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## Drug Diplomacy and the Supply-Side Strategy: A Survey of United States Practice

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## I. INTRODUCTION

The illicit drug trade is gigantic. The United Nations reports that the annual value of the illegal drug trade worldwide is 250 to 300 billion dollars.<sup>1</sup> The United States leads the world in illicit drug consumption<sup>2</sup> and suffers a myriad of drug-related problems.<sup>3</sup> The majority of marijuana, cocaine, and heroin consumed in the United States throughout the 1980s was supplied by six Latin American and Caribbean countries.<sup>4</sup> These countries, like the United States, are plagued by drug-related problems. The governments and citizens of both drug producing and drug transit countries are increasingly victims of crime, violence, and corruption.<sup>5</sup>

Attendant to these increasing problems is a plethora of media coverage that has sensationalized the drug issue.<sup>6</sup> Studies have linked this

1. Address by Dr. Irving G. Tragen, Drug/Alcohol Education Training Seminar (July 5-9, 1989), reprinted in 135 CONG. REC. E3001, 3002 (daily ed. Sept. 12, 1989) [hereinafter Address]. Some sources have estimated the worldwide trade to be as high as \$500 billion. Regan, *The Color of Money Can Stop Drugs*, N.Y. Times, Sept. 18, 1989, at A19, col. 4.

2. See Address, *supra* note 1, at E3002 (stating that illegal drug sales in the United States are approaching \$200 billion and that 90% of the profits are made in the United States); see also *Presidential Certifications Regarding International Narcotics Control: Hearing and Markup Before the Subcomm. on Western Hemisphere Affairs of the Comm. on Foreign Affairs House of Rep. on H.R. 4162, H.J. Res. 491, 493, 495, 497 and 499, 100th Cong., 2d Sess. 200 (1988)* [hereinafter *Certification Hearing*] (statement of Rep. Peter H. Kostmayer). The United States has 6% of the world's population and consumes over 60% of the world's drugs. *Id.*

3. See France, *Should We Fight or Switch?*, A.B.A. J., Feb. 1990, at 43, 45. Drug-related problems fall into two categories: problems that result from the use of drugs, such as rising addict levels, hospital deaths, and AIDS cases; and problems that result from drug enforcement such as skyrocketing prison populations, court case loads, and levels of violence and corruption.

4. See Bagley, *Narco-Diplomacy: Drug Trafficking and U.S.-Latin American Relations*, in SELECT COMM. ON NARCOTICS ABUSE AND CONTROL, 101ST CONG., 1ST SESS., DRUGS AND LATIN AMERICA: ECONOMIC AND POLITICAL IMPACT AND U.S. POLICY OPTIONS 75 (Comm. Print 1989) [hereinafter *POLICY OPTIONS*] (edited transcript of a Congressional Research Service seminar). These countries are Mexico, Colombia, Jamaica, Belize, Peru, and Bolivia. *Id.* at 77. The drug control strategy has focused primarily on Colombia, the major manufacturer, and Peru and Bolivia, the major cultivators, of cocaine.

5. "Over 221 court employees, including 42 judges . . . [and] hundreds of law enforcement officials, journalists, politicians, and private citizens have . . . been killed by the drug cartels. No nation . . . has paid a higher price in its efforts to combat drug trafficking than Colombia." 135 CONG. REC. E3484 (daily ed. Oct. 19, 1989) (statement of Rep. Lawrence Coughlin). The increasing drug problems in foreign countries are largely the result of antidrug efforts as opposed to drug use.

6. See P. SHOEMAKER, COMMUNICATION CAMPAIGNS ABOUT DRUGS 31-32 (1989) (discussing the intermedia convergence on the drug issue); see also A. TREBACH, THE GREAT DRUG WAR AND RADICAL PROPOSALS THAT COULD MAKE AMERICA SAFE AGAIN 15-16 (1987) (recounting the story of a *U.S. News & World Report* reporter who confessed to being a "Drug-Hype Junkie"). In the early 1980s, a growing public preoccupation with the drug problems in the United States fueled the media "hype." Bagley, *supra* note 4, at 76.

media "hype" to political agenda setting by both candidates for public office and the press itself.<sup>7</sup> Manipulating the drug issue for political ends is not a new tactic,<sup>8</sup> but the practice culminated in the 1988 presidential race, which provided an ideal forum for the "get tough" on drugs theme.<sup>9</sup>

Not surprisingly, the American public ranks the illegal drug trade as its number one concern and the most important foreign policy issue facing the United States. For example, a June 1988 national poll showed that eighty-seven percent of the American people considered drug trafficking a "very serious" problem in Central America.<sup>10</sup> The American mood toward drug control has reached the point of militancy, and the United States government has been urged to declare war on drugs.

The targets of this "war" have most often been drug suppliers rather than drug consumers. Public opinion polls show that most Americans support drug policies that seek to limit the supply of drugs coming into the United States rather than to curb the American demand for drugs.<sup>11</sup> The present supply-side enforcement policy has led the United States to "force draft" foreign countries to fight the drug war on their own soil.<sup>12</sup> Despite marginally successful diplomacy, unprecedented levels of funding,<sup>13</sup> and strong public, media, and political support for the supply-side antidrug effort, the United States does not appear to be winning the war on drugs.<sup>14</sup>

This Note examines the United States drug control policy. Part II

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7. See SHOEMAKER, *supra* note 6, at 47-65. Nancy Reagan's "Just Say No" campaign was itself an attempt at political agenda setting. *Nightline: The Politics Behind the Newest Drug War* (ABC television broadcast, Sept. 4, 1989) (transcript on file at *Vanderbilt Law Review*).

8. R. SCHROEDER, *THE POLITICS OF DRUGS* 148-49 (1980); see *POLICY OPTIONS*, *supra* note 4, at 107 (Ambassador Edwin G. Corr remarking that "White House statements and documents by different administrations on narcotics control . . . reveal[] a selective use of facts and data bases to demonstrate the current administration's success").

9. See Bagley, *supra* note 4, at 75; see also *Election-Year Anti-Drug Bill Enacted*, 1988 CONG. Q. ALMANAC 85, 85-86 [hereinafter *ALMANAC*].

10. See *Americans Want Military in Drug War*, United Press Int'l (PM Cycle), June 2, 1988 (text available in LEXIS).

11. *Id.*

12. Bagley, *supra* note 4, at 87.

13. Between 1981 and 1987 the federal drug control budget tripled from \$1.2 to \$3.9 billion. Bagley, *supra* note 4, at 78. The 1990 drug budget is \$9.4 billion, four times more than the 1986 budget. 135 CONG. REC. E3326 (daily ed. Oct. 5, 1989) (statement of Rep. Charles B. Rangel).

14. *Review of the 1989 International Narcotics Control Strategy Report: Hearings Before the Comm. on Foreign Affairs House of Rep.*, 101st Cong., 1st Sess. 62 (1989) [hereinafter *Strategy Hearings*] (testimony of Ann Wroblewski, Asst. Sec. to the Bureau of International Narcotics Matters (BINM), Dept. of State). "[T]he international war on narcotics is clearly not being won. In fact, in some areas we appear to be slipping backwards." *Id.* at 62 (quoting letter from Secretary of State James Baker to Congress).

focuses on the supply-side, bilateral enforcement policy.<sup>15</sup> Parts III, IV, V, and VI, in the context of American domestic law, give an overview of the United States aid leveraging system and of the major bilateral control programs such as the militarization of law enforcement, prosecution of foreign traffickers in the United States, and crop eradication. This overview analyzes the legal and extralegal arguments raised by foreign countries against the programs and the diplomatic tactics pursued by the United States in response.

Parts VII and VIII conclude that many of the diplomatic tactics and the programs they support have been counterproductive and propose alternative policy options. In Part IX this Note concludes that no amount of supply-side law enforcement will prevent drugs from entering the United States. The American public may have been persuaded to support militant policies by promises of an impossible achievement.

## II. THE SUPPLY-ORIENTED POLICY

In October 1982, President Reagan declared war on drugs.<sup>16</sup> His administration's drug control strategy called for more law enforcement efforts aimed at reducing supply and demand and less domestic treatment, prevention, and education.<sup>17</sup> This policy placed a greater emphasis on supply-side law enforcement than ever before. It focused on breaking the trafficking link of the supply chain by interdicting drug smuggling craft at the American borders and by extraditing top-level drug traffickers.<sup>18</sup> Although the Reagan Administration insisted that drug control was a top foreign policy priority, the drug issue was subordinated to other policy interests, such as fighting communism.<sup>19</sup>

Dissatisfied with both the Reagan Administration's reluctance to use aid leveraging for drug diplomacy and the results of its drug strat-

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15. Since its inception, drug control and supply-side methods have gone hand in hand. See generally A. TAYLOR, *AMERICAN DIPLOMACY AND THE NARCOTICS TRAFFIC, 1900-1939* (1969). The chain of the drug supply to United States consumers consists of the cultivation, manufacture, and traffic of drugs. Control at the source, or cultivation stage, has almost always been the predominant goal of United States policy. See generally *id.* The actual implementation by the United States of supply-side programs in other countries did not begin until the 1970s. See *infra* notes 95-99 and accompanying text.

16. See *Reagan Cracking Down on Drugs*, United Press Int'l (PM Cycle), Oct. 13, 1982 (quoting from national radio address by President Reagan on Oct. 3, 1982).

17. The drug law enforcement budget rose from \$468.1 million in 1979 to \$695 million in 1982, while the treatment budget declined from \$404.8 million to \$206.4 million in the same period. Kirschten, *Reagan's Crime-Fighting Proposals—Shoot First and then Load the Gun?*, NAT'L L.J., Nov. 13, 1982, at 1934.

18. See Note, *The Extraterritorial War on Cocaine: Perspective from Bolivia and Colombia*, 12 SUFFOLK TRANSNAT'L L.J. 39, 41-45 (1988) (discussing the Reagan Administration's interdiction strategy).

19. Bagley, *supra* note 4, at 83-84.

egy,<sup>20</sup> and in the belief that ineffective diplomacy was largely responsible for the failing drug war, Congress passed amendments to the Foreign Assistance Act that allowed it to suspend aid to a noncooperating country<sup>21</sup> and created a power that Congress did not hesitate to exercise.<sup>22</sup>

In 1986 public pressure for increased drug control efforts had mounted, and one month before the 1986 congressional elections, Congress passed the Anti-Drug Abuse Act of 1986 (the 1986 Act), which created a certification system of aid leveraging.<sup>23</sup> The 1986 Act established drug control as a top foreign policy priority and made aid leveraging a tool for pressuring foreign governments to engage in law enforcement measures such as crop eradication, law enforcement militarization, extradition of foreign nationals, and mutual legal assistance for prosecution. Under this strategy, seventy-five percent of the total drug budget was earmarked for supply-side control programs.<sup>24</sup>

Despite the array of seizure, prosecution, and eradication statistics that resulted from these efforts, the drug supply to the United States increased from 1986 to 1988.<sup>25</sup> Disillusioned with the supply-oriented strategy and once again facing re-election, Congress passed the Anti-Drug Abuse Act of 1988 (the 1988 Act).<sup>26</sup> This Act earmarked fifty percent of the fiscal year 1989 drug budget for domestic demand controls and mandated that in subsequent years, sixty percent of the budget would go to demand control programs.<sup>27</sup>

The 1988 Act suggested movement toward a demand-oriented pol-

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20. *Narcotics Control Strategy Report Released*, 86 DEP'T ST. BULL. 80, 80-81 (Apr. 1986).

21. See 22 U.S.C. § 2413 (1988) (as amended by the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 2005, 100 Stat. 3207-61 to -62 (1986)) (authorizing the withholding of aid to drug producing countries).

22. The House cancelled \$7.2 million in Economic Support Funds and froze \$200 million in U.S. Agency for International Development (AID) funds. Note, *supra* note 18, at 52.

23. Bagley, *supra* note 4, at 78-79. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) [hereinafter 1986 Act]. Although this Act was characterized as a comprehensive antidrug statute, it largely neglected demand-side programs. The Act earmarked \$214 million for demand reduction, see *id.* § 4002, 100 Stat. 3207-103, but appropriated \$7 million for Justice Department helicopters, *id.* § 3421, 100 Stat. 3207-103, \$93.5 million for Customs aircraft, *id.* § 3141, 100 Stat. 3207-93, and \$277.5 million for Department of Defense (DOD) interdiction equipment, *id.* § 3052, 100 Stat. 3207-74.

24. Bagley, *supra* note 4, at 84-85.

25. See *The Worldwide Drug Situation and International Narcotics Control Programs: Hearing Before the Comm. on Foreign Affairs House of Rep.*, 100th Cong., 1st Sess. 1 (1987) [hereinafter *Worldwide Hearing*] (statement of Rep. Lawrence J. Smith, reporting that from 1986 to 1987 opium production increased by 30%, marijuana production increased by 20%, and cocaine production increased by 10%).

26. Bagley, *supra* note 4, at 87-88; see Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) [hereinafter 1988 Act]; see also *ALMANAC*, *supra* note 9 (summarizing the provisions of the 1988 Act).

27. Bagley, *supra* note 4, at 88.

icy, but no transition has actually occurred. Although demand-side funding has increased, supply-side funding has continued to rise as well.<sup>28</sup> In addition, although the demand-side increases were earmarked primarily for law enforcement, education, and treatment activities, the funds actually authorized by Congress in fiscal year 1989 did not meet the levels necessary to achieve the lofty goals of the 1988 Act.<sup>29</sup> As a result, the 1988 Act remains only a symbolic commitment to treatment, education, and state and local law enforcement.

Moreover, supply-side funding has not diminished. The 1988 Act made few changes in the bilateral supply-side strategies of the 1986 Act,<sup>30</sup> but did call for increased multilateral and regional cooperation.<sup>31</sup> Subsequent United States efforts have resulted in the United Nations' adoption of a multilateral treaty on illicit drug control that incorporates many of the United States enforcement programs.<sup>32</sup> In addition, at a 1990 hemispheric drug summit, the Bolivian, Colombian, and Peruvian governments promised to use their best efforts to increase cooperation in drug control and the United States agreed to provide economic aid if antidrug efforts hurt any of the countries' economies.<sup>33</sup>

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28. *Id.* at 91.

29. *Id.* at 90-91. The 1988 Act called for treatment of addicts within one week of a request for help and for construction of facilities for this purpose. *Id.* at 90. Yet in 1989, only one in four addicts who demanded treatment was accommodated. 135 CONG. REC. S12,657-01 (daily ed. Oct. 5, 1989) (statement of Sen. Joseph R. Biden). Moreover, these individuals waited an average of eight months after application to receive help. *Id.* Funds appropriated for treatment in 1990 will not even be sufficient to treat one-quarter of the United States addicts who are pregnant. *Nightline: Reaction to Bush's Anti-Drug Speech* (ABC television broadcast, Sept. 5, 1989) (transcript on file at *Vanderbilt Law Review*). The emphasis now placed on demand-side law enforcement efforts is reflected by increasing use of measures such as drug testing. See generally Special Project, *Government Drug Testing: A Question of Reasonableness*, 43 VAND. L. REV. 1343 (1990). In 1990 no federal funds will be provided for state and local prisons, and only 1% of state and local law enforcement efforts are federally funded. Barrett, *Drug Czar Bennett, Once Supreme In His Realm, Is Himself in Revolt Over Obstacles In His Path*, *Wall St. J.*, Nov. 30, 1989, at A16, col. 2.

30. Compare 1988 Act, *supra* note 26 with 1986 Act, *supra* note 23. For a synopsis of the provisions of the 1988 Act, see ALMANAC, *supra* note 9, at 87-88.

31. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 4101-08, 82 Stat. 4181, 4263-67 (codified at 22 U.S.C. § 2291 (1988)).

32. *UN Narcotics Conference Adopts Convention*, 89 DEP'T ST. BULL. 49 (Apr. 1989) (text of Convention adopted by the U.N. Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances). The treaty includes U.S.-style laws on money laundering, asset forfeiture, mutual legal assistance, police training, extradition, crop eradication, and chemical control. See *id.* For a discussion of the existing system of multilateral controls, see Note, *International Narcotics Control: A Proposal to Eradicate an International Menace*, 14 CAL. W. INT'L L.J. 530 (1984). In practice, this system regulates only legitimate drug industries, but does serve as a foundation for the United States' bilateral agreements involving the control of illicit drugs.

33. Hunt, *Bush Vows Trade Help for "Anti-Drug Cartel,"* *The Tennessean*, Feb. 16, 1990, at 1A, col. 4. At the summit, the four countries' leaders dealt only with broad drug control themes in order to maintain harmony. *Id.* at 1A, col. 5. The South American leaders refused United States military assistance but signed a communiqué stating that each country may use its own military in

Despite the mandate of the 1988 Act, bilateral supply-side efforts are apparently increasing. The International Narcotics Control Act of 1989<sup>34</sup> foreshadows future increases in supply-side efforts. More funds for supply-side initiatives are being generated from other budgets such as the defense budget.<sup>35</sup> Despite more zealous enforcement efforts during 1989, drug supplies have continued to increase.<sup>36</sup>

The 1990 drug control strategy remains basically the same,<sup>37</sup> but increases diplomatic pressure on foreign countries for more military and crop spraying programs.<sup>38</sup> Because of the decreasing threat of spreading communism, the Bush Administration, unlike its predecessor, may actually make drug control a top foreign policy issue.

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its territory. *Id.* President Bush promised to enhance demand-side efforts, *id.* at 1A, col. 4, and to increase economic assistance to the three countries. *Id.* at 6A, col. 4. Yet, no specified amount of aid was established and President Bush stated that there would be no immediate economic aid increases. *Id.* at 6A, col. 5. The United States has already promised an increase of \$206 million in 1990 for increased military, law enforcement, and economic assistance to Bolivia, Colombia, and Peru. The Tennessean, Feb. 15, 1990, at 5A, col. 1. Yet, no specific allocations of economic aid have been made.

34. International Narcotics Control Act of 1989, 101 P.L. 231, H.R. 3611, 101st Cong., 2d Sess. (1989) [hereinafter 1989 Act]. The 1989 Act contains 16 sections. Eight of these sections deal with law enforcement and military assistance. *See id.* §§ 3 (authorizing military and law enforcement assistance of Bolivia, Colombia, and Peru), 4 (requiring acquisition by Special Defense Acquisition Fund of defense articles for drug control), 5 (providing excess defense articles for certain major illicit drug producing countries), 6 (waiving Brooke-Alexander amendment for major coca producing countries), 11 (urging creation of a multilateral antinarcotics strike force), 12 (prohibiting weapons transfers to international drug traffickers), 13 (offering up to \$2 million for information concerning acts of international terrorism), and 15 (amending the Mansfield Amendment, which deals with participation in foreign police actions). Four of the sections relate to aid leveraging. *See id.* §§ 7 (discussing aid certification for Mexico), 8 (waiving certification procedures for drug-transit countries meeting certain requirements), 9 (urging the coordination of trade policies and drug control objectives), and 10 (authorizing debt-for-drugs exchanges as of Oct. 1, 1990). Section 14 of the 1989 Act waives the Burmese Amendment, which prohibits the use of United States assistance to grow crops in a foreign country that would compete with crops grown in the United States, for fiscal year 1990 to the extent that it applies to crop substitution projects in furtherance of drug control.

35. *See Gest, Soldiers Can't Beat Smugglers*, U.S. NEWS & WORLD REP., May 30, 1988, at 18 (charting fiscal year increases in the Pentagon budget for drug interdiction from \$4 million in 1982 to \$94 million in 1988). Ironically, in 1987 Congress decreased the Coast Guard budget by \$103 million. *Id.*

36. *See Strategy Hearings*, *supra* note 14, at 347 (Rep. Lawrence J. Smith reporting "growth upwards, eradication downwards, flow more, processing more, less extraditions, . . . more fear"). The world supply of illicit drugs has increased to the extent that the drug traffickers are now exploring new markets in Europe, the Soviet Union, and even their own countries. *Id.* at 11 (testimony of Ann Wroblewski). This extension of the drug trade has fueled international interest in the drug issues. *Id.*

37. Bagley, *supra* note 4, at 85.

38. *See Berke, Bush's Drug Plan Aims at Capturing Mid-Level Figures*, N.Y. Times, Aug. 31, 1989, at A1, col. 3 (stating that the Bush Administration's new strategy will de-emphasize extradition of kingpins and re-emphasize interdiction). *See* 1989 Act, *supra* note 34. The current strategy employs 41% of the supply-side budget for eradication programs and 37% for interdiction. *Strategy Hearings*, *supra* note 14, at 20, 30.



Significantly, United States policy may be changing in one important respect: recognition of drug control in foreign countries as an economic and trade issue rather than as solely a moral and law enforcement one. For example, the 1990 drug summit addressed the economic aspects of drug control and the 1989 Act will provide annual debt forgiveness and relaxed crop growing restrictions to Colombia, Bolivia, or Peru if they cooperate to stem the flow of cocaine to the United States.<sup>39</sup> These economic incentives are clearly diplomatic leveraging tools, but whether they mark a larger trend in United States drug control policy is uncertain. The 1988 Act, despite its rhetorical commitment to monetary assistance for crop conversion and alternative employment programs, did not actually authorize any additional assistance. The Act required the President to ask Congress for any additional aid necessary to fulfill the terms of the 1990 Hemispheric Drug Summit,<sup>40</sup> but no aid was promised as a result of the summit. President Bush has discouraged all nonmilitary assistance for 1990.<sup>41</sup> Under the Bush Administration, economic development assistance would not begin until 1991, presumably after the drug producing countries have control over their territories through law enforcement measures.<sup>42</sup>

### III. AID LEVERAGING AS A DIPLOMATIC TOOL FOR BILATERAL LAW ENFORCEMENT PROGRAMS

The existing system of aid leveraging was established in the 1989 Act. Under this system, United States aid to the twenty-four major drug producing or drug transit countries is withheld unless the President certifies that the particular country has "cooperated fully" in drug law enforcement efforts.<sup>43</sup> In addition, the United States representative to each of the multilateral development banks (MDBs) will vote against multilateral loans for any country not receiving the President's certification.<sup>44</sup> The President may waive an aid suspension based on vital na-

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39. See 1989 Act, *supra* note 34, §§ 6 & 10. In a previous draft of the 1989 Act, the drug producing countries would not have been entitled to these benefits unless they agreed to eradicate coca plants by aerial herbicidal spraying. See H.R. 3611, 101st Cong., 2d Sess., § 17, 135 CONG. REC. H8411, H8414-15 (daily ed. Nov. 13, 1989) (amending § 485 of Chapter 8 of Part I of the Foreign Assistance Act of 1961).

40. 1989 Act, *supra* note 34, § 2(e).

41. See 135 CONG. REC. H8418 (daily ed. Nov. 13, 1989). The United States has already promised to give the Andean countries \$2.2 billion over the next five years for military and economic functions in the drug war. Hunt, *Bush Vows Trade Help for "Anti-Drug Cartel,"* The Tennessean, Feb. 16, 1990, at 6A, col. 5. Because of the Bush Administration's strategy, most of this aid will likely go to law enforcement efforts until 1991.

42. 135 CONG. REC. H8418 (daily ed. Nov. 13, 1989) (statement of Rep. Benjamin A. Gilman).

43. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 4401-4408, 102 Stat. 4181, 4275-84 (1988).

44. The U.S. votes do not carry enough weight alone to deny assistance. *Certification Hear-*

tional interests of the United States. In 1988 Congress enacted the Chiles Amendment that required decertification of any major drug producing or transit country that does not have a specific, bilateral drug control agreement with the United States.<sup>45</sup>

This implicitly coercive type of diplomacy has been termed "big stick" diplomacy. Congress supports big stick diplomacy because it has at times convinced foreign countries to implement the United States law enforcement programs.<sup>46</sup> Yet, aid leveraging has just as often spawned negative reactions from foreign governments.<sup>47</sup> For the past two decades and primarily since the inception of the present certification system, Congress and the executive branch have disagreed fundamentally on aid leveraging's role in diplomacy.<sup>48</sup>

In making certification decisions, the executive branch has distinguished drug control cooperation from drug control results. Although governments may be implementing the United States programs, other factors such as economics, violence, and insurgency have impeded the intended results. Thus, in 1988 President Reagan created a third category consisting of certified countries that are warned to do more in the future.<sup>49</sup> In 1989 President Bush placed six countries in this category.<sup>50</sup>

Congress has often stated that the executive branch places too much emphasis on preserving national sovereignty, puts other foreign policy objectives before drug control, and thus, certifies noncooperative

ings, *supra* note 2, at 163.

45. *Strategy Hearings*, *supra* note 14, at 71. The agreement must discuss eradication, interdiction, demand control, and law enforcement cooperation. *Id.*

46. *Certification Hearing*, *supra* note 2, at 32 (statement of Rep. Lawrence J. Smith). As Rep. Smith stated, "experience has shown . . . the salutary effects of applying pressure to drug-producing countries. In 1986, . . . Congressionally-imposed sanctions . . . led the Bolivians to undertake Operation Blast Furnace. In 1987 sanctions led to the first eradication program in Bolivia's history." *Id.*

47. See, e.g., Letter from Bahamian Attorney General to Ann Wroblewski (Mar. 28, 1988), reprinted in *Certification Hearing*, *supra* note 2, at 174. The letter expresses outrage at Congress's attempt to suspend aid to the Bahamas and poses the following question: "If corruption is needed to move [drugs] . . . through The Bahamas . . . why is it not needed to successfully deliver these shipments into Florida?" *Id.* at 176.

48. See *Strategy Hearings*, *supra* note 14, at 347 (statement of Rep. Lawrence J. Smith). After talking to State Department members, Representative Smith concluded that the U.S. is "giving them the carrot and usually hitting ourselves over the head with the stick" and proposed a "carrot and a carrot" approach. *Id.* See generally Note, *U.S. Bilateral and Multilateral Aid to Nations Which Do Not Cooperate with the U.S. to Combat International Drug Traffic*, 7 N.Y.U. J. INT'L L. & POL. 361 (1974).

49. See Wroblewski, *Presidential Certification of Narcotics Source Countries*, 88 DEP'T ST. BULL. 47, 48 (June 1988) ("sending a signal to Colombia and Mexico").

50. Wroblewski, *Global Narcotics Cooperation and Presidential Certification*, 89 DEP'T ST. BULL. 49 (Oct. 1989) (giving warnings to the Bahamas, Bolivia, Colombia, Mexico, Paraguay, and Peru).

countries.<sup>51</sup> Congress believes that the programs will succeed, despite violence and economic problems, with stronger United States and foreign commitment to them. As a result, in 1987 Congress proposed to suspend aid to five countries that the President had certified.<sup>52</sup>

Certainly the United States is able to decide whether its aid will go to a particular country. Yet foreign governments have challenged what they believe is dictation of their internal policies through coercion. This criticism applies particularly to the United States policy of voting against MDB loan programs for noncooperative countries. Congress has passed amendments to the appropriations for the MDBs that allow the United States to vote against loans to narcotics-producing countries.<sup>53</sup> Yet, the charters of the MDBs provide that only economic considerations, not political ones, should control the decision making process of the MDB members.<sup>54</sup> Thus, the United States policy of voting based on narcotics control considerations arguably violates its treaty obligations.

Foreign governments primarily are concerned that big stick diplo-

51. See, e.g., *Certification Hearing*, *supra* note 2, at 32 (statement of Lawrence J. Smith, Chairman of the Task Force on Narcotics of the House Foreign Affairs Committee). Rep. Smith stated: "We demean the certification process, our own law, and our own anti-drug efforts, by certifying proven non-cooperators . . . [W]e hide behind the excuses that seem to pass for 'full cooperation' these days". *Id.* At this Certification Hearing, Rep. Smith further stated:

You [the Committee on Foreign Affairs] also will hear, no doubt, about the dire consequences of de-certification. I personally do not believe that there will be much a down side from these governments. I do not know what more they can do to us. . . .

. . . And if we say we have a drug policy and we are going to prevent growth in trafficking, we then do not lie down with the dogs and come up with the fleas, which everyone can see and which therefore they use as a basis for saying, they [the United States] do not mean it anyway. They are all bark and no bite. . . .

It is time for the United States Congress to stand up and take the political lead. We cannot rely on the President solely to make these determinations . . . because the executive branch is too timid to take them [the Noriegas of the world] on.

*Id.* at 52-53. In 1989, Rep. Smith reported that "the [certification] report once again takes a head-in-the-sand view . . . [in that] the only countries decertified are those reflecting a political agenda . . . . [T]his charade fools fewer and fewer people each year. I do not believe it fools those of us in Congress who follow these issues." *Strategy Hearings*, *supra* note 14, at 55. The present "mandatory" aid suspension system places the U.S. in the position of either maintaining a duplicitous policy or offending foreign and even U.S. interests.

52. *Certification Hearing*, *supra* note 2, at 156-61. These countries were The Bahamas, Bolivia, Paraguay, Peru, and Mexico. Note that Congress would hold all of the countries to the Colombian standard of cooperation. In early 1990, however, Colombian cooperation appeared to be backsliding. See, e.g., *Won't Deploy "Drug Bugs" Without Consent, U.S. Says*, *Tennessean*, Feb. 21, 1990, at 4A, col. 6 (stating that the Colombian government pardoned 35 guerillas who participated in a 1985 attack on the Palace of Justice).

53. 22 U.S.C. § 284(k) (1988) (International Development Association and International Bank for Reconstruction and Development); 22 U.S.C. § 285(p) (1988) (Asian Development Bank).

54. Articles of Agreement of the International Bank for Reconstruction and Development, art. IV, § 10 & art. III, § 4, July 1, 1944, 60 Stat. 1401, T.I.A.S. No. 1502, 2 U.N.T.S. 134 (1947); Agreement Establishing The Asian Development Bank, Dec. 4, 1965, art. 36, § 4 & art. 14, 17 U.S.T. 1419, T.I.A.S. 6103, 571 U.N.T.S. 123.

macy and the resulting programs infringe on their states' sovereignty. Under international law, a sovereign nation's jurisdiction to engage in coercive activity within its territory is generally exclusive.<sup>55</sup> Therefore, the United States would need a foreign government's consent to use force within the foreign territory. In practice, however, whether any action taken by the United States in another nation is coercive and violative of the nation's sovereignty depends on that nation's assessment of the particular act.<sup>56</sup> Traditionally, civil law states have been extremely sensitive to any action, even the taking of depositions, by foreign officials or representatives in their territory. South Americans are particularly suspect of United States actions.

Based on past dealings by the United States with these countries, their suspicions seem well-founded. South American nationals view the drug control programs, often implemented as a result of aid leveraging, as a violation of their nations' sovereignty, despite their governments' acquiescence.<sup>57</sup> Thus, foreign officials are often unwilling to make public accessions to the programs because they are politically unpalatable. The governments and citizens of these countries have consistently maintained that the United States demand for drugs has caused the drug problem and is ruining their countries.<sup>58</sup>

These countries view the aid certification system as a continuation of arbitrary and unfair dealing by the United States. Application of the present system has held different countries to different standards of cooperation.<sup>59</sup> Yet, a few South American countries have reaped the bene-

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55. See Paikin, *Problems of Obtaining Evidence in Foreign States for Use in Federal Criminal Prosecutions*, 22 COLUM. J. TRANSNAT'L L. 232, 235 (1984) (discussing limits on enforcement jurisdiction in the territory of another state). Generally, law enforcement agents' actions are permitted in foreign territory.

56. *Id.* at 236.

57. *International Narcotics Control: Hearing Before the Select Comm. on Narcotics Abuse and Control House of Rep.*, 98th Cong., 2d Sess. 16 (1984) [hereinafter *International Hearing*] (statement of Dominick DiCarlo, Asst. Sec. BINM, Dept. of State) (stating that "some of these governments . . . [point out] that when they do something in answer to the narcotics problem, even though . . . out of self-interest, immediately the accusation goes up that they are doing it because of pressure from Big Brother North America, even though it is inaccurate").

58. See, e.g., Duffy, *Now, For the Real Drug War*, U.S. NEWS & WORLD REP., Sept. 11, 1989, at 18 (quoting Colombia's President Virgilio Barco as saying: "Those of you who depend on cocaine have created the largest, most vicious criminal enterprise the world has ever known").

59. Bagley, *supra* note 4, at 83.

President Reagan never used his powers to punish a close U.S. ally. In 1988, for example, the Reagan Administration decertified only four nations—Iran, Syria, Afghanistan and Panama—none of which were recipients of U.S. economic or military assistance[.] Strategically important Turkey, in contrast, was not even mentioned on Reagan's State Department list, even though the DEA classified it as a major heroin-transiting country. In the Asian heroin-producing countries, most of which share borders with Communist nations, the struggle against Communist expansion consistently received diplomatic priority over the anti-drug war from Reagan. Likewise, the Reagan White House never imposed sanctions on Pakistan, even

fit of these inconsistencies.<sup>60</sup>

In the final analysis, however, many countries implement the United States programs, whether out of self-interest or economic pressure. In addition, the United States has demonstrated its willingness to engage in big stick diplomacy regardless of the potential economic, political, and diplomatic reverberations. In his 1989 drug plan President Bush proposed replacing the aid certification system with a system that would reward cooperating countries by offering them additional aid.<sup>61</sup> The executive branch generally believes that this system would be more conducive to cooperative drug control efforts, but no change appears forthcoming from Congress.

#### IV. CROP ERADICATION

Crop eradication is a particularly volatile issue in foreign countries because it is often directed at peasants who grow drug crops to support their families. Bolivian growers, in particular, are opposed to crop control because coca growing was legal in Bolivia until 1988. In addition, coca still has many legitimate uses in the traditional cultivating countries.<sup>62</sup>

Traditional crop control programs favored the strategy of crop substitution. Substitution programs were conducted by the United States and United Nations throughout the 1970s and early 1980s, but they were expensive and produced disappointing results.<sup>63</sup> Subsequent crop control systems were based on the belief that crop substitution programs cannot be effective unless supplemented by eradication efforts. Today, the system emphasizes crop eradication at the expense of substitution programs. Subsidies for crop substitution are contingent on a

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though that country was a major source of heroin, or on the Afghani "freedom fighters," despite their deep involvement in opium cultivation and trafficking. Indeed, when President Reagan met with a group of Afghan guerrilla leaders in November 1987, he reportedly did not even broach the topic of drug trafficking with them.

*Id.*

60. For example, the United States continued relations with General Manuel Noriega of Panama until his indictment despite evidence of drug involvement. *Id.* Similarly, Nicaraguan contra and Honduran involvement has been downplayed by the U.S. government. *Id.* at 83-84.

61. Berke, *supra* note 38, at A1, col. 3 & A8, col. 1. The debt forgiveness provision of the 1989 Act is an incentive-based leveraging device rather than a punitive one. *See* 1989 Act, *supra* note 34, § 10.

62. *See* Note, *Extradition Treaty Improvements*, 15 GA. J. INT'L & COMP. L. 285, 296 n.87 (stating that Andean nations have used coca leaves in religious ceremonies for 3000 years and that coca leaves relieve hunger, fatigue, and cold); *see also infra* notes 74-76 and accompanying text.

63. *See* Note, *Trends in Extraterritorial Narcotics Control: Slamming the Stable Door After the Horse Has Bolted*, 16 N.Y.U. J. INT'L L. & POL. 353, 404-06 & nn.300-01 (1984) (criticizing foreign countries who regard U.S. aid as a "ticket to economic development" but do not take adequate enforcement measures).

successful eradication program.<sup>64</sup> The United States Bureau of International Narcotics Management (BINM) has recognized coca eradication as its top priority.<sup>65</sup>

The United States now has eradication programs in approximately twenty-three countries.<sup>66</sup> The method of eradication varies among the common drug crops. All coca eradication and most poppy eradication is done manually. Manual eradication is extremely difficult, however, and none of the manual eradication programs have been successful.<sup>67</sup> In particular, coca control is virtually impossible through manual eradication,<sup>68</sup> which has led Peru to begin testing herbicides to develop a safe and effective aerial program for coca eradication. In spite of these efforts, overall coca and poppy cultivation have increased.<sup>69</sup>

All marijuana eradication is done aurally by herbicidal spraying,<sup>70</sup> and these programs have achieved limited success in reducing foreign production. Reductions of foreign crops, however, have encouraged growers in the United States to produce a greater supply of marijuana domestically,<sup>71</sup> so that displacement remains a drawback to eradication efforts.<sup>72</sup> As a result, the government now acknowledges that in order to effectively decrease drug supplies to the United States, it would have to control all areas of cultivation simultaneously.<sup>73</sup> In addition to the problems associated with displacement, many of the programs have failed as a result of external factors such as violence and insurgency.

#### A. *Economics and Ecology As Diplomacy Issues*

Foreign countries have been slow to accept crop eradication programs not only because of their independence as national sovereigns, but also because of economic and ecological considerations. The economic impact of crop eradication is intimately tied to the sovereignty of

64. The U.S. AID fund requires that 70% of a farmer's coca be eradicated before crop conversion assistance will be given. 135 CONG. REC. S12,144 (daily ed. Sept. 9, 1988) (statement of Sen. Arlen Specter).

65. Whitehead, *U.S. International Narcotics Control Programs and Policies*, 86 DEP'T ST. BULL. 37, 39 (Oct. 1986).

66. Wroblewski, *supra* note 49, at 47.

67. See Wroblewski, *supra* note 50, at 49 (reporting that "Peru eradicated 5130 hectares of coca—possibly offsetting for the first time any expansion of Peru's coca crop which has been increasing by an estimated 10% a year"). Yet, Peru still cultivates more coca than any other country. *Id.* at 57.

68. *Id.* at 49, 50, 57.

69. *Id.* at 49.

70. See generally *id.* at 51-52.

71. See generally *id.* at 52. The United States is the world's third largest marijuana producer. *Id.*

72. Progress in one country causes a shift to a more vulnerable one. *Id.* at 49.

73. *International Hearing, supra* note 57, at 31 (testimony of Dominick DiCarlo).

the largest drug producing countries. Those countries and their citizens oppose the crop destruction programs because narcotics cultivation is often a way of life and an essential part of the economy.<sup>74</sup> For example, in Bolivia in 1988, the income generated from cocaine exports exceeded eight hundred million dollars, which is equal to the aggregate value of all of its other legal exports.<sup>75</sup> Congressional research suggests that successful eradication programs in these countries would destroy their economies by creating massive unemployment, migration to the cities from the country, immigration to the United States, and currency devaluation.<sup>76</sup>

The United States and United Nations do conduct crop substitution programs to try to ameliorate the consequences of eradication. United States programs, however, are underfunded, are only available for traditional growing areas irrespective of a region's economic conditions, and are contingent on eradication of large amounts of a grower's drug crop. As a result of efforts by the United States, United Nations aid programs have also been linked to drug control efforts.<sup>77</sup> Moreover, crop substitution is often not viable when it is available.<sup>78</sup>

Although the United States appears to be ready to address these problems through proposals such as debt forgiveness and economic aid for alternative employment, the United States has recently exacerbated economic problems in several drug producing countries by facilitating the collapse of the International Coffee Agreement.<sup>79</sup> In addition, American economic assistance is still contingent on foreign enforcement cooperation. Ironically, the United States has been simultaneously

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74. For example, cocaine cultivation provides employment for approximately 350,000 Bolivian peasants, at least 200,000 Peruvian peasants, and approximately 40,000 Colombian individuals. The depressed lawful economies and coca economy have integrated. *POLICY OPTIONS*, *supra* note 4, at V, VII (executive summary of seminar).

75. *Id.*

76. *Id.*

77. *International Hearing*, *supra* note 57, at 33.

78. No crop has yet to produce the economic yields that drug crops do, alternative crops are often not even marketable, and drug crops grow during the dry season in remote areas with bad soil conditions. Although § 14 of the 1989 Act waives the restriction on United States assistance for growing crops that will compete with similar crops grown in the United States, this allowance will not solve the crop substitution problems. *See* 1989 Act, *supra* note 34, § 14.

79. *See* Fricker, *A Judiciary Under Fire*, A.B.A. J., Feb. 1990, 54, 57. Because the U.S. government was upset about Colombia's trading with "Iron Curtain" countries, the U.S. representative to the International Coffee Organization caused the International Coffee Agreement to collapse by suggesting to other countries that they might lose United States military aid if they favored price supports for Colombia. *Id.* Coffee is Colombia's main source of income. The collapse of the International Coffee Agreement will cost Colombia an estimated \$500 million annually. 135 CONG. REC. S16,807 (daily ed. Nov. 21, 1989) (statement of Sen. Joseph R. Biden). Section 9 of the 1989 Act supports a presidential review of whether the International Coffee Agreement negotiations should be resumed. *See* 1989 Act, *supra* note 34, § 9.

pressuring some South American countries to resist industrial development, which would lessen the economic impact of crop eradication, in order to preserve the rain forests.<sup>80</sup>

Rain forest preservation may also be inconsistent with the United States policy of herbicide use for crop eradication. In 1989, however, the United States claimed that the possible use of herbicides was the most misunderstood issue in its drug control efforts.<sup>81</sup> The government also emphasized that its program provides for use of only safe and effective chemicals and for close monitoring of potential negative effects.

Nevertheless, foreign countries and citizens remain concerned about the health and environmental impact of chemical use in crop eradication. They point out that at least some of the herbicides are considered carcinogenic by the National Cancer Institute.<sup>82</sup> In addition, contaminated food crops, water, and drugs may be consumed by unwary citizens. Such health concerns are not unfounded, as evidenced in 1989 when Burmese Armed Forces misused United States eradication aircraft and a carcinogenic herbicide to spray ethnic minorities in northern opium growing areas.<sup>83</sup>

Environmentalists believe that the herbicides could kill rare plants and animals and prevent future plant growth by poisoning the soil. Such environmental concerns have been voiced not only abroad but within the United States as well. Recently, the scientist in charge of the United States herbicide studies resigned his position to protest a lack of concern for long-term environmental consequences.<sup>84</sup> In addition, certain chemical and pharmaceutical companies have refused to sell particular chemicals to the United States government because of potential product liability actions.<sup>85</sup>

In defense of its eradication programs, the United States points out that foreign countries use United States domestic chemical testing standards, which are much higher than international ones.<sup>86</sup> The government also points out that some of the protested chemicals are

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80. See Lemonick, *What Can Americans Do?*, TIME, Sept. 18, 1989, at 85.

81. Wroblewski, *supra* note 50, at 50.

82. 134 CONG. REC. S12,142 (daily ed. Sept. 9, 1988) (statement of Sen. Daniel Patrick Moynihan); see also *infra* note 99.

83. 134 CONG. REC. S12,142 (daily ed. Sept. 9, 1988) (statement of Sen. Daniel Patrick Moynihan).

84. POLICY OPTIONS, *supra* note 4, at 30 (statement of Gustavo Gorriti).

85. The most notable refusal was made by Eli Lilly, the manufacturer of spike, a chemical defoliant believed effective in destroying coca plants. See *Eli Lilly "Spikes" Plan to Poison Cocaine Crop*, U.S. NEWS & WORLD REP., June 13, 1988, at 52. As a result of this refusal, the United States government has threatened to give the company's patent to a more cooperative company. *Id.* Future negotiations are anticipated. Dow Chemical and DuPont are also worried about potential product liability suits. *Id.*

86. Wroblewski, *supra* note 50, at 50.



commonly used in the United States<sup>87</sup> and that other precautions, such as the use of pellets to minimize chemical drift, are taken when spraying. The State Department suggests that the danger to food supplies is minimal because, in the areas targeted for spraying, only about twenty percent of the farmers grow food crops.<sup>88</sup> In addition, the eradication program in Myanmar (formerly known as Burma)<sup>89</sup> has been discontinued due to its misuse of United States assistance and Myanmar has been decertified under the United States aid program.<sup>90</sup> Finally, the United States believes that debates on the negative environmental effects of herbicide use are superficial because the narcotics growers are destroying forests to clear areas for crops, and the narcotics processors are dumping the chemicals that they use.<sup>91</sup> Ironically, the United States Drug Enforcement Administration (DEA) estimates that eighty percent of the chemicals used by the drug processors are exported from the United States.<sup>92</sup>

In August 1989 Congress enacted the Chemical Diversion and Trafficking Act that provides new export controls for drug producing chemicals.<sup>93</sup> In addition, the 1988 United Nations treaty outlines broad norms for chemical sales control. At present, however, little money has been provided to monitor the United States exports.<sup>94</sup>

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87. *Eli Lilly "Spikes" Plan to Poison Cocaine Crop*, *supra* note 85, at 52.

88. Wroblewski, *supra* note 50, at 51.

89. The United Nations formally adopted the country's name change in June 1989. *Burma Out, Myanmar In*, N.Y. Times, June 25, 1989, § 1, at 14, col. 4.

90. See 134 CONG. REC. S12,142 (daily ed. Sept. 9, 1988) (statement of Sen. Daniel Patrick Moynihan) (reporting that Burmese armed forces used eradication chemicals supplied by the United States to spray ethnic minorities); Wroblewski, *supra* note 50, at 54 (reporting that the United States suspended aid to Burma).

91. Wroblewski, *supra* note 50, at 50. Some environmentalists have accepted herbicide use as a means of stopping the drug trade from damaging the environment. *Id.* at 51.

Environmentalists have also disagreed over the United States most recent crop destruction technique. *Won't Deploy "Drug Bugs" Without Consent, U.S. Says*, *Tennessean*, Feb. 21, 1990, at 4A, col. 6. The United States has been conducting research concerning the malumbia, a white moth that eats coca plants while in its caterpillar stage. *Id.* at 4A, col. 5. An Agricultural Research Service administrator believes that a sufficient number of these caterpillars could defoliate the South American coca plants. *Id.* at 4A, col. 6. The Administrator added that "this is quite a voracious caterpillar." *Id.*

The Bolivian and Peruvian governments apparently do not approve of the United States new concept of biological drug warfare. The Peruvian Ambassador met with United States officials immediately after hearing news reports of the caterpillar research for assurance that the United States would not use the caterpillar without Peru's consent. *Id.* at 4A, col. 5. A Bolivian official predicted that his country would reject the use of biological agents because of the same environmental concerns that have prompted it to reject the use of chemical agents. *Id.* Yet, the Bush Administration has proposed a \$5 million increase (over the \$1.5 million that will be spent in 1990) for 1991 research.

92. Andreas, *Briefings: Circle of Cocaine*, GREENPEACE, Nov.-Dec. 1989, at 17.

93. See Chemical Diversion and Trafficking Act of 1988, 21 U.S.C. § 802 (1988).

94. Andreas, *supra* note 92, at 17.

### B. Crop Control and Aid Leveraging

Turkey agreed to the first crop controls in 1971 in consideration for a foreign aid package. This agreement arose after Congress threatened to suspend aid to Turkey. Turkey is generally regarded as the United States' primary aid leveraging success because Turkey has never re-emerged as a major supplier of heroin to the United States.<sup>95</sup> Subsequent to the agreement, however, the Turkish president was not re-elected and his successor lifted the opium ban. Congress responded by enacting further threats to suspend Turkish aid if future negotiations were unsuccessful.<sup>96</sup> Despite Turkey's cooperation, the United States treatment of Turkey today is ironic.<sup>97</sup>

While touting the Turkish program's success, many officials fail to acknowledge that the crop substitution program that was carried out in Thailand at the same time was a failure. The Thai government did not pursue the crop controls as adamantly as the Turkish government because the Thai government had weak control over its territory, which had been infiltrated by a Chinese Irregular Forces drug trafficking ring. This powerful trafficking organization had more resources than the Thai government and had corrupted high level government officials. A congressional attempt to suspend aid to Thailand failed. Thailand perhaps had leverage against the United States because United States air bases were located there.<sup>98</sup>

As a result of the Turkish supply reductions, Mexican supplies to the United States increased. When the United States initiated an aerial eradication program, Mexico resisted. As a result, in 1969 the United States began Operation Interrupt, a twenty day program of stringent United States-Mexico border inspections. These inspections resulted in only nominal marijuana seizures, but as intended, caused serious economic consequences that led to Mexico's acceptance of a crop eradication program.<sup>99</sup>

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95. See Note, *supra* note 63, at 358-360 (discussing Turkish agreement).

96. See Note, *supra* note 48, at 363 n.8 (discussing breakdown of the Turkish agreement and congressional reactions).

97. STAFF OF COMM. ON FOREIGN AFFAIRS U.S. HOUSE OF REP., U.S. NARCOTICS CONTROL PROGRAMS OVERSEAS: A CONTINUING ASSESSMENT, 100th Cong., 1st Sess., 17 (Comm. Print 1986-87) [hereinafter STAFF REP.]. As part of the opium ban, Turkey agreed to refine its licit opium through a concentrated poppy straw method (CPS) that prevented its use in the illicit market. Today, the United States has reserved 80% of the American licit market for India and Turkey, traditional opium growers. Yet, the majority of American companies buy from India because of Turkish mismanagement and because they prefer the Indian opium that is not refined by CPS. *Id.*

98. See Note, *supra* note 48, at 371-73 (discussing problems in Thailand and the congressional posturing that ensued).

99. See R. SCHROEDER, *supra* note 8, at 123; see also Note, *supra* note 62, at 363-64, 406 (noting that the Mexican program was costly and eventually failed when the U.S. attempted to reduce the aid). In 1979 the Mexican marijuana spraying program was discontinued by the Percy

During the 1980s, coca eradication programs in Bolivia and Peru, the prime coca producing countries, were implemented through aid leveraging. In 1983, in consideration for a foreign aid package, Bolivia agreed to meet certain eradication targets by 1986. When Bolivia failed to meet these targets, the House voted to cancel economic aid to Bolivia unless it made greater control efforts.<sup>100</sup>

In order to regain economic aid, Bolivia cooperated with the United States military in a joint search and destroy mission known as Operation Blast Furnace.<sup>101</sup> Following that operation Bolivia was given one-half of the previously suspended aid for its cooperation. The other half of the aid remained contingent on Bolivia's agreement to ban illicit coca production and to set eradication targets.<sup>102</sup> The State Department maintains that Operation Blast Furnace's significance was to convince Bolivia to begin negotiations on such an agreement.<sup>103</sup> On February 25, 1987, Bolivia signed a three year eradication plan in return for a United States promise to provide economic development assistance to displaced growers during the fourth year. Two annexes to this agreement outlined laws to ban illicit coca production.<sup>104</sup> In July 1988, the Bolivian Congress passed these laws, thus allowing the second half of the suspended aid to flow to Bolivia.<sup>105</sup>

Significantly, the new law prohibits all herbicide use. Although the law originally contained no reference to herbicide use, the Bolivian Congress inserted the prohibition after the spike controversy erupted in the United States and after a powerful Bolivian coca lobby pressed for this concession. In response, the United States recently has pressured Bolivia into confiscating chemicals used by the coca growers by pointing out that the law prohibits all herbicide use.<sup>106</sup> The State Department acknowledges that Bolivian negotiations are effectively stymied until

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Amendment, which prohibited aerial spraying of paraquat. The Percy Amendment was a congressional response to concerns that United States citizens might be harmed by smoking paraquat-sprayed marijuana. The Percy Amendment was amended in 1981 by Pub. L. No. 97-113, § 502(a)(1), 95 Stat. 1538 (1981), which authorized spraying contingent on the finding of a health hazard by the Secretary of Health and Human Services. See 22 U.S.C. § 2291(d) (1982); National Org. for Reform of Marijuana Laws (NORML) v. United States Dept. of State, 508 F. Supp. 1 (D.C. D.C. 1979).

100. See Note, *supra* note 18, at 51-56 (discussing events leading to Operation Blast Furnace).

101. See *infra* notes 147-48 and accompanying text.

102. See *Worldwide Hearing*, *supra* note 25, at 64-66 (discussing the aid situation in Bolivia).

103. *Id.* at 64 (statement of Ann Wroblewski) (stating that Blast Furnace brought the Bolivians to the table to talk seriously for the first time about eradication).

104. See *id.* at 58. The agreement calls for interdiction, a 12-month voluntary eradication program, and then a 24-month involuntary program. *Id.*

105. *Strategy Hearings*, *supra* note 14, at 74-75.

106. See *id.* at 130-31 (discussing the herbicide ban in the new Bolivian law).

eradication tests in Peru are concluded.

In 1987, after President Reagan had certified Peru, Congress unsuccessfully attempted to suspend Peru's aid by joint resolution.<sup>107</sup> Since 1987, Peru has been fending off United States pressure for aerial coca eradication by initiating tests to find a safe and effective chemical to destroy coca plants. But the spike controversy in the United States led to the formation of an environmental commission in Peru. Thus, in mid-1988 Peru's tests were just getting underway. Also in 1989, in an unrelated experiment with manual chemical spraying, a group of Bolivian protesters murdered the government eradication force.<sup>108</sup>

## V. LAW ENFORCEMENT MILITARIZATION

### A. *The Expanded Scope of Law Enforcement*

The earliest bilateral agreements relating specifically to drug law enforcement provided United States equipment to other countries in return for their promises to combat drug problems.<sup>109</sup> Subsequent agreements called for law enforcement assistance, mutual information sharing, or foreign officer training by American personnel or in the United States.<sup>110</sup> The 1988 Act waived an earlier provision that had prohibited United States funding of foreign police forces to allow funding for drug control efforts.<sup>111</sup>

In addition to equipment, training, funds, and information, the DEA has sent agents into foreign countries to work with their police. Initially, the DEA collected a small amount of drug intelligence in addition to its police activities. In 1981, however, President Reagan issued an executive order that made intelligence gathering a primary and affirmative responsibility of not only the DEA, CIA, and FBI, but also of six other departments, including the armed forces.<sup>112</sup>

Since that time, the military's role in drug intelligence efforts has expanded. Present military involvement in intelligence gathering in-

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107. See *Certification Hearing*, *supra* note 2.

108. See *POLICY OPTIONS*, *supra* note 4, at 31-33 (discussing the Peruvian situation and the herbicide issue). An American Ambassador in Lima also quit his job in protest of herbicide use. *Id.* at 31.

109. See, e.g., *Cooperation in Combating Illicit International Traffic in Narcotics and Other Dangerous Drugs: Communications Equipment*, Aug. 31, 1973, United States-Mexico, 24 U.S.T. 1978, T.I.A.S. No. 7709.

110. Most recently, the U.S. has concluded a Memorandum of Understanding with the Soviet Union for law enforcement cooperation in drug related cases. *Strategy Hearings*, *supra* note 14, at 71.

111. *ALMANAC*, *supra* note 9, at 88; see *infra* note 120 and accompanying text.

112. See Exec. Order No. 12,333, 46 Fed. Reg. 59,941, reprinted in 50 U.S.C. § 401 (1982), secs. 1.4, 2.6 & 3.4(f). For a prior executive order on intelligence, see Exec. Order No. 12,036, 43 Fed. Reg. 3674 (1978).

cludes surveillance by Air Force Airborne Warning and Control System (AWACS) planes in the Gulf of Mexico area. Also, a 1990 proposal to expand military participation would authorize use of the radar stations of the North American Aerospace Defense Command (NORAD), which were originally created for early detection of Soviet missiles, to relay information regarding drug movements to law enforcement officials.<sup>113</sup> Yet, the results of past military intelligence activities have not been worth their costs.<sup>114</sup>

Increased law enforcement assistance has created a number of practical, legal, and ethical problems. For example, the increase in foreign intelligence activity for drug control has also had an impact on United States criminal law. In *Jabara v. Webster*<sup>115</sup> the Sixth Circuit found that information gathered without a warrant by foreign intelligence agents could be turned over to domestic law enforcement agencies without violating the fourth amendment rights of an American citizen. The court reasoned that individuals have no reasonable expectation of privacy with regard to information in the possession of a government agency.<sup>116</sup>

Law enforcement agents are placed in extremely dangerous situations as a result of their expanded enforcement duties.<sup>117</sup> DEA agents have most recently been involved in Operation Snowcap, a series of paramilitary missions to search and destroy clandestine coca processing labs and coca crops in Bolivia and Peru.<sup>118</sup> Operation Snowcap is the most extensive involvement undertaken by DEA agents to date.

Military personnel in Bolivia have confiscated American-supplied weapons from the police in order to gain state-of-the-art equipment.<sup>119</sup>

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113. MAGNUSON, *More and More, A Real War*, TIME, Jan. 22, 1990, at 22.

114. See Gest & Kaylor, *Soldiers Can't Beat Smugglers*, U.S. NEWS & WORLD REP., May 30, 1988, at 18 (stating that "[i]n the first three months of 1988, the Air Force flew 154 hours in AWACS radar planes at a cost of \$678,000—and helped with only three arrests").

115. 691 F.2d 272 (6th Cir. 1982), cert. denied, 464 U.S. 863 (1983).

116. This holding is problematic given the wide latitude of foreign intelligence agencies to collect information.

117. See, e.g., The Heritage Foundation, *A 15-Point Program to Stem the Flow of Drugs From Mexico*, Heritage Foundation Reports, Apr. 12, 1989 (reporting the abduction and murder of Enrique Camarena Salazar, undercover DEA agent in Mexico, and the torture of Victor Cortez, DEA agent in Mexico). It is estimated that in 1988, at least one DEA informant per month was tortured or killed in the most dangerous regions of Mexico. *Id.*

118. Operation Snowcap involves law enforcement officials from 12 countries. The DOD provides training and logistical support. *Strategy Hearings*, supra note 14, at 74. Operation Snowcap was suspended in early 1989 because of the Peruvian forces' inability to protect U.S. personnel. Klare, *Scenario For a Quagmire: Fighting Drugs with the Military*, THE NATION, Jan. 1, 1990, at 8 (text available in NEXIS). The operation was resumed in September 1989 after the construction of a fortified base camp. *Id.*

119. Lee, *The Cocaine Morass in South America*, in POLICY OPTIONS, supra note 4, at 119, 126.

Insurgency forces could also get control of the weapons. In addition, American trained and funded Burmese forces have used eradication equipment supplied by the United States to facilitate attacks on ethnic minorities.<sup>120</sup> Significantly, the United States has no control over any of the equipment that it supplied to foreigners prior to 1986. In 1986 Congress mandated retention of aircraft titles by the United States,<sup>121</sup> so that the State Department now has its own air force. These planes and helicopters are most often used for eradication and are frequently armed with automatic weapons.<sup>122</sup>

### B. *The Mansfield Amendment*

Despite the nominal resistance of foreign countries to the presence of DEA or other law enforcement agents, United States domestic law does impose restrictions on this activity.<sup>123</sup> Federal legislation also restricts military participation in police arrest actions outside United States territory.<sup>124</sup> To respond to the involvement of United States agents in the torture of an individual arrested for extradition to the United States and to preserve bilateral relations with other countries, Congress enacted the Mansfield Amendment in 1976.<sup>125</sup> This Amend-

120. The prohibition on funding to police forces has been lifted only for countries that respect human rights. The State Department has been criticized for not policing this requirement more stringently. Note, *supra* note 63, at 407, n.308. For an example of one situation, see Nusser, *Torture, Beatings, Illegal Detentions Mark Ugly Side of Mexico's War on Drugs*, *The Atlanta J. and Constitution*, Mar. 11, 1990, at 135, cols. 1-5 (recounting a story of illegal detention, beating, and torture by Mexican police and reporting that that "kind of abuse is constant").

121. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570 § 484, 100 Stat. 3207 (1986).

122. See *Strategy Hearings*, *supra* note 14, at 26. BINM has 52 aircraft that cost \$24.5 million. *Id.* at 21. Some of these craft were "given" to BINM by the DOD. *Id.*

123. 22 U.S.C. § 2291(c) (1988) provides, in part, as follows:

(1) No officer or employee of the United States may directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts, notwithstanding any other provision of law. This paragraph does not prohibit an officer or employee from assisting foreign officers who are effecting an arrest.

(2) Unless the Secretary of State, in consultation with the Attorney General, has determined that the application of this paragraph with respect to that foreign country would be harmful to the national interests of the United States, no officer or employee of the United States may engage or participate in any direct police arrest action in a foreign country with respect to narcotics control efforts, notwithstanding any other provision of law. Nothing in paragraph (1) shall be construed to allow United States officers or employees to engage or participate in activities prohibited by this paragraph in a country with respect to which this paragraph applies.

124. 135 CONG. REC. S12,004 (daily ed. Sept. 27, 1989) (statement of Sen. Arlen Specter). *But see* 22 U.S.C. § 2291 (c)(6) (1988) (stating that the Mansfield Amendment does not restrict military operations under applicable Status of Force arrangements).

125. See *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974); 1976 U.S. CODE CONG. & ADMIN. NEWS 1930-31; S. REP. NO. 841, 95th Cong., 2d Sess. 13, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 1833, 1845; see also *infra* notes 240-42 and accompanying text (describing the alleged detention and abuse of Toscanino by a group of Brazilian police that included United

ment prohibited the presence of United States employees or officers during foreign police arrests.

In the early 1980s this Amendment was increasingly criticized as hampering overseas investigations. Thus, in 1985, after a failed attempt to repeal the Mansfield Amendment,<sup>126</sup> Congress added an exception to the Amendment that permitted the Secretary of State and a foreign government to agree that United States officers and employees could be present during foreign police actions.<sup>127</sup> Even under the exception, however, the United States officials had to refrain from direct participation in the arrests.<sup>128</sup> Because foreign governments were unwilling to enter into such agreements publicly, Congress eliminated the need for an agreement with the other country in the 1986 Anti-Drug Abuse Act.<sup>129</sup> That provision provided that a United States officer or employee could not "engage or participate" in any direct "police arrest action" in a foreign country unless the Secretary of State, after consulting with the Attorney General, determined that American interests would be harmed by nonintervention.<sup>130</sup>

That statutory language suggested that American personnel may engage in arrest actions in a foreign country without the country's consent. The legislative history of that provision, however, indicates that the provision was only intended as an exception to the Mansfield Amendment to replace the unworkable requirement of an agreement with the foreign country.<sup>131</sup> Recent discussions between the State Department and Congress have acknowledged that the wording of the provision is confusing, and the State Department has interpreted the language as providing only that United States personnel may "assist" in foreign police arrest actions.<sup>132</sup> Moreover, on December 31, 1989, the Mansfield Amendment was again amended.<sup>133</sup> This 1989 amendment

States agents).

126. See H.R. CONF. RPT. No. 237, 99th Cong., 1st Sess., reprinted in 1985 U.S. CODE CONG. & ADMIN. NEWS 239.

127. International Narcotics Control Act of 1985, Pub. L. No. 99-83, § 605, 99 Stat. 190, 229 (1985) (codified at 22 U.S.C. § 2291 (1988)).

128. Despite the exception, subsection (c)(1), prohibiting direct arrests by United States employees or officers, was retained. See 22 U.S.C. § 2291(c)(1) (1988).

129. 22 U.S.C. § 2291(c) (1988).

130. See *supra* note 122.

131. H.R. REP. No. 798, 99th Cong., 2d Sess. 9 (1986).

132. *Worldwide Hearing*, *supra* note 25, at 59-60; see 32 C.F.R. § 203 (1986); see also *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 188 (1804), quoted in *Lauritzen v. Larson*, 345 U.S. 571, 578 (1953) (stating that "an act of Congress ought never to be construed to violate the law of nations if any other construction remains").

133. See 101 P.L. 231, 1989 H.R. 3611 § 15. The amended statute reads in part as follows:

(c)(1) Prohibition on effecting an arrest—No officer or employee of the United States may directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts, notwithstanding any other provisions of law.

clarifies the language of the prior amendment.

Thus, the apparent state of legislation banning participation in foreign police arrest actions is that United States officers or employees may not directly effect an arrest, search, or seizure in another nation. However, they may be present and may assist while foreign officials make arrests, and can take direct action if it is necessary to their safety. In addition, in 1988 a federal district court held in *United States v. Zabaneh*<sup>134</sup> that a court is not required to divest itself of jurisdiction if the Mansfield Amendment is violated because Congress provided no remedy under the Act.<sup>135</sup> As a result of congressional and judicial decisions, the Mansfield Amendment, contrary to its original purpose, provides no special protection to foreign offenders or foreign states.

### C. *The Posse Comitatus Act and the 1988 Amendments*

The Posse Comitatus Act<sup>136</sup> prohibits direct participation by the military in law enforcement operations unless authorized by Congress or the Constitution. The Act is based on a strong tradition of separating civil law from military activities and on the superiority of civilian authorities in civil law enforcement.<sup>137</sup> Although the Act does not expressly limit the use of the Navy or Marine Corps for law enforcement, as of 1981 the Department of Defense (DOD) had applied the prohibition to all of the services as a matter of policy.<sup>138</sup>

The text of the Act does not state whether the prohibition applies extraterritorially. Prior to 1981, the military departments had generally recognized the extraterritorial application of the Act, but had not invoked its proscriptions when an executive act authorized military involvement to advance foreign policy objectives or to protect Americans

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(2) Participation in Arrest Actions—Paragraph (1) does not prohibit an officer or employee of the United States, with the approval of the United States Chief of Mission, from being present when foreign officers are effecting an arrest or from assisting foreign officers who are effecting an arrest.

*Id.*

134. 837 F.2d 1249 (5th Cir. 1988).

135. *Id.*

136. See 18 U.S.C. § 1385 (1988). The penalty for a violation is a \$10,000 fine, two years in prison, or both.

137. Note, *The Navy's Role in Interdicting Narcotics Traffic: War on Drugs or Ambush on the Constitution?*, 75 GEO. L.J. 1947, 1953 (1987). Some commentators have argued that the tradition of civilian control over the military has constitutional underpinnings. *Id.* at 1951-53.

138. *Id.* at 1954-55 (quoting Department of Defense Directive No. 5525.5 at 4-6); see 32 C.F.R. § 213.2 (1986) (defining military service for civilian law enforcement as the Army, Navy, Air Force, and Marines). The Act originally applied only to the Army because it originated as an amendment to an Army appropriations bill. Note, *A Proposal for Direct Use of the United States Military in Drug Enforcement Operations Abroad*, 23 TEX. INT'L L.J. 291, 294 (1988). Congress later included the Air Force in the Act, and the Department of Defense has applied the Act to the Navy and Marines as a matter of policy. *Id.*



abroad.<sup>139</sup> In 1982 Congress amended the Act to clarify the scope of military authority in civil law enforcement and to resolve the confusion over the extraterritorial effect of the Act.

### 1. The 1982 Amendments

While retaining the restriction on direct participation, the 1982 Amendments authorized the military to assist civilian law enforcement through information, equipment, facilities, training, and advice.<sup>140</sup> The Amendments also permitted the military to operate equipment for civilian law enforcement activities. Extraterritorial military participation was restricted to "emergency circumstances," and even in an emergency, the military could not "interdict or interrupt the passage of vessels or aircraft."<sup>141</sup>

The legislative history of the 1982 Amendments shows that proponents relied primarily on the need for more sophisticated equipment and better trained personnel to match that of the drug traffickers.<sup>142</sup> Military resources were readily available for this purpose. Critics of these Amendments, including the DOD, argued that military personnel would assume too much authority because they are not trained to ensure constitutional protections. In addition, opponents believed that the preparedness of the United States military would be negatively affected

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139. Siemer & Efron, *Military Participation in United States Law Enforcement Activities Overseas: The Extraterritorial Effect of the Posse Comitatus Act*, 54 ST. JOHN'S L. REV. 1, 51 (1979).

140. See 10 U.S.C. §§ 371-375 (1988).

141. 1981 U.S. CODE CONG. & ADMIN. NEWS at 1861. The legislative history of the Amendments explained the "emergency circumstances" requirement as follows: "That definition is intended to focus on the threat of large scale criminal activity at a particular point in time or over a finite period. It should not be construed to permit use of this authority on a routine or extended basis." *Id.* But see Ferraro, *Bennett Hails Noriega Ouster*, United Press Int'l (BC Cycle), Dec. 20, 1989, at 2 (reporting that the "Justice Department's Office of Legal Counsel issued a legal opinion on Nov. 3, at the request of the White House, finding that the law [the Posse Comitatus Act] does not apply outside the United States"). Administration officials said that the opinion was considered before ordering the Panamanian invasion. *Id.* at 1.

The Justice Department's opinion is confidential, so the legal basis for the ruling is not known. The legislative history of the 1982 Posse Comitatus Amendments clearly gives extraterritorial force to the restrictions. Moreover, the 1988 Amendments list activities, including some overseas activities, in which the military may participate. See *infra* notes 154-56 and accompanying text. Direct arrests are not included in the authorized overseas activities and 10 U.S.C. § 374(c) permits the Secretary of Defense to provide military assistance for reasons other than those listed only if the activity does not require an arrest, search, or seizure. See *infra* note 156 and accompanying text. Furthermore, the Mansfield Amendment also prohibits direct arrests in foreign countries by United States military personnel acting without the assistance of foreign officers. See *supra* notes 129-30 and accompanying text. Based on these considerations, the legal basis for the Justice Department's opinion that the Posse Comitatus provisions do not apply outside the United States remains unclear.

142. See Note, *Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement*, 54 GEO. WASH. L. REV. 404, 417-21 (1986).

and that this initial military authorization would lead to greater military involvement.<sup>143</sup>

Although the 1982 Amendments were intended to clarify the permissible scope of military involvement, the difficulty of applying the Act and its Amendments to particular situations demonstrated that the legal scope of military involvement in civilian enforcement activities was more uncertain. Despite the express prohibition on interdiction in the 1982 Amendments, courts later legitimized such participation by holding that the Act applies to the Navy and Marines only because of the DOD policy extension<sup>144</sup> and that the 1982 Amendments did not reduce the authority that the DOD possessed prior to the passage of the 1982 Amendments.<sup>145</sup>

In 1986 Congress passed an amendment authorizing the placement of Coast Guard Tactical Enforcement Teams (TACLETs) on Navy ships.<sup>146</sup> With a TACLET aboard, a Navy ship is deemed to provide only equipment and assistance if it apprehends a vessel and the TACLET actually performs the arrest. During these operations, Navy ships have fired upon civilian vessels.<sup>147</sup> Although courts have found that firing disabling shots violates the Posse Comitatus proscriptions, the courts have refrained from imposing any penalty under the Act.<sup>148</sup> Some courts have even noted that although no exclusionary rule presently exists for evidence obtained in violation of the Act, such a rule should be fashioned if repeated and widespread violations occur.<sup>149</sup>

Prior to 1989, the only use of American combat troops in drug law enforcement abroad was in a Bolivian search and destroy mission known as Operation Blast Furnace.<sup>150</sup> Over one hundred military per-

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143. *Id.* at 419-21.

144. *See* United States v. Roberts, 779 F.2d 565 (9th Cir.), *cert. denied*, 107 S. Ct. 142 (1986). For a discussion of the case and the court's reasoning, see Note, *supra* note 138, at 299-300. *But see* United States v. Chaparro-Almeida, 679 F.2d 423, 425 (5th Cir. 1982) (suggesting that Posse Comitatus proscription applies to all branches of armed services), *cert. denied*, 459 U.S. 1156 (1983); United States v. Walden, 490 F.2d 372, 375 (4th Cir.) (stating that legislative history of the Act reveals a policy applicable to all services except the Coast Guard, which serves a law enforcement purpose), *cert. denied*, 416 U.S. 983 (1974); *see also* 10 U.S.C. § 375 (1988) (placing Amendment restrictions on all services).

145. Note, *supra* note 137, at 1955 n.49.

146. 10 U.S.C. § 379 (1986); *see* United States v. Del Prado-Montero, 740 F.2d 113 (1st Cir.) (describing a TACLET boarding and noting that a Navy ship comes under Coast Guard control with the raising of the Coast Guard ensign), *cert. denied*, 469 U.S. 1021 (1984).

147. *See, e.g.*, United States v. Roberts, 779 F.2d 565 (9th Cir.), *cert. denied*, 107 S. Ct. 142 (1986).

148. *Id.* at 569.

149. *See, e.g.*, United States v. Wolffs, 594 F.2d 77, 85 (5th Cir. 1979); Walden, 490 F.2d at 373.

150. *See supra* notes 101-03 and accompanying text; Note, *supra* note 18, at 47-60 (analyzing Operation Blast Furnace and applicable law); *see also id.* at 53 n.78 (noting a possible War Powers

sonnel participated in a series of six or seven joint raids that produced no cocaine and no arrests of major drug traffickers. Both the United States and Bolivian governments hailed the operation as a success because market demand for the coca leaf and coca prices declined. One month after the withdrawal of American troops, however, both the quantity of cocaine exported and the price of coca were greater than they had been before Operation Blast Furnace.<sup>151</sup> The Reagan Administration refused to comment on the issue of whether authority for the operation came from the Posse Comitatus Amendments or the President's 1986 National Security Decision Directive (NSDD) that declared drug trafficking a national security threat.<sup>152</sup>

In the 1986 Anti-Drug Abuse Act Congress sanctioned the operation.<sup>153</sup> By raising the drug issue to the level of a "national security threat," or "emergency," the President had been able to justify all levels of intervention. The distinction between civilian and military activities had been obscured by drug enforcement practice and deference by different branches of the government to one another's interpretation of the 1982 Amendments.

## 2. The 1988 Amendments

In 1988 Congress amended the Posse Comitatus Act again.<sup>154</sup> The 1988 Amendments were fueled by the belief that the drug war was failing and by a perceived need for better equipment and personnel. In effect, the 1988 Amendments codified existing practices. The most significant changes related to maintenance and operation of equipment.

The 1988 Amendments deleted the provisions that permitted extraterritorial operation of military equipment only in emergency circumstances and substituted an expanded list of activities in which the military could participate.<sup>155</sup> The Amendments allow the military to track the movements of drug traffickers, engage in aerial reconnaissance, and intercept crafts for the purpose of communicating with them. In addition, the Amendments allow the military to transport civilian law enforcement personnel and to operate a base camp overseas

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conflict). The War Powers Resolution, 50 U.S.C. §§ 1541-48 (1982), addresses the separation of executive and legislative war powers. The Resolution does not mention the Posse Comitatus Act restrictions. Because the Resolution does not address the civilian-military conflict, it is beyond the scope of this Note. For a discussion of the War Powers conflict, see Born, *The President's War Powers*, 23 TEX. INT'L L.J. 153 (1988).

151. Note, *supra* note 18, at 57-58.

152. *Id.* at 50 n.62.

153. 1986 Act, Pub. L. No. 99-570, § 2012, 100 Stat. 3207-66 (1986).

154. See National Defense Authorization Act, Pub. L. No. 100-456, § 1104(a), 102 Stat. 2042 (1988).

155. 10 U.S.C. § 374 (1988).

with the joint approval of the Secretaries of State and Defense. Finally, the Amendments authorize the Secretary of Defense to make military personnel available to federal, state, and local law enforcement agencies to operate equipment for reasons other than those expressly listed provided that the activity does not require direct participation, which is defined as an arrest, search, or seizure.<sup>156</sup>

In 1988 Congress also expanded the use of Navy resources to interdict traffickers by authorizing Coast Guard personnel commanding a TACLET or Coast Guard ship to fire upon any vessel that does not stop after being ordered to do so.<sup>157</sup> Most recently, in January 1990, a Navy TACLET ship fired disabling shots at a Cuban vessel. The Cuban vessel escaped into Mexican waters. Mexican authorities reportedly found no drugs aboard the vessel.<sup>158</sup> In addition, congressional and administrative debates have now addressed a proposal to shoot down planes over American borders that ignore warnings to land.<sup>159</sup>

Nevertheless, increased military interdiction efforts, for the most part, have failed to increase arrests.<sup>160</sup> That failure has been attributed to an inability to police all of the American border simultaneously and to the use of military equipment that is inadequate for interdicting drug smuggling vessels. In recent years, the Coast Guard and Customs budgets have been cut to the extent that they are now inadequate for interdiction operations without military assistance.<sup>161</sup> Now, however, interdiction efforts are being moved away from the United States borders to the coasts of drug producing and drug transit countries. In addition, the United States has pressed foreign countries to use their own militaries in civilian law enforcement operations. Like the United States, some of these countries have strong traditions against military involvement in civilian law enforcement activities.<sup>162</sup>

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156. *Id.* §§ 374(c), 375.

157. Pub. L. No. 100-690, § 7401, 102 Stat. 4483 (1988).

158. *Mexico Finds No Drugs on Cuban Ship*, United Press Int'l (Home Ed.), Feb. 2, 1990, at 1.

159. Dwyer, *Marines Aren't the Answer to America's Drug Problem*, Bus. Wk., Sept. 4, 1989, at 30.

160. For example, in all of fiscal year 1987 Navy patrols assisted in only 110 arrests. Gest, *Soldiers Can't Beat Smugglers*, U.S. NEWS & WORLD REP., May 30, 1988, at 18-19; see also GAO REPORT BEFORE THE SENATE COMM. ON ARMED SERVICES, FED'L DRUG ABUSE CONTROL POLICY AND THE ROLE OF THE MILITARY IN ANTI-DRUG EFFORTS, at 111 (stating that in 1987 the Air Force committed 591 hours to interdiction, costing over \$2.6 million and resulting in six seizures and ten arrests; in 1987 the Coast Guard occupied Navy ships for 2500 days at a cost of \$40 million and made twenty seizures and ten arrests).

161. Gest, *supra* note 160, at 19 (noting that the Coast Guard budget was cut by \$103 million in 1987).

162. See, e.g., *Colombian Drug Trafficking and Control: Hearing Before the House Select Comm. on Narcotics Abuse and Control*, 100th Cong., 1st Sess. 17 (1987) (testimony of Ann Wroblewski). Ms. Wroblewski stated that "[Colombia's] tradition probably argues as strongly as our tradi-

In January 1990 the United States dispatched the aircraft carrier *John F. Kennedy* and a task force to Colombia before the United States had informed Colombia of such activity. While some reports suggest that the United States intended to set up an interdiction blockade off the coast of Colombia, the United States government insists that the mission's purpose was solely to plot patterns of suspicious travel from Colombia.<sup>163</sup> This action incensed many Colombians because they believed that the action showed a clear disregard for Colombian sovereignty. Significantly, Operation Hat Trick, an operation involving Navy troops in Colombian waters, was cut short in 1984 because the operation was too costly in light of the nominal results.<sup>164</sup> Nevertheless, the present policy trend appears to favor increased military interdiction in foreign waters.

The United States provides military assistance for nonmaritime law enforcement operations with military equipment, military trainers and advisors, and military combat troops. To date, most of the deployed military equipment and training teams have been used for interdiction and crop eradication programs. Also, military trainers and advisors generally have been restricted to base camps in foreign countries.<sup>165</sup>

In 1989, however, in response to a declaration of war by Colombian drug traffickers against the Colombian government, the United States sent sixty-five million dollars in equipment and a number of advisors and pilots to Colombia.<sup>166</sup> President Bush signed a National Security Decision Directive (NSDD) authorizing United States military advisors in Latin America to train troops and officials in secure areas outside of base camps and to accompany foreign forces on drug raids. Advisors have also been sent to Peru and Bolivia. Approximately one hundred advisors are now in Latin America, and in 1990 an estimated two hundred troops and Green Berets are expected to supplement the advisors already in place.<sup>167</sup>

The United States will continue to supply equipment, training, and advice to Peru, Bolivia, and Colombia. The 1989 Act appropriates an additional 125 million dollars for military activities in these three countries only and authorizes the provision of excess United States defense

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tion against using the military in law enforcement operations and to come to a joint command, as we saw in some of their recent raids, was not an easy thing for the government to do." *Id.*

163. Magnuson, *supra* note 113, at 22-23.

164. *Id.* at 23.

165. Weinraub, *Bush to Let U.S. Anti-Drug Troops Move Outside Latin Base Camps*, N.Y. Times, Sept. 11, 1989, at A1, col. 3.

166. Exec. Order No. 89-24, 54 Fed. Reg. 38,371 (Aug. 25, 1989); see Weinraub, *supra* note 165, at A1, col. 4.

167. Magnuson, *supra* note 113, at 22.

equipment to eligible Latin American and Caribbean countries for cooperation with the United States law enforcement strategy.<sup>168</sup> The United States has also already promised to give the Andean countries 2.2 billion dollars over the next five years for military and economic functions during the drug war.<sup>169</sup>

Attendant to the expanding military role are congressional proposals to further expand this role by authorizing direct military participation in narcotics law enforcement. The most recent of these proposals was made in October 1989 by Senator Jesse Helms. The Helms Amendment, which met with strong congressional opposition, would have authorized military use to forcibly kidnap General Manuel Noriega from Panama on drug indictment charges.<sup>170</sup> The proposal was to foreshadow United States military intervention in Panama.

### 3. Escalation Toward a Real War on Drugs

On December 20, 1989, in the largest show of military force since Vietnam, over 24,000 American troops descended on Panama. The American troops took control of Panama and installed democratically elected President Guillermo Endara in place of General Manuel Noriega. General Noriega fled to the Vatican Embassy of Panama where he claimed sanctuary as a political prisoner. After eleven days at the Embassy, he surrendered to United States authorities. He is now in the United States awaiting trial on a number of drug related charges.<sup>171</sup>

The United States espoused four reasons for military intervention: to protect the Panama Canal Treaty, to safeguard American lives, to restore democracy, and to arrest General Noriega on drug charges.<sup>172</sup> The United States later claimed that it acted in self-defense because Panama had declared war on the United States five days before the intervention.<sup>173</sup> Although many member nations opposed the United States action, the United Nations did not denounce the activity because

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168. See 1989 Act, *supra* note 34, § 5. A previous version of the Act would have appropriated an additional \$25 million for military activity in Colombia, Bolivia, and Peru. See 135 CONG. REC. H8411 (daily ed. Nov. 13, 1989).

169. See *supra* notes 33, 41 and accompanying text.

170. 135 CONG. REC. S12,679-80 (daily ed. Oct. 5, 1989) (proposal by Sen. Jesse Helms). The Bush Administration opposed this amendment. *Id.* at S12,681.

171. Mashek & Kurkjian, *Noriega Surrenders to U.S. Agents*, Boston Globe, Jan. 4, 1990, at 1, col. 1.

172. Ferraro, *Bennett Hails Noriega Ouster*, United Press Int'l (BC Cycle), Dec. 20, 1989, at 1.

173. See *id.* (reporting government's position that the intervention was justified under Article 51 of the United Nations Charter); see also Kinsley, *Speak Softly and Carry a Cage*, TIME, Jan. 22, 1990, at 74 (discussing the U.S. justifications for intervention and noting that the White House originally "laughed off Noriega's 'declaration of war'").

Panama had declared war on the United States.<sup>174</sup> Nevertheless, United States relations in Latin and South America are now strained.

Although pleased with the capture of General Noriega, these countries are concerned that the United States would use military forces in their territory without consent. Most of these countries strongly oppose use of American troops in their territory,<sup>175</sup> and incidents during the Panamanian invasion have probably fueled their concern. For example, many Panamanian civilians were killed or are now homeless as a result of the invasion.<sup>176</sup> In addition, American troops surrounded the Peruvian Embassy in Panama after reports that General Noriega might have been hiding there<sup>177</sup> and actually entered and searched the Nicaraguan Embassy in an attempt to locate the General.

For the first time, the war on drugs has taken on its literal meaning. The present state of military participation in civilian law enforcement has confirmed the fears of the original opponents of the 1982 Posse Comitatus Amendments. Military involvement is routine and each new level of involvement appears to have been a stepping stone to the next. Moreover, United States military preparedness has been weakened. One example of the abuse of military assistance occurred in May 1988 when the only military cutter in the area was forced to leave its post in the Yucatan Channel off the coast of Cuba to escort a seized yacht to the United States.<sup>178</sup>

#### D. Military Diplomacy

Foreign governments appear willing to accept United States equipment, training, and intelligence, presumably out of self-interest and necessity. Nevertheless, allowing United States military participation in civilian enforcement activities is politically risky for foreign officials. For example, military activity in Bolivia generated sovereign resistance that resulted in violence and anti-Americanism.<sup>179</sup> Thus, most discus-

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174. See Ferraro, *supra* note 172, at 1.

175. 135 CONG. REC. S12,683 (daily ed. Oct. 5, 1989) (statement of Sen. Sam Nunn). Senator Nunn noted that the Colombian, Bolivian, and Peruvian Ambassadors had testified before Congress that "[t]he last thing we need is U.S. military forces coming in here to enforce our laws. We do not want them. If you do that, it is going to undermine the government. If you [do that] . . . , we are likely to end up with a Communist kind of insurgency." *Id.*

176. See Kinsley, *supra* note 173, at 74. The number of Panamanian civilians killed is "proportionally equivalent to 22,000 Americans." *Id.*

177. *Id.*

178. Gest, *supra* note 160, at 19 (noting that the cutter's post was left vacant for three days).

179. Following the first raid, peasants chased Bolivian police and surrounded a U.S. troop carrier shouting "Kill the Yankees." *Angry Mob Blocks Arrests of Bolivian drug Dealers*, United Press Int'l, Oct. 10, 1986. The peasants allowed the carrier to leave only after being assured that no arrests would be made. *Id.* In another incident, peasant threats led American instructors in the Chaparé region to abandon base camps. Christian, *Bolivians Fight Efforts to Eradicate Coca*, N.Y.

sions with the United States relating to military assistance are not publicly revealed.<sup>180</sup>

One approach by the United States to avoid the repercussions of sending its military abroad has been to convince foreign nations to use their own militaries in drug enforcement. The United States has convinced Colombia, at times, to use its military by stressing the link between drug trafficking and insurgency forces.<sup>181</sup> At the 1990 drug summit, the United States, Bolivia, Peru, and Colombia signed a joint communiqué stating that each country could use its own military in its territory.<sup>182</sup> The United States, at least conceptually, promised enhanced economic aid and increased demand-side efforts.<sup>183</sup> In addition, economic sanctions levied against Jamaica's largest commercial carriers have led to militarization of the Jamaican airports and seaport.<sup>184</sup>

Nevertheless, the use of the military to apprehend drug traffickers remains a sensitive issue with all participants. For example, in Operation Blast Furnace both the United States and Bolivian governments claimed that the other had initiated the proposal.<sup>185</sup> The National Drug Policy Board later claimed that it had proposed the operation.<sup>186</sup> Congress soon repudiated this assertion and reaffirmed that Bolivia had requested the assistance.<sup>187</sup> Operation Blast Furnace probably resulted from joint efforts of the two governments, but these claims illustrate the political posturing that is likely to surround any agreement for military involvement.

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Times, July 27, 1987, at A3, col. 4.

180. See H.R. REP. NO. 798, 99th Cong., 2d Sess. 10 (1986).

181. See *Colombian Drug Trafficking and Control: Hearing Before the House Comm. on Narcotics Abuse and Control*, 100th Cong., 1st Sess. 17 (1987) (statement of Ann Wroblewski) (stating that the United States has urged Colombia to use its own forces in eliminating cocaine labs).

182. See *supra* note 33.

183. See *id.*

184. POLICY OPTIONS, *supra* note 4, at 13. The two largest shipping lines in Jamaica, Evergreen and Sea-Land Services, have refused to transport goods out of Jamaica because of fines of \$135 million and \$85 million, respectively, levied against them by United States Customs when drugs were found in their goods. *Id.* at 12-13. Also, two Jamaican Banana Cooperative Association boats have been confiscated because they could not afford the fines. *Id.* at 13. The militarization of the airports and seaport occurred after Air Jamaica was fined; Air Jamaica is now nearly bankrupt. *Id.* at 13.

185. Brinkley, *Bolivians Deny They Ask U.S. to Send Troops to Help in Raids*, N.Y. Times, July 20, 1986, § 1, at 1, col. 2 & 12, col. 1.

186. Note, *supra* note 18, at n.73.

187. *Id.*



## VI. PROSECUTING FOREIGN DRUG OFFENDERS IN UNITED STATES COURTS

In recent years the United States has given extraterritorial effect to its drug laws in order to prosecute foreign drug offenders. These prosecutions occur within a framework of both international and domestic law and of bilateral and multilateral treaties. The four mechanisms available to the United States to apprehend and prosecute foreign drug offenders are extradition treaties and orders, abduction and irregular rendition, mutual legal assistance treaties, and multilateral treaties.

### A. *Extradition Treaties*

Extradition is the legal process through which one nation requests another to surrender an individual found in its territory for trial or other punishment in accordance with a bilateral treaty between the two countries.<sup>188</sup> Presently the United States is a party to approximately 103 extradition treaties.<sup>189</sup> The 1988 Act calls for greater efforts to negotiate new or updated extradition treaties and for the development of a specific narcotics extradition treaty.<sup>190</sup> This mandate seeks to overcome both procedural and diplomatic obstacles to drug prosecutions.

#### 1. Obstacles to Extradition

The process of extradition is regarded in international law as an arrangement affecting only the interests of the states involved.<sup>191</sup> Thus, the extraditee has no standing to challenge a violation of the treaty or to compel compliance with its provisions absent a protest by the asylum state. Speciality and double criminality, universal principles that govern all extraditions, are also state privileges rather than individual rights.<sup>192</sup> These two principles are often procedural obstacles to extradition.

Speciality requires that the extraditee be tried in the requesting country only on the offense for which extradition is granted.<sup>193</sup> In drug cases, the United States is often not able to request extradition for a

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188. Bassiouni, *Unlawful Seizures and Irregular Rendition Devices As Alternatives to Extradition*, 7 VAND. J. TRANS. L. 25 (1973).

189. *Worldwide Hearing*, *supra* note 25, at 77; see 18 U.S.C. § 3181 (1988).

190. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 4605, 102 Stat. 4181, 4290 (1988) (codified at 18 U.S.C. § 3181 (1988)).

191. *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d. Cir.), *cert. denied*, 421 U.S. 1001 (1975).

192. See Bassiouni, *supra* note 188, at 25; Bernholz, Bernholz & Herman, *International Extradition in Drug Cases*, 10 N.C.J. INT'L L. & COM. REG. 353, 355 & 369 (1985).

193. Bernholz, Bernholz & Herman *supra* note 192, at 364.

specific crime, such as continuing criminal enterprise<sup>194</sup> crimes, because the offense has no counterpart in the law of the foreign country.<sup>195</sup> Some treaties overcome this obstacle, however, by allowing trial not only on the offense for which extradition was granted, but also for any other offense based on the same set of facts.<sup>196</sup>

The same differences in American and foreign law have posed extradition problems under the doctrine of double criminality. Double criminality requires that the offense for which extradition is requested must be criminal under the laws of both countries.<sup>197</sup> Traditionally, extraditable offenses were defined as those listed in the treaty and punishable under the laws of both countries by a minimum term of years.<sup>198</sup> While most of the older treaties did not list the new crime of narcotics trafficking, more recent ones list drug crimes as an offense. A few newer treaties have simply adopted the double criminality doctrine to define extraditable offense as any offense punishable under the laws of both countries.<sup>199</sup>

In addition, most extradition treaties do not require countries to extradite nationals and the absence of such an obligation has been a major obstacle in drug related extraditions. Civil-law countries traditionally have retained jurisdiction over their own nationals,<sup>200</sup> and many civil-law constitutions even prohibit the extradition of nationals.<sup>201</sup> Some foreign governments that have departed from tradition and allowed the extradition of nationals have encountered resistance from their citizens.<sup>202</sup>

Although new provisions can help overcome some of the obstacles to drug extraditions, only a few treaties containing new provisions have been negotiated. In addition, most of the new treaties are not yet in

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194. 21 U.S.C. § 848 (1988).

195. See Bernholz, Bernholz & Herman, *supra* note 192, at 358-64.

196. See, e.g., Treaty on Extradition Between the United States and the Netherlands, June 24, 1980, art. 15, T.I.A.S. No. 10,733.

197. Bernholz, Bernholz & Herman, *supra* note 192, at 355.

198. *Id.*

199. See, e.g., Treaty on Extradition, June 14, 1983, United States-Jamaica, S. TREATY DOC. No. 18, 98th Cong., 2d Sess. (1984) (not yet in force) [hereinafter Jamaican Treaty].

200. Note, *The Jaffe Case and the Use of International Kidnaping as an Alternative to Extradition*, 14 GA. J. INT'L & COMP. L. 357, 365 (1984). Common-law states do grant extradition of their nationals. *Id.*

201. For example, the U.S. resorted to irregular rendition to obtain jurisdiction over Juan Ramon Matta-Ballesteros because the Honduran constitution forbids extradition of nationals. See *Honduran Leader Acts to Put Down Anti-U.S. Protests*, N.Y. Times, Apr. 9, 1988, at A1, col. 6; see also *infra* notes 253-56 and accompanying text.

202. See *Hondurans Riot at U.S. Offices; Four Said to Die*, N.Y. Times, Apr. 8, 1988, at A1, col. 1 (reporting the protests in Honduras after the arrest of Matta that forced the Honduran president to declare a state of siege).

effect<sup>203</sup> and their predecessors do not apply to drug trafficking. Finally, the United States does not even have treaties with some of the major drug producing countries, such as Iran and Afghanistan. Yet, despite these obstacles, the Justice Department Office of International Affairs reports that negotiating new treaties and rewriting old ones doubled the number of formal extraditions between 1980 and 1984.<sup>204</sup>

## 2. Deadly Diplomacy

The need for updated extradition treaties has received little attention from United States diplomats.<sup>205</sup> This lack of priority may be the result of the successful use of more convenient methods of apprehension, such as irregular rendition and abduction.<sup>206</sup> In dealing with Colombia, however, the United States has been obsessed with extradition. This obsession stems from the fact that Colombia is the largest cocaine producer in the world and the home of the infamous drug cartels.

Extradition of Colombian nationals to the United States began in 1979.<sup>207</sup> Colombian criminals responded to these extraditions with a series of violent murders of Colombian government officials. In 1986 the Supreme Court of Colombia declared the extradition treaty unconstitutional.<sup>208</sup> Since that time, the United States has been pressuring Colombia on the extradition issue. For example, in December of 1987, Jorge Ochoa, who was wanted in the United States on a drug trafficking indictment, was released for the second time from a Colombian jail.<sup>209</sup> Although the Colombian government had taken security measures to prevent Ochoa's escape, the government had no jurisdiction over the criminal court justice who released Ochoa.<sup>210</sup> The United States responded by subjecting Colombian travelers and perishable products to stringent United States customs checks.<sup>211</sup> This retaliation incensed Colombians.

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203. *E.g.*, Jamaican Treaty, *supra* note 199; Treaty on Extradition, Dec. 4, 1982, United States-Costa Rica, S. TREATY DOC. NO. 17, 98th Cong., 2d Sess. (1984) (not yet in force); Treaty on Extradition, Dec. 14, 1983, United States-Thailand, S. TREATY DOC. NO. 16, 98th Cong., 2d Sess. (1984) (not yet in force).

204. *See* Schacter, *Arrests Abroad*, L.A. Times, July 17, 1986, § 1, at 1, col. 1 (stating that the number of extraditions increased from 227 to 454).

205. STAFF REP., *supra* note 97, at 1.

206. *See* 135 CONG. REC. H6553-54 (daily ed. Oct. 3, 1989) (statement of Rep. Frank R. Wolf).

207. *See generally* Kavass, *Findel Tratado de Extradición Colombia—Estados Unidos de 1979: Una Comedia de Errores?* 3-14 (mayo-junio 1988) (published by Centro des Estudios Internacionales de la Universidad de Los Andes, Serie Documentos Occasionales).

208. *See infra* text accompanying note 219.

209. Bagley, *supra* note 4, at 87.

210. Lee, *South American Cocaine: Why the U.S. Can't Stop It*, CURRENT, June 1989, at 30.

211. *Id.*

Inconsistencies in the United States position on extradition become apparent when the Colombian situation is compared with that of Pakistan. The United States has had an extradition request for a major drug trafficker pending in Pakistan since 1987. A treaty exists between the two countries, and the extradition request has been sent to a Pakistani court. The Pakistani government refers to this request as a "test" extradition case.<sup>212</sup> Moreover, Pakistan has suggested that the United States should submit several more requests for extradition to aid in this test.<sup>213</sup> Pakistan has never been subject to United States diplomatic pressures because of its importance in the struggle against communist expansion.<sup>214</sup>

Inconsistent treatment has also been evident in cases in which extradition to the United States was granted. For example, in the early 1970s the United States sought extradition of Auguste Ricord from Paraguay on drug conspiracy charges. A Paraguayan court denied extradition on grounds of jurisdiction and double criminality.<sup>215</sup> Subsequently, the United States pressured the government to overturn the court decision by closing down substantial lines of credit for fourteen months.<sup>216</sup> The extradition request was eventually granted.

In two contemporaneous cases, extradition on drug smuggling charges was denied by the United Kingdom on similar grounds.<sup>217</sup> Upon denial, the United States immediately dropped the request. One legal scholar has noted that the difference in the United States' reactions to extradition denials by Paraguay and the United Kingdom reinforces the Latin American belief that "gunboat diplomacy" is still practiced by the United States.<sup>218</sup>

### B. Executive Extradition

Extradition between the United States and Colombia dates back to the 1979 extradition treaty. On December 12, 1986, however, the Colombian Supreme Court declared the treaty unconstitutional based on a technical challenge to the signing of the treaty by the interim president.<sup>219</sup> Extradition from Colombia was virtually stopped.

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212. See *Worldwide Hearing*, *supra* note 25, at 86-87.

213. *Id.*

214. See Bagley, *supra* note 4, at 83.

215. See Collins, *Traffic in the Traffickers: Extradition and the Controlled Substances Import and Export Act of 1970*, 83 YALE L.J. 706, 707 & nn.11-13 (1974) (discussing Ricord incident and citing decision of Aug. 15, 1972, on file at the Department of State).

216. *Id.* at 707 n.11.

217. *Id.* at 707 n.13.

218. *Id.* at 707 (stating that "it is extremely doubtful . . . whether the United States itself would have been willing or able to grant extradition under similar circumstances").

219. See Kavass, *supra* note 207, at 3-14.

On August 18, 1989, following the assassination by drug leaders of Colombia's prime presidential candidate, President Virgilio Barco declared a "state of siege"<sup>220</sup> in Colombia. In an unprecedented move, he then issued an executive extradition decree that suspended a provision of the Colombian Code of Criminal Procedure that required the Supreme Court to approve any extradition of nationals.<sup>221</sup> This suspension applied only to drug trafficking offenses. Under the executive order, which remains in effect at present, decisions to extradite are made by the National Council of Narcotics, which consists of the president and the ministers of the government. Despite the absence of a treaty and the provision requiring court approval, the executive decree potentially guarantees certain rights to Colombian nationals, such as protection against the death penalty and inhumane treatment, that traditional methods of extradition do not. As of February 1990, fourteen low- to mid-level traffickers had been extradited pursuant to this order.<sup>222</sup>

Nevertheless, the majority of Colombian nationals oppose extraditions to the United States, and the Colombian Congress is presently considering a referendum on extradition.<sup>223</sup> Because of the Colombians' resistance to United States interference, United States influence must be disassociated from the controversial decree in order for the decree to remain viable. After the failure of the extradition treaty in 1987, the United States sent a legal team to Colombia to find an alternative means of extradition. Despite this legal presence, there is no evidence that the United States influenced the creation of the executive decree.

### C. *Extraordinary Apprehension of Foreign Offenders*

Historically, the United States has, in certain instances, avoided the formal methods of extradition by resorting to methods of apprehension such as irregular rendition or abduction.<sup>224</sup> These methods are most often justified as acts of necessity based on the failure of the extradition process. Weaknesses of the extradition system are that it is too time consuming, expensive, and complicated, and that it frequently fails to produce the offender. In such circumstances the United States

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220. 135 CONG. REC. S11,766-77 (daily ed. Sept. 25, 1989) (resolution submitted by Sen. Daniel Patrick Moynihan).

221. *Id.*

222. Squiteri & Kelley, *Drug War Splits U.S., Colombia*, USA Today, Feb. 9, 1990, at 3A, col. 3; see also *Nightline: The Drug Battle in Colombia Escalates*, at 3 (ABC television broadcast, Dec. 6, 1989) [hereinafter *Nightline: Drug Battle*] (transcript on file at *Vanderbilt Law Review*). As of December 1989, nine traffickers had been extradited pursuant to the order and that "[s]o far the [executive order] plan has failed. . . . To date, we haven't . . . uncovered any of the trophy bass . . . ." *Id.*

223. *Nightline: Drug Battle*, *supra* note 222, at 3.

224. See generally Bassiouni, *supra* note 188.

must choose between extraordinary apprehension or no prosecution at all. Many officials feel that the latter choice is untenable because of the nature of the drug offenses, the high profile identities of many of the offenders such as General Noriega, and the public outcry for drug control.<sup>225</sup>

Recent examples of irregular rendition are the cases of Juan Ramon Matta-Ballesteros<sup>226</sup> and Rene Martin Verdugo-Urquidez.<sup>227</sup> In the past decade, the United States has obtained jurisdiction over at least four drug traffickers by means of irregular rendition.<sup>228</sup> Irregular rendition is generally not considered a violation of international law because it is carried out with the consent of the foreign government.

In June 1989 Assistant Attorney General William Barr issued a legal opinion, reversing a 1980 opinion issued under the Carter Administration, that allows the FBI to abduct alleged criminals in a foreign country without that country's consent.<sup>229</sup> The Administration cites increasing terrorist and drug cartel threats as justification of that policy. The opinion is confidential, but State Department Legal Adviser Abraham Sofaer testified before a congressional committee that the opinion considered only domestic law and that an interagency process exists to ensure that international law and foreign policy issues are addressed before abduction can occur.<sup>230</sup> The United States policy of abduction presents domestic and international law issues relating to the legitimacy of the actions of United States agents in foreign countries. Both irregular rendition and abduction raise domestic and international law questions regarding the jurisdiction of United States courts subsequent to apprehensions outside the treaty process.

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225. Abramovsky & Eagle, *U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction, or Irregular Rendition?*, 57 ORE. L. REV. 51 (1977); see *Nightline: Reaction to Bush's Anti-Drug Speech*, at 13 (ABC television broadcast, Sept. 5, 1989) (transcript on file at *Vanderbilt Law Review*) (statement of Sen. Joseph R. Biden) (stating that the death penalty for kingpins is "a little bit of a red herring").

226. See *United States v. Matta-Ballesteros*, 700 F. Supp. 528 (N.D. Fla. 1988); *Matta-Ballesteros ex rel. Stolar v. Henman*, 697 F. Supp. 1040 (S.D. Ill. 1988).

227. See *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990).

228. See *Verdugo-Urquidez*, 856 F.2d 1214; *United States v. Zabaneh*, 837 F.2d 1249 (5th Cir. 1988); *United States v. Cordero*, 668 F.2d 32 (1st Cir. 1981); *Matta-Ballesteros*, 700 F. Supp. 528.

229. Ostrow, *Baker Vows Full Talks Before FBI Uses Foreign Arrest Powers*, L.A. Times, Oct. 14, 1989, at 6, col. 4.

230. Ostrow, *Ruling on FBI Seizures Defended in Congress*, L.A. Times, Nov. 9, 1989, at A18, col. 1.

### 1. Authority to Abduct

The Administration acknowledges that the proposed nonconsensual kidnapping would violate international law by breaching the territorial boundaries and sovereignty of the asylum state.<sup>231</sup> The domestic law basis for the legal opinion is unclear. Apparently, United States law neither authorizes nor prohibits abduction.<sup>232</sup> Thus, according to *The Paquette Habana* that incorporates international law into the domestic law unless an executive, legislative, or judicial act provides otherwise, the new ruling may even violate United States domestic law.<sup>233</sup>

Undoubtedly the decision to adopt abduction as a Justice Department policy was fueled by the domestic law relating to court jurisdiction after the apprehension is carried out. Domestic law concerning jurisdiction to try an individual, however, should not be confused with authorization to act in a foreign country in contravention of international law.

### 2. The Court Role in Abduction

In all but one instance of irregular rendition or abduction by the United States, domestic courts have followed the doctrine of *male captus, bene dententus*.<sup>234</sup> That is, a court will exercise in personam juris-

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231. See *Law Makers Criticize FBI Kidnap Policy*, Chicago Tribune, Nov. 9, 1989, at 8 (acknowledging that the conduct would violate international law unless done in "self-defense"); see also Ostrow, *supra* note 229, at 6, col. 4 (statement of John Hargrove, executive vice president of American Society of International Law) (stating that "the new Justice Department policy flew in the face of 'pretty fundamental international law'").

232. Cf. *supra* notes 130-31 and accompanying text (discussing comparable ambiguity in provisions of the Mansfield Amendment).

233. 175 U.S. 677, 700 (1900) (stating that "[i]nternational law is part of our law . . . where there is no treaty, and no controlling executive or legislative act or judicial decision . . .").

234. The doctrine of *male captus, bene dententus* has been criticized almost uniformly by legal scholars. See, e.g., Abramovsky & Eagle, *supra* note 225; Evans, *Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice*, 40 BRIT. Y.B. INT'L L. 77 (1964); Garcia-Mora, *Criminal Jurisdiction of a State over Fugitives Brought from a Foreign Country by Force or Fraud: A Comparative Study*, 32 IND. L.J. 427 (1957); Comment, *United States v. Toscanino: An Assault on the Ker-Frisbie Rule*, 12 SAN DIEGO L. REV. 865 (1975). But see Findlay, *Abducting Terrorists Overseas for Trial in the United States: The Issues of International and Domestic Law*, 23 TEX. INT'L L.J. 1 (1988). Professor M. Cherif Bassiouni, a leading expert on extradition, has pointed out that the court decisions suggest that the United States courts first decide on the guilt of the offender and then find a way to avoid the legal rule that would divest the courts of jurisdiction. Bassiouni states that

for all practical purposes, the judiciary has largely abandoned any concerns for the integrity of the judicial process in the face of practical exigencies which facilitate the work of this government in its prosecutorial function, as well as that of other governments' law enforcement agencies working together to apprehend wanted offenders or alleged offenders. The reading of decisions gives the inescapable feeling that courts reach a judgment on the criminality of the accused and then decide as to how to avoid applying a legal rule that would negate criminal jurisdiction and thus allow the relator to go free. The resulting signals to U.S.

diction over a defendant regardless of the means through which the defendant was brought to trial.<sup>235</sup> In the United States this rule is commonly known as the *Ker-Frisbie* doctrine.<sup>236</sup> In 1886 the United States Supreme Court held in *Ker v. Illinois*<sup>237</sup> that the abduction of an individual, despite its violation of international law, does not deprive the court of jurisdiction over the individual. Approximately seventy-five years later in *Frisbie v. Collins*,<sup>238</sup> the Supreme Court permitted abductions from one state to another within the United States. This doctrine has been unsuccessfully challenged in many subsequent drug related cases.<sup>239</sup>

In only one case, *United States v. Toscanino*,<sup>240</sup> has a court held that forcible abduction requires a court to divest itself of jurisdiction. In *Toscanino* the Second Circuit reasoned that the Supreme Court's expansion of a defendant's due process rights after the *Ker* decision required it to refuse jurisdiction.<sup>241</sup> The court stated that it could also compel this result based on its general supervisory powers. Finally, the court held that the United States action violated the United Nations

law enforcement officers are encouraging and lead to more of that practice.

1 M. BASSIUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW & PRACTICE 212 (1987) (footnote omitted).

235. Bassiuni, *supra* note 188, at 27, 45.

236. See Abramovsky & Eagle, *supra* note 225, at 55-56 (discussing *Ker-Frisbie* doctrine).

237. 119 U.S. 436 (1886).

238. 342 U.S. 519 (1952).

239. See, e.g., *Verdugo-Urquidez*, 856 F.2d 1214; *United States v. Cordero*, 668 F.2d 32 (1st Cir. 1981) (holding that poor treatment afforded defendants in Panamanian jail did not divest court of jurisdiction, although arrest was made at the request of United States agents); *United States v. Lopez*, 542 F.2d 283 (5th Cir. 1976) (holding that abduction at the instigation of the United States but without direct United States involvement in torture is insufficient to divest court of jurisdiction); *United States v. Lara*, 539 F.2d 495 (5th Cir. 1976) (finding no *Toscanino* violation where defendant failed to show direct United States involvement in torture); *Lujan*, 510 F.2d at 62 (alleging that Lujan was lured from Argentina to Bolivia where he was taken into custody by Bolivian police who were not acting on orders of Bolivian authorities but as paid agents of the United States and held incommunicado for four days prior to his transport to the United States); *Matta-Ballesteros*, 700 F. Supp. at 528.

240. 500 F.2d 267 (2d Cir. 1974). *Toscanino* alleged that

[he] was forced to walk up and down a hallway for seven or eight hours at a time. When he could no longer stand he was kicked and beaten but all in a manner contrived to punish without scarring. When he would not answer, his fingers were pinched with metal pliers. Alcohol was flushed into his eyes and nose and other fluids . . . were forced up his anal passage. Incredibly, these agents of the United States government attached electrodes to *Toscanino's* earlobes, toes, and genitals. Jarring jolts of electricity were shot throughout his body, rendering him unconsc[io]us for indeterminate periods of time but again leaving no physical scars. . . . [Following this period of torture, *Toscanino* alleged that] he was drugged by Brazilian-American agents and placed on Pan American Flight #202 destined for the waiting arms of the United States government.

*Id.* at 270. On remand, the district court held that *Toscanino* had failed to prove his allegations. 398 F. Supp. 916 (E.D.N.Y. 1975). The court did not divest itself of jurisdiction. *Id.* at 916.

241. 500 F.2d at 275.



Charter and the Organization of American States Charter.<sup>242</sup>

The continuing viability of the *Ker-Frisbie* doctrine was preserved, however, in *United States ex rel. Lujan v. Gengler*,<sup>243</sup> a Second Circuit opinion handed down several months after *Toscanino*. The court limited its due process holding in *Toscanino* to cases in which the protested conduct "shock[s] the conscience."<sup>244</sup> In addition, the Second Circuit held that absent an official protest by the asylum state, the United States would not be deemed to have violated the charters of international law.<sup>245</sup>

Critics of this doctrine have argued not only that abduction violates due process rights, but that it also violates international human rights.<sup>246</sup> Their argument is based on the premise that the rights of individuals in international law have been greatly expanded since the *Ker* and *Frisbie* holdings. Recently, individuals have been regarded as proper subjects of international law. Arguments advanced against the recognition of international human rights are that the international human rights laws are not legally binding; the extradition process protects state, not individual rights; none of the international human rights instruments expressly prohibit extraterritorial abductions; and the instruments provide no remedy against a state regardless of violations.<sup>247</sup>

The proponents of abduction and irregular rendition have pointed out that a deterrent to abduction is allowing punishment of the abductors. United States courts have suggested that an abductee might be allowed to file a tort action for violation of internationally recognized human rights.<sup>248</sup> More recently, in the *Verdugo* case, the court allowed a civil damages suit against the United States Marshals Service.<sup>249</sup>

242. *Id.* at 277.

243. 510 F.2d 62 (2d Cir. 1975), *cert. denied*, 421 U.S. 1001 (1975).

244. 510 F.2d at 65-66 (quoting *Rochin v. California*, 342 U.S. 165 (1952)).

245. *Id.* at 67.

246. See Bassiouni, *supra* note 188, at 51-59 (discussing the relevant treaties and arguments expressed both for and against this proposition).

247. See Findlay, *supra* note 234, at 33-44 (arguing against the proposition that abduction violates the international human rights of the accused).

248. See *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975) (stating that "[t]he illegal seizure, removal and detention of an alien against his will in a foreign country would appear to be a tort . . . in violation of the 'law of nations'") (question regarding application of the Alien Tort Statute, 28 U.S.C. § 1350, not reached due to inadequate briefing); *Jaffe v. Boyles*, 616 F. Supp. 1371, 1379 (D.C.N.Y. 1985) (quoting *Nguyen Da Yen v. Kissinger* and stating that the abduction of the plaintiff in violation of an extradition treaty "may well amount to a tort in violation of the law of nations"); see also *Filartiga v. Pena-Ira-la*, 630 F.2d 876, 888 (2d Cir. 1980) (holding that plaintiff stated a cause of action under 28 U.S.C. § 1350 (1988) where plaintiff's brother was tortured to death in Paraguay by Paraguayan police).

249. See, e.g., *United Press Int'l (BC Cycle)*, Sept. 1, 1987 (reporting that a judge dismissed a \$110 million civil rights law suit filed by Rene Martin Verdugo because allegations of civil rights violations were too vague, but gave Verdugo 30 days to file a more specific complaint); Schacter,

Courts have even granted extradition of the abductors to the offended state.<sup>250</sup> These protections are, however, illusory if the abductors' actions are characterized as "acts of state."<sup>251</sup> Generally, states' remedies are more limited.<sup>252</sup> A state often makes a self-interested compromise and decides not to protest the abduction.

### 3. Diplomatic Dealing for Individuals

Two recent cases of irregular rendition illustrate the different types of extraordinary arrangements that may be made by the United States. In April 1988 Juan Ramon Matta-Ballesteros was arrested by Honduran police and flown to the Dominican Republic. From there, he was placed on a plane to New York by Dominican officials. Once aboard the plane, Matta was arrested by the United States Marshals Service.<sup>253</sup> Matta was not extraditable under the extradition treaty between Honduras and the United States because the Honduran Constitution prohibits extradition of nationals.<sup>254</sup> Yet, the Honduran government appears to have approached the United States government repeatedly with concerns about Matta.<sup>255</sup> Whether the Hondurans initiated the apprehension is unclear, but nevertheless, Honduran officials would not publicly have admitted to this action.

For two days after Matta's arrest, Honduran nationals protested, creating social and political chaos.<sup>256</sup> These protesters threatened the Honduran President and even bombed the American Consulate in Honduras. Despite these riots, Honduras did not protest the apprehension.

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*Arrests Abroad*, L.A. Times, July 17, 1986, § 1, at 1, col. 1 (reporting the filing of a \$15 million civil suit against United States and Australian authorities by Thomas Roessler, who was abducted along with his four-year-old daughter by Mexican officers and "kicked" across the border to the United States). Moreover, in *Ker v. Illinois*, 119 U.S. 436 (1886), the court reasoned that the "party himself would probably not be without redress, for he could sue . . . in an action of trespass and false imprisonment, and the facts set out in the plea would without a doubt sustain the action." *Id.* at 444.

250. See *Vaccaro v. Collier*, 38 F.2d 862 (D. Md. 1930), *aff'd in part, revised in part sub nom. Collier v. Vaccaro*, 51 F.2d 17 (4th Cir. 1931); Bernholz, Bernholz & Herman, *supra* note 192, at 379 (discussing the U.S. extradition of an abductor to Canada to stand trial on kidnapping charges); see also *Ker*, 119 U.S. at 444 (suggesting that the extradition of the kidnapers is appropriate).

251. See Evans, *supra* note 234 (quoting from Memorandum, Assistant Secretary of State Rogers, to Legal Adviser Hackworth, Dec. 31, 1931, D.S. MS File No. 211.42 Vaccaro, Sarro/57).

252. See Abramovsky & Eagle, *supra* note 225, at 78-79. These remedies include an expression of apology or monetary payment. *Id.*

253. Reuters, *Hondurans Riot at U.S. Offices*, N.Y. Times, Apr. 8, 1988, at A1, col. 1.

254. *Honduran Leader Acts to Put Down Anti-U.S. Protests*, N.Y. Times, Apr. 9, 1988, at A1, col. 6.

255. *U.S. Foreign Policy and International Narcotics Control—Part II: Hearing Before the Select Comm. on Narcotics Abuse and Control House of Rep.*, 100th Cong., 2d Sess. 28 (1988).

256. Reuters, *supra* note 253, at A1, col. 1.

In most documented cases of irregular rendition, the foreign governments have not made protests to the United States.<sup>257</sup> Analysts cite common interest and intimidation as reasons for foreign governments' silence.<sup>258</sup> These analysts believe that Third World dependence on United States trade, security, or economic aid renders these countries subservient to United States demands.<sup>259</sup>

On the other hand, Mexico protested the 1986 apprehension of Rene Martin Verdugo-Urquidez.<sup>260</sup> Verdugo was abducted in Mexico by six Mexicans, allegedly police officers, who surrendered him to the United States Marshals Service at the United States-Mexico border. Whether this apprehension was an irregular apprehension or abduction is questionable.<sup>261</sup> The United States induced the six individuals to abduct Verdugo by paying them money for his delivery.<sup>262</sup> Despite the protest, the United States did not return Verdugo to Mexico.

In at least one other case, the United States has paid foreign officials to deliver an accused.<sup>263</sup> At times, the United States has also been able to negotiate a settlement after the apprehension, thus preventing the offended country from protesting the action. For example, the United States has granted extradition of the abductors to the offended state.<sup>264</sup>

The United States has not yet attempted an abduction pursuant to the Justice Department authorization. Nevertheless, foreign governments have already contacted the United States to express dissatisfaction with the policy.<sup>265</sup>

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257. Schacter, *Arrests Abroad*, L.A. Times, July 17, 1986, § 1, at 1, col. 1.

258. *Id.*

259. *Id.*

260. Murphy, *Mexico Hits Arrest in Killing of U.S. Drug Agent*, L.A. Times, June 22, 1988, § 2, at 3, col. 1. The Mexican government formally protested the arrest of Verdugo under both Mexican and international law. This protest was not made until almost two and one-half years after the abduction. *Id.*

261. Schacter, *Arrests Abroad*, L.A. Times, July 17, 1986, § 1, at 1, col. 1.

262. The six individuals were paid \$32,000. After the apprehension, the United States permitted them to emigrate to the U.S. because of threats on their lives. *Id.* But see Brinkley, *U.S.-Mexican Border Efforts Hampered by Politics and Inertia*, N.Y. Times, June 27, 1986, at A14, col. 1 (reporting that the Mexicans were paid about \$50,000); Schacter, *Verdugo Trial Tactic Seen As Subterfuge*, L.A. Times, Feb. 25, 1986, § 1, at 1, col. 5 (reporting that Verdugo's attorneys claim the Mexicans were paid \$100,000). Mexican authorities issued arrest warrants for five of the six individuals on kidnapping and false imprisonment charges. See Schacter, *Arrests Abroad*, L.A. Times, July 17, 1986, § 1, at 1, col. 1.

263. See *Lujan*, 510 F.2d at 63.

264. See *supra* note 250 and accompanying text.

265. Foreign officials have already contacted the United States expressing concern that the United States would "mount up like the Lone Ranger." Ostrow, *supra* note 230, at A18, col. 2 (statement of Abraham Sofaer, State Dep't Legal Adviser).

#### D. Mutual Legal Assistance Treaties

Mutual legal assistance treaties (MLATs) are bilateral or multilateral treaties that obligate the party states to provide access to evidence and to otherwise cooperate in criminal prosecutions. The first United States MLAT was not created until 1977.<sup>266</sup> The traditional method of obtaining evidence and cooperation from a foreign country in a criminal prosecution has been letters rogatory, which are mere requests that create no obligation to cooperate and which have been generally recognized as inefficient and ineffective.<sup>267</sup> MLATs, unlike letters rogatory, may also be used to obtain evidence during investigations. The United States has entered into MLATs with twelve countries. Four of these treaties have been ratified and are in force<sup>268</sup> and two have been ratified but are not in force.<sup>269</sup> Six are pending before the United States Senate.<sup>270</sup>

##### 1. Obstacles for Future MLATs

Both foreign and domestic law create obstacles for MLATs. Despite the obvious necessity of MLATs for successful drug prosecutions, six MLATs have been pending before the United States Senate for over two years. One possible reason for this delay is concern over whether the MLATs violate the due process and compulsory process rights of defendants by denying them the ability to use the MLAT process to obtain evidence for their defense.

In *Washington v. Texas*<sup>271</sup> the United States Supreme Court struck down as unconstitutional a statute barring defendants from introducing accomplice testimony but permitting the state to use such testimony. The Court held that the right to present witnesses to establish a defense is a fundamental element of due process. Moreover, in *United States v. Sindona*<sup>272</sup> the Second Circuit held that the case would be

266. AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, 109 REPORT TO THE HOUSE OF DELEGATES 3 (1989) [hereinafter A.B.A. REP. No. 109] (copy on file at *Vanderbilt Law Review*); see Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302 [hereinafter Swiss Treaty].

267. A.B.A. REP. No. 109, *supra* note 266, at 6-7.

268. Treaty on Mutual Assistance in Criminal Matters, Nov. 9, 1982, United States-Italy, S. TREATY Doc. No. 25, 98th Cong., 2d Sess. (1984); Treaty on Judicial Assistance: Criminal Investigations, June 12, 1981, United States-Netherlands, T.I.A.S. No. 10,734; Treaty on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, United States-Turkey, 32 U.S.T. 3111, T.I.A.S. No. 9891; Swiss Treaty, *supra* note 266.

269. These are the Colombian Treaty and Moroccan Treaty. See A.B.A. REP. No. 109, *supra* note 266, at 4, 5 & n.4.

270. These are the Canadian Treaty, Thai Treaty, Caymanian Treaty, Bahamian Treaty, Mexican Treaty, and Belgian Treaty. See A.B.A. REP. No. 109, *supra* note 266, at 5 & n.5.

271. 388 U.S. 14 (1966).

272. 636 F.2d 792 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981).

dismissed unless a request by the defendant under the Swiss MLAT was fulfilled. The American Bar Association, among others, believes that the United States must provide a defendant with the same opportunity to obtain evidence as the government.<sup>273</sup>

Supporters of the MLATs argue that a defendant is not denied access to foreign evidence because a defendant may use the letters rogatory process to obtain information. In addition, they point out that under international treaty law, individuals are not guaranteed rights unless so stated in the treaty. The ABA challenge, however, is based on United States domestic law, and the letters rogatory process has been recognized by the government itself as an illusory guarantee. The Justice Department argues that Congress should ratify the treaties because the constitutional issue is one for the courts.<sup>274</sup>

Despite strong evidence that the MLATs violate the fifth, sixth, and fourteenth amendments, some members of Congress have predicted that the MLATs will be ratified without granting defendants equal discovery powers.<sup>275</sup> Congress and the Justice Department oppose granting defendants access to the MLAT process because foreign governments are reluctant to enter into MLATs under such circumstances.<sup>276</sup> In addition, both Congress and the Justice Department remain outraged that Michael Abbell, a former Justice Department official who now represents Colombia's Cali cartel, lobbied both the ABA and the Senate Foreign Relations Committee in favor of the amendment granting defendants equal access.<sup>277</sup>

Yet another criticism of the MLATs has been raised by Senator Helms, an avid supporter of drug control measures. He has delayed ratification after expressing worries that the Mexican and Bahamian governments are too corrupt to have access to United States law enforcement information.<sup>278</sup> Congress should give serious consideration to this problem. The United States should not enter into MLATs without a corresponding willingness to provide assistance.

## 2. Court Subpoenas As Diplomatic Leverage

Foreign countries have opposed MLATs because of legal and nonlegal considerations. The most significant legal obstacle is foreign bank

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273. See A.B.A. REP. NO. 109, *supra* note 266, at 7-8.

274. Strasser, *Crime Has No Borders, So Countries Close Ranks*, NAT'L L.J., Oct. 30, 1989, at 1, 40.

275. *Id.* at 40, col. 1.

276. *Id.* at 40, col. 4.

277. See 135 CONG. REC. H6553-54 (daily ed. Oct. 3, 1989) (statement of Rep. Frank R. Wolf).

278. Strasser, *supra* note 274, at 1, col. 1, 40.

secrecy law. Many countries have legislation prohibiting bank officials from disclosing financial information about a bank customer. These laws are based on a strong belief in financial privacy.<sup>279</sup> MLATs have been an effective means of waiving a country's bank secrecy laws but those laws attract a tremendous number of investors to foreign banks. Foreign bank officials not only fear prosecution, but are concerned about large losses of business if they are forced to make financial disclosures. Thus, in negotiating MLATs, the United States must pacify the foreign country's sense of fiscal privacy and concerns about loan business.

Originally, the United States bargained for MLATs by agreeing not to request information in tax evasion cases.<sup>280</sup> But the main diplomatic tool for inducing recent MLATs, such as those with Canada, the United Kingdom, and the Bahamas, has been the threat of federal subpoenas to obtain foreign bank records. In 1975 a United States District Court compelled the New York branch of a Swiss bank to cooperate with Justice Department officials attempting to gather financial records by threatening to freeze the assets of the New York branch.<sup>281</sup> Whether this pressure led to the conclusion of the Swiss treaty is uncertain.

Despite conclusion of the treaty, however, United States officials often have attempted to avoid the treaty process because defendants challenge the evidence gathering process in foreign courts, forestalling litigation in the United States.<sup>282</sup> In 1983 United States officials circumvented the treaty process by obtaining a federal subpoena for documents of a Swiss corporation with an American subsidiary.<sup>283</sup> The Swiss protested this action as a sovereignty violation by calling a United Nations news conference and filing an amicus curiae brief on the defendant's behalf.<sup>284</sup>

Moreover, in a 1982 case, a federal grand jury subpoenaed bank records of a Bahamian branch of a Canadian bank for use in a tax eva-

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279. See Ellis & Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis*, 19 INT'L LAW. 189, 197 (1985).

280. *Id.* at 197 & n.48.

281. See SEC v. Am. Inst. Counselors, Inc., [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,388 (D.D.C. 1975); see also Ellis & Pisani, *supra* note 279, at 219.

282. See Ellis & Pisani, *supra* note 279, at 219.

283. See Marc Rich & Co., A.G. v. United States, 707 F.2d 663 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983); see also *War Breaks Out Over A Rich Man's Tax Return*, 288 ECONOMIST 83 (1983). For other cases in which courts have granted subpoenas against foreign companies with American subsidiaries, see *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983), and *United States v. Field*, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976). *But see* *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983) (denying enforcement of summons seeking bank records located in Greece and concerning Greek nationals).

284. Ellis & Pisani, *supra* note 279, at 219 & n.166.

sion and narcotics investigation, although compliance with the subpoena would violate the Bahamian bank secrecy law.<sup>285</sup> Canada, the Cayman Islands, and the United Kingdom filed amicus curiae briefs on the defendant's behalf that were critical of the United States' overzealous pursuit of foreign evidence.<sup>286</sup>

Arguably these court orders do not violate international law.<sup>287</sup> Regardless of whether the treaties violate international law, Congress has authorized deviation from international standards in the Bank Secrecy Act of 1982.<sup>288</sup> This Act authorizes the United States government to move against drug generated assets. Thus, the court orders are consistent with domestic law. The Bank Secrecy Act is, however, indifferent to foreign bank secrecy law and the precarious position of the holder of information who may be penalized by the foreign country for disclosing the information and sanctioned by the United States for not disclosing the information.

This judicial trend toward enforcement of subpoenas against foreign entities regardless of conflicts of law was undoubtedly used as diplomatic leverage in recent MLAT negotiations. Evidence that this concern moved foreign governments to protect their sovereignty through MLATs is found in the treaty concluded with the United Kingdom concerning the Cayman Islands; in return for providing access to Cayman Islands bank accounts to the United States, Great Britain secured a promise that the United States would not attempt to enforce federal subpoenas for the bank records.<sup>289</sup> The United States has also motivated foreign governments to cooperate under already existing MLATs by allowing the foreign country to freeze and retain the assets of drug offenders as a quid pro quo for their cooperation.<sup>290</sup>

## VII. THE MEANS AND END OF SUPPLY-SIDE CONTROL

### A. Drug Diplomacy

The diplomatic war on drugs has been marginally successful in implementing United States programs in foreign countries. The United

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285. *Bank of Nova Scotia*, 691 F.2d at 1384.

286. Paikin, *supra* note 55, at 269 n.152.

287. *See id.* at 246 (pointing out that U.S. courts issuing subpoenas have at times professed to follow international law, but noting that these arguments are not convincing); *see also* *Blackmer v. United States*, 284 U.S. 421, 439 (1932) (stating that no interest of the foreign country is prejudiced by serving a subpoena in its territory). The *Blackmer* court focused on the fact that serving subpoenas was an innocuous act. *Id.* *But see* *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1311 (D.C. Cir. 1980) (discussing the coercive nature of serving a foreign citizen abroad by registered mail).

288. 31 U.S.C. §§ 5311-5324 (1982 & Supp. 1987).

289. Ellis & Pisani, *supra* note 279, at 190 n.3.

290. Paikan, *supra* note 55, at 269 n.146.

States now boasts twenty-three crop eradication programs, six new MLATs, different levels of military use throughout South America, and imprisonment of an unprecedented number of foreign nationals. While some of these achievements have no doubt been in the best interests of both parties, the United States has often resorted to big stick diplomacy when other nations failed to cooperate. Congress has facilitated that policy by providing the executive branch with diplomatic tools such as aid leveraging, trade sanctions, and other fines.

Unlike the diplomatic achievements, the negative effects of big stick diplomacy are not quantifiable and are perhaps more insidious. Both the Bush Administration and foreign governments have consistently maintained that big stick diplomacy is counterproductive. The pressure from "Big Brother North America" has fueled anti-American sentiment and driven the nationals of many South American countries to support the drug traffickers.

In addition, nationals as well as drug traffickers have resorted to violence to protect their countries' interests. The link between the drug traffickers and the communist insurgency forces was forged in response to United States programs, such as extradition, in Colombia. In many instances, United States pressure has worked to destabilize the governments of countries that the United States purports to protect.<sup>291</sup>

Moreover, the aid leveraging system and the programs themselves disregard the economic realities of the drug war. First, the ominous presence of United States law enforcement keeps drug prices high, thereby generating greater incentives for drug traffickers. Second, because of the enormous profits involved in drug trafficking, the United States programs only result in displacement of the traffickers to other South American countries. The United States does not have enough economic leverage to maintain programs in all of these countries simultaneously. Third, depressed economies have forced the South American nationals into the drug trade to support their families. Aid cuts from the United States further depress these economies.

The big stick methods also ignore the political underpinnings of the reluctance to cooperate in American programs. Furthermore, these methods are often arbitrarily and inconsistently applied. Many United States actions, such as the stringent border checks on Colombians after Ochoa's release from prison, appear childish and irrational. In pursuing its goals, the United States has demonstrated a growing willingness to

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291. A February 1990 poll shows that 67% of Colombian citizens do not consider the United States a "real friend." Kelley, *Drug War Splits U.S., Colombia*, USA Today, Feb. 9, 1990, at 1A, col. 4. Moreover, 60% of Colombians believe that they can deal with their country's drug problems without United States assistance. *Id.*



act in disregard of other nations' sovereignty.

South American nations are increasingly pointing to the United States demand as the cause of the problem. One academician has proposed a decertification system that Latin American countries could use against the United States.<sup>292</sup> This proposal sheds light on the foreign perception of the United States big stick policy. It asks United States citizens to consider their reaction if the other countries of the world decided to ban cigarette and alcohol production and then attempted to coerce the United States to enforce that prohibition against its domes-

292. Professor Richard Craig states that foreign countries should: opt for . . . a "Quid Pro Quo/Practice What You Preach/Put Up or Shut Up" course couched in the form of a "Latin American Decertification Agenda." Said agenda is premised on the following introductory clause: "We the undersigned Latin American nations propose to decertify the United States if it does not 'cooperate fully' with said nations, or take adequate steps on its own with regard to preventing drug production, drug trafficking, and drug-related money laundering by:"

1. Eradicating, in percentage terms, as much or more of its illicit drug crops as we do.
2. Utilizing in its eradication program on both private and public lands the herbicides "Paraquat" and "Spike."
3. Amending even further its posse comitatus statutes so as to involve its military to an extent equalling or surpassing the involvement of our own armed forces.
4. Ratifying, as several of us have, the Mutual Legal Assistance Treaties (MLAT) which it pushed us so hard to enact.
5. Agreeing to extradite "on call" its own nationals.
6. Ceasing to cooperate with notoriously narco-tainted reactionary regimes.
7. Cleaning up its own narco-corrupted judicial, political, and law enforcement ranks.
8. Ceasing to coddle its drug abusers, in particular its "star" abusers. Set an example for us—send Stanley Wilson and Dexter Manley to prison, not to the Superbowl!
9. Equaling or surpassing our own sacrifices in terms of comparative budgetary allocations and lives lost in antidrug campaigns.
10. Controlling far more strictly, as your own recently-enacted statute requires, the sale and shipment of precursor chemicals. Do not your own analysts contend that 80-90% of these chemicals so indispensable to the production of cocaine hydrochloride are manufactured by American firms?
11. Curtailing the sale of such sporting weapons as the AK47, many of which end up in the hands of our traficantes and guerrillas. After all, how many rounds does it take to bring down a rampaging doe?
12. Coordinating its antidrug effort to the extent that it ends the notorious interagency turf battles and is thus able to speak with one voice.
13. Permitting our equivalent of its DEA to operate in the United States with the same freedom of movement that we grant its agents.
14. Launching a truly concerted campaign against money laundering, even if it entails long-term imprisonment of prominent financial figures.
15. Attacking with true vigor and far more budgetary dollars the true fount of its and our drug dilemma: America's seemingly insatiable demand for mind altering substances.
16. Ending its unilateral policy tendencies in regards to drug control.
17. Admitting that as bad as its drug problem may be, ours is far worse. Political rhetoric aside, drugs really do not constitute a threat to United States national security. For us, in Latin America, they most certainly do.

Craig, *Narcotrafico: Regional Impacts and the Quest for Solutions*, in *POLICY OPTIONS*, *supra* note 4, at 109, 112-13.

tic producers. Even further, the proposal encourages Americans to consider their reaction if the United States failed to cooperate and a foreign government sent agents to the United States to kidnap American citizens. The present drug control policy may force the United States to use domestic programs such as crop eradication, military enforcement, or extradition, including acquiescence in irregular rendition or abduction of United States citizens on demand, as a quid pro quo to foreign nations.

### B. *The Bilateral Programs*

Just as the drug issue is shaping American foreign policy, it is shaping international and domestic law. By implementing eradication, military, and prosecution programs in foreign countries, the United States has often acted in disregard of state sovereignty and international law. Human rights are being sacrificed as well in pursuit of drug control. Zealous pursuit and implementation of United States drug programs threaten to undermine long-term bilateral and multilateral cooperation not only on drug issues but in other areas as well.

United States domestic law has also been affected by efforts to conform it to the extraterritorial programs. For example, the Posse Comitatus Act, representing a strong American tradition, has been amended several times in the past decade. Military presence in domestic drug control activities is more frequent.<sup>293</sup> Americans are now subject to being fired on by Navy ships and might soon face the thought of being shot out of the sky over American borders for failure to respond to radio communication. In addition, the potential for chemical crop eradication in the United States will increase as Americans increasingly grow their own supplies. Moreover, United States courts will soon be faced with the problem of protecting one set of rights for foreigners and another for American citizens.<sup>294</sup>

### C. *The End of Supply Control*

These results would be bad enough if successful, but they appear even more intolerable in light of increasing drug supplies. Displacement is a prime problem for supply-side control. The United States is finan-

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293. See *United States v. Bacon*, 851 F.2d 1312 (11th Cir. 1988) (holding that investigation by military personnel for assisting agencies does not constitute posse comitatus if the acts did not subject citizens to military power); *United States v. Gerena*, 649 F. Supp. 1179 (D. Conn. 1986) (holding that escort by U.S. Marshals and military personnel to New York did not violate the Posse Comitatus Act because the military's involvement was passive).

294. See, e.g., *Verdugo-Urquidez*, 856 F.2d 1214 (holding that the fourth amendment does not apply to search and seizure by United States agents of property owned by nonresident aliens and located in a foreign country).

cially incapable of carrying out a worldwide system of eradication, military use, and prosecution. Also, many countries such as Iran will not accept United States assistance regardless of coercion.<sup>295</sup>

Aside from the failure to control supplies is the uncertain effect of successful supply-side control in the United States.<sup>296</sup> Effective control of supplies may work to increase crime rates and black markets within the United States. For example, successful marijuana eradication in foreign countries has resulted in increased marijuana production to the extent that marijuana is now a leading cash crop in the United States.<sup>297</sup> In addition, synthetic drugs, such as the new designer drug "ice," are manufactured within the United States.

The conventional supply-side policy must be re-examined in light of its diplomatic repercussions, domestic and international legal consequences, and ineffectiveness. While supply-side control may be less expensive and more politically palatable, it has not and will not solve the problems that have moved the United States public.

### VIII. ALTERNATIVE POLICY OPTIONS

An alternative United States drug control policy must be premised on three assumptions: demand-side control should be the cornerstone; supply-side control should be accomplished by restructuring the economies of drug producing nations; and, more resources should be allocated to drug control.<sup>298</sup>

Admittedly, demand-side law enforcement is often counterproductive in the same ways as supply-side policy. For example, domestic law enforcement has created a skyrocketing prison population that places a great burden on the court system. Many prisons have been forced to let criminals go free or face sanctions because they are operating well over their maximum capacity. In addition, civil liberties must necessarily be diminished in investigating crimes that are easily concealable and that have no immediate victims.

The United States demand-side policy should place much more emphasis on prevention, treatment, and education. At present, United States policy makes only a rhetorical commitment to these goals. The

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295. See, e.g., Wroblewski, *supra* note 49, at 51.

296. A 1975 White House Task Force studied the effects of the early 1970s heroin shortage and found mixed results. *The White Paper on Drug Abuse* found that supply reduction at best may reduce, but not eliminate, drug use and abuse. A. TREBACH, *supra* note 6, at 175. The shortage did not reduce crime rates in American cities. *Id.* The task force also found that supply reduction may foster black markets, corruption of public officials, and increased crime rates as users must compete for scarce and expensive drugs. *Id.* The report concluded that no amount of supply reduction would solve the U.S. problems. *Id.*

297. See *supra* note 71.

298. Craig, *supra* note 292, at 113.

United States government needs to view the problem from a macroeconomic perspective and address the circumstances that underlie growing drug use, such as poverty and inner city neglect. These crises spawn much of the drug related violence in American cities.

Supply-side policy should also focus on economic realities. The United States, in coordination with other industrialized nations, must help restructure the economies of the South American countries to provide alternative employment and income opportunities for foreign nationals. Big stick diplomacy should be replaced with an economic reward system.

Tackling both domestic and international economic problems will necessarily involve a greater commitment of funds. These funds will, however, produce long-term results that the present programs will not.

#### IX. CONCLUSION

At present, the United States policy is result-oriented and sacrifices many traditional American values. The United States' efforts to justify inappropriate means of controlling drugs by pointing to the great need for drug control should be rejected. This assertion is especially true in light of the disappointing results and unintended reverberations of the present law enforcement programs. During the 1990s the United States must foster more cooperative relations with drug producing countries by refraining from unilateral initiatives. Moreover, supply merely responds to demand so that the United States must focus more resources on demand-side control.

The United States government must break out of the cycle of escalating present programs that seem to be failing. Their low level of success and high costs demand a policy reassessment. In part, resistance to a change in drug policy is driven by fears that such a change will signal defeat of the United States by the drug traffickers.<sup>299</sup> A drug control policy should not be fashioned by fears, public opinion, the media, or politics. Drug control policy for the 1990s should be shaped by reference to historical lessons and realistic views of the present.

*Sandi R. Murphy\**

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299. See, e.g., *Nightline: Drug Battle*, *supra* note 222, at 7 (statement of Asst. Sec. of State Melvyn Levitsky) (stating that giving up is losing in a worse way than fighting and losing).

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