit suicide in Colombia is to indict a narcotics trafficker.<sup>66</sup> Colombian judges are in an unenviable position. Judges can either indict traffickers and die or not indict the drug lords and receive large "rewards."<sup>67</sup> A DEA special agent in Colombia affirmed that examples of violent threats are abundant, saying, "To those who oppose [the cartel]. . . they send a little shoe-box. Inside is a small coffin, inside that is a video tape: it shows the target's child (whom he thought was safely hidden in Switzerland) going to school; it shows his wife (supposedly safe in Mexico) shopping. It is the death notice for both [him and his family]."<sup>68</sup> Protection of the judges is next to impossible.<sup>69</sup> The Medellin Cartel could assassinate most judges

59. See Otera, *supra* note 13, at 957-61.

60. *Id.* at 972-73.

61. *Id.*

62. See Adrian Croft, *Colombian Drug Cartel Threatens Attacks on its Main Rivals*, REUTERS, Jan. 6, 1992.

63. See William R. Long, *War on Cocaine Turns into a Bloody Standoff*, L.A. TIMES, Dec. 13, 1989, at A6.

64. Maj. Peter M. Sanchez, *The "Drug War": The U.S. Military and National Security*, 34 A.F. L. Rev. 109, 115 (1991).

65. See *infra* notes 66-71 and accompanying text.

66. The Medellin cartel typically focuses on influencing the judiciary rather than the Colombian legislative and executive branches. Otera, *supra* note 13, at 962-63. However, the Cartel has eradicated presidential candidates who have publicly opposed the Cartel. Susan Benesch, *Fugitive Wields his Power*, ST. PETERSBURG TIMES, July 30, 1992.

67. Gitta Sereny, *The Sheriff of Cocaine City*, THE TIMES (London), Jan. 2, 1990, at 2. Sereny concludes that even the most courageous Colombians usually have no choice but to acquiesce in order to protect their families. *Id.*

68. *Id.*

69. See Tina Rosenberg, *A Mess in the Andes: Colombia's Government-by-Cocaine*, NEW REP., Sept. 18, 1989, at 23. One effort to protect judges is the "faceless judges" system, under which judges' identities are kept secret. *Drug Lords Sentenced in Colombia*, DALLAS MORNING NEWS, Dec. 22, 1992, at 15A.

with little effort despite the use by judges of bodyguards and other protective measures.<sup>70</sup> Colombian judges, consequently, must be quite brave even to indict suspected drug traffickers.<sup>71</sup>

The Colombian judicial system is currently in shambles. Indicting a narcotics trafficker often has little effect.<sup>72</sup> Even if a judge feels bound to indict one of the criminals, only one in one thousand is prosecuted.<sup>73</sup> Each judge receives four hundred thousand cases each year and is able to process only seventy thousand of those cases.<sup>74</sup> Courts dismiss most of the processed cases because of inadequate jail space.<sup>75</sup> Judges, therefore, are more likely to bow to threats because they know that, even if they indict drug traffickers, they will not likely be able to convict them.<sup>76</sup> Judges are said to have a choice: *plomo o plata* (lead or silver).<sup>77</sup> The reality of this "choice," combined with the inefficiency of the system, renders the Colombian judiciary virtually worthless as an instrument for fighting the drug industry.<sup>78</sup>

### 3. Current Status of the Medellin Cartel

Despite the ineffectiveness of the Colombian judiciary, the intense focus of other segments of the Colombian government on battling the Medellin Cartel has produced dramatic results.<sup>79</sup> The Colombian government has severely damaged the infrastructure of the Medellin Cartel through the destruction of

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70. See generally Bagley, *supra* note 13, at 70. The most startling example of judges' exposure was the murder of eleven members of the Supreme Court by a bomb placed the Palace of Justice. *Id.* The Medellin Cartel allegedly paid the M-19 guerrillas one million dollars to attack the Palace of Justice. Colombian police raided the Palace in an attempt to stop the attack, but the guerrillas destroyed the Palace, and the justices perished. *Id.* At the time, the Supreme Court was preparing to vote on the legality of the extradition treaty which, not surprisingly, was eventually defeated. Rosenberg, *supra* note 69, at 23.

71. See James Brooke, *Drug Baron's Jailing Heartens Colombia*, N.Y. TIMES, June 21, 1991, at A8.

72. Rosenberg, *supra* note 69, at 23.

73. *Id.*

74. *Id.*

75. *Id.* On average, only one quarter of jail inmates have been tried in court. Persons who are ultimately acquitted often have spent several years in jail. *Id.*

76. *Id.* Although a narcotics trafficker may not be convicted by a court, he is unlikely to forget the judge who indicted him when he ultimately leaves prison. Judges are keenly aware of this fact. *Id.*

77. James Brooke, *Gaviria's Gamble*, N.Y. TIMES, Oct. 13, 1991, at A38.

78. *Id.* The Colombian judiciary is paralyzed by fear, inefficiencies, and corruption. For this reason, the prospect of being tried in a Colombian court is not very intimidating for narcotics traffickers. *Id.*

79. See *Narcotics Task Force*, *supra* note 5, at 19-23.

labs and base sites, the arrest and assassination of cartel lieutenants, and even the arrest of some cartel leaders.<sup>80</sup> The United States has also imprisoned several cartel members and is using their imprisonment as leverage to gain more arrests and more knowledge about the Colombian drug trafficking organizations.<sup>81</sup>

The war against drugs at the same time has taken an immense toll on Colombia. An aide to assassinated Colombian presidential candidate Luis Carlos Galán<sup>82</sup> clearly indicated the effect of the bloodshed on Colombia, reportedly saying that "the price is becoming too high[;] [i]f the stability of the country requires dialogue with the narcotics traffickers, we should do it."<sup>83</sup> While Colombia has bravely pursued the Medellín Cartel, the extreme bloodshed that ravaged Colombia for several years ultimately prompted the Colombian government to alter its extradition policy.<sup>84</sup> Decrees 2027 and 3030, issued by Colombian President Cesar Gaviria, provided guarantees of non-extradition and reduced sentences for drug lords who voluntarily surrender.<sup>85</sup> In 1991, the Colombian General Assembly finally banned extradition entirely. This action prompted numerous drug kingpins to surrender to the Colombian government.<sup>86</sup>

80. *Id.* The number of labs destroyed is difficult to estimate, although the Task Force avers that not enough have been destroyed to have a significant, long-term effect on cocaine production. *Id.* at 4, 19-23.

81. Hugh Davies, *Cuba Regime Running Drug Racket*, DAILY TELEGRAPH, Apr. 9, 1993, at 10. Carlos Lehder Rivas is currently in a United States prison serving a life sentence for narcotics trafficking. The United States recently moved Lehder from a maximum security prison at Marion, Illinois to a less secure prison in exchange for his cooperation in an investigation of Raul Castro, Cuba's Minister of Defense and brother of Cuba's President Fidel Castro. Raul Castro may be involved in a cocaine smuggling conspiracy with the Medellín Cartel. *Id.*

82. Farah, *supra* note 52, at A1.

83. Otera, *supra* note 13, at 959.

84. *Id.*

85. *Colombia: Pablo Escobar Surrenders to the Authorities*, INTER PRESS SERV., June 19, 1991. Pursuant to Colombia's plea bargaining agreement, if the drug lords did not voluntarily surrender, the drug traffickers would face severe penalties including extradition. Cesar Gaviria, *We Didn't Surrender to Escobar*, WASH. POST, June 30, 1991, at C7. These decrees, however, received mixed responses from Colombian officials, some of whom considered the decrees an admission of defeat at the hands of the drug lords. See James Brooke, *Colombian Kidnappings Are Gagging the Press*, N.Y. TIMES, Jan. 28, 1991, at A2. One Colombian columnist argued that the decrees were "a pact with the devil. This is not submitting the criminals to the law. It is submitting the law to the criminals." *Id.*

86. Brooke, *supra* note 77, at A38. The list of drug kingpins who have surrendered includes the Ochoa Brothers and Pablo Escobar. *Id.*; Joseph B. Treaster, *Drug Baron Gives Up in Colombia as an End to Extradition is Approved*, N.Y. TIMES, June 20, 1991, at A1. Hours after the Colombian Constitutional

These surrenders, however, often took place on the terms of the drug barons, most of whom were convicted of only minor infractions.<sup>87</sup>

In order to quell narco-terrorism, the government has decreased the enforcement of anti-drug legislation.<sup>88</sup> While the government has continued to seize cocaine, it has not increased its seizures sufficiently to keep pace with the increase in cocaine production.<sup>89</sup> For a state devastated by years of ruthless fighting, however, conciliation with the drug traffickers is apparently not only acceptable, but preferred.<sup>90</sup> While some Colombian officials argue that Colombia has capitulated to the drug lords by agreeing to peace essentially under terms proscribed by cocaine traffickers,<sup>91</sup> President Gaviria contends that the war on cocaine has been successful.<sup>92</sup> Gaviria may be correct, at least as far as the Medellin Cartel is concerned: Colombia's pressure on the cartel helped to decrease its share of the United States cocaine market to less than twenty percent.<sup>93</sup>

With the escape from jail of Pablo Escobar,<sup>94</sup> and his survival among friends throughout Colombia, it seemed possible that the Medellin Cartel could again increase in strength.<sup>95</sup> International

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Assembly voted 51 to 13 to ban extradition entirely, Escobar turned himself into the authorities in return for a promised sentence reduction. *Id.* Escobar's lawyers successfully obtained "a few" concessions, the most significant being Escobar's right to construct his own jail. The jail, known as the "Cathedral," was designed more to keep opposing factions out than keep Escobar in. Daniel Bland, *Jailing Drug Baron Accomplished Little*, TORONTO STAR, July 23, 1992, at A21. The jail had televisions, gourmet food prepared by Escobar's mother, a full size soccer field, and various other amenities. Escobar also purchased the 11 farms surrounding the prison. For most of his prison stay, Escobar also was able to entertain visitors. *Id.* While the Colombian government was apparently tightening its reigns on Escobar, he organized an escape, embarrassing the government. Treaster, *supra*, at A1.

87. See Bland, *supra* note 86, at A21. Escobar, for example, denied all but one of about 40 charges and qualified for a reduced sentence. *Id.*

88. Brooke, *supra* note 77, at A38.

89. See generally Charles Lane, *The Newest War*, NEWSWEEK, Jan. 6, 1992, at 18.

90. See Brooke, *supra* note 77, at A38.

91. Tom Morganthau, *The Widening Drug War*, NEWSWEEK, July 1, 1991, at 32.

92. Gaviria, as President of Colombia, has attempted to quell terrorist organizations in Colombia and has achieved the transformation of the M-19 guerrilla faction into the M-19 political party. The commander of the People's Liberation Army, Don Fidel, has also changed his group from an army to a political movement called "Hope, Peace, and Freedom." *Id.*

93. See Boudreaux, *supra* note 49, at A5.

94. See *Authorities Comb Hills of Colombia in Search of Pablo Escobar*, AGENCE FR. PRESSE, July 23, 1992.

95. Michael Hedges, *Escobar Escape Has Little U.S. Impact*, WASH. TIMES, July 24, 1992, at A7.

attempts to find Escobar initially produced few leads.<sup>96</sup> Escobar often offered to surrender under his own terms, but, after his escape and the criticism of the Colombian government that ensued, neither the United States nor Colombia was likely to agree to Escobar's terms.<sup>97</sup>

A special 1500 man police unit finally killed Pablo Escobar on December 2, 1993 after pursuing him for 16 months.<sup>98</sup> Numerous informants, interested in the substantial monetary reward for Escobar's capture, assisted the police efforts.<sup>99</sup> The days of dominance of the Medellin Cartel and their powerful leader, Pablo Escobar, once having a net worth valued at three billion dollars by Forbes magazine, are clearly over,<sup>100</sup> opening the door for the unhindered development of the already powerful Cali Cartel.

### B. The Cali Cartel

While war raged in the neighboring city of Medellin, drug barons in Cali began to organize carefully and create a drug cartel that eventually was to outstrip the power of the Medellin Cartel.<sup>101</sup> Gilberto Rodriguez Orejuela<sup>102</sup> developed the Cali Cartel and is now considered "[t]he most dangerous, ruthless, and powerful drug trafficker in the world" according to the United States DEA chief in Bogota.<sup>103</sup> Cali now controls eighty percent

96. *Colombia: Government Accepts Escobar's Terms, But Prepared to Capture Him if He Doesn't Surrender*, NOTISUR, Mar. 23, 1993. The United States and Colombia offered a 9.6 million dollar reward for Escobar. *Id.*

97. *See Bogota Drug War Set Back by Court*, N.Y. TIMES, May 5, 1993, at A10.

98. *Jose De Cordoba, Death in Columbia: End of Pablo Escobar May Slow the Violence, But Not the Cocaine Trade*, WALL ST. J., Dec. 3, 1993, at A1.

99. *Andrew Selsky, Drug Lord Barely Eludes Capture*, CALGARY HERALD, Oct. 27, 1993, at A14.

100. Despite this decrease in Medellin power, authorities discovered evidence of current ties between Medellin and new Russian black market capitalists. Police captured well respected Russian chemists in a Moscow laboratory manufacturing China White, a substance many times more powerful than heroin, for the Medellin Cartel. These ties have apparently existed for the last two years. *Marcus Warren, Drug Lords Cash In on Russian Connection*, SUN. TELEGRAPH, Oct. 31, 1993, at 30.

101. *United States: Colombia Cartel Blamed for Journalist's Murder*, INTER PRESS SERV., May 10, 1993.

102. *Harold Seneker, The World's Billionaires*, FORBES, July 22, 1991, at 216. Rodriguez and his brother Miguel Rodriguez are likely two other cocaine-created billionaires. *Id.*

103. *Tom Quinn, Passion-Fruit Mousse with the King of Cocaine*, SUN. TELGRAPH, June 30, 1991, at 16. *Id.* Rodriguez is also known as "The Chess Player" because of his intelligence and his ability to escape trial in the United States. *Id.*

of Colombian cocaine production,<sup>104</sup> and the cartel earns about twenty billion dollars a year from its participation in world cocaine trade.<sup>105</sup>

In the wake of the tremendous violence surrounding the "Extraditables" of the Medellin Cartel, Colombians are more tolerant of the methods of operation of the Cali Cartel.<sup>106</sup> Rather than using violence and intimidation, the Cali Cartel prefers to work with the government to achieve more peaceful solutions to problems.<sup>107</sup> Because of the cartel's more reserved actions, people generally know less about it than about the Medellin Cartel.<sup>108</sup> Attracting less attention is, therefore, another benefit of their more peaceful operations. The Cali Cartel, however, is extremely powerful and dangerous. In fact, one DEA operative reportedly said, "Cali is a monster. The Cali men are much smarter than Escobar. They may not be as dangerous but they're perfectly prepared to use violence when necessary. The difference is that Pablo doesn't mind leaving his fingerprints behind. The Cali men don't leave their calling card."<sup>109</sup>

The Cali Cartel is known as the "smart cartel" and the "quiet cartel."<sup>110</sup> Cali focuses on bribery rather than on bombings, kidnappings, and violent assassinations of uncooperative officials.<sup>111</sup> Although Cali is the primary cocaine producer in Colombia,<sup>112</sup> it has not caused excessive government reaction.<sup>113</sup> The Colombian government, in fact, appears willing to accept the cartel's quiet narcotics trafficking rather than clamp down on Cali operations and risk another outbreak of violence.<sup>114</sup> The Colombian government, therefore, focuses a much smaller portion of its anti-drug operations on the Cali Cartel, notwithstanding the tremendous power of this narcotics organization.<sup>115</sup> Recently, however, sixty Cali Cartel members, including several top members, have expressed a desire to

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104. *Id.*

105. Phil Davison, *Rivals Muscle in on Escobar Drug Empire*, THE INDEPENDENT, Mar. 23, 1993, at 13. Cali's earnings are evidently about five times those of the Medellin Cartel. *Id.*

106. See Thomas Ferraro, *Bush Trip to Drug Summit: A Potential for Danger*, UPI, Feb. 10, 1990.

107. *Id.*

108. See *Colombian Cartel Considers Mass Surrender*, L.A. TIMES, May 8, 1993, at A19.

109. Davison, *supra* note 105, at 13.

110. Ferraro, *supra* note 106.

111. See *id.*

112. Quinn, *supra* note 103, at 16.

113. Ferraro, *supra* note 106, at 1.

114. *Id.*

115. *Id.*

surrender to authorities provided that the authorities meet certain demands.<sup>116</sup> The United States, nevertheless, says that the sixty members will not receive special treatment.<sup>117</sup> These offers of surrender indicate growing pressure on the Cali Cartel and recognition it as a significant drug cartel.<sup>118</sup>

Part of the reason for the increased attention focused on the cartel may be that its methods of operation recently have begun to more closely resemble Medellin Cartel tactics.<sup>119</sup> United States officials accused Jose Santacruz Londono,<sup>120</sup> a leading member of the Cali Cartel, of ordering the execution in Queens, New York of Manuel de Dios Unanue, a journalist who reported on the narcotics trade for *El Diario-La Prensa*, a Spanish newspaper published in the United States.<sup>121</sup> According to Robert Bonner, the head of the DEA in Washington, the Cali Cartel regularly sends hit men into the United States to kill people who, for example, have failed to pay promptly for delivered narcotics.<sup>122</sup>

Cali operations differ from Medellin operations in the method of shipment of narcotics.<sup>123</sup> The Cali Cartel employs more conservative, slow, and secure methods of cocaine shipment, rather than attempting to ship the narcotics quickly by airplane.<sup>124</sup> Cali also employs extremely sophisticated money laundering techniques to create legitimate funds out of its illegal proceeds.<sup>125</sup> These funds have successfully created a network of

116. Michael Stott, *Colombia's Cali Drug Barons Considering Mass Surrender*, REUTERS, May 7, 1993.

117. *Id.*

118. See *Call Cartel Leaders Negotiating Surrender*, AGENCE FR. PRESSE, May 7, 1993. Although the Cali Cartel typically operates discreetly and avoids broad-based violence, both the United States and Colombia have begun to target Cali Cartel members. *Id.*

119. See Ian Fisher, *Jackson Heights Streets Familiar to Drug Cartels*, N.Y. TIMES, May 11, 1993, at B2.

120. Santacruz, known as *Don Chepe* (The Shepherd), is a real estate magnate and club owner in New York. The funds to finance his business ventures come from narcotics operations. Peg Tyre, *Drug Don of Queens*, NEWSDAY, May 11, 1993, at 83.

121. Stassen-Berger, *supra* note 57, at A3. De Dios reported on narcotics traffickers and provided names and photographs. While reporting on the drug trade in Colombia has always been a dangerous occupation, this is the first time a reporter has been murdered in the United States for writing about the drug trade. *Id.*

122. Joseph B. Treaster, *Seven Indicted in 1992 Slaying of a Journalist*, N.Y. TIMES, May 11, 1993, at A1.

123. See *U.S. Links to Cartel in Cali Arrested*, USA TODAY, Apr. 29, 1992, at 3A.

124. Tyre, *supra* note 120, at 83. The Cali cartel often ships cocaine in cargo ships, hidden in objects as varied as lumber, chocolate, pottery, shoes, lye, hangers, and produce. *Id.*

125. Sereny, *supra* note 67, at 1.

legitimate businesses that could eventually support the cartel if the production of cocaine were no longer feasible in the future.<sup>126</sup> The DEA estimates that, in an area of New York heavily populated by Colombians, some two hundred travel agencies, check-cashers, and international telephone services launder hundreds of millions of dollars for the Cali Cartel.<sup>127</sup>

### III. EXTRADITION

#### A. Overview

The United States increasingly attempts to use extradition as a means of battling drug traffickers.<sup>128</sup> Extradition, considered a quasi-judicial process, occurs when an asylum state surrenders an alleged criminal to a requesting state.<sup>129</sup> Treaties typically govern extradition laws, but states occasionally practice extradition out of courtesy.<sup>130</sup> International law, however, typically requires a nation to return an alleged criminal only if an extradition treaty exists between the two states.<sup>131</sup> Many states do not recognize political crimes as extraditable offenses, although most other offenses are considered extraditable.<sup>132</sup> The "doctrine of specialty" also mandates that a requesting state can only prosecute an alleged criminal for the offenses for which the asylum state agreed to extradite that individual.<sup>133</sup>

The United States prefers the extradition of narcotics barons from foreign states because the foreign governments are often unable to incarcerate the criminals because of the effect of intimidation, corruption, and force on the states' judicial

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126. *Id.*

127. Ian Fisher, *supra* note 119, at B2.

128. Jonathan Hafén, *International Extradition: Issues Arising Under the Dual Criminality Requirement*, 1992 B.Y.U. L. REV. 191, 192 (1992).

129. *Id.*

130. *See id.* at 202-03.

131. Andrew B. Campbell, Note, *The Ker-Frisbie Doctrine: A Jurisdictional Weapon in the War on Drugs*, 23 VAND. J. TRANSNAT'L L. 385, 399-400 (1990). The United States has also followed this tradition since the 1840 Supreme Court decision in *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840). Campbell, *supra*, at 400.

132. Charles Kallenbach, *Plomo o Plata: Irregular Rendition as a Means of Gaining Jurisdiction Over Colombia Drug Kingpins*, 23 N.Y.U. J. INT'L L. & POL'Y 169, 175 (1990).

133. Peter S. McCarthy, Comment, *United States v. Verdugo-Urquidez: Extending the Ker-Frisbie Doctrine to Meet the Modern Challenges Posed by the International Drug Trade*, 27 NEW ENG. L. REV. 1067, 1071 (1993).

systems.<sup>134</sup> Extradition of drug traffickers from Colombia, however, has proved a difficult process.<sup>135</sup> The United States often indicts narcotics traffickers,<sup>136</sup> but without suitable extradition laws these indictments are impotent.<sup>137</sup>

The United States and Colombia first implemented an extradition treaty in 1891 (1891 Accord).<sup>138</sup> Unlike the central focus of modern Latin American extradition laws, however, the 1891 Accord did not discuss narcotics trafficking.<sup>139</sup> Under the Carter administration the United States initially attempted to control the flow of marijuana from Colombia through extradition laws.<sup>140</sup> However, Colombian President Alfonso Lopez Michelsen was unresponsive to United States demands and refused to pursue legislation that the United States deemed necessary to adequately address the drug trafficking problem.<sup>141</sup>

In 1978, President Julio Cesar Turbay Ayala<sup>142</sup> concomitantly strengthened the power of the President and established a closer relationship with the United States.<sup>143</sup> Several years later, Colombia and the United States signed a new extradition treaty.<sup>144</sup> Despite pressures from both the Reagan

134. See Campbell, *supra* note 131, at 386-87. As previously discussed, in Colombia, the Medellin Cartel has essentially destroyed the judicial system. Obtaining an untainted verdict is an extremely difficult task. See *supra* part II.A.2. Drug kingpin threats, however, are less likely to influence the United States judicial system. Extradition, if available, consequently appears to be a valid alternative. See Campbell, *supra* note 131, at 396-98.

135. *Hearing of the Senate Judiciary Committee on International Drug Control*, 101st Cong., 1st Sess. 4-6 (1989) (statement of Robert Merkle, Former United States Attorney).

136. *Id.* The United States has indicted every prominent member of the Medellin and Cali Cartels, including Pablo Escobar, Jorge Luis Ochoa, Fabio Ochoa, and Gilberto Orejuela. *Id.*

137. *Id.* If Colombia refuses to extradite Colombian nationals, the United States cannot prosecute the drug traffickers, notwithstanding the indictments, unless the United States is willing to take some other action.

138. Convention for the Reciprocal Extradition of Criminals, May 1888 (U.S.-Colom.), 26 Stat. 1534; see also Mark A. Sherman, *United States International Drug Control Policy, Extradition, and the Rule of Law in Colombia*, 15 NOVA L. REV. 661, 670 (1991). This accord was implemented early in Colombia's judicial formation, Colombia having adopted its current constitution only five years earlier. *Id.*

139. Sherman, *supra* note 138, at 670. The United States and Columbia, however, subsequently amended the accord to include "[c]rimes against the laws for the suppression of the traffic in narcotics." *Id.* at 670-71.

140. *Id.* at 674.

141. *Id.*

142. Ayala was a member of the Liberal Party of Colombia. *Id.* at 675.

143. *Id.*

144. *Id.* at 676. The United States and Colombia signed this treaty on September 14, 1979, and it entered into force on March 4, 1982. Through political and economic pressure, the United States coerced Colombia to accept

and the Bush administrations, however, enforcement of the extradition treaty has been less than successful.<sup>145</sup>

### B. Dual Criminality

A common feature of extradition treaties is a requirement of "dual criminality," which means that the offense charged must be considered a crime in both the requesting state and in the requested state.<sup>146</sup> Originally, the purpose of dual criminality was to force the asylum state either to extradite the desired offender or to provide legal justification for not sending the criminal.<sup>147</sup> Recently, however, states, including Colombia, have used the dual criminality requirement as a barrier to extradition.<sup>148</sup> Although the purpose of the dual criminality requirement is to avoid frivolous extraditions and, thereby, preserve individual liberties, the requirement protects persons' rights less than it functions as a barrier to justice.<sup>149</sup> Nonetheless, foreign courts sufficiently value the sovereignty of their states to uphold the dual criminality requirement and, therefore, often unjustly protect criminals.<sup>150</sup> Colombia has been able to avoid the extradition of various narcotics traffickers by claiming that certain United States crimes, such as actions in violation of the Racketeer Influenced and Corrupt Organizations (RICO) and Continuing Criminal Enterprise (CCE) acts, are not criminal under Colombian law.<sup>151</sup> Consequently, the United

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this treaty. The United States agreed to provide certain military and financial assistance only if Colombia agreed to sign the treaty. *Id.* at 676-77.

145. Kallenbach, *supra* note 132, at 185-190.

146. Hafén, *supra* note 128, at 191.

147. *Id.* at 194.

148. *Id.* at 204-07. The United States has required dual criminality since 1794 and uses it today in various treaties with foreign powers. Most of the Colombians protected by the dual criminality requirement were lower level members of the cartels, but Colombia also has refused to extradite drug lords such as Pablo Escobar without providing any justifications for their actions. *Id.*

149. *Id.* at 196. While claiming that they are merely protecting individual liberties, states can use the dual criminality requirement to block extradition, thereby impeding the prosecution of criminals who have often committed heinous crimes. *Id.*

150. *Id.* Colombia would often rather block extradition of a criminal rather than allow prosecution in the United States. The reasons for these actions vary. Pride, sovereignty, fear, and violence all affect the Colombian government. These influences will not soon dissipate, and, consequently, extradition of narcotics traffickers from Colombia will remain a difficult task. *Id.* Furthermore, Colombia does not like to extradite narcotics traffickers to the United States because the United States authorizes the death penalty for drug traffickers who have committed certain offenses, but Colombia does not impose the death penalty in any circumstances. Kallenbach, *supra* note 132, at 182.

151. Hafén, *supra* note 128, at 209-10.

States has a difficult burden to establish dual criminality in cases in which RICO and CLE are critical to successful prosecution.<sup>152</sup>

Dual criminality presents a second problem for the United States. Under dual criminality, the requesting state must make specific charges and divulge any evidence against the accused to the asylum state.<sup>153</sup> The United States is often unwilling to comply with these requirements, fearing that compliance might compromise future trials in the United States.<sup>154</sup> Some countries, such as Canada, recently have waived the dual criminality requirement, but Colombia has not acted as cooperatively.<sup>155</sup>

### C. Lack of Columbian Support for Extradition

Most Colombians do not favor extradition.<sup>156</sup> Because the Cali Cartel's methods are typically non-violent, Colombian peasants are generally indifferent to it.<sup>157</sup> Eighty-two percent of Colombians, in fact, oppose the extradition of criminals for trial.<sup>158</sup> Part of the rationale for protecting cartel members concerns fear and intimidation while another part concerns appreciation of jobs and infrastructure development that the cartel has made possible.<sup>159</sup> Given narco-trafficker influence on the Colombian judicial system, efforts to stop extradition of important cartel members have been extremely successful, yielding only one significant extradition.<sup>160</sup>

The Colombian government does not fully support the United States in its pursuit of extradition because it does not believe that the United States is committed to the anti-drug war.<sup>161</sup> The

152. See *id.* at 210.

153. See Peter Eisen, *Sharing Evidence: Colombia Seeks U.S. Help to Convict Drug Bosses*, NEWSDAY, May 3, 1993, at 14.

154. *Id.*; Kallenbach, *supra* note 132, at 176.

155. See Kallenbach, *supra* note 132, at 176. Colombia, consequently, has not appeared ready to cooperate in the extradition process.

156. See *id.* at 187.

157. Boudreaux, *supra* note 18, at A4.

158. Cecilia Rodriguez, *Jailing a Feared Narco-Terrorist Won't End Narco-Trafficking*, L.A. TIMES, June 9, 1991, at M2.

159. See *supra* part II.A.2.; Kallenbach, *supra* note 132, at 182-86. The Colombians find it difficult to earn a living through any other means. The price of coffee has decreased 14 times in the last decade and is rarely a profitable enterprise for Colombian peasants with antiquated farm equipment. Foreign corporations, rather, now reap most of the profits to be made through coffee exportation. *Id.*

160. Kallenbach, *supra* note 132, at 185-87. The only significant extradition was that of Carlos Lehder.

161. *Id.*

"Andean Strategy,"<sup>162</sup> however, was designed to bolster nations of the Andean region through increased commitment of funds to those nations, the development of Andean governments, and the development of their national law enforcement agencies.<sup>163</sup> This was a feeble effort, though, according to Rensselaer Lee, a drug consultant at Foreign Policy Research Institute, who attests that the Andean Strategy "is the least promising approach. We've spent billions [of dollars] on international assistance programs and have nothing to show for it."<sup>164</sup>

Except for, perhaps, the unsuccessful Andean Strategy, Colombia's case that the United States is not committed to the drug war is strong.<sup>165</sup> When United States authorities videotaped Washington, D.C. Mayor Marion S. Barry smoking crack cocaine in a hotel room, he was convicted of only one misdemeanor count.<sup>166</sup> More remarkable is that after being released from prison, Barry has again been elected to public office. A further signal to Colombia that the United States is not committed is that when the United States decided to help Kuwait after its invasion by Iraq, the United States expended billions of dollars in aid.<sup>167</sup> The United States even removed two portable radar units that had only recently been set up in Colombia to inspect narcotics operations and sent the bases to the Middle East.<sup>168</sup> A close associate to President Gaviria reportedly said, "Less than 20 Israelis were killed by Scud missiles, and yet they will probably get another \$13 billion in United States aid. Egypt gets \$7 billion in debt forgiven. We lose a thousand people here [in Colombia],

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162. The United States spent 12 billion dollars annually on the Andean Initiative alone. Michael McGuire, *Airborne Police Wage Losing Battle in Colombia Poppy Fields*, CHI. TRIB., Apr. 4, 1993, at C6.

163. Before the Subcomm. on Western Hemisphere Affairs and Task Force on International Narcotics Control of the House Comm. on Foreign Affairs, 103rd Cong., 1st Sess. 7 (1992) (statement of John P. Walters, Deputy Director for Supply Reduction, Office of National Drug Control Policy). The Andean Strategy targeted states such as Bolivia located in the Andean Region of South America. *Id.*

164. *Id.*

165. *Id.*

166. Brooke, *supra* note 17, at A1.

167. *Id.*

168. Douglas Farah, *Meanwhile, What About the Drug War? Suddenly, U.S. Priorities Shifted -- and the Andean Leaders Are Angry*, WASH. POST., Feb. 24, 1991, at B2. The Colombians justifiably argue that while hundreds of thousands of people die world wide from narcotics-related incidents, the United States does little to help. However, when a United States interest, such as oil, is in jeopardy, the United States acts quickly and forcefully. In addition, Colombia wants to retain its sovereignty and will not allow United States military operations in Colombia. The two states must willingly work together to help solve this narcotics crisis. *Id.*

and we can't get \$200 million in trade concessions.'"<sup>169</sup> Colombia is understandably frustrated with United States actions.<sup>170</sup>

#### D. Current Status of Extradition Laws with Colombia

In 1989, the United States and Colombia, under the guidance of President Barco, agreed to sign a new treaty.<sup>171</sup> President Barco valued the military and economic assistance of the United States and wished to maintain good relations with President Bush in light of Bush's promise to step up the war on drugs.<sup>172</sup> The recent murder of Colombian presidential candidate Carolo Luis Galán also prompted Colombian cooperation.<sup>173</sup>

The new extradition treaty provides for the immediate extradition of drug traffickers. Article 1 effectively denies the Colombian legislature the authority to convene on the desirability of extradition in any specific instances.<sup>174</sup> Article 2 denies judicial review of extradition decisions relating to narcotics trafficking.<sup>175</sup> Article 5 provides that any extradition request supplants any pending criminal trial.<sup>176</sup> Article 7, however, imposes a maximum penalty of thirty years imprisonment for any Colombian national extradited and a "guarantee that the human rights of the person extradited shall be respected . . . in a manner that is non-discriminatory with regard to those convicted in [the requesting state]."<sup>177</sup> This doctrine is essentially the "doctrine of specialty" found in most extradition treaties requiring that the accused be prosecuted only for the crimes charged to obtain

169. *Id.*

170. *See id.*

171. DECRETO NUMERO 1860 de 1989, No. 38,945 DIARIO OFICIAL 5 (18 de agosto de 1989) [hereinafter 1989 Treaty]. The new treaty was issued as Decree Number 1860 of 1989 in Colombia. *Id.*

172. Sherman, *supra* note 138, at 690-91.

173. *See id.* at 692. Most of the Colombian population vehemently opposed an extradition treaty prior to Galán's assassination. Sherman subtly advances the theory that the United States and President Barco may have conspired to have Galán assassinated in order to create a reaction necessary to prompt Colombia to endorse the extradition treaty. Galán's murder is still a mystery and no evidence indicates that the assassination was carried out by drug traffickers or their assassins. In fact, drug traffickers probably realized that such an action would turn public opinion against them. *Id.* at 692-93.

174. *See* 1989 Treaty, *supra* note 171.

175. *Id.* art. 2.

176. *Id.* art. 5. This Article is especially important because it denies the judiciary the power to hold a drug trafficker who has committed some other minor crime in Colombia. *Id.* art. 7.

177. *Id.* art. 7. This final Article decreases some of the threat of extradition to the narcotics traffickers. *Id.*

extradition.<sup>178</sup> Although the Colombian Supreme Court of Judiciary on October 3, 1989 held that the 1989 Treaty was unconstitutional,<sup>179</sup> Colombia and the United States still honor, if not always abide by, the treaty.<sup>180</sup> This disrespect demonstrates the minimal the authority of the Colombian Supreme Court.<sup>181</sup>

Colombia and the United States require more modern extradition laws.<sup>182</sup> The United States, however, employs minimal resources to rectify this growing problem.<sup>183</sup> The United States, nonetheless, has specifically responded to Colombia's lack of assistance in enforcing extradition.<sup>184</sup> United States retaliations to Colombia's inaction on extradition matters, however, have only incensed Colombian citizens and caused them to harden their stance against allowing extradition of Colombian nationals to the United States.<sup>185</sup> According to an analyst of the Colombian situation, "The U.S. campaign to extradite drug dealers for trial in America has been blamed not only for the assassinations but for the tear in Colombian pride."<sup>186</sup> Colombia, consequently, is not likely to ever extradite significant numbers of narcotics traffickers to the United States, especially given Colombian apathy toward the United States.<sup>187</sup>

Various commentators have proffered solutions for the problems existing in current extradition laws.<sup>188</sup> One possible solution involves a new resolution to the Tenth International

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178. Campbell, *supra* note 131, at 402-3.

179. See Sherman, *supra* note 138, at 875. The Supreme Court held that because the 1979 Treaty had not been formally withdrawn, that treaty merely remained dormant and took precedence over the new treaty. However, given the unconstitutionality of the 1979 Treaty, the Supreme Court reasoned that the 1989 Treaty was impotent and unconstitutional. *Id.*

180. *Id.*

181. *Id.*

182. See Sandi R. Murphy, Special Project, *Drug Diplomacy and the Supply-Side Strategy: A Survey of United States Practice*, 43 VAND. L. REV. 1259, 1290-92 (1990).

183. *Id.* at 1292. Without better laws, other methods of combatting the narcotics trafficking problem must be utilized. One strategy, which the United States uses with increasing frequency, is abduction of foreign nationals without any foreign cooperation. *Id.*

184. *Id.* For instance, after the Supreme Court of Justice of Colombia held the extradition treaty unconstitutional and Jorge Ochoa escaped from prison in Colombia, the United States increased custom checks on Colombian travelers. *Id.*

185. *Id.*

186. Richard L. Fricker, *A Judiciary Under Fire*, A.B.A. J., Feb. 1990, at 54.

187. See Murphy, *supra* note 182, at 1288-92. The United States is currently seeking extradition of approximately 300 drug traffickers. The chances of Colombia extraditing a significant number of these individuals are slim. Fricker, *supra* note 186, at 57-8.

188. See Hafen, *supra* note 128, at 195.

Congress that would require requested states to set aside the dual criminality requirement unless certain circumstances necessitate otherwise.<sup>189</sup> Another possible solution is to deem the dual criminality requirement fulfilled when the drug trafficker intends to harm the requesting state.<sup>190</sup> Extradition treaties might also be altered to more adequately reflect the problems surrounding the prosecution of drug traffickers.<sup>191</sup>

### E. *Effect of the Mansfield Amendment on Extradition*

The Mansfield Amendment, which Congress adopted in 1976 as part of the International Security Assistance and Army Export Control Act, prohibits the unsolicited assistance of United States employees or officers in foreign police arrests.<sup>192</sup> The Amendment further bans any agents or employees of the United States from even monitoring foreign police arrests of desired extraditables.<sup>193</sup> Consequently, the Mansfield Amendment debilitates United States extradition efforts by limiting the scope of the DEA's powers in conducting extraterritorial operations.<sup>194</sup>

The 1986 Anti-Drug Abuse Act altered the Mansfield Amendment.<sup>195</sup> Under the amendment, the United States could intervene in foreign arrests provided that the Attorney General and the Secretary of State consulted on the issue, but, even then,

189. *Id.* These circumstances, however, include political and civil turmoil within the requested state. Colombia would be able to claim rather easily that such a situation exists in Colombia and, therefore, still be able to claim exception and hide behind the dual criminality requirement. *Id.*

190. *Id.* One problem with this solution, however, is coercing Colombia into agreeing to it. If Colombia wanted extradition to work successfully, the framework is currently in place to sufficiently effect the prosecution of narcotics traffickers. The Colombian government, however, although often voicing its desire to prosecute drug lords, does not actually wish to promote extradition. *Id.*

191. *Id.* Problems, however, also exist with this possible solution. Colombia wants to retain its sovereignty and decide whether certain criminals are, in fact, extradited to the United States. Agreeing to a treaty alteration might decrease this power. Colombia, consequently, would likely be difficult to negotiate with on these issues. *Id.*

192. Murphy, *supra* note 182, at 1288.

193. Campbell, *supra* note 131, at 422.

194. *See* Murphy, *supra* note 182, at 1279. Because this Amendment greatly hampered extradition activities, Congress altered the Mansfield Amendment to allow the Secretary of State of the United States and a foreign government to permit the presence of United States officers and other agents at foreign police arrests. Direct participation, however, is still prohibited. *Id.*

195. Campbell, *supra* note 131, at 406.

intervention could be only indirect.<sup>196</sup> The 1989 International Narcotics Control Act<sup>197</sup> further clarified and extended the Mansfield Amendment.<sup>198</sup> This further congressional alteration of the amendment permitted United States officials to directly partake in overseas arrests.<sup>199</sup> The United States Justice Department also issued a legal opinion that the United States Federal Bureau of Investigation (FBI) could legally apprehend United States, but not foreign, fugitives in foreign states without the consent of the foreign governments.<sup>200</sup> Consequently, the Mansfield Amendment now provides less protection to foreign drug traffickers than initially perceived.<sup>201</sup>

#### IV. VIABILITY OF A MILITARY SOLUTION TO NARCO-TRAFFICKING

##### A. Overview

Because of the minimal impact that other United States programs have had on the Colombian narcotics trade, certain commentators advocate a more aggressive United States role through the use of its vast military capabilities.<sup>202</sup> Operation Blast Furnace was a United States attempt to use the military to attack the drug trade.<sup>203</sup> This operation essentially entailed the use of United States Army Blackhawk helicopters to destroy cocaine laboratories in Latin America over the course of about four months.<sup>204</sup> Very few laboratories were located or destroyed, cost over-runs were significant, and the operation incited ill-will

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196. Murphy, *supra* note 182, at 1280. However, according to a 1989 Amendment to the Mansfield Amendment, United States officials may take direct action if necessary to preserve their safety. *Id.*

197. 1992 Pub. L. No. 102-583, 106 Stat. 4914 codified at 12 U.S.C. § 635.

198. Murphy, *supra* note 182, at 1279-81. Because of these alterations, the Mansfield Amendment no longer performs the functions for which it was originally designed. *Id.*

199. *See id.*

200. *Id.* The Justice Department issued an opinion on June 21, 1989 that actually extended FBI jurisdiction over United States citizens who had fled the United States for a foreign territory. *Id.*

201. *See id.* The Mansfield Amendment, given its original intent, however, does not appear to assist United States extradition efforts. *Id.*

202. Sanchez, *supra* note 64, at 140-41. Sanchez suggests that the military may provide the best means of protecting national security given the necessity of quick, conclusive action to terminate narcotics trafficking. *Id.*

203. Guy Gugliotta, *Drug Wars—Hey, We're Winning!*, WASH. POST, Feb. 11, 1990, at C1.

204. *Id.*

from the states in which it was conducted.<sup>205</sup> The lack of operational success was not the only problem with Operation Blast Furnace. Certain other problems also exist concerning the legality of using military bodies to enforce federal and state laws.<sup>206</sup>

### B. *Posse Comitatus Act*

Congress passed the Posse Comitatus Act (the Act) in the post-Civil War period.<sup>207</sup> The Act, applying to both federal and state law, prohibited the military from acting as a law enforcement body.<sup>208</sup> Although the Act only specifically delineated Army and Air Force action, the Navy and Marine Corps also adhere to the statute.<sup>209</sup> One legal scholar argues that the Act prohibits the use of any of these bodies to directly enforce any laws, including laws against drug trafficking.<sup>210</sup>

Certain exceptions to the Act exist.<sup>211</sup> For example, as the head of the executive branch, the President has the power to use the military in emergency situations such as insurrection, rebellion, and domestic violence.<sup>212</sup> In these situations, because of possible consequences of inaction and separation of powers concerns, courts have not enforced the Posse Comitatus Act and have not declared the uses of force unconstitutional.<sup>213</sup>

205. *Id.* One positive effect of Operation Blast Furnace, however, was that the Medellín Cartel's use of the laboratories during this time period markedly decreased. However, as soon as the operation terminated, cocaine production regained previous levels. *Id.*

206. Sanchez, *supra* note 64, at 117.

207. 18 U.S.C. § 1385 (1990).

208. *Id.*

209. Sanchez, *supra* note 64, at 119. Courts have also held the Posse Comitatus Act applicable to the United States Coast Guard. An exception, however, exists. The Act does not apply to the National Guard when acting under the command of a Governor in emergency situations, such as natural disasters. *Id.*

210. *Id.* at 125.

211. *Id.*

212. *Id.* Presidents have historically used this power in national emergencies and have used it over 100 times since the power was initially created. *Id.*

213. *See id.* One uprising that incited several criminal court trials occurred at Wounded Knee, South Dakota in 1972. The judgments, however, only vaguely referred to the Posse Comitatus Act. *Id.* at 121.

### C. Application of the Military to Narcotics Trafficking

Congress has attempted to pass legislation to stop the influx of narcotics into the United States.<sup>214</sup> The proposed legislation has included various plans both to stop the supply of narcotics from Colombia and to quell the United States domestic demand for cocaine.<sup>215</sup> In 1981, Congress, in an effort to enhance the strength of operations against drug traffickers, amended the Posse Comitatus Act of 1878.<sup>216</sup> The amendment did not allow direct military intervention into civilian arrests of narcotics traffickers but did allow the Department of Defense to supply civilian law enforcement agencies with training, information, equipment, and general assistance.<sup>217</sup> This amendment prompted over ten thousand requests for this type of assistance within three years.<sup>218</sup> The expansion of military contributions was, therefore, significant. Since 1989, the Pentagon's drug war budget has increased nearly three hundred percent to 1.2 billion dollars.<sup>219</sup> However, the increased funding has focused on radar nets around the United States which have had little impact on drug trafficking or domestic cocaine prices.<sup>220</sup>

Despite the 1981 Amendment to the Posse Comitatus Act, the drug problem in the United States continued to expand rapidly to epidemic proportions.<sup>221</sup> Incited by pressure from constituents, Congress again amended the Act. The latest

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214. *Id.* at 122.

215. *See id.*

216. *Id.* at 122-23. Congressman Charles Bennett, a Democrat from Florida, proposed a strong amendment that would allow the United States military to search, seize, and arrest drug traffickers (inside or outside of United States borders). *Id.* at 122. While the final amendment provided only a fraction of the liberties that Congressman Bennett proposed, he did initiate an important change in congressional attitudes concerning the war on drugs. *Id.*

217. *Id.* at 122-23. Although the military was not allowed to act in a physical, aggressive manner, it was able to make a valuable contribution to the war against drugs. *See generally id.* Equipment and more detailed information were required to bolster domestic anti-narcotic operations. *Id.* at 123.

218. *Id.* at 122. While civilian law enforcement agencies had previously requested and the United States military had previously provided assistance of this type, the 1981 Amendment to the Posse Comitatus Act served to ratify the occurrences and enable their widespread adoption. *Id.*

219. Charles Lane, *The Newest War*, NEWSWEEK, Jan. 6, 1992, at 18.

220. *Id.* The problem with increased radar surveillance is that while the radar may detect a ship or a plane, the contents of the vessel are not detectable. *Id.* Narcotics, consequently, conveniently slip through the radar net on barges and ocean freighters. *Id.* The ease with which cocaine can be smuggled in that fashion is the principal reason the Cali Cartel has shifted trafficking operations from fast airplanes to slow cargo ships. *See generally id.*

221. *See Sanchez, supra* note 64, at 123.

Amendment both allocated more federal funds to the war against drugs and provided for the central command and control of military operations to monitor drug traffickers.<sup>222</sup> The Amendment also called for enhanced military surveillance operations to monitor drug trafficking before drugs enter the United States.<sup>223</sup> Although the United States military still could conduct only technically passive operations, their actions were now more fundamental to a cogent United States anti-drug effort.<sup>224</sup> If military operations exceeded initially desired and proscribed limits, however, courts could put teeth back into the Posse Comitatus Act and force a decrease in anti-drug military operations.<sup>225</sup>

Article 17 of the Charter of the Organization of American States (OAS), mirroring the United Nations nonaggression provision, provides that no state may "be the object, even temporarily, of military occupation"<sup>226</sup> by another state.<sup>227</sup> However, article 51 of the United Nations Charter reads, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations. . . ." <sup>228</sup> The United States could argue that, given the huge destructive effect that narcotics have had on it, the United States was merely acting in self-defense by attacking Colombia.<sup>229</sup> States have exploited the self-defense argument to justify military intervention in other states in certain circumstances.<sup>230</sup> This power, however, is tenuous,<sup>231</sup> and any long-term organized military operations will be difficult to justify without the cooperation of the invaded state.

222. *See id.* During this time military opposition to fighting a drug war became evident. Military personnel were arguing that being forced to fight a never ending drug battle would decrease the readiness of the United States military forces. *Id.* at 124.

223. *See id.* Such surveillance operations would entail increased naval patrols, AWAC flights, and enhanced Coast Guard operations.

224. *See id.*

225. *See id.* at 125-26. Noted commentators, however, asserted that if the drug crisis continued, popular opinion would essentially force the issue to be a political rather than a judicial one. Courts would, therefore, most likely leave any alterations of drug policy to the legislature. *See id.* at 126-27.

226. Charter of the Organization of American States, Apr. 30, 1948, art. 17, 2 U.S.T. 2394, 2420.

227. *See Sanchez, supra* note 64, at 129.

228. U.N. CHARTER art. 51.

229. *Sanchez, supra* note 64, at 130.

230. *See id.*

231. *See id.*

Given Colombia's hostility to the United States, its agreement to a military invasion is unthinkable.<sup>232</sup> Also, given the opposition of the United States military, this type of operation is unlikely to receive the support necessary to be successful.<sup>233</sup> With the inherent problems of military intervention, short of dropping a nuclear bomb on Medellin as former New York Mayor Ed Koch suggested, alternative solutions to narcotics trafficking are required.<sup>234</sup>

## V. IRREGULAR RENDITION AS A SOLUTION TO NARCOTICS TRAFFICKING

### A. Overview

Irregular rendition is essentially a unilateral action by a state to apprehend a criminal from a foreign state for trial in the apprehending state. Irregular rendition may be an effective alternative to extradition for bringing narcotics traffickers to justice in the United States.<sup>235</sup> United States law, and probably, international law, recognizes the legality of irregular rendition.<sup>236</sup> United States law, however, does not specifically mention abduction as an authorized means of international law enforcement.<sup>237</sup> Irregular rendition is essentially a self-help measure that arguably may be warranted in light of the lack of success of extradition in curbing narcotics trafficking.<sup>238</sup>

### B. The Ker-Frisbie Doctrine

The *Ker-Frisbie* doctrine takes its name from two Supreme Court cases, *Ker v. Illinois*<sup>239</sup> and *Frisbie v. Collins*.<sup>240</sup> This

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232. See Treaster, *supra* note 1, at 7.

233. Sanchez, *supra* note 64, at 130. Military strategists fear the possibility of another unwinnable war similar to Vietnam if United States troops attempt to attack drug lords in their homeland. See generally *id.* at 140-43.

234. Gilles Trequesser, *Colombia Drug War Not Won But International Support Guaranteed*, REUTERS, Sept. 17, 1989, at 1. Mayor Koch's statement prompted retaliation from the Medellin Cartel. The cartel attempted to assassinate Koch with a car bomb, a typical tactic used to murder judges and other officials in Medellin. *Id.*

235. Kallenbach, *supra* note 132, at 179.

236. *Id.* at 171-72.

237. Murphy, *supra* note 182, at 1296.

238. Kallenbach, *supra* note 132, at 173.

239. 119 U.S. 436 (1886).

240. 342 U.S. 519 (1952).

doctrine represents the legal approach of the United States to irregular rendition.<sup>241</sup> In both of these decisions the Supreme Court upheld trial court decisions permitting the United States to seize defendants in foreign states through irregular rendition.<sup>242</sup> The Supreme Court held that courts do not violate due process merely by allowing defendants to be abnormally brought into the custody of the law.<sup>243</sup> The United States, however, must indict the defendant prior to his abduction<sup>244</sup> but need not attempt to try the case prior to abducting the individual.<sup>245</sup> A trial requirement would pose an almost insurmountable burden on the implementation of irregular rendition.<sup>246</sup> The Court has since applied this doctrine to both domestic and international arrests.<sup>247</sup> The Court also ruled that this type of arrest does not violate either due process or the Fourth Amendment's prohibition of unreasonable searches and seizures.<sup>248</sup> According to the Court, abduction does not violate procedural safeguards in administering justice.<sup>249</sup>

Although the Second Circuit's decision in *United States v. Toscanino*<sup>250</sup> initially appeared to limit the doctrine, the case ultimately had little effect on the scope of the *Ker-Frisbie* doctrine.<sup>251</sup> The court held that the district court had denied Toscanino's pre-trial rights because of unnecessary lawlessness on the part of foreign officials in his abduction.<sup>252</sup> The Supreme

241. Kallenbach, *supra* note 132, at 195-96.

242. *Id.* In *Ker v. Illinois*, Ker was charged with larceny and embezzlement but fled to Peru where a United States official kidnapped Ker notwithstanding his argument that the United States did not have proper jurisdiction in Peru. 119 U.S. at 437-38. In *Frisbie v. Collins*, Michigan officials kidnapped Frisbie who had fled to Chicago to escape a murder trial in Michigan. 342 U.S. at 520.

243. Campbell, *supra* note 131, at 410.

244. *Id.* at 411.

245. *Id.* The Supreme Court also held that defendants whom the United States kidnaps are not able to invoke the protection of any extradition treaty that may exist between the two states. *Id.*

246. *Id.*

247. See Kallenbach, *supra* note 132, at 197. An example is the arrest of Ruben Zuno-Arce for the murder of two DEA agents. *United States v. Zuno-Arce*, 958 F.2d 380, 381 (1992).

248. Kallenbach, *supra* note 132, at 170.

249. *Id.* The Supreme Court thought that the defendant would still receive a fair trial notwithstanding his abduction. See *id.*

250. 500 F.2d 267 (2d Cir. 1974). United States authorities seized Toscanino, an Italian Citizen, in Uruguay against his will. Toscanino was accused of conspiracy to import and distribute narcotics. *Id.*

251. Kallenbach, *supra* note 132, at 200-05.

252. See *id.* at 201. Officials allegedly kidnapped Toscanino after luring him to a deserted area in Uruguay, took him to Brazil, tortured him for 17 days, and finally drugged him and put him on a flight to the United States. *Id.*

Court, however, had expanded due process rights since *Ker-Frisbie*, and, consequently, the Second Circuit felt justified in holding that the government had violated the defendant's constitutional rights.<sup>253</sup>

In *United States v. Lira*,<sup>254</sup> the Second Circuit limited its prior decision in *Toscanino*. The court held that *Toscanino* limited the *Ker-Frisbie* doctrine only where "the Government itself secures the defendant's presence in the jurisdiction through use of cruel and inhuman conduct [that amounts] to a patent violation of due process principles."<sup>255</sup> The court held that United States officials violated due process only when there was affirmative proof of gross misconduct in the abduction itself.<sup>256</sup> Further clarifying its two decisions, the court held that *Toscanino* provided an exception to the *Ker-Frisbie* doctrine only when United States government agents or their representatives acted in a "most outrageous and reprehensible" manner.<sup>257</sup> Specifically, the court held that the Chilean police were not acting as agents of the United States when arresting the defendant,<sup>258</sup> and, consequently, the United States government was not "vicariously responsible" for the actions of the Chilean government.<sup>259</sup> In *United States v. Reed*, the Second Circuit affirmed, and further defined the *Ker-Frisbie* doctrine, holding that verbal abuse of a mail fraud defendant abducted in the Bahamas was not gross mistreatment which denied the defendant due process.<sup>260</sup>

The United States Supreme Court in *United States v. Alvarez-Machain*<sup>261</sup> has also recently acknowledged that federal courts have jurisdiction over cases in which United States officials abducted persons in other states and brought them to the United States.<sup>262</sup> These court decisions merely reinforce a long standing

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253. See *id.* at 200-02.

254. 515 F.2d 68 (2d Cir. 1975), *cert. denied*, 423 U.S. 847 (1975). Defendant Rafael Lira was convicted on a narcotics charge. *Id.*

255. 515 F.2d at 70.

256. See Kallenbach, *supra* note 132, at 203.

257. *Lira*, 515 F.2d at 70.

258. *Id.* at 71. The defendant argued that United States officials were present when Chilean police tortured him. The United States Drug Enforcement Agency, however, denied being present, and the court record reflected no other indication that the United States was present or authorized his mistreatment. *Id.*

259. *Id.*

260. 639 F.2d 896, 901-02 (2d Cir. 1981).

261. 112 S.Ct. 2188 (1992). United States officials abducted Humberto Alvarez-Machain in Mexico for the kidnapping and murder of a United States DEA agent. *Id.*

262. *Id.*

United States policy of *mala captus bene detonates*.<sup>263</sup> Consequently, although some commentators criticize *Ker-Frisbie*, the United States government may be able to use the doctrine to effect the prosecution of Colombian narco-traffickers successfully.<sup>264</sup>

The Supreme Court in *Alvarez-Machain* examined the issue of "whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts."<sup>265</sup> The district court concluded that DEA agents were indirectly responsible for the defendant's abduction from Mexico to the United States.<sup>266</sup> The court of appeals agreed with the district court that because the Mexican-United States Extradition Treaty did not specifically allow this abduction, the abduction violated the treaty.<sup>267</sup> The court of appeals held that, although the treaty did not specifically prohibit such abductions, the actions violated the "purpose" of the extradition treaty.<sup>268</sup> The Supreme Court, however, held that because the treaty, which was amended in 1978, did not attempt to curtail the *Ker-Frisbie* doctrine, the treaty does not impliedly prohibit abductions outside the scope of the treaty.<sup>269</sup> According to the Court, the treaty does not attempt to delineate every allowable manner of extradition.<sup>270</sup> For the treaty to impliedly prohibit this type of abduction would be an irrational leap of logic.<sup>271</sup> Consequently, the Court held, the United States did not violate the extradition treaty and the doctrine of *Ker v. Illinois* was "fully applicable to this case. The fact of respondent's forcible abduction does not therefore prohibit

263. See Kallenbach, *supra* note 132, at 171. This doctrine essentially means that abduction of an accused person does not necessarily preclude federal court jurisdiction. This is true even if the abduction was, in fact, illegal. *Id.*

264. *Id.* at 171-73.

265. *Alvarez-Machain*, 112 S.Ct. at 2190.

266. *Id.*

267. *Id.* The lower courts believed that because the United States violated the Treaty, the courts did not have jurisdiction over the defendant. They held, therefore, that the United States should dismiss the indictment and order the repatriation of the defendant to Mexico. *Id.* at 2190-91.

268. *Id.* at 2191. Article 9 of the Treaty states, in part, "Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so." *Id.* at 2193.

269. *Id.* at 2194.

270. *Id.*

271. *Id.* at 2196.

his trial in a court in the United States for violations of the criminal laws of the United States."<sup>272</sup>

Critics of the *Ker-Frisbie* doctrine claim that the policy is unconstitutional.<sup>273</sup> Other commentators argue that the doctrine violates international treaties by ignoring extradition laws.<sup>274</sup> These commentators further argue that the United States Constitution applies to both foreign and domestic government actions.<sup>275</sup> They assert that abduction consequently violates both the Fourth Amendment<sup>276</sup> and the Fifth Amendment.<sup>277</sup> However, these arguments find little justification,<sup>278</sup> and clearly represent the view of a minority of commentators on the doctrine.<sup>279</sup>

## VI. ASSET ATTACHMENT AND MONEY LAUNDERING

### A. Overview

The dollar drives nearly every activity in the world,<sup>280</sup> and the Cali Cartel's activities are not exceptions to this rule. The cartel hires the best attorneys and financial advisors to hide their illicit cocaine related earnings.<sup>281</sup> Often huge deposits of cocaine money provide the necessary seed capital to start legitimate

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272. *Id.* at 2197.

273. *See id.*

274. *Id.* The critics argue that the United States should give more respect to the preservation and observance of international treaties. *Id.*

275. *Id.* Notwithstanding these criticisms, the validity of such claims does not appear to derive support from Supreme Court decisions. *Johnson v. Elsentrager*, 339 U.S. 763 (1950), establishes that constitutional protections do not apply to aliens outside the United States. *Id.* at 768.

276. The Fourth Amendment delineates a person's right to be free from unreasonable searches and seizures. U.S. CONST. amend. IV.

277. The Fifth Amendment states that no person shall be deprived of life or liberty without due process. U.S. CONST. amend. V.

278. Most Constitutional scholars argue that the Fourth and Fifth Amendments are only applicable to domestic issues and do not address actions in foreign states. In fact, the court in *Lira* specifically held that when the United States does not play any role in gross misconduct in the abduction of a defendant, the United States does not owe the defendant any obligation to enforce his asserted rights in the foreign state. *United States v. Lira*, 515 F.2d 68, 71-72 (2d Cir. 1975), *cert. denied*, 423 U.S. 847 (1975).

279. *Id.*

280. *See* Peter J. Kacarab, *An Indepth Analysis of the New Money Laundering Statutes*, 8 AKRON TAX J. 1, 2 (1991).

281. *See* William Drozdiak, *World Crime Groups Expand Cooperation, Spheres of Influence*, WASH. POST, Oct. 5, 1992, at A12.

businesses that, in turn, further finance the Cali Cartel and help create an invincible, diversified, and legal empire.<sup>282</sup> Although difficult, disrupting the economic incentives of the narcotics industry may prove more fruitful than attempts to ebb the tide of drug trading through extradition and military operations.<sup>283</sup> Congress recently has recognized the influence of economics and implemented anti-drug legislation that targets the financial transactions connected with narcotics trafficking, rather than the trafficking activity itself.<sup>284</sup>

The Cali Cartel employs sophisticated money laundering techniques to hide and legitimize their narcotics derived wealth.<sup>285</sup> Money laundering is essentially the act of "washing" ill-gotten gains so as to provide the funds with an appearance of legitimacy.<sup>286</sup> This operation may be either basic or sophisticated; however, the fundamental similarity of all money laundering operations is the desire of the recipients of the illegal money to conceal the source and derivation of the funds.<sup>287</sup>

The Cali Cartel has also recently developed an illicit money trading market to help move illegally acquired funds out of the United States and into Colombia.<sup>288</sup> This system involves the use of independent Colombian money brokers who guarantee to remove large blocks of funds from the United States, launder the funds in Colombia, and pay the Cali Cartel in Colombian Currency. For completing this transaction, the money brokers receive a large commission, approximately twenty to thirty percent of the total cash block, depending upon the difficulty of the transaction.<sup>289</sup> Losing the money, however, can be dangerous because the cartel often keeps "friends" in the homes

282. Kacarab, *supra* note 280, at 3. These businesses are extremely diversified in the garment, foodstuffs, and even heavy industry areas. Consequently, the Cartel is able to decrease investment risk by spreading their funds among various industries. *Id.*

283. *Id.*

284. *Id.* at 1. These statutes essentially prosecute any use of illicitly obtained funds to further bolster the illegal activity, avoid taxation consequences, or conceal the nature of the illegal income. *Id.*

285. *See id.*

286. *Id.* at 2.

287. Laura M.L. Maroldy, Note, *Recordkeeping and Reporting in an Attempt to Stop the Money Laundering Cycle: Why Blanket Recording and Reporting of Wire and Electronic Funds Transfers is Not the Answer*, 66 NOTRE DAME L. REV. 863, 866-67 (1991).

288. Douglas Farah & Steve Coll, *Cocaine Dollars Flow Via Unique Network*, WASH. POST, Sept. 19, 1993, at A1.

289. *Id.*

of these money brokers to ensure their commitment to the transactions.<sup>290</sup>

### B. Asset Forfeiture

Asset forfeiture may prove to be the most productive method of curbing narcotics trafficking.<sup>291</sup> Congress designed the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Drug Abuse Act) to curb narcotics trafficking by strengthening penalties for the receipt or use of illegally derived money.<sup>292</sup> Congress amended the Drug Abuse Act in 1984 to include continuing criminal enterprises and an enhanced forfeiture provision to strengthen the enforcement capabilities of the Act.<sup>293</sup> The Supreme Court interpreted the scope of the Drug Abuse Act in 1989 in *Caplin & Drysdale v. United States*.<sup>294</sup> The Court held that the defense attorney who represented Christopher Reckmeyer, the narcotics trafficker in the underlying decision, was not entitled to payment of his legal fees.<sup>295</sup> Caplin & Drysdale, the petitioner law firm, argued that the lower court's denying payment to the firm for representation of defendant Reckmeyer violated his sixth amendment<sup>296</sup> right to counsel.<sup>297</sup> Caplin & Drysdale also challenged the court's order as a violation of defendant's Fifth Amendment<sup>298</sup> due process rights.<sup>299</sup>

The Court addressed both of these constitutional challenges. On the issue of the violation of the Sixth Amendment, the Court asserted that *Wheat v. United States*<sup>300</sup> established that a defendant did not have an absolute right to any attorney, but only the right to an attorney that the defendant could afford with

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290. *Id.*

291. Grace E. Greer, *Cocaine Wars: Are the Taxpayers Really Winning?*, 20 SW. U. L. REV. 419, 420 (1991).

292. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236.

293. See 21 U.S.C. §§ 824, 848, & 881 (Supp. 1990).

294. 109 S. Ct. 2646 (1989).

295. *Id.* at 2656.

296. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.")

297. 109 S. Ct. at 2651. The attorneys' fees were not to be paid because defendant Reckmeyer pled guilty and as a result the forfeiture provisions of the Drug Abuse Act were applicable and denied the defendant any benefits from the seized assets. *Id.* at 2652-53.

298. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law").

299. *Id.*

300. 486 U.S. 153 (1988).

his legitimate assets.<sup>301</sup> Because Reckmeyer's assets were not legitimate but obtained from marijuana trafficking, Caplin & Drysdale was not entitled to attorneys' fees.<sup>302</sup> The Court next addressed the issue concerning the Fifth Amendment rights of the defendant.<sup>303</sup> The Court held that because the defendant received proper adjudication under the Sixth Amendment, the defendant's due process rights were not violated.<sup>304</sup> The petitioner, consequently, was not entitled to payment of legal fees.<sup>305</sup>

The Drug Abuse Act also strengthened civil forfeiture in connection with trafficking in illegal substances.<sup>306</sup> Congress amended the 1970 Act in 1978 to allow the government also to seize the proceeds from the sale of illegal narcotics.<sup>307</sup> Further, Congress passed the Money Laundering Controls Act in 1986 in an attempt to strengthen the United States government's ability to seize assets obtained from illicit activities.<sup>308</sup> Prior law had focused on prosecuting evasion of currency transaction reporting requirements.<sup>309</sup> The 1986 Act, however, broadly applies to any assets associated with narcotics and any other illegally obtained assets.<sup>310</sup> A money laundering conviction results in forfeiture of any property associated with the offense.<sup>311</sup> Under this statute even an accountant who had nothing to do with actual narcotics trafficking could face prosecution.<sup>312</sup> Individuals may also be prosecuted under the 1986 Act if they purposefully attempt to

301. 109 S. Ct. at 2652.

302. *Id.* at 2653.

303. *Id.* at 2656.

304. *Id.* A problem with this answer, however, was that it was essentially circular, using the basis of one argument to prove another one, and vice versa. While the Court was most likely within constitutional guidelines in asserting that the defendant's fifth amendment rights were preserved, it did not substantially address this issue. *Id.*

305. *See id.* at 2657.

306. Pub. L. No. 91-513, 84 Stat. 1276 (1970) (codified at 21 U.S.C. 881-896).

307. Pub. L. No. 95-633, 92 Stat. 3777 (1978) (codified at 21 U.S.C. 881(a)(6)).

308. 18 U.S.C. § 1956 (1988).

309. Kacarab, *supra* note 280, at 1-5.

310. *Id.* The Money Laundering Controls Act does not simply focus on cash transactions between the persons immediately involved in the narcotics transfer, but applies to any individuals related to the crime only tangentially. Consequently, the impact of the law is considerably broader than with prior legislation. *Id.*

311. Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified at 18 U.S.C. §§ 1956, 1957).

312. *See* Kacarab, *supra* note 280, at 2-3. The Act provides for stiff fines, forfeiture of property, and imprisonment for violation of the Act. Also, any individual who knowingly accepts laundered money will face these penalties while also being unable to maintain the benefits of the transaction. *Id.*

remain ignorant about certain transactions when an ordinary person would have been alerted to the nature of the transaction.<sup>313</sup>

Pursuant to the 1986 Act, the court of appeals in *United States v. Daccarett*<sup>314</sup> tested the effectiveness of forfeiture as a tool for seizing the earnings of narcotics trafficking as the money passes through the banking system by Electronic Fund Transfers (EFTs). The court held that warrantless seizure of EFTs does not violate the Fourth Amendment.<sup>315</sup> Three associates of the Cali Cartel had been arrested after opening hundreds of bank accounts, depositing large sums of money, and conducting countless EFTs. Twelve million dollars was seized in the United States.<sup>316</sup>

According to the Drug Abuse Act as amended in 1978, the United States government can institute forfeiture in rem proceedings in three different manners.<sup>317</sup> First, the government can follow the Supplemental Rules for Certain Admiralty and Maritime Claims. Second, the government can obtain a warrant as prescribed by the Federal Rules of Criminal Procedure. Finally, the government can seize property without judicial process "[w]hen the Attorney General has probable cause to believe that property is subject to civil forfeiture."<sup>318</sup> In *Daccarett* the government seized the funds pursuant to the first and third options, neither of which requires judicial approval prior to seizure.<sup>319</sup>

Even if the initial seizure is illegal, however, the seized property can still be forfeited.<sup>320</sup> The government must have probable cause to seize funds.<sup>321</sup> If the government lacks probable cause, the seized assets may not be admitted into evidence at trial.<sup>322</sup> The property itself, however, is still subject to the forfeiture action.<sup>323</sup>

To be a valid warrantless seizure, officials must obtain the funds pursuant to one of the recognized exceptions to the Fourth Amendment's warrant requirement.<sup>324</sup> The government,

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313. 18 U.S.C. § 1956 (1988).

314. *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993).

315. *See id.* at 48-50.

316. *See id.* at 44.

317. 21 U.S.C. § 881(a)(6) (1988).

318. *Daccarett*, 6 F.3d at 48.

319. *Id.* at 46.

320. *United States v. \$31,990 in U.S. Currency*, 982 F.2d 851 (2d Cir. 1993).

321. *Daccarett*, 6 F.3d at 49-50.

322. *Id.* at 50.

323. *Id.* at 46.

324. *United States v. LaSanta*, 978 F.2d 1300, 1305 (2d Cir. 1992).

therefore, need not obtain a judicial determination of probable cause prior to the seizure if an extraordinary situation exists.<sup>325</sup> "[S]uch an extraordinary situation exists when the government seizes items subject to forfeiture."<sup>326</sup> The government, consequently, must have probable cause at the time the clerk issues the warrant in rem, but the government need not prove that it has probable cause unless the claimant later challenges the seizure.<sup>327</sup> To later prove probable cause, the government must demonstrate only that a nexus exists between the seized funds and the narcotics trafficking.<sup>328</sup> "To show that nexus when the res is a bank account, the government must establish that there is probable cause to believe the funds represent proceeds traceable to drug transactions."<sup>329</sup> Under *Daccarett*, the government, pursuant to a Fourth Amendment exception, appears to have the necessary tools to act quickly in order to seize Cali Cartel funds on their way back to Colombia.

### C. Reporting Requirements to Decrease Money Laundering

The Currency and Foreign Transactions Reporting Act,<sup>330</sup> more commonly called the Bank Secrecy Act (BSA), delineates transaction reporting requirements.<sup>331</sup> BSA regulations cover large currency transactions themselves as well as the transportation of currency from foreign states and from specific locations within the United States.<sup>332</sup> Financial institutions must report currency transactions in excess of ten thousand dollars.<sup>333</sup> After receiving a transaction over ten thousand dollars, the financial institution must divulge the identity and occupation of the individual who conducted the transaction with the institution, the customer's account number, the identity of the person on whose behalf the transaction was conducted, as well as a

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325. See *Daccarett*, 6 F.3d at 57.

326. *United States v. \$8,850*, 461 U.S. 555, 562 n.12 (1983) (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)).

327. *Daccarett*, 6 F.3d at 57.

328. *Id.* at 56.

329. *Id.* at 56.

330. See *id.*

331. 31 C.F.R. § 103 (1990).

332. 31 C.F.R. § 103.29 (1990).

333. 31 C.F.R. § 103.22(a)(1) (1990). A "transaction in currency" is "[a] transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part." *Id.*

description of the transaction.<sup>334</sup> The Secretary of the Treasury also has broad discretionary authority to alter the dollar level of transactions which trigger the reporting requirements.<sup>335</sup> The Secretary will often alter the levels and the target areas in order to catch a would be money launderer who believed the threshold level was higher than it actually was.<sup>336</sup> These reporting requirement levels are often altered in transactions involving entities in foreign states or geographic areas where questionable activities are thought to occur.<sup>337</sup> In addition to these tactics the Secretary of the Treasury is also able to include electronic fund transfers (EFTs), wire transfers, bank checks, cashier's checks, money orders, traveler's checks, and currency transfers in the reporting requirements.<sup>338</sup> BSA attempts to alert federal officials of possible narcotics related transactions at the earliest possible point in the money laundering chain.<sup>339</sup>

Narcotics traffickers, however, may attempt to avoid these requirements by seeking an exemption to the reporting requirements under BSA regulations.<sup>340</sup> Deposits and currency withdrawals "from an existing account by an established depositor" may receive exemption if the bank chooses to grant the exemption.<sup>341</sup> Banks, however, do not exercise complete discretion in granting exemptions and must report any deposits that "exceed amounts commensurate with the customary conduct . . . of that customer" and thus appear to be of questionable origin.<sup>342</sup> If a financial institution violates any of these regulations, it is subject to a civil penalty of up to 100 thousand dollars per day or the amount involved in the transaction whichever is greater per day in which the violation occurs.<sup>343</sup> The maximum criminal penalty is up to 250 thousand dollars per day and/or five years imprisonment.<sup>344</sup> If the underlying money

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334. 31 C.F.R. § 103.11(e) (1992).

335. 31 C.F.R. § 103.25 (1990).

336. 31 C.F.R. § 103.26(a) (1992).

337. *Id.*

338. 31 C.F.R. § 103.29 (1993).

339. Sarah N. Welling, *Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions*, 41 FLA. L. REV. 287, 294 (1989).

340. 31 C.F.R. § 103.22(b)(2) (1993); *see also* Maroldy, *supra* note 287, at 878.

341. Maroldy, *supra* note 287, at 878.

342. 31 C.F.R. 103.22(c) (1993); *see also* Maroldy, *supra* note 287, at 879.

343. 31 U.S.C. § 532 (1988); 31 C.F.R. § 103.47 (1993); *see also* Maroldy, *supra* note 287, at 879-80.

344. 31 U.S.C. § 532 (1988); 31 C.F.R. § 103.49(b) (1993); *see also* Maroldy, *supra* note 287, at 880-81.

laundering scheme is known, the maximum penalty is up to 500 thousand dollars per day and/or ten years imprisonment.<sup>345</sup>

#### D. Anti-Smurfing Statutes

Smurfing is the act of conducting multiple transactions at different banks or different branches of the same bank on the same day with funds below the ten thousand dollar trigger for reporting under BSA.<sup>346</sup> A smurf is an individual who takes "dirty" narcotics money to various banks and bank branches in bundles under the ten thousand dollar reporting limit and obtains cashier's checks or some other medium of exchange.<sup>347</sup>

Before Congress passed the Money Laundering Control Act (MLCA),<sup>348</sup> courts yielded inconsistent and often contradictory holdings on the legality of smurfing.<sup>349</sup> While some courts held that persons who deposited the cash had a duty to report deposits over ten thousand dollars, other courts held that only the banks were responsible for such communications.<sup>350</sup> With the increasing incidence of smurfing, some courts were willing to collapse the various transactions that a smurf conducted at different banks in one day into a lump sum that inevitably exceeded the ten thousand dollar limit.<sup>351</sup> Only a small number of courts, however, were initially willing to collapse the multiple fraudulent transactions.<sup>352</sup>

Congress passed further legislation to make smurfing a criminal act to which stiff sanctions attached.<sup>353</sup> The new regulations also redefined the bank reporting requirements and the definitions of "bank," "financial institution," and "branch," so as to prevent or at least criminalize any future smurfing.<sup>354</sup> This law also incorporates an accomplice liability provision so that anyone who even indirectly causes the failure of a bank to report

345. 31 U.S.C. § 532 (1988).

346. Maroldy, *supra* note 287, at 881.

347. Welling, *supra* note 339, at 296-97. A smart, or at least a brave, smurf would often determine when new tellers arrived at banks on their rotation schedule and redeposit money in the same banks, but with different personnel.

348. Money Laundering Control Act of 1986, Subtitle M of Title I of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended throughout 18 U.S.C. and 31 U.S.C.).

349. Maroldy, *supra* note 287, at 881.

350. Welling, *supra* note 339, at 295-96.

351. Maroldy, *supra* note 287, at 881. Courts viewed the transactions as fraudulent, purposefully designed to avoid reporting requirements.

352. *See id.* at 881-85.

353. *See* 31 U.S.C. § 5324 (Supp. IV 1986); *see also* Welling, *supra* note 339, at 299.

354. *See* Welling, *supra* note 339, at 300.

transactions that legitimately exceed ten thousand dollars is guilty of a felony.<sup>355</sup> Even if the smurf attempts to mislead a bank, but the bank discovers that the transaction is fraudulently attempting to controvert federal law, courts may still prosecute the smurf for violating the attempt language of the statute.<sup>356</sup> Inducing a bank to file a report containing a material omission or misstatement also violates the statute.<sup>357</sup> The main thrust of the legislation makes structuring financial transactions with intent to avoid the federal reporting requirements a felony.<sup>358</sup>

This recent anti-smurfing legislation has successfully curtailed money laundering, putting pressure on drug cartels to develop more sophisticated and creative schemes for money laundering.<sup>359</sup> New schemes, however, typically involve numerous people, large amounts of capital, and networks of shell corporations and other often legitimate enterprises. The chance for infiltration into these endeavors, consequently, has increased markedly, and the rewards for success in even one multi-national anti-drug operation are tremendous.

In a further attempt to control money laundering, the United States Treasury will adopt two new programs in the near future: (1) know-your-customer regulations, and (2) guidelines to help banks recognize activities associated with money laundering.<sup>360</sup> The first program requires banks to understand the nature of their customers' businesses.<sup>361</sup> A bank must attempt to piece together the various transactions of a particular customer to determine if suspicious activities are occurring.<sup>362</sup> The bank then may refer to the Treasury Department's list of suspicious activities.<sup>363</sup> Banks, therefore, will not be immune from prosecution solely by complying with the Bank Secrecy Act.<sup>364</sup>

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355. *Id.* at 303-04. This had the affect of making the sanctions of the legislation more pervasive and applicable to drug traffickers who did not smurf, but were located several levels up in the hierarchy of various narcotics operations.

356. See 18 U.S.C. §§ 1343, 1341, 1952 (1982); see also Welling, *supra* note 339, at 305-06.

357. 31 U.S.C. § 5324 (Supp. IV 1986); see also Welling, *supra* note 339, at 306-07.

358. Welling, *supra* note 339, at 306-07.

359. See *id.*

360. Robyn Meredith, *Treasury Planning Changes in Money-Laundering Rules*, AM. BANKER, Sept. 23, 1993, at 8.

361. *Id.*

362. *Id.*

363. *Id.*

364. According to Peter G. Djinis, the director of Treasury's Office of Financial Enforcement, "Complying with the Bank Secrecy Act will help [banks] a lot." However, "[e]ven if you cross all your t's and dot all your i's on your currency

Banks must also take better steps to comply with their three thousand dollar identification log, which monitors cash transactions between three thousand and ten thousand dollars. Banks will now be required to take a more active role in attempting to curb money laundering.

### E. Operation Green Ice

One United States program directed at illicit cartel wealth, Operation Green Ice, had a significant impact on drug trafficking.<sup>365</sup> This operation directly attacked the money laundering operations of the Cali Cartel and the Italian mafia, sending a direct and painful message to the cartel.<sup>366</sup> United States Deputy Attorney General George Terwilliger, stating that the "aim [of the program was] to drive a stake through the heart of the illegal drug business by attacking their financial operations," called the operation a success that dealt a "crippling blow" to the Cali Cartel.<sup>367</sup>

Operation Green Ice was conducted as a joint effort between Italian police and the United States Drug Enforcement Agency.<sup>368</sup> The domestic part of the operation also incorporated United States Marshals, the Federal Bureau of Investigations, the Department of the Treasury, and the United States Customs Service.<sup>369</sup> The investigation spanned at least seven nations<sup>370</sup> and involved countless banks, shell corporations, and diverse individuals. According to the Italian Minister of the Interior Nicola Mancino, the operation, which began on September 25, 1992, yielded significant quantities of laundered money the "value of which so far can only be determined in cubic meters."<sup>371</sup> The arrests that resulted, although obviously not putting the Cali

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transaction reports, that doesn't mean the bank is going to stay out of trouble." *Id.*

365. *Colombia Drug Barons Planning Wave of Revenge Killings*, REUTERS LIBR. REP., Oct. 6, 1992, at 1. Operation Green Ice produced one of the largest drug busts in history. *Id.*

366. See Michael Hedges, *Operation Green Ice Began with Fake Leather Shop*, WASH. TIMES, Sept. 29, 1992, at A3.

367. Ronald Ostrow & William Montalbano, *Agents Break Global Drug Money Laundry*, L.A. TIMES, Sept. 29, 1992, at A1.

368. *201 Medellin Couriers Fall into Worldwide Drug Net*, MID. EAST NEWS NETWORK, Sept. 29, 1992, at 1. The operation took ten months of planning and was the largest drug sting operation to date, yielding significant quantities of drug money. *Id.*

369. D.E.A. Press Conf., Sept 28, 1992, at 38.

370. *Officials Say 7-Nation Dragnet Hurt Mafia-Colombia Connection*, CHI. TRIB., Sept. 29, 1992, at C8.

371. *201 Medellin Couriers Fall Into Worldwide Drug Net*, *supra* note 368, at 1.

Cartel out of business, were a major set-back for the cartel according to Terwillinger.<sup>372</sup>

The operation involved a highly sophisticated three year investigation. DEA officials established leather good shops throughout the United States.<sup>373</sup> These stores were designed to create a legitimate paper trail for the cocaine money.<sup>374</sup> DEA operators posed as money laundering facilitators.<sup>375</sup> The Cali Cartel, however, had so much money that some shops were claiming to sell over twenty million dollars worth of leather goods annually.<sup>376</sup> Worried about the possibility of leaks which would jeopardize both the operation and countless lives of undercover agents, the DEA decided to act swiftly on the information they already possessed, rather than risk total failure in an attempt to render an even more significant blow to Colombian operations.<sup>377</sup>

In response to the recent expansion of Cali money laundering operations into Europe,<sup>378</sup> Operation Green Ice was devised as a method of cracking the intricate Cali money laundering machine, the life-blood of the cartel.<sup>379</sup> The operation also focused on Italy, the largest European cocaine customer.<sup>380</sup> Notwithstanding the significance of the operation, however, the drug and money seizure that occurred as a result of Operation Green Ice amounted to only a few days gross capital intake for the cartel.<sup>381</sup> According to Italy's top anti-Mafia investigator, Liliansa Ferraro, "This is a big success, but I fear it is only the tip of the iceberg.

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372. Michael Hedges, *Call Cocaine Cartel Dealt 'Crippling Blow', U.S. Says*, WASH. TIMES, Sept. 29, 1992, at A3.

373. Ostrow & Montalbano, *supra* note 367, at A1. The operation was very intricate and involved numerous undercover agents. Seven major Cali Cartel members were arrested and indicted in the United States. This operation indicates that significant inroads into the central operations of the Cali organization are possible. Operation Green Ice led to the arrest of Jose "Tony The Pope" Duran. This individual, having over 20 different assumed names, may have been the most important distributor in the world for Colombian cocaine. The operation also led to the arrest of over two hundred narcotics related individuals most of whom are currently awaiting trial in the United States. *Id.*

374. See Jimmy Burns, *International Swoop Cracks Big Cocaine-Smuggling Ring*, FIN. TIMES, Sept. 29, 1992, at 6.

375. *Seven-Nation Green Ice Effort Deals Blow to Cartels*, MONEY LAUNDERING ALERT, Oct. 1992, at 6.

376. William Drozdiak, *World Crime Groups Expand Cooperation, Spheres of Influence*, WASH. POST, Oct. 5, 1992, at A12.

377. *See id.*

378. *Id.*

379. *Follow the Money; Operation Green Ice Breaks Up the Cali Cartel's Financial Network*, TIME, Oct. 22, 1992, at 26.

380. *Officials Say Seven-Nation Dagnet Hurt Mafia-Colombia Connection*, *supra* note 370, at C8.

381. Drozdiak, *supra* note 376, at A12.

Drug profits are becoming a major international problem because they are getting so big that they now affect economic life everywhere.<sup>382</sup> Exploiting cracks in Cali's money laundering operations, nevertheless, is a fundamental task in decreasing narcotics trafficking, and the potential of operations such as Green Ice should not be underestimated.<sup>383</sup> Focusing on Cali's asset base could lead to significant enforcement results in a relatively short time period.<sup>384</sup>

Other sophisticated DEA operations have resulted in the destruction of Cali operations throughout the United States.<sup>385</sup> In December, 1991 federal officials arrested forty-four people in New York tied to the Cali Cartel.<sup>386</sup> The raid led to the destruction of a 650 million dollar per year drug operation.<sup>387</sup>

Because of tougher United States banking regulations, more Colombian drug money is flowing back to Colombia.<sup>388</sup> During the 1980s only about ten to twenty percent of the cocaine cash went back to Colombia, now about fifty percent of the illicit funds—five billion to seven billion dollars—flows back to Colombia.<sup>389</sup>

## VII. THE CLINTON ADMINISTRATION'S INITIAL DRUG STRATEGY

On October 20, 1993 Drug Czar Lee Brown outlined the Clinton administration's new drug policy in a thirty-one page report entitled *Breaking the Cycle of Drug Abuse*.<sup>390</sup> Senate Judiciary Committee members were visibly upset with the vague and nonsubstantive proposal.<sup>391</sup> The lack of detail in and the delay in development of the proposal together with a reduction in

382. *Id.* Ferraro's two previous successors were both murdered by the mafia. Ferraro states that the mafia had been preparing to take advantage of the relaxing of borders of the European Community (EC) in 1992. Officials planned Operation Green Ice at a time appropriate to disrupt Colombian and Italian narcotics trafficking as the pace increased dramatically. *Id.*

383. *Id.* Not only did the operation yield narcotics and money, but also weapons and important records necessary for the maintenance and secrecy of other money laundering operations. *Id.*

384. Ostrow & Montalbano, *supra* note 367, at A1.

385. *An Editor's Last Story*, NEWSDAY, May 11, 1993, at 80.

386. *Id.*

387. *Id.* Manuel de Dios Unanue, killed by the Cali Cartel, identified Ramiro Herrera as the head of this operation. This raid also resulted in the elimination of two Cali Cartel "cells" or drug importation units. *Id.*

388. Farah & Coll, *supra* note 288, at A1.

389. *Id.*

390. *Just Say "Probably Not,"* WASH TIMES, Oct. 26, 1993, at A16.

391. *Id.*

Lee Brown's staff from 140 people to 25 people furthers an impression that the Clinton administration does not care sufficiently about the drug issue.<sup>392</sup>

During his campaign President Clinton promised that the new drug policy would focus on demand-side issues. Long on rhetoric, the proposal, however, is strikingly similar to Bush's drug policy.<sup>393</sup> The new drug plan specified that 13.1 billion dollars would be allocated to the war on drugs with sixty-four percent of that funding going to police and military actions.<sup>394</sup> While the United States has pledged 6.2 million dollars to support the three year old underfunded United Nations International Drug Control Program (UNDCP), such minimal funding appears to constitute political maneuvering rather than substantive change. Although adopting an international focus to curbing the drug trade may have beneficial results, this minor contribution is not enough.

Brown declared that the new administration would no longer use the phrase "War on Drugs" because "[w]e don't believe a government should declare war against its own people."<sup>395</sup> The United States, however, has already asked and is still asking Colombia to declare war on its people by curbing the supply of cocaine. Brown, in fact, while praising Colombia for its anti-drug efforts, said, "Colombia is demonstrating political will and commitment. Colombia is hurting the cartels and in return is paying in blood."<sup>396</sup> Brown, focusing the new drug plan only on hard core users, further commented, "We need to work on a manageable scale when dealing with drugs."<sup>397</sup> These statements appear to be hypocritical and exhibit a lack of conviction.

The new plan does not appear to offer a change sufficient to further reduce narcotics trafficking. The current administration has indicated that supply-side policies are ineffective, yet without either a new anti-drug strategy or a strong stance against domestic demand for cocaine, the United States is unlikely to achieve any promising results in stopping the import of drugs into the United States. Lee Brown, consequently, will have to

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392. *Drug Haze*, WASH. POST., Oct. 30, 1993, at A20.

393. Patrick Cockburn, *Washington Losing the Narcotics War*, THE INDEPENDENT, Oct. 30, 1993, at 14.

394. *United States: New Drug Policy Draws Fire*, INTER PRESS SERV., Oct. 21, 1993.

395. Craig Santy, *U.S. Drug Czar Plans Attack on Domestic Use*, UPI, Oct. 23, 1993.

396. Robert Green, *U.S. Official Praises Colombia Anti-Drug Efforts*, REUTERS, Oct. 5, 1993.

397. *Id.*

more carefully delineate his plan so as not to reduce further his credibility in Congress and among United States citizens.

### VIII. CONCLUSION

The world's narcotics problem is a serious one, requiring multi-national cooperation and focused objectives. If the United States wants to curb drug trafficking, the focus of their operations must shift from Medellin to Cali. That process may be difficult because of the different methods of operation of the two powerful cartels. The bombings, killings, and kidnappings of the Medellin Cartel are high profile events on which the media have widely reported. The Cali Cartel, however, typically uses more subdued methods of securing their narcotics enterprise. Public outcry, consequently, often shaped through the media, is concentrated on the Medellin Cartel. The Cali Cartel, however, produces most of the world's cocaine.<sup>398</sup> To reduce the supply of cocaine, the necessity of a shift in focus is clearly apparent.

Governments use various techniques to curb narcotics trafficking. Most of these enforcement techniques, however, are unsuccessful. The two strategies with the most potential are irregular rendition and asset attachment. The Cali Cartel is a sophisticated machine that invests its drug created wealth in both legal and illegal operations. Infiltrating these operations, determining the players in the Cali cocaine trade, and uncovering the flow of these assets could have a profound affect on Cali operations. The Second Circuit's recent decision in *United States v. Daccarett* appears to provide the necessary legal weapons to seize EFTs and disrupt the Cali financial empire. Operation Green Ice also indicates the scale of success that governments have achieved and can achieve again in the future through careful anti-money laundering sting operations.

Once governments uncover the persons involved in drug transactions, the government can employ irregular rendition to bring cartel members to justice in the United States. *United States v. Alvarez-Machain*<sup>399</sup> provides a strong weapon for United States officials to abduct those narcotics traffickers whom it is able to locate.<sup>400</sup> In order to enhance the effectiveness of irregular

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398. Davison, *supra* note 105, at 13.

399. 112 S.Ct. 2188 (1992).

400. Locating many of the elite drug barons, however, is often difficult as indicated by Pablo Escobar's ability to evade an elite army and police search team, and the Cali Cartel, among other militant groups.

rendition, foreign states must cooperate with the United States to form a cohesive alliance in the war against the drug barons.<sup>401</sup>

A united effort focused on the economic wealth of the Cali Cartel is, therefore, necessary. Multi-national operations, however, may expose operatives. Once compromised, these individuals are essentially dead,<sup>402</sup> given narcotics traffickers history of violence toward those individuals who attempt to disrupt their cocaine operations. The task, consequently, will be difficult, but, nonetheless, necessary to curb the narcotics trade on which governments have spent billions of dollars and lost countless lives with only minimal success.

As President Bush stated in a speech referring to strategies to combat illegal narcotics, "The game has changed." To date, however, the game has principally been played on the terms of the drug lords. Colombian cartels have successfully demonstrated that they have both the will and the resources to win the waiting game. That must stop, and states must play a new game in which they vigorously work together to execute a well-defined attack on illicit cartel wealth.

*Gregory Wilson*

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401. Foreign states, particularly Colombia, play an integral role in locating the drug barons. Although South American states often damn any United States intervention in their affairs and desire to prosecute drug lords unilaterally, this approach is not sufficient to solve the drug problem. The Cali and Medellin Cartels have strongly asserted that they do not fear the Colombian government and are willing and able to survive a protracted war in Colombia.

402. Even people in the United States are no longer safe. The Cali Cartel is willing to send hit men into the United States to silence opposition as indicated by the murder of the journalist, Manuel de Dios Unanue. *3 Plead Guilty in Killing of Anti-Drug Writer*, CHI. TRIB., Oct. 27, 1993, at 10.

