Benitez v. Garcia: The Ninth Circuit Renders Receipt of Assurances Unnecessary to Bind the United States to Conditions of Extradition

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Benitez v. Garcia: The Ninth Circuit Renders Receipt of Assurances Unnecessary to Bind the United States to Conditions of Extradition

Introduction

The United States currently has bilateral extradition treaties in force with 109 countries.¹ These treaties define the terms under which countries will extradite a person to the United States and vice versa. Most of these treaties contain provisions by which a foreign country can request sentencing assurances from the country seeking extradition. Typically, such assurances are aimed at protecting the extradited party from a death sentence.² If the country seeking extradition provides the assurance sought, then normally the foreign country will extradite the party; however, if the country seeking extradition refuses to provide the assurance, then the foreign country can choose not to extradite the party. The United States has understood this process of seeking and receiving satisfactory assurances to be a bilateral one,³ and this is how the courts in the United States, until the Ninth Circuit panel’s decision on February 8, 2007 in Benitez v. Garcia,⁴ have treated it.⁵

¹ See 18 U.S.C.A. §3181, Historical Note.
² The United States-Venezuela extradition treaty is unusual in that it also allows for requesting assurances against life imprisonment. The Extradition Treaty, and additional article, between the Government of the United States of America and the Bolivarian Republic of Venezuela, signed on January 19 and 21, 1922, 43 Stat. 1698; TS 675; 12 Bevans 1128; 49 LNTS 435.
³ The United States has long recognized the practical necessity of providing assurances in certain circumstances even when not specified in the treaty; for instance, when dealing with Colombia or Costa Rica, the United States frequently provides assurances against life imprisonment, even though those extradition treaties only provide for assurances in cases involving the death penalty. The practice of providing assurances in situations not covered in the treaty itself is well established in international extradition practice. For example, the Supreme Court observed, “all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.” The Schooner Exchange v. M’Faddon and Others, 7 Cranch, 116, 136 (1812). Thus, in the United States, “[t]he Executive Branch has discretion in surrendering a relator found extraditable, the conditions of his surrender, and subsequent treatment.” M. Bassiouni, International Extradition, United States Law and Practice, at 602, citing Fong Yue Ting v. United States, 149 U.S. 698 (1893); see also Terlininden v. Ames, 184 U.S. 270 (1902). Despite this recognition, the process of requesting and providing assurances is a bilateral one.
⁴ 476 F.3d 676 (9th Cir. 2007).
In its February 8, 2007 decision in *Benitez v. Garcia*, a panel of the United States Court of Appeals for the Ninth Circuit issued an opinion effectively binding the United States to unilateral conditions of extradition, despite the fact that under extradition treaties it is the prerogative of the requesting country to grant or refuse to grant assurances. In effect, the Ninth Circuit panel’s decision nullifies the need for foreign governments to seek and receive assurances from the United States prior to extradition. The holding interferes with the government’s ability to negotiate and enforce extradition treaties.

Assurances are given on a case by case basis. Aside from a handful of cases in the Second Circuit, there is very little case law addressing them. Of the cases which have addressed them, none has called for the enforcement of unilateral conditions asserted outside of the “request and receipt of satisfactory assurances” process. With no binding precedent directly on point, the Ninth Circuit panel in *Benitez* called upon the related rule of specialty, as interpreted by the Supreme Court in *United States v. Rauscher* and *Johnson v. Browne*, for guidance. Although the rule of specialty is not directly on point with respect to assurances, the panel found adequate support to hold that, even where a country forgoes an opportunity to seek assurances under an extradition treaty with the United States, the United States is bound by any conditions that might have been reasonably expected by the extraditing country.

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5 *See infra* pages 17-26.
6 476 F.3d 676 (9th Cir. 2007).
7 *Id.*
8 119 U.S. 407 (1886).
9 205 U.S. 309 (1907).
10 The Ninth Circuit defined reasonably expected as any condition that would have been available under the treaty.
The Ninth Circuit panel’s opinion undermines the purpose of extradition treaties as well as the government’s ability to negotiate and enforce them. The opinion opens the door for countries to avoid the process of requesting assurances in situations where they believe the assurances may not be granted. Instead, those countries could simply refer to expectations in their extradition orders. Based on the Ninth Circuit panel’s decision, if those expectations were possible under the respective treaty, the United States would be bound by them. Thus, the opinion renders the assurances provisions of extradition treaties completely ineffective and gives rise to causes of actions for any number of defendants from any number of countries whose expectations may not be supported by assurances granted by the United States.

Relevant Facts & Procedural History

Cristobal Rodriguez Benitez, a Mexican citizen, shot and killed Isidro Valle in San Diego, California on September 13, 1993 after a fight between Valle and Benitez’ brother.11 Following the shooting, Benitez and his brother fled. Four years later, Benitez was found and arrested in Caracas, Venezuela.12 The United States requested extradition according to the United States-Venezuela treaty,13 which includes a provision for receipt of satisfactory assurances. Under the provision, Venezuela “may ‘decline to grant extradition for crimes punishable by death and life imprisonment’ unless it receives

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12 Id.
‘satisfactory assurances that in the case of conviction the death penalty or imprisonment for life will not be inflicted.’”

In response to the United States request for extradition, Venezuela sought assurances that Benitez would not be sentenced to death. The United States granted the assurance and informed Venezuela that under California’s sentencing guidelines, Benitez would face 25-years-to-life, with additional terms of three, four, or five years if he were also convicted of using a gun. Further, the United States informed Venezuela that Benitez would receive a minimum mandatory prison term of 19 years, 2 months if convicted of first degree murder, or less if convicted of a lesser degree of murder. Benitez could request parole after serving the mandatory term.

After summarizing the possible sentences as explained by the United States, Venezuela expressed its understanding through its Attorney General that, “Considering this situation, it has been fully determined that capital punishment shall not be applied in any case, and, in principle, not even life imprisonment.” On June 4, 1998 Venezuela’s Supreme Court granted Benitez’ extradition. In that extradition order, however, Venezuela’s Supreme Court added that Benitez “was not to receive ‘punishment depriving his freedom for more than thirty years, pursuant to the rules [found in the Constitution of Venezuela and the Criminal Code]’” Although Venezuela added that condition, it did not seek an assurance to that effect, as it could have done under the

15 Id. at 1237.
16 Id.
17 Id.
18 Id. at 1238 (quoting an official translation of the Attorney General of Venezuela dated February 27, 1998).
19 Benitez, 419 F.Supp.2d at 1238
treaty. Further, the United States upon receipt of Venezuela’s extradition decree provided no such assurance.

Benitez was extradited on August 28, 1998. On July 16, 1999, just before Benitez’ trial, Venezuela expressed its concern to the United States Department of Justice that “an indeterminate sentence might run afoul of the treaty’s ban on imprisonment for life or the thirty year sentencing cap referenced in the extradition decree.”

Benitez was tried in California state court. At trial, Benitez moved for dismissal on grounds that Venezuela had not been informed that life imprisonment was a real possibility if Benitez were not in fact paroled. Benitez further argued that Venezuela had had a mistaken belief that Benitez would not face the possibility of life imprisonment and in fact would not be subject to more than 30 years of imprisonment. The trial court held that Benitez could be tried for murder and that Venezuela had extradited him with knowledge of California’s sentencing guidelines. Benitez was convicted by a jury of second-degree murder.

On August 30, 1999, the District Attorney’s office received a letter from United States Department of State recommending Benitez not receive a life sentence. In the letter, however, the government clarified that under the assurances provided to Venezuela, the District Attorney was under no obligation to accept its recommendation, as the assurances “only encompassed the death penalty.” The District Attorney did not submit the letter into evidence and the trial court was not aware of the letter at

20 Id.
21 Id.
22 Id. at 1238-39.
23 Id. at 1239.
24 Id.
Benitez was sentenced to an indeterminate term of 15-years-to-life plus four years for the use of a gun.\textsuperscript{27} Benitez requested that his term should be capped at 30 years. The trial court declined, on the basis that the issue was not ripe for review.\textsuperscript{28}

The State Appellate Court upheld the trial court’s ruling, “based on a direct interpretation of the language of the extradition treaty between the United States and Venezuela.”\textsuperscript{29} The State Appellate Court found that the treaty made no mention of a 30 year cap, nor did it expressly incorporate Venezuela’s constitution. Thus, the court found that the United States had only granted the assurance that Benitez would not receive the death penalty, the United States had explained California’s sentencing guidelines to Venezuela, Venezuela extradited Benitez without requesting assurances that he would not receive an indeterminate sentence, and the United States did not assure an indeterminate sentence.\textsuperscript{30} As a result of these findings, the State appellate court held that the trial court did not err when it concluded no violation of the extradition treaty occurred and allowed Petitioner to stand trial. The court of appeal denied Benitez’s appeal on October 11, 2000. Thereafter, on December 20, 2000, the California Supreme Court denied review. Thus, Benitez filed a habeas petition on March 14, 2002.\textsuperscript{31}

The United States District Court denied Benitez’s petition and held that, [his] indeterminate sentence did not violate the specific terms of the extradition treaty with Venezuela and, therefore, the state court’s decision is not contrary to clearly established federal law. Further, there is no controlling Supreme Court authority that would afford an extradition

\textsuperscript{26} Id.  
\textsuperscript{27} Id.  
\textsuperscript{28} Id.  
\textsuperscript{29} Id.  
\textsuperscript{30} Id.  
decree the same force and effect as an extradition treaty. Thus, the state
court’s adjudication was not contrary to clearly established federal law.
Finally, the failure to extend the specialty doctrine to the punishment
received by Petitioner was not objectively unreasonable.32

Benitez appealed to the United States Court of Appeals for the Ninth Circuit, and
a panel of the Ninth Circuit granted the petition.33 The Ninth Circuit panel granted the
petition because it found “[t]he rights claimed by Benitez pursuant to the extradition [to
be] clearly established federal law pursuant to treaty law, and [that] the sentence issued
by the California Superior Court contravene[d] [those] rights, providing a basis for
reversal.”34 The panel was referring to the Supremacy Clause which calls for duly ratified
treaties entered into by the United States to be the law of the land.35 Analogizing the
Supreme Court’s decisions in Rauscher36 and Browne37 to this case, the panel found the
unambiguous language of the treaty to be indisputably clearly established federal law.
The panel concluded that adequate assurances were granted by the United States from
“the interactions between the United States and Venezuela pursuant to the treaty.”38 In
reaching this conclusion, the panel focused on “what the surrendering state expected and
believed the extradition defendant would face.”39 Without consideration of the context in
which Venezuela issued the statement, the panel found Venezuela’s extradition decree,
which used the words “is conditioned to the understanding that the aforementioned
citizen will not be sentenced to death or life in prison or incarceration for more than thirty

32 Id. at 1248.
33 Benitez v. Garcia, 449 F.3d 971 (9th Cir. 2006).
34 Id. at 972.
35 Id. at 975 (citing the Supreme Court decisions in United States v. Rauscher and Johnson v. Browne
infra).
38 Id. at 975.
39 Id. at 976.
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(30) years,"40 to be sufficient to bind the United States to those conditions.41 The panel found additional support in Venezuela’s expression of concern, prior to Benitez’ trial, that an indeterminate sentence might violate the terms of the extradition. As a result, the panel held that California could not sentence Benitez to more than thirty years of imprisonment. Thus, the Ninth Circuit panel reversed the district court’s decision, granted the petition for a writ of habeas corpus, and remanded the case to the district court to enter habeas relief consistent with its decision.42

California filed a petition for rehearing en banc, and on January 22, 2007, the panel issued an amended opinion. This opinion was further amended, and a second amended opinion was issued on February 8, 2007. It is this second amended opinion which forms the basis for this paper.

Legal Background

The Rule of Specialty and the Supreme Court

The Rule of Specialty provides that upon extradition, an extradited party will only be charged and/or punished for the offenses named in the extradition proceedings.43 The doctrine, which is typically included as an express provision of the extradition treaty, provides a powerful incentive to extradite in that it allows the extraditing country to retain some control over the proceedings in the requesting country; thus, to the extent that the requested country provides for in the treaty, it ensures consistency with that country’s legal and political paradigms. The foundation for the rule of specialty was laid in the

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40 Id. at 977 (quoting Venezuela’s Extradition Decree).
41 The Court erroneously reasoned that “[b]ecause we must examine and defer to the surrendering country’s wishes, particularly as they are expressed in its extradition decree, these statements are telling.” Id. at 977.
42 Id. at 978.
43 18 U.S.C §3186; see also United States v. Rauscher, 119 U.S. 497 (1886).
Supreme Court’s decision in *United States v. Rauscher* 44 and further honed in its later decision in *Johnson v. Browne.* 45

**United States v. Rauscher**

*United States v. Rauscher* 46 involved an extradited party who had been indicted for assaulting and inflicting cruel and unusual punishment upon a member of his crew on the high seas. 47 The Circuit Court for the Southern District of New York certified four questions to the Supreme Court as a result of a division of opinion between the Circuit Court judges. The questions were 1) whether the Circuit Court had jurisdiction to put the defendant on trial for cruel and unusual punishment when he had been extradited on a charge of murder; 48 2) whether the defendant had a right to be afforded an opportunity to return to the extraditing country prior to being prosecuted for a crime other than that which was charged during the extradition proceedings; 49 3) whether it was error on the part of the trial judge to overrule a plea to the jurisdiction of the court to try the indictment charging the defendant with cruel and unusual punishment, when it had been established that the victim of the cruel and unusual punishment by the defendant was the same victim of the murder for which the defendant was extradited; 50 and 4) whether it

44 119 U.S. 407 (1886).
45 205 U.S. 309 (1907).
46 119 U.S. 407 (1886).
47 Id. at 409.
48 The Court answered this question in the negative, holding that “a person who has been brought within the jurisdiction of a court by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings.” Id. at 430.
49 The Court answered this question in the affirmative, see supra note 11.
50 The Court answered this question in the affirmative. It was error to overrule the plea to jurisdiction of the court. The rights of persons extradited under the treaty can[ ] be enforced by the judicial branch of government. However, the Court did not find of import the fact that the acts of cruel and unusual punishment were based upon the same evidence as the charge of murder. “It may be very true that evidence
was error on the part of the trial judge to refuse to direct a verdict for acquittal once it had been established that the defendant had been extradited on the charge of murder, even when during the extradition proceedings the acts constituting cruel and unusual punishment and murder involved the same evidence that was used at trial.\textsuperscript{51}

The Court addressed each question in turn, but first took considerable time to explain the basis for its jurisdiction to hear this case, recognizing the delicate balance between the judicial, executive, and legislative branches of government. The Court took special care to establish that treaties are fundamentally executive in nature in that they represent contracts between nations; however, in the United States, a treaty is “a law of the land, as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And, when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision [ ] as it would to a statute.”\textsuperscript{52}

\textsuperscript{51} The court found this question immaterial because the Circuit Court did not have jurisdiction over the defendant at the time. \textit{Rauscher}, 119 U.S. at 433.
\textsuperscript{52} \textit{Rauscher}, 119 U.S. at 419 (citing Chew Heong v. U.S., 112 U.S. 536, 540).
Thus, the Court began with the treaty itself, the Ashburton Treaty of 1842, which it noted was supplemented by legislative enactments, §§ 5270, 5272, and 5275 of the Revised Statutes, under title 66, ‘Extradition.’ In addressing the construction of the treaty and the force of the statutes, the Court found support in the opinions of contemporary authorities on the subject of international law. The Court found that, “according to the doctrine of publicists and writers on international law, the country receiving the offender against its laws from another country had no right to proceed against him for any other offense than that for which he had been delivered up.” This is especially true in the case at hand, given the specificity with which Article X of the extradition treaty identifies extraditable offenses. It is unreasonable to suppose that one country could seek extradition based on a general representation to the extraditing

53 The Ashburton Treaty was created on August 9, 1842 for the purpose of “sett[ling] and defin[ing] the boundaries between the territories of the United States and the possessions of her Britannic majesty in North America; for the final suppression of the African slave trade; and for the giving up of criminals, fugitive from justice, in certain cases.” 8 U.S. St. at Large, 576 (emphasis added). The pertinent part of this treaty is Article X, which states, “It is agreed that the United States and her Britannic majesty shall, upon mutual requisitions by them or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy or arson or robbery or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum or shall be found within the territories of the other: provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive.” 8 Stat. at L. 572-576, Art. 10.

54 Rauscher, 119 U.S. at 415.

55 See William Beach Lawrence, 14 ALB. LAW J. 85; 15 ALB. LAW J. 224; 16 ALB. LAW J. 361 (“[A] person delivered up under this treaty on a demand charging him with a specific offense mentioned in it, can only be tried by the country to which he is delivered for that specific offense, and is entitled l, unless found guilty of that, to be restored in safety to the country of his asylum at the time of his extradition”). See also 10 AMER. LAW REV. 1875-76, p. 617 (Judge Lowell of the United States court at Boston examined the authorities on extradition and found that, “[T]he person whose extradition has been granted cannot be prosecuted and tried except for the crime for which his extradition has been obtained; and, entering upon the question of the construction of the treaty of 1842, he gives to it the same effect in regard to that matter”); David Dudley Field, Int. Code, §237, p. 122.

56 Rauscher, 119 U.S. at 419.
country that the person sought was guilty of some violation without specifying the charged offense or without specifying an offense listed in the treaty. Yet, that is the effect of trying an extradited party for an offense other than the one for which he was demanded and which is described in the treaty. To demand that the Circuit Court try the defendant for cruel and unusual punishment when he had been extradited for murder would in effect eliminate the need for a description of extraditable offenses in the treaty. “[T]he enumeration of offenses . . . is so specific, and marked by such a clear line in regard to the magnitude and importance of those offenses, that it is impossible to give any other interpretation to it than that of the exclusion of the right of extradition for any others.” Further, the scope and object of the treaty itself is conveyed in its caption, which provides for the “giving up of criminals, fugitive from justice, in certain cases.”

Finally, reading the treaty in light of the Revised Statutes, §§5272 and 5275, the Court found that, “The obvious meaning of these two statutes, which have reference to all treaties of extradition made by the United States, is that the party shall not be delivered up by this government to be tried for any other offense than that charged in the extradition proceedings; and that, when brought into this country upon similar proceedings, he shall not be arrested or tried for any other offense than that with which he was charged in those proceedings, until he shall have had a reasonable time to return

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57 Id. at 420.
58 Id. at 421.
59 Id. at 420.
60 Id. at 422.
61 In pertinent part, §5275 of the Revised Statutes states, “[I]t shall be lawful for the secretary of state, under his hand and seal of office, to order the person so committed to be delivered to such person or persons as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly.” (emphasis added).
unmolested to the country from which he was brought.”  Thus, the Court held that “a person who has been brought within the jurisdiction of the court, by virtue of proceedings under an extradition treaty can only be tried for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings.”

### Johnson v. Browne

The Supreme Court further honed its interpretation of the Rule of Specialty in *Johnson v. Browne*. *Johnson v. Browne* involved a defendant who fled to Canada following a conviction in the United States Circuit Court for the Southern District of New York, which was affirmed by the Second Circuit, and for which certiorari was denied. Upon finding the defendant in Canada, the United States initiated extradition proceedings in Montreal.

The defendant had been indicted on two charges: conspiracy to defraud the United States and attempting to enter certain Japanese silks into the country for less tax than was legally required. Prior to fleeing to Canada, the defendant had been convicted on the conspiracy charge. The United States requested extradition so that the defendant could serve his sentence for the conspiracy conviction. The United States argued that conspiracy to defraud the government was an extraditable offense under the United States-Great Britain extradition treaty of 1889. The applicable provision defines the

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62 *Rauscher*, 119 U.S. at 423-34.
63 Id. at 430; Justice Gray concurred and Justice Waite dissented (refusing to recognize a fugitive’s absolute right to asylum in a country to which he flees.)
64 205 U.S. 309 (1907).
65 Id.
offense as, “Fraud by bailee, banker, agent, factor, trustee, or director or member or officer of any company made criminal by the laws of both countries.” The Canadian Court held that conspiracy to defraud the United States was not covered under the provision; therefore, extradition was refused.

The United States then rearrested the defendant on the other charge, for which he had been indicted but had not yet been tried, attempting to enter certain Japanese silk into the country without charging the full tax. The Canadian Court then affirmed the Canadian commissioner’s decision to extradite the defendant. Upon arriving in the southern district of New York, the defendant was imprisoned in accordance to his prior conviction on the conspiracy to defraud the government charge. He was to remain imprisoned for two years under his conviction.

On writ of habeas corpus, the defendant argued that his imprisonment violated the third and seventh articles of the extradition treaty between the Unites States and Great Britain. The Circuit Court for the Southern District of New York discharged the defendant from imprisonment and the Supreme Court affirmed, holding that an extradited party shall not be surrendered for one offense and then punished for another.

The Supreme Court began by noting that the United States had made no move to try the defendant on the indictment for which his extradition had been requested; rather, the United States had moved to imprison him based on the conviction of which crime the Canadian government had refused to extradite him. The Court found that the question of whether the defendant’s crime fell within the provisions of the extradition treaty was
for Canada to decide, and that that decision was final.\textsuperscript{70} The legality of the imprisonment depended on the extradition treaty between the United States and Great Britain,\textsuperscript{71} which had been interpreted by the Supreme Court in 1886 in \textit{United States v. Rauscher}.\textsuperscript{72}

As interpreted by the Supreme Court’s decision in \textit{United States v. Rauscher},\textsuperscript{73} according to the “‘manifest scope and object of the treaty itself’[ ]there is no reason to doubt that the fair purpose of the treaty is that the person shall be delivered up to be tried for that offense, and for no other.”\textsuperscript{74} Further, the Court cited §§ 5272 and 5275, Revised Stat. (U.S. Comp. Stat. 1901, pp. 3595-96)\textsuperscript{75} which apply to all extradition treaties made by the United States and which provide that no party extradited by the United States be tried for any other offense than that which he was charged in the extradition proceeding; and, that when a party is extradited to the United States, he shall not be arrested or tried for any offense other than that with which he was charged in the extradition proceeding until he has had reasonable time to return to the country from which he was extradited.\textsuperscript{76} The Court found “the manifest scope and object of the [1842 Ashburton] treaty itself, even without those sections of the Revised Statutes, would limit the imprisonment as well as the trial to the crime for which extradition had been demanded and granted.”\textsuperscript{77}

The government argued that the Ashburton treaty was so “altered and enlarged” by the subsequent treaty of 1889 as to preclude the finding that an extradited party cannot be \textit{punished} for an offense other than that which was charged in the extradition

\textsuperscript{70} \textit{Id.}.
\textsuperscript{71} The Ashburton Treaty of 1842, 8 Stat. at L. 572-576, Art. 10, and the subsequent treaty called the Convention of July 12, 1889, 26 Stat. at L. 1508.
\textsuperscript{72} 119 U.S. 407 (1886)
\textsuperscript{73} 119 U.S. 407 (1886)
\textsuperscript{74} \textit{Rauscher}, 119 U.S. at 422-23.
\textsuperscript{75} 18 U.S.C.A. §§ 653, 659.
\textsuperscript{76} \textit{Browne}, 205 U.S. at 317-18 (citing \textit{Rauscher}, 119 U.S. at 423).
\textsuperscript{77} \textit{Id.} at 318.
Article II of the 1889 treaty states that no extradited party “shall be triable or tried, or be punished for any political crime or offense, or for any act connected therewith, [that was] committed previously to his extradition.”\textsuperscript{78} Article III, however, states only that, “No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offense committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.”\textsuperscript{79} The government argued that the absence of the word punished in Article III, when it had been specified in Article II, should be read to mean that an extradited party could be punished for a crime of which he already was convicted. The Court disagreed.

The Court found that in reading the treaty of 1889 in light of the Ashburton treaty of 1884, “the whole treaty [...], fairly construed, does not permit of the imprisonment of an extradited person under the facts in this case.”\textsuperscript{80} The Court found the general scope of the two treaties to “manifest an intention to prevent a state from obtaining jurisdiction of an individual whose extradition is sought on one ground and for one expressed purpose, and then, having obtained possession of his person, to use it for another and different purpose.”\textsuperscript{81} The absence of the word punished in Article III of the 1889 treaty was not enough to “so far alter the otherwise plain meaning of the two treaties as to give them a totally different construction.”\textsuperscript{82}

Finding the government’s argument to be inconsistent with the provisions of the Revised Statutes and the scope of both treaties, particularly “where the government

\textsuperscript{78}\textit{Id.} at 319 (quoting The Ashburton Treaty of 1842).
\textsuperscript{79}\textit{Id.}
\textsuperscript{80}\textit{Id.}
\textsuperscript{81}\textit{Browne}, 205 U.S. at 320.
\textsuperscript{82}\textit{Id.}
surrendering the person has refused to make the surrender for the other offense, on the
ground that such offense was not one covered by the treaty," the Court affirmed the
Circuit Court’s order discharging the defendant from imprisonment.

Thus, the Court in Browne further honed its interpretation of what would become
the doctrine of specialty: the understanding that an extradited party will not be charged
with, tried for, convicted of, or punished for an offense other than that for which he is
extradited.

**Assurances and the Second Circuit**

Related to the rule of specialty are assurances, which are conditions the requested
country may seek of the requesting country before agreeing to extradite a party. Upon
receipt of satisfactory assurances, the extraditing country surrenders the party to the
requesting country. Similar to the rule of specialty, assurances provide an incentive to
extradite in that they allow the extraditing country to retain some control over what will
happen to the extradited party after he has been surrendered. Also similar to the rule of
specialty is that the assurances which may be sought are typically expressly provided for
in the extradition treaty. Just because certain assurances are allowable under an
extradition treaty does not necessarily mean they will be sought. Problems arise when
assurances that could have been sought are not; and then post-extradition, the extradited
party or extraditing country seeks to assert unilateral conditions on the requesting
country.

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83 *Id.* at 322.
United States v. Casamento

There is little case law on assurances. Nearly all of the courts to address assurances have been in the Second Circuit. In United States v. Casamento, one of sixteen defendants prosecuted for conspiracy and various narcotics law violations, Gaetano Badalamenti, challenged his extradition from Spain on three grounds. The third of these grounds was that his forty-five year prison sentence violated the terms of his extradition order. Spain had sought and received the assurance that Badalamenti’s “maximum period of imprisonment [would] not in any event exceed 30 years.” The Second Circuit found no violation of the extradition treaty, however, because although the district judge had sentenced Badalamenti to prison for forty-five years, he had also ordered that Badalamenti be released after thirty years. The district judge had avoided a situation where under a thirty year sentence Badalamenti might have earned good time credits requiring his release after serving only twenty to twenty-three years. Thus, because Badalamenti’s sentence required mandatory release after thirty years, the Court held that his sentence did not violate the extradition treaty.

United States v. Campbell

After its 1989 decision in United State v. Casamento, the Second Circuit next addressed the issue of assurances in 2002 in United States v. Campbell. The defendant
in *Campbell*[^91] was convicted of four counts of armed robbery of banks, three counts of armed robbery of post offices, one count of conspiracy to commit those crimes, and seven counts of carrying and using a firearm while committing a crime of violence.[^92] He was sentenced to 155 years of imprisonment.[^93] However, similar to *Casamento*,[^94] this case involved an assurance limiting the defendant’s sentence.[^95] In this case, the sentence was not to exceed 50 years.[^96] As the district judge had done in *Casamento*,[^97] the district judge in this case had ordered the Bureau of Prisons to release Campbell after 50 years.

Campbell appealed to the Court of Appeals for the Second Circuit on four claims. The ones pertinent to this discussion are claims one and two: “(1) that his overall sentence violates the terms of the Costa Rican government’s extradition decree, (2) that his prosecution on the firearms counts was not authorized by the Treaty or the decree.”[^98] The Second Circuit affirmed his conviction and upheld the district court’s ruling that Campbell’s sentence could follow the Sentencing Guidelines as long as the sentence was accompanied by a mandatory order to release him after 50 years.[^99] Finding calculation errors, however, the Court vacated the judgment and remanded the case for recalculation and entry of corrected judgment.[^100]

In arriving at its decision to uphold the district judge’s sentencing order, the Court began by analyzing the extradition decree and the process by which assurances were

[^91]: Id.
[^92]: *Campbell*, 300 F.3d at 204-05.
[^93]: Id. at 205.
[^94]: 887 F.2d 1141 (2d Cir. 1989).
[^95]: *Campbell*, 300 F.3d at 206. (citing Decree of Third Criminal Court of San José dated October 1, 1996)(internal citations omitted).
[^96]: United States v. Campbell, 300 F.3d 202, 205 (2d Cir. 2002).
[^97]: United States v. Casamento, 887 F.2d 1141 (2d Cir. 1989).
[^98]: *Campbell*, 300 F.3d at 205.
[^99]: Id.
[^100]: Id.
granted. In response to the United States’ request for extradition, the Costa Rican criminal court issued a decree granting extradition, subject to the following condition: that the United States “must give a formal promise covering the following: A- That the person extradited will not be subject to life imprisonment. B-That the person extradited will not be sentenced to death. C-That a copy of the sentence, duly translated and authenticated, will be sent to this country. D-That he will not receive a sentence of more that 50 years. E-That he will not be tried for crimes different from the ones for which this extradition is granted. The extradition is not granted for the crimes of concealment and evasion, which are time barred.”\(^\text{101}\) In response, the United States provided assurances via a diplomatic note stating that “Campbell will not be sentenced to serve a term of imprisonment greater than 50 years.”\(^\text{102}\) In addition, the United States District Court for the Eastern District of New York issued an order stating its own assurances that it would not sentence the defendant to life imprisonment nor would it order any other sentence which would require the defendant to serve more than 50 years’ imprisonment.\(^\text{103}\)

The Court next analyzed the process by which Campbell was sentenced. Upon conviction, but prior to sentencing, the United States sought clarification of Costa Rica’s position regarding the permissible format of the sentence. In response, the Costa Rican government stated in a letter from the Legal Director of the Costa Rican Ministry of Foreign Affairs Legal Department to the Costa Rican Consulate in Washington, D.C. dated June 15, 2000 that the sentence “may make reference to the general amount of jail time to be imposed. However, both the dispositive part and the explanation of purposes

\(^{101}\) Campbell, 300 F.3d at 206. (citing Decree of Third Criminal Court of San José dated October 1, 1996)(internal citations omitted).

\(^{102}\) Campbell, 300 F.3d at 206.

\(^{103}\) Id. (Order dated January 24, 1997, (Denis R. Hurley, Judge at 2.)
must establish in a clear and manifest fashion that the maximum sentence to be served is fifty years, as provided by Article 51 of the Costa Rican Criminal Code.”

The Court next discussed each of the defendant’s claims in turn. Campbell’s first claim was that his conviction on the firearms charges and his overall sentence violate both the terms of the extradition treaty and the Costa Rican government’s grant of extradition. He argued that the extradition treaty between the United States and Costa Rica does not list firearms offenses as described by 18 U.S.C. §924 (c) as extraditable crimes. The Court rejected this argument, citing the Supreme Court’s decisions in United States v. Rauscher and Johnson v. Browne. Under the rule of specialty, an extradited party may only be tried for an offense included in the extradition treaty. However, the Campbell Court noted that under Browne, “the question of whether an extradition treaty allows prosecution for a particular crime that is specified in the extradition request is a matter for the extraditing country to determine.” The Campbell Court reasoned that public policy demanded deference to the requested country: “It could hardly promote harmony to request a grant of extradition and then, after extradition is granted, have the requesting nation take the stance that the extraditing nation was wrong to grant the request.” Thus, the Court found that if the extraditing country does not exclude a crime for which extradition was requested from its grant of extradition, then trying the party for the crime is presumed to be a permissible.

104 Campbell, 300 F.3d at 206 (Costa Rican Ministry Letter (emphasis added)).
105 119 U.S. 407 (1886).
106 205 U.S. 309 (1907).
107 Id.
108 Campbell, 300 F.3d at 209 (citing Johnson v. Browne, 205 U.S. 309, 316 (1907)).
109 Id. ("[W]e interpret Johnson v. Browne to mean that our courts cannot second-guess another country’s grant of extradition to the United States").
110 Campbell, 300 F.3d at 209.
With regard to whether the firearm counts, as defined by §924(c) of the United States Code fell within the scope of the extradition treaty, the Court found Campbell’s claim meritless. The supporting affidavit supplied to Costa Rica with the request for extradition explicitly described the counts, what elements the government would have to establish, and the penalties they entailed. The Court noted that, “Presented with this affidavit and copies of the indictment and the statutory provisions, the Costa Rican Criminal Court granted extradition, and its decision was affirmed on appeal.”

Therefore, the Court rejected Campbell’s argument that the Costa Rican government did not knowingly consent to his extradition on those counts.

The Court next turned to Campbell’s sentence. Campbell argued that his 155-year sentence violated the terms of his extradition, in light of the assurance that he would not be subject to imprisonment for more than 50 years. The Court held that given the record of correspondence between the United States and Costa Rica, there was no violation. The Costa Rican government requested an assurance that Campbell would not receive a sentence of more than 50 years. In response, the United States granted that assurance, stating that Campbell would not be sentenced “to serve a term of imprisonment greater than 50 years.” Further, the United States District Court for the Eastern District of New York gave the assurance that the court would not impose any sentence requiring Campbell to serve more than 50 years. Given the clarification requested by the United States and received from Costa Rica regarding the format of the sentence, the Second Circuit held that “the sentence imposed complies with the terms of

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111 *Id.* at 211.
112 *Id.* (citing State Department Note (emphasis added)).
113 *Campbell*, 300 F.3d at 211.
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the Costa Rican government’s grant of extradition.”114 Citing Casamento,115 the Court noted that “it was well within the discretion of the district court to impose its sentence in the form of a 155-year sentence with an order that exactly 50 years be served, without any diminution for, e.g., good time credits, in order to ensure that Campbell would be incarcerated for the full 50 years permitted by the Extradition Decree.”116

**United States v. Baez**

Just one year after its decision in Campbell,117 the Second Circuit was faced with another case involving assurances. The case was United States v. Baez118 The defendant in this case, Alex Restrepo, was extradited from Colombia and convicted in the United States District Court for the Southern District of New York of racketeering, racketeering conspiracy and murder in aid of racketeering, after which the District Court sentenced him to life imprisonment.119

The pertinent issue on appeal was whether Restrepo’s sentence violated the terms of his extradition.120 Restrepo argued that a diplomatic note containing certain assurances sent by the United States to Colombia barred a life sentence.121 The Court began its analysis by reviewing the extradition proceedings and the diplomatic note in question.

In September 2000, Colombia granted Restrepo’s extradition contingent upon the receipt of a satisfactory assurance that, if he were to receive the death penalty, it would be

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114 *Id.* at 212.
115 887 F.2d. 1141, 1185 (2d Cir. 1989).
116 *Campbell*, 300 F.3d at 212.
117 United States v. Campbell, 300 F.3d 202 (2d Cir. 2002).
118 349 F.3d 90 (2d Cir. 2003).
119 *Id.* at 91-92.
120 *Id.* at 92.
121 *Id.*
commuted. In response, the United States issued a diplomatic note in which it assured Colombia that the death penalty would neither be sought nor imposed in this case.\footnote{Baez, 349 F.3d 90, 92 (2d Cir. 2003)(citing Diplomatic Note No. 1060).} Then in October 2000, Colombia sought further assurance that Restrepo would not receive a life sentence. Again, the United States responded with a diplomatic note assuring that “the United States executive authority, with agreement of the attorney for the accused,” would not seek a penalty of life imprisonment; however, the government also stated in that same note that, “should the competent United States judicial authority nevertheless impose a sentence of life imprisonment against Mr. Restrepo, the United States executive authority will take appropriate action to formally request that the court commute such sentence to a term of years.”\footnote{Id. (citing Diplomatic Note No. 1206).} Finding the assurances to be satisfactory, Colombia extradited Restrepo.

Restrepo interpreted the second diplomatic note from the United States to be an absolute assurance against a life sentence. The Second Circuit disagreed, explaining that, “The note expressly contemplated the possibility that a sentencing court might impose a term of life imprisonment and assured Colombia that if that occurred, the executive authority of the United States would seek to have the sentence commuted to a term of years.”\footnote{Id. at 92.} When in fact the District Court imposed a life sentence on Restrepo following his conviction, the government upheld the assurance it granted in Diplomatic Note No. 1206 when it requested that the sentence be commuted to a term of years. The Second Circuit found that the government had fulfilled its commitment and stated that “the Court was not obligated under that note to sentence Restrepo to a term of years.”\footnote{Id. at 93.}
While the Second Circuit held that the District Court did not abuse its discretion in imposing a life sentence on Restrepo, the Court disagreed with the reasoning behind the District Court’s holding. Specifically, the District Court had suggested that “it could ignore the consequences of an extradition agreement between Colombia and the United States because the Judiciary is a branch of our tripartite government independent of the Executive Branch.” The Second Circuit cautioned that while the Judiciary is independent of the Executive, the cauldron of circumstances in which extradition agreements are born implicate the foreign relations of the United States. In sentencing a defendant extradited to this country in accordance with a diplomatic agreement between the Executive branch and the extraditing nation, a district court delicately must balance its discretionary sentencing decision with the principles of international comity in which the rule of specialty sounds

As the Campbell Court had asserted the year before, the Court here pointed out that policy considerations require courts to temper their discretion in sentencing with deference to assurances made by the United States. “If anything, such deference may well allow the United States to secure the future extradition of other individuals because foreign nations would observe that the limitations they negotiated with the Executive branch in respect to the prosecution of their extradited citizens are being honored.”

United States v. Banks

Following Baez, the next case to raise the issue of assurances in the Second Circuit was United States v. Banks. In this 2006 opinion, Second Circuit encountered

126 Id.
127 Baez, 349 F.3d 90, 93 (2d Cir. 2003).
128 Campbell, 300 F.3d 202, 209. (2d Cir. 2002).
129 Baez, 349 F.3d 90, 93 (2d Cir. 2003).
130 349 F.3d 90 (2d Cir. 2003).
the very issue addressed by the Ninth Circuit in *Benitez v. Garcia*, whether unilateral conditions made outside of the extradition process of requesting and receiving assurances are enforceable. The Court in *Banks* held that, in absence of any agreement with the United States limiting a defendant’s sentence, the Dominican Republic’s unilateral expectation that the sentence would be limited to the maximum under Dominican law would not bind the United States.

The defendant in *Banks*, Johnny Martinez, was convicted of conspiracy to commit murder for hire and using and carrying firearms during and in relation to a crime of violence in the United States District Court for the Southern District of New York. He was sentenced to life imprisonment plus ten years. The issue on appeal pertinent to this paper was Martinez’s claim that his sentence violated the extradition agreement between the United States and the Dominican Republic. Martinez argued that the Dominican Republic sought assurances that the United States would limit any sentence in his case to 30 years of imprisonment.

The Second Circuit affirmed the District Court’s ruling that Martinez’ 30 year sentence was not in violation of any extradition agreement between the Dominican Republic and the United States. The Second Circuit based its decision on three findings: First, the Court found no provision in the extradition treaty limiting sentences. Second, although the Dominican Republic has a law providing for the receipt of satisfactory

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131 464 F.3d 184 (2d Cir. 2006).
132 476 F.3d 676 (9th Cir. 2007).
133 464 F.3d 184 (2d Cir. 2006).
134 *Id.*
135 *Id.*
136 *Id.* at 185.
137 *Id.*
138 *Id.* at 191.
139 *Id.*
assurances in extradition proceedings, Martinez failed to show that that law was invoked during Martinez’ extradition proceedings. Further, the United States’ documentation of the proceedings confirms that the Dominican Republic at no time requested assurances regarding Martinez’ sentence. While Martinez established that the Dominican Republic’s domestic law would have limited Martinez to a 30 year sentence, such statutes were not binding on the United States. “[N]o nation may unilaterally bind another sovereign by the sheer force of its statutory enactments.” Thus, the Court held that absent the process for seeking and receiving satisfactory assurances, the United States will not be bound to unilateral conditions on extradition.

Case Analysis

In its amended opinion, the Ninth Circuit panel clarified its May 23, 2006 decision and held that Venezuela could not expect that the defendant’s sentence would be capped at thirty years because there was no language to that effect in the actual treaty. Still, the opinion renders provisions in extradition treaties for the request and receipt of assurances unnecessary to bind the United States to conditions of extradition.

The panel began by noting that extradition treaties often provide for extraditing countries to request and receive assurances limiting the punishment extradited parties can receive once they are extradited. Calling on the Supreme Court’s decisions in *Rauscher* and *Browne* with respect to the rule of specialty, the panel emphasized that “the extraditing country’s expectations must be respected if they are within that country’s

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140 United States v. Banks, 464 F.3d 184, 192 (2d Cir. 2006)(quoting Rosado v. Civiletti, 621 F.2d 1179, 1192 (2d Cir. 1980)).
141 Id. at 191-192.
142 Benitez v. Garcia, 476 F.3d 676, 678 (9th Cir. 2007).
The panel first reviewed the issue of whether Benitez’ challenge to his sentence was ripe for review. Because Benitez’s extradition was conditioned not only on what sentence he would serve, but also on what sentence could be entered against him, the

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145 See supra page 4.
146 349 F.3d 90 (2d Cir. 2003).
147 See supra pages 23-24.
148 Benitez, 476 F.3d at 678.
panel held that his challenge became ripe upon entry of the sentence of fifteen years to life.\textsuperscript{149}

The panel next addressed the district court’s denial of the writ of habeas corpus. The panel began by explaining that Under the Death Penalty Act of 1996 (AEDPA), for a writ to issue, the court “must find that the state court’s decision was either contrary to or an objectively unreasonable application of ‘clearly established Federal law, as determined by the Supreme Court of the United States.’”\textsuperscript{150} In its analysis of this issue, the panel focused on the Supreme Court’s decisions \textit{United States v. Rauscher}\textsuperscript{151} and \textit{Johnson v. Browne}\textsuperscript{152} as providing the clearly established federal law. The panel’s analysis is flawed in that these decisions, while they address the policy concern in honoring extraditing countries’ legitimate expectations, they deal solely with the rule of specialty. Assurances are fundamentally different. Whereas the rule of specialty deals with enforcing terms of treaties already negotiated, assurances deals with the process of negotiating under the treaty. Assurances arise on a case by case basis and require action from both parties. The process of seeking and receiving assurances does not allow for unilateral conditions. In fact, enforcing such conditions renders the entire process unnecessary.

While it is true that treaties should be enforced in good faith and “that enforcement of an extradition treaty also entails giving effect to ‘the processes by which it is to be carried into effect,’”\textsuperscript{153} it is not the case that “language in a foreign nation’s extradition order invoking provisions of an extradition treaty must be enforced by federal

\textsuperscript{149} \textit{Id.} at 680.
\textsuperscript{150} \textit{Id.} at 680 (citing 28 U.S.C. §2245(d)(1)).
\textsuperscript{151} 119 U.S. 407 (1886).
\textsuperscript{152} 205 U.S. 309 (1907).
\textsuperscript{153} \textit{Benitez}, 476 F.3d at 681 (citing \textit{Rauscher}, 119 U.S. at 420-21).
courts," particularly when such conditions that are meant to be bilaterally agreed upon are asserted unilaterally. Based its erroneous interpretation of Rauscher and Browne as applied to the facts of this case, the Ninth Circuit panel held that the state court’s failure to give effect to Venezuela’s conditions of extradition was an objectively unreasonable application of clearly established federal law.

In this amended decision, the Ninth Circuit panel qualified its original opinion, however, with regard to the thirty year cap on Benitez’s sentence. The panel correctly noted that Venezuela had the right to refuse extradition unless it received assurances that neither the death penalty nor a life sentence would be imposed; however, the panel neglected to mention that only assurances against the death penalty were sought. Assurances against life imprisonment were not sought. For that matter, neither were assurances against a thirty year cap sought. While the Ninth Circuit panel correctly concluded that it should not “enforc[e] extradition conditions that are neither expressly agreed to by both countries nor contemplated by the relevant extradition treaty[, thus] [a] thirty-year limitation is therefore not enforceable," the panel found Venezuela’s expectation that there would be no life sentence enforceable. The panel found the condition enforceable solely because it was contemplated by the treaty and despite the fact that it had not been expressly agreed upon. In this regard, the panel abused its discretion.

In reaching its decision, the panel placed great weight on Rauscher and Browne, despite the fact that assurances by their temporal nature are substantially

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154 Id. at 682 (citing Browne, 205 U.S. at 311-12).
155 See supra note 151.
156 See supra note 152.
157 Id. at 682.
158 See supra note 151.
different than ensuring a defendant is not charged with or punished for crimes not already agreed upon. In issuing an opinion that binds the government to conditions which the extraditing country failed to extract contractually, the Ninth Circuit panel undermines the government’s ability to effectively negotiate and enforce treaties. Indeed, the decision calls into question the good faith, certainty, and predictability that the formal process of negotiating treaties is supposed to protect.

Despite this, the panel held that “Benitez’s indeterminate life sentence was the result of an objectively unreasonable decision by the California Courts.” The panel reversed the district court’s decision, remanded the case, and ordered Benitez released “from custody unless California begins resentencing proceedings within 180 days or extended by the district court as reasonably necessary.”

Conclusion

In deciding Benitez v. Garcia, the Ninth Circuit panel took no instruction from the carefully considered approach to assurances that had developed in the Second Circuit between 1989 and 2007. Instead, with no binding precedent to guide it, the panel looked only to Rauscher and Browne and the Supreme Court’s treatment of the rule of specialty. While similar to the rule of specialty in that provisions for requesting and receiving satisfactory assurances allow extraditing countries some control over what will happen to extradited parties once they have been extradited, assurances are not governed by the rule of specialty. In fact there is no clearly established law governing their

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159 See supra note 152.
160 Id.
161 Id.
162 476 F.3d 676 (9th Cir. 2007).
163 119 U.S. 407 (1886).
164 205 U.S. 309 (1907).
application. While the Supreme Court decisions in *Rauscher*¹⁶⁵ and *Browne*¹⁶⁶ point to the delicate balance between the executive, legislative, and judicial branches of government as well as the political necessity of taking into consideration extraditing countries’ expectations, in no way do these decisions support the Ninth Circuit panel’s opinion that the extraditing country’s expectations alone are sufficient to bind the United States to conditions of extradition. The Ninth Circuit should rehear the case en banc and consider following the Second Circuit’s approach to assurances.

¹⁶⁵ *See supra* note 163.
¹⁶⁶ *See supra* note 164.