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## Kear v. Hilton: Enforcing the Treaty On Extradition Between the United States and Canada

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# Kear v. Hilton: Enforcing the Treaty On Extradition Between the United States and Canada

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## **Abstract**

This Note examines the justness of the Kear decision. The current provisions of the Extradition Treaty, the powers of bounty hunters, and the role of the courts in regulating extradition are discussed. The Note concludes that extradition was not only proper, but necessary in order to maintain the Extradition Treaty's goal of suppressing crime through cooperation between Canada and the United States.

KEAR V. HILTON: ENFORCING THE TREATY ON  
EXTRADITION BETWEEN THE UNITED  
STATES AND CANADA

INTRODUCTION

The Treaty on Extradition Between the United States and Canada<sup>1</sup> (Extradition Treaty) governs all extradition proceedings between the two countries.<sup>2</sup> In 1981, two United States bounty hunters, without benefit of a formal extradition request, went to Canada, apprehended a party who had failed to appear for trial in the United States, and returned him to the United States to stand trial.<sup>3</sup> Amidst much publicity—*Putnam County vs. Canada*,<sup>4</sup> *A One-Man Diplomatic Flap*,<sup>5</sup> *The not-so-happy hunting ground*,<sup>6</sup> *Handcuffs across the border*<sup>7</sup>—Canadian authorities sought to extradite them for kidnapping.<sup>8</sup> In *Kear v. Hilton*,<sup>9</sup> the United States Court of Appeals for the Fourth Circuit ruled that, despite the freedom generally allowed bounty hunters in the United States,<sup>10</sup> extradition was required.<sup>11</sup>

This Note examines the justness of the *Kear* decision. The current provisions of the Extradition Treaty,<sup>12</sup> the powers of bounty hunters,<sup>13</sup> and the role of the courts in regulating ex-

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1. Dec. 3, 1971, United States-Canada, 27 U.S.T. 983, T.I.A.S. No. 8237 [hereinafter cited as Extradition Treaty]. The Extradition Treaty provides that the United States and Canada will extradite to the other all those who are charged with committing offenses covered by the Extradition Treaty, when the terms of the Extradition Treaty are met. Extradition Treaty, *supra*, art. 1.

2. It has been held that apart from treaty obligations, there is no well-defined obligation of one country to deliver up fugitives to another. *See, e.g.*, United States v. Rauscher, 119 U.S. 407, 411-12 (1886). The United States extradition statute contained in 18 U.S.C. § 3181 (1982), states that “[t]he provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.” *Id.*; *infra* text accompanying notes 16-18.

3. *See infra* notes 31-40 and accompanying text.

4. *Putnam County vs. Canada*, Time, Aug. 8, 1983, at 58.

5. Strasser, *A One-Man Diplomatic Flap*, Newsweek, Aug. 8, 1983, at 28.

6. Posner, *The not-so-happy hunting ground*, Maclean's, Feb. 8, 1982, at 23.

7. Posner, *Handcuffs across the border*, Maclean's, July 25, 1983, at 6.

8. *See infra* notes 41-44 and accompanying text.

9. 699 F.2d 181 (4th Cir. 1983).

10. For a discussion of the freedom allowed bounty hunters in the United States, *see infra* notes 59-63 and accompanying text.

11. *Kear*, 699 F.2d at 185; *see also infra* note 108.

12. *See infra* notes 26, 49, 107, 129-30, 147-49 and accompanying text.

13. *See infra* notes 59-73 and accompanying text.

tradition<sup>14</sup> are discussed. The Note concludes<sup>14</sup> that extradition was not only proper, but necessary in order to maintain the Extradition Treaty's goal of suppressing crime through cooperation between Canada and the United States.<sup>15</sup>

### I. *THE TREATY ON EXTRADITION BETWEEN THE UNITED STATES AND CANADA*

Extradition is governed by statute in the United States.<sup>16</sup> The law provides for "the surrender of persons who have committed crimes in foreign countries . . . only during the existence of any treaty of extradition with such foreign government."<sup>17</sup> Accordingly, the United States can extradite to a foreign country only when there exists a treaty on extradition with that country.<sup>18</sup>

#### A. *The Development of the Treaty*

The United States and Canada entered into the Extradition Treaty on December 3, 1971.<sup>19</sup> Prior to the enactment of the Extradition Treaty, extradition proceedings between the United States and Canada were governed by article X of the Webster-Ashburton Treaty of 1842 Between the United States and the United Kingdom<sup>20</sup> (Webster-Ashburton Treaty). The Webster-Ashburton Treaty provided for the extradition only of persons who had committed one of a limited number of offenses.<sup>21</sup> Although article X was repeatedly modified,<sup>22</sup> it

14. See *infra* notes 131-38 and accompanying text.

15. See *infra* notes 141-46 and accompanying text.

16. See 18 U.S.C. § 3181 (1982).

17. *Id.*

18. The Supreme Court, in *Factor v. Laubenheimer*, 290 U.S. 276 (1933), stated that there is "no right to extradition apart from treaty." *Id.* at 287. In *Ivancevic v. Artukovic*, 211 F.2d 565 (9th Cir.), *cert. denied*, 348 U.S. 818 (1954), the court specifically referred to § 3181 in holding that extradition to a foreign country may be accomplished only during the existence of a treaty with that country. *Ivancevic*, 211 F.2d at 566.

19. Extradition Treaty, *supra* note 1.

20. Aug. 9, 1842, United States-United Kingdom, art. X, 8 Stat. 572, 576, 12 Bevans 82, at 88 [hereinafter cited as Webster-Ashburton Treaty].

21. Article X of the Webster-Ashburton Treaty stated:

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 offence 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 or 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. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive.

Webster-Ashburton Treaty, *supra* note 20, art. X.

22. Article X of the Webster-Ashburton Treaty was modified by five supplemental agreements between the United States and the United Kingdom, and one between the United States and Canada. The Supplementary Convention on Extradition, July 12, 1889, United States-United Kingdom, art. 1, 26 Stat. 1508, 1509, 12 Bevans 211, at 212, added 10 extraditable offenses:

1. Manslaughter, when voluntary.
2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.
3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.
4. Fraud by bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.
5. Perjury, or subornation of perjury.
6. Rape; abduction; child-stealing; kidnapping.
7. Burglary; house-breaking or shop-breaking.
8. Piracy by the law of nations.
9. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.
10. Crimes and offences against the laws of both countries for the suppression of slavery and slave-trading.

*Id.* art. 1. Additional offenses were added by: Supplementary Convention Between the United States of America and Her Majesty for the Mutual Extradition of Fugitive Criminals, Oct. 26, 1951, United States-Canada, 3 U.S.T. 2826, T.I.A.S. No. 2454; Convention in Respect of Canada for Extradition of Offenses Against Narcotic Laws, Jan. 8, 1925, United States-Great Britain, 44 Stat. 2100, T.S. No. 719; Supplementary Convention on Extradition, May 15, 1922, United States-Great Britain, 42 Stat. 2224, T.S. No. 666; Supplementary Convention on Extradition, Apr. 12, 1905, United States-Great Britain, 34 Stat. 2903, T.S. No. 458; Supplementary Treaty on Extradition, Dec. 13, 1900, United States-Great Britain, 32 Stat. 1864, T.S. No. 391.

was deemed unsatisfactory<sup>23</sup> because it did not cover the full range of offenses necessary to properly combat international crime.<sup>24</sup> One of the goals of the Extradition Treaty was "modernization of the extradition relations between the United States and Canada"<sup>25</sup> by increasing the number of extraditable offenses to thirty.<sup>26</sup>

The Extradition Treaty was recently construed in *Kear v.*

23. *Galanis v. Pallanck*, 568 F.2d 234, 236 (2d Cir. 1977). The court in *Galanis* stated that the Webster-Ashburton Treaty, *supra* note 20, was "rudimentary," and was an unsatisfactory basis for extradition between the United States and Canada. *Galanis*, 568 F.2d at 236.

24. *The President's Message to the Senate Transmitting the Treaty for Advice and Consent to Ratification*, S. EXEC. DOC. NO. G, 93d Cong., 2d Sess., reprinted in 120 CONG. REC. 31,090 (1974) (statement of Gerald R. Ford, President of the United States) [hereinafter cited as *The President's Message*].

25. *Id.*

26. Extradition Treaty, *supra* note 1, schedule. The offenses are:

1. Murder; assault with intent to commit murder.
2. Manslaughter.
3. Wounding; maiming; or assault occasioning bodily harm.
4. Unlawful throwing or application of any corrosive substances at or upon the person of another.
5. Rape; indecent assault.
6. Unlawful sexual acts with or upon children under the age specified by the laws of both the requesting and requested States.
7. Willful nonsupport or willful abandonment of a minor when such minor is or is likely to be injured or his life is or is likely to be endangered.
8. Kidnapping; child stealing; abduction; false imprisonment.
9. Robbery; assault with intent to steal.
10. Burglary; housebreaking.
11. Larceny, theft or embezzlement.
12. Obtaining property, money or valuable securities by false pretenses or by threat of force or by defrauding the public or any person by deceit or falsehood or other fraudulent means, whether such deceit or falsehood or any fraudulent means would or would not amount to a false pretense.
13. Bribery, including soliciting, offering and accepting.
14. Extortion.
15. Receiving any money, valuable securities or other property knowing the same to have been unlawfully obtained.
16. Fraud by a banker, agent, or by a director or officer of any company.
17. Offenses against the laws relating to counterfeiting or forgery.
18. Perjury in any proceeding whatsoever.
19. Making a false affidavit or statutory declaration for any extrajudicial purpose.
20. Arson.
21. Any act done with intent to endanger the safety of any person

*Hilton*.<sup>27</sup> However, the *Kear* decision was not without precedent. The ruling in *Kear*<sup>28</sup> was very similar to that in the factually comparable case, *Collier v. Vaccaro*,<sup>29</sup> which was decided under article X of the Webster-Ashburton Treaty.<sup>30</sup>

## II. KEAR AND COLLIER: THE SIMILARITIES

### A. Kear v. Hilton

#### 1. Factual Background

Sidney L. Jaffe had lived in Canada since 1971 as a resident alien.<sup>31</sup> In 1981, Jaffe was charged with conducting unlawful land sales practices in connection with a real estate de-

travelling upon a railway, or any aircraft or vessel or other means of transportation.

22. Piracy, by statute or by law of nations; mutiny or revolt on board a vessel against the authority of the captain or commander of such vessel.

23. Any unlawful seizure or exercise of control of an aircraft, by force or violence or threat of force or violence, or by any other form of intimidation, on board such aircraft.

24. Willful injury to property.

25. Offenses against the bankruptcy laws.

26. Offenses against the laws relating to the traffic in, production, manufacture, or importation of narcotic drugs, Cannabis sativa L., hallucinogenic drugs, amphetamines, barbiturates, cocaine and its derivatives.

27. Use of the mails or other means of communication in connection with schemes devised or intended to deceive or defraud the public or for the purpose of obtaining money or property by false pretenses.

28. Offenses against federal laws relating to the sale or purchase of securities.

29. Making or having in possession any explosive substance with intent to endanger life, or to cause severe damage to property.

30. Obstructing the course of justice in a judicial proceeding, existing or proposed, by:

a) dissuading or attempting to dissuade a person by threats, bribes, or other corrupt means from giving evidence;

b) influencing or attempting to influence by threat, bribes, or other corrupt means a person in his conduct as a juror; or

c) accepting a bribe or other corrupt consideration to abstain from giving evidence or to do or to refrain from doing anything as a juror.

*Id.*

27. 699 F.2d 181, 183-85 (4th Cir. 1983).

28. For a discussion of the ruling of *Kear*, see *infra* notes 48-101, 112-15 and accompanying text.

29. 51 F.2d 17, 19-21 (4th Cir. 1931).

30. *Id.* at 19; see *supra* note 21 (for text of article X).

31. Press, *The Bounty-Hunter Mutiny*, Newsweek, Aug. 30, 1982, at 58.

velopment in Florida.<sup>32</sup> A professional bonding company, or "surety,"<sup>33</sup> posted bonds in the amount of U.S. \$137,500 to insure Jaffe's appearance for trial in Florida.<sup>34</sup> After bail was posted, Jaffe returned to Toronto, Canada, and obtained Canadian citizenship.<sup>35</sup>

At the time of the trial in the spring of 1981, Jaffe remained in Toronto, claiming he was not well enough to travel.<sup>36</sup> In September 1981, Daniel J. Kear, a licensed bondsman, and agent of the surety,<sup>37</sup> and Timm Johnson, a professional bounty hunter,<sup>38</sup> apprehended Jaffe while he was jogging near his Toronto home.<sup>39</sup> Forcing him into a car, they drove across the border to Niagara Falls, New York. Kear and Johnson then flew with Jaffe to Florida, where he was tried.<sup>40</sup>

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32. *Florida Parole Board Votes to Free Canadian*, N.Y. Times, Oct. 6, 1983, at A18, col. 6.

33. A "surety" is defined as: "One who undertakes to pay money or to do any other act in event that his principal fails therein." BLACK'S LAW DICTIONARY 1293 (5th ed. 1979). A "surety company" is "[a] company, usually incorporated, whose business is to assume the responsibility of a surety on the bonds of officers, trustees, executors, guardians, etc., in consideration of a fee proportioned to the amount of the security required." *Id.*

34. *Kear*, 699 F.2d at 181.

35. Press, *The Bounty-Hunter Mutiny*, Newsweek, Aug. 30, 1982, at 58.

36. *Accredited Surety & Casualty Co. v. State*, 418 So.2d 378, 379 (Fla. Dist. Ct. App. 1982).

37. *Kear*, 699 F.2d at 182.

38. *Id.*

39. Press, *The Bounty-Hunter Mutiny*, Newsweek, Aug. 30, 1982, at 58. There appears to be a question of exactly who did what when Jaffe was apprehended. According to *Kear*, "Johnson may have posed as a member of the Ontario police force," 699 F.2d at 185, while another source notes that both "bounty hunters [were] posing as Canadian police officers." *Canadian, Kidnapped to Stand Trial in Florida, Is Freed on Bond*, N.Y. Times, Oct. 12, 1983, at A14, col. 3.

40. *Kear*, 699 F.2d at 182. Jaffe was convicted on the charges of unlawful land sales practices and sentenced to 35 years in the Avon Park Correctional Institution. Strasser, *A One-Man Diplomatic Flap*, Newsweek, Aug. 8, 1983, at 28. The Fifth District of the Florida Court of Appeals overturned Jaffe's conviction on the grounds that the jury had been misdirected and that "prosecutors had failed to charge a crime when they drew up the original documents." *Canadian, Kidnapped to Stand Trial in Florida, Is Freed on Bond*, N.Y. Times, Oct. 12, 1983, at A14, col.3; see *Jaffe v. State*, 438 So. 2d 72, 75-76 (Fla. Dist. Ct. App. 1983). However, the court left standing the count on failing to appear for trial, which carried a five-year sentence. See *Jaffe*, 438 So. 2d at 76; *Canadian, Kidnapped to Stand Trial in Florida, Is Freed on Bond*, N.Y. Times, Oct. 12, 1983, at A14, col. 3.

In October 1983, the Florida Parole and Probation Commission approved Jaffe's release. *Florida Parole Board Votes to Free Canadian*, N.Y. Times, Oct. 6, 1983, at A18, col. 6. However, because bond had not yet been posted on a remaining charge of organized fraud, he was ordered into the custody of Putnam County officials. *Id.*



Canadian officials were outraged by the incident,<sup>41</sup> charging that it made a "mockery of the extradition treaty between the [United States and Canada]."<sup>42</sup> Consequently, Canada sought to extradite Kear, charging him with violation of section 247(1)(b) of the Canadian Criminal Code,<sup>43</sup> which makes it a crime to kidnap a person with the intent to send or transport the person out of Canada against his will.<sup>44</sup> In an attempt to avoid extradition, Kear petitioned the United States District Court for the Eastern District of Virginia for a writ of habeas corpus.<sup>45</sup> The court denied the petition,<sup>46</sup> and its ruling was affirmed by the United States Court of Appeals for the Fourth Circuit.<sup>47</sup>

## 2. The Fourth Circuit's Holding in *Kear v. Hilton*

Under the United States extradition statute,<sup>48</sup> Canada's request for extradition of Kear from the United States could be granted only if the terms of the Extradition Treaty were met.<sup>49</sup> Kidnapping is among the extraditable offenses listed in the Extradition Treaty.<sup>50</sup> The crime of kidnapping as defined in both

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Bond was then posted in the amount of U.S. \$150,000, and Jaffe was released. The remaining fraud charge is still pending. *Canadian, Kidnapped to Stand Trial in Florida, Is Freed on Bond*, N.Y. Times, Oct. 12, 1983, at A14, col. 3.

41. Strasser, *A One-Man Diplomatic Flap*, Newsweek, Aug. 8, 1983, at 28.

42. *Id.*

43. *Kear v. Hilton*, 699 F.2d 181, 183 (4th Cir. 1983).

44. Criminal Code, CAN. REV. STAT. ch. C-34, § 247(1)(b) (1970). Section 247(1)(b) reads in pertinent part: "Every one who kidnaps a person with intent . . . to cause him to be unlawfully sent or transported out of Canada against his will, . . . is guilty of an indictable offence and is liable to imprisonment for life." *Id.*

45. *Kear*, 699 F.2d at 181. "While, in the United States, no appeal lies from the decision of the extradition magistrate committing the accused for surrender, the accused may challenge the legality of his detention by means of a petition for a writ of habeas corpus." 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1014 (1968).

46. *See Kear*, 699 F.2d at 185.

47. *Id.*

48. 18 U.S.C. § 3181 (1982); *see supra* note 2 (for text of statute).

49. *See Extradition Treaty, supra* note 1, art. 2(1). Article 2(1) reads in full: Persons shall be delivered up according to the provisions of this Treaty for any of the offenses listed in the Schedule annexed to this Treaty, which is an integral part of this Treaty, provided these offenses are punishable by the laws of both Contracting Parties by a term of imprisonment exceeding one year.

*Id.*

50. Extradition Treaty, *supra* note 1, schedule; *see supra* note 26 (for text of schedule).

the United States<sup>51</sup> and Canadian<sup>52</sup> statutes includes the unlawful transport of someone out of the country. Thus, the statutes were deemed sufficiently similar for the Extradition Treaty to be applicable.<sup>53</sup>

a. The Lack of Mutuality Argument

The Extradition Treaty requires a mutuality between two statutes.<sup>54</sup> The alleged crime must be punishable under the laws of both countries by a term of imprisonment exceeding one year.<sup>55</sup> Despite the similarity between the United States and Canadian kidnapping statutes,<sup>56</sup> Kear contended that extradition would be improper because the Extradition Treaty requirement of mutuality had not been met. Kear argued that it would not be a crime under United States law if a Canadian bondsman seized a bail jumper in the United States and returned him to Canada.<sup>57</sup> Thus the required mutuality between the United States and Canadian kidnapping statutes was not present.<sup>58</sup>

Kear's argument was based on the "extraordinary pow-

51. 18 U.S.C. § 1201(a) (1982). Section 1201(a) reads in full:

Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:

- (1) the person is willfully transported in interstate or foreign commerce;
- (2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;
- (3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 101(36) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(36)); or
- (4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title, shall be punished by imprisonment for any term of years or for life.

*Id.*

52. Criminal Code, CAN. REV. STAT. ch. C-34, § 247(1)(b) (1970); *see supra* note 44 (for text of statute).

53. *Kear*, 699 F.2d at 184.

54. *Id.* at 183. A mutuality between the statutes is a "reciprocation" or "interchange" between them. BLACK'S LAW DICTIONARY 920 (5th ed. 1979).

55. *See* Extradition Treaty, *supra* note 1, art. 2(1); *supra* note 49 (for text of article 2(1)). For a crime to be punishable it is "capable of being punished by law or right." BLACK'S LAW DICTIONARY 1110 (5th ed. 1979).

56. *See supra* notes 44, 51.

57. *Kear*, 699 F.2d at 183.

58. *Id.*

ers”<sup>59</sup> that professional bondsmen hold in the United States to compel the return of a bail jumper.<sup>60</sup> The common law right of recapture was recognized by the United States Supreme Court over 100 years ago in *Taylor v. Taintor*.<sup>61</sup> The Supreme Court in *Taylor* held that sureties are regarded as having custody of their principals after posting bail.<sup>62</sup> Thus, in order to secure his principal’s appearance in court, a surety may seize the principal at any time without obtaining a warrant.<sup>63</sup>

The Court of Appeals for the Fourth Circuit rejected Kear’s argument.<sup>64</sup> The court noted that “[t]he rationale advanced [by Kear] . . . depend[ed] solely on cases relating to seizures within the United States for return to appear before a

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59. *Id.* at 182. For a discussion as to what is meant by the extraordinary powers of bondsmen, see *infra* note 60.

60. The court in *Maynard v. Kear*, 474 F. Supp. 794 (N.D. Ohio 1979), explained the relationship between the bondsman and his principal:

The bondsman, in exchange for a fee and according to a contract, provides a service, obtaining the principal’s release from imprisonment. To obtain the principal’s release, the bondsman must pledge to a court that the bondsman will assume responsibility for securing the appearance of the accused at trial. The bondsman thus owes a duty to the court and must suffer financial penalty for failure to perform that duty. In order to secure the principal’s appearance at future court proceedings, the bondsman has the right pursuant to the bail contract or common law to arrest the principal at any time and at any place and to redeliver the principal into the hands of the public jailor. . . . In making the rearrest, the bondsman need not obtain a warrant, can use agents, can use force, if necessary, and can pursue the principal into any state and bring him back for trial without obtaining extradition, unless there is a contrary state statute. . . . In sum, the bondsman merely continues the original imprisonment, albeit in a more comfortable condition for the principal.

*Id.* at 801-02 (footnote and citations omitted).

61. 83 U.S. (1 Wall.) 366 (1872). In *Taylor*, sureties posted bail for their principal, charged with grand larceny, in Connecticut. *Id.* at 368. The principal left the state, and went to New York. While there, he was delivered to authorities from Maine regarding a prior burglary charge. *Id.* He was tried and imprisoned in Maine, and thus could not appear before the Connecticut court at the time of his trial there. *Id.* at 368-69. The Court ruled that the sureties were not to be discharged from liability for failing to produce their principal. *Id.* at 372-75. They permitted him to go to New York and it was their duty “to be aware of his arrest when it occurred, and to interpose their claim to his custody.” *Id.* at 373 (footnote omitted).

62. *Id.* at 371.

63. *Id.* But see *Maynard*, 474 F. Supp. at 802. “[T]he common law right of recapture is limited by the reasonable means necessary to effect the rearrest.” When the bondsman is acting under the cloak of state authority, the common law right of recapture is also circumscribed by the fourth amendment prohibition against unreasonable searches and seizures. *Id.*; see U.S. CONST. amend. IV.

64. *Kear*, 699 F.2d at 183.

federal or state court.”<sup>65</sup> It refused to extend the authority to act directly, without recourse to public authorities,<sup>66</sup> when the crossing of an international boundary was involved.<sup>67</sup> In support of this position, the court cited *Reese v. United States*.<sup>68</sup> The Supreme Court in *Reese* held that the power of sureties over principals did not extend outside the United States.<sup>69</sup> In *Reese*, the defendant, who had posted bail, stipulated with the government that he could leave the United States prior to his appearance for trial.<sup>70</sup> Accordingly, the government could not recover against the sureties for failing to produce their principal.<sup>71</sup>

*Reese* may be distinguished from *Kear* in that, in *Kear*, the government did not give Jaffe permission to leave the country.<sup>72</sup> However, this factual distinction does not undermine the rule of law stated in *Reese*, restricting the powers of sureties to the United States.<sup>73</sup> The *Kear* court had a firm basis for stating that the United States kidnapping statute would apply if a Canadian bondsman seized a bail jumper in the United States and returned him to Canada.<sup>74</sup> This, in turn, destroyed *Kear*'s contention “that, reciprocally treated, his conduct was not a crime under [United States] law.”<sup>75</sup> Furthermore, the court

65. *Id.*

66. *Id.* at 182.

67. *Id.* at 183.

68. 76 U.S. (9 Wall.) 13 (1869).

69. *Id.* at 21.

70. *Id.* at 15-16.

71. *Id.* at 22.

There is . . . an implied covenant on the part of the government, when the recognizance of bail is accepted, that it will not in any way interfere with this covenant between [the surety and the principal], or impair its obligation, or take any proceedings with the principal which will increase the risks of the sureties or affect their remedy against him.

*Id.*

72. Compare *Kear*, 699 F.2d at 181-82 with *Reese*, 76 U.S. (9 Wall.) 13 at 22.

73. The *Reese* court stated that the bondsman's “power of arrest can only be exercised within the territory of the United States.” 76 U.S. (9 Wall.) 13 at 21. It did not qualify this rule, and in fact, emphasizes that the sureties cannot be held liable because the government “itself consented to [the principal's] placing himself beyond their reach and control.” *Id.* at 22 (footnote omitted).

74. *Kear*, 699 F.2d at 183.

75. *Id.* at 183-84. As further authority for the proposition that violation of the sovereignty of a foreign state is prohibited, the court cited *Villareal v. Hammond*, 74 F.2d 503 (5th Cir. 1934). However, this case may be distinguished from *Kear* in that the persons who “abducted” an escaped bond defaulter from Mexico were not

pointed out that in Canada, as opposed to the United States, there are statutory limits on bonding.<sup>76</sup> One example is section 127(1) of the Canadian Criminal Code,<sup>77</sup> which prohibits a surety from accepting any compensation for his services.<sup>78</sup> In addition, section 449(3) of the Code<sup>79</sup> mandates that "[a]ny one other than a peace officer who arrests a person without warrant shall . . . deliver the person to a peace officer."<sup>80</sup> Thus, Kear allegedly violated not only the Canadian law against bonding for compensation,<sup>81</sup> but also the law requiring delivery to a peace officer before return to a distant court.<sup>82</sup>

Kear also argued that because Canadian law would allow a bondsman to capture and return a bail jumper to a United States court, he had not violated the Canadian kidnapping stat-

bondsmen, but merely persons attempting to obtain a reward for the defaulter's return, without delivering him first to the Mexican authorities. *See id.* at 504-05.

76. *Kear*, 699 F.2d at 182 n.3, 184.

77. Criminal Code, CAN. REV. STAT. ch. C-34, § 127(1) (1972).

78. *Id.* Section 127(1) reads in full:

Every one who willfully attempts in any manner to obstruct, pervert or defeat the course of justice in a judicial proceeding,

(a) by indemnifying or agreeing to indemnify a surety, in any way and either in whole or in part, or

(b) where he is a surety, by accepting or agreeing to accept a fee or any form of indemnity whether in whole or in part from or in respect of a person who is released or is to be released from custody, is guilty of

(c) an indictable offence and is liable to imprisonment for two years, or

(d) an offence punishable on summary conviction.

*Id.*

79. *Id.* ch. C-34, § 449(3) (2d Supp. 1972).

80. *Id.* Section 702 of the Canadian Criminal Code states that "[n]othing in this Part limits or restricts any right that a surety has of taking and giving into custody any person for whom, under a recognizance, he is a surety." Criminal Code, CAN. REV. STAT. ch. C-34, § 702 (1970). The *Kear* court recognized that this section "preserve[s] the common law right of a surety to seize the accused and deliver him to a justice," but "nevertheless section 449 of the Canadian Criminal Code" must control. *Kear*, 699 F.2d at 182 n.3.

81. *See* Criminal Code, CAN. REV. STAT. ch. C-34, § 127(1) (1972); *supra* notes 77-78 and accompanying text.

82. *See* Criminal Code, CAN. REV. STAT. ch. C-34, § 449(3) (2d Supp. 1972); *supra* notes 79-80 and accompanying text. The term "kidnapping" is not actually defined in the Canadian Criminal Code and Canadian courts have not given a definition. *See* K. CLARKE, R. BARNHORST & S. BARNHORST, CRIMINAL LAW AND THE CANADIAN CRIMINAL CODE 210 (1977). However, in *R. v. Reid*, [1972] 2 All E.R. 1350, (C.A.), the court ruled that the crime is "complete when the person is seized or carried away." *Id.* at 1352. This criterion would appear to be satisfied in *Kear*, 699 F.2d at 182.

ute.<sup>83</sup> In addressing this argument, the court noted that Kear's actions probably violated Canadian law.<sup>84</sup> The authority for this contention was the Fourth Circuit's earlier decision in *Collier v. Vaccaro*.<sup>85</sup> Vaccaro was an informer working with a narcotics agent of the United States government.<sup>86</sup> Under an arrangement between United States and Canadian authorities, Vaccaro and the narcotics agent worked in Canada to develop evidence regarding an international smuggling operation.<sup>87</sup> Eventually, Vaccaro forcibly arrested the alleged head of the smuggling ring and brought him into the United States.<sup>88</sup> The *Collier* court ruled that Vaccaro violated the Canadian kidnapping statute<sup>89</sup> because there was sufficient evidence to support Canada's argument that he had forcibly carried the suspect into the United States.<sup>90</sup>

In addition to relying on *Collier*, the *Kear* court noted that Canadian authorities had instituted kidnapping charges and extradition proceedings against Kear.<sup>91</sup> According to the court, it was the function of Canadian courts to determine whether Canadian law had been violated.<sup>92</sup> In refusing to "preempt the Canadian courts" and "restrict the application of the [Extradition] Treaty," the court pointed to *Factor v. Laubenthal*.<sup>93</sup> The Supreme Court held in *Factor* that in order to

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83. *Kear*, 699 F.2d at 183; see Criminal Code, CAN. REV. STAT. ch. C-34, § 247(1)(b) (1970); *supra* note 44 (for text of statute).

84. *Kear*, 699 F.2d at 184. The court does not actually state that Kear's conduct would most likely violate Canadian law, but this can be inferred from the fact that the court discusses a case in which conduct analogous to Kear's was held to have violated Canadian law. *Cf. id.* at 184 (citing *Collier v. Vaccaro*, 51 F.2d 17 (4th Cir. 1931)).

85. 51 F.2d 17 (4th Cir. 1931).

86. *Id.* at 18.

87. *Id.*

88. *Id.*

89. The kidnapping statute then in effect reads as follows: "Every one is guilty of an indictable offense and liable to twenty-five years' imprisonment who, without lawful authority, . . . kidnaps any other person with intent . . . to cause such other person to be unlawfully sent or transported out of Canada against his will." Criminal Code, CAN. REV. STAT. ch. 36, § 297(a)(ii) (1927). This is very similar to the current section 247(1)(b) of the Canadian Criminal Code, CAN. REV. STAT. ch. C-34, § 247(1)(b) (1970); see *supra* note 44 (for text of statute).

90. 51 F.2d at 19.

91. *Kear*, 699 F.2d at 184.

92. *Id.*

93. *Id.*; see *Factor v. Laubenthal*, 290 U.S. 276 (1933). In *Factor*, the accused's extradition to London was sought on the grounds that he had received money which he knew had been fraudulently obtained. *Id.* at 286. The accused con-

conform with the principles controlling international agreements,<sup>94</sup> treaties were to be construed so as to reflect the intentions of both parties.<sup>95</sup> Equality between the countries was not to be sacrificed in the process of interpreting treaty obligations.<sup>96</sup> Had the *Kear* court undertaken to interpret Canadian law, it would have been narrowing the rights that Canada could claim under the Extradition Treaty.<sup>97</sup>

Kear also argued that Jaffe's act of posting bail was a consent to his recapture at any time.<sup>98</sup> Thus, returning him to Florida was not "kidnapping."<sup>99</sup> The court rejected this argument,<sup>100</sup> stating that it was "at best, a question to be raised by way of defense in the Canadian criminal proceedings."<sup>101</sup>

### B. *A Comparison of the Defenses in Kear and Collier v. Vaccaro*

Although *Collier v. Vaccaro*<sup>102</sup> was decided more than fifty years before *Kear v. Hilton*,<sup>103</sup> the two cases are markedly similar. Each case involved Canadian government charges of kidnapping,<sup>104</sup> and in both, the extradition proceedings were gov-

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tended that such an act would not be a crime under the laws of the state of Illinois, and thus, according to the Webster-Ashburton Treaty, *supra* note 20, extradition would not be proper. *Factor*, 290 U.S. at 286. The Court ruled that:

Once the contracting parties are satisfied that an identified offense is generally recognized as criminal in both countries, there is no occasion for stipulating that extradition shall fail merely because the fugitive may succeed in finding, in the country of refuge, some state, territory or district in which the offense charged is not punishable.

*Id.* at 300.

94. These principles are that the "diplomatic relations between nations, and the good faith of treaties," require that treaty obligations should be construed "so as to effect the apparent intention of the parties to secure equality and reciprocity between them." *Factor*, 290 U.S. at 293.

95. *Id.* at 293-94.

96. *See id.* at 293.

97. In the words of the *Kear* court, "[w]e should not rush to insert ourselves and possibly preempt the Canadian courts who doubtless are better prepared to answer the question than we are. We should be slow to restrict the application of the Treaty in that fashion." *Kear*, 699 F.2d at 184.

98. *Id.* at 183.

99. *Id.*

100. *Id.* at 184-85.

101. *Id.* at 185.

102. 51 F.2d 17 (4th Cir. 1931). For a detailed discussion of the facts of *Collier*, see *supra* notes 86-88 and accompanying text.

103. 699 F.2d 181 (4th Cir. 1983).

104. *See supra* notes 44, 89 and accompanying text.

erned by treaty provisions.<sup>105</sup> Interpreting the relevant statutes<sup>106</sup> and treaty provisions,<sup>107</sup> the courts in both *Collier* and

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105. Kear's actions were governed by the Extradition Treaty, *supra* note 1. In *Collier*, Vaccaro's actions were governed by article X of the Webster-Ashburton Treaty, *supra* note 20; *see Collier*, 51 F.2d at 19.

106. The statutes in *Kear* were 18 U.S.C. § 1201(a) (1982), and § 247(1)(b) of the Canadian Criminal Code, CAN. REV. STAT. ch. C-34, § 247(1)(b) (1970). In *Collier*, the statutory construction involved § 297(a)(ii) of the Canadian Criminal Code, CAN. REV. STAT. ch. 36, § 297(a)(ii) (1927), and the kidnapping statute of Maryland, MD. ANN. CODE, art. 27, § 316 (1924) (current version at MD. ANN. CODE, art. 27, § 337 (1957)). The Maryland statute provided that:

Every person, his counsellors, aiders or abettors, who shall be convicted of the crime of kidnapping and forcibly or fraudulently carrying or causing to be carried out of this State any person with intent to have such person carried out of this State, shall be sentenced to the penitentiary for not more than twenty-one years.

*Id.*

107. At the time *Collier* was decided, article X of the Webster-Ashburton Treaty, *supra* note 20, governed extradition proceedings between the United States and Canada. As a result of the Supplementary Convention on Extradition of 1899 between the United States and the United Kingdom, *supra* note 22, kidnapping was added as an extraditable offense. *Id.* The Webster-Ashburton Treaty provided that extradition was proper "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 offence had been there committed. . . ." Webster-Ashburton Treaty, *supra* note 20, art. X.

This provision is akin to article 10(1) of the current Extradition Treaty, *supra* note 1; *see also infra* note 129 (for text of article 10(1)). Despite the almost identical language in both treaties concerning "the laws of the place where the person shall be found," in *Kear*, the federal statute, 18 U.S.C. § 1201(a) (1982), was used to define kidnapping, while in *Collier*, the state statute of Maryland was used. *Compare Kear*, 699 F.2d at 183 *with Collier*, 51 F.2d at 19. This apparent inconsistency can be explained.

First, the Webster-Ashburton Treaty, *supra* note 20, did not contain a provision similar to article 2(1) of the current Extradition Treaty, which states that the offenses must be punishable by "the laws of both Contracting Parties by a term of imprisonment exceeding one year." Extradition Treaty, *supra* note 1, art. 2(1); *see supra* note 49 (for text of article 2(1)). Thus, the Extradition Treaty "commands reference to the laws of the 'Contracting Parties,' " the United States and Canada. *Cucuzzella v. Keliikoa*, 638 F.2d 105, 107 n.3 (9th Cir. 1981). These laws have been construed as meaning "similar criminal provisions of federal law or, if none, the law of the place where the fugitive is found or, if none, the law of the preponderance of the states." *Id.* at 107.

Secondly, *Collier* follows the interpretation of article X of the Webster-Ashburton Treaty given in *Pettit v. Walshe*, 194 U.S. 205 (1904). The Court in *Pettit* stated that: "[T]he required evidence as to the criminality of the charge against the accused must be such as would authorize his apprehension and commitment for trial in that State of the Union in which he is arrested." *Id.* at 217; *see Collier*, 51 F.2d at 19 (the state statute is used to define kidnapping). However, in *Factor v. Laubenheimer*, 290 U.S. 276 (1933), the Supreme Court addressed the issue of whether "extradition may not be had unless the offense charged is a crime under the law of the state where the



*Kear* reached the conclusion that extradition was proper.<sup>108</sup>

The similarities between the cases extend to the defenses invoked by the parties.<sup>109</sup> In *Collier*, the court recognized Vaccaro's contention that "in attempting to apprehend [the smuggler], [he] was operating under [the] instructions of his superior and . . . with the sanction of the Canadian authorities."<sup>110</sup> However, the court held that whether Vaccaro believed he was acting lawfully was immaterial when his conduct reflected the elements of the kidnapping offense.<sup>111</sup> In *Kear*, the court considered the broad powers of professional bondsmen in the

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fugitive is found" under the Webster-Ashburton Treaty. *Id.* at 286. The Court stated that:

It cannot be said that these words give any clear indication that a fugitive charged with acts constituting a crime named in the treaty is not to be subject to extradition unless those acts are also defined as criminal by the laws of the state in which he is apprehended. The proviso would appear more naturally to refer to the procedure . . . in conformity with local law, by which compliance with the obligation of the treaty may be exacted at the place of refuge; and sets up a standard by which to measure the amount of the proof of the offense charged which the treaty requires as prerequisite to extradition.

*Id.* at 290-91.

Thus, "the proviso of [a]rticle X relates to the procedure to be followed in asserting rights under the treaty and is not a limitation upon the definition of offenses with respect to which extradition might be demanded." *Id.* at 296.

The approach taken by *Kear* is in accordance with article 2(1) of the Extradition Treaty, *supra* note 1, art. 2(1), and with the broader approach urged by *Factor*, "that construction should be adopted that enlarges the rights of the parties under the treaty." *Brauch v. Raiche*, 618 F.2d 843, 850 (1st Cir. 1980).

108. The *Collier* court held that extradition was justified because Vaccaro "had no right to carry [the alleged smuggler] forcibly out of Canada and into the United States." *Collier*, 51 F.2d at 19. The *Kear* court held that "circumstances justifying extradition [had] been established," *Kear*, 699 F.2d at 185, due to the mutuality between the Canadian and United States kidnapping statutes. *Id.* at 184.

109. Both defendants invoked the defense that they believed they were acting lawfully. See *Kear*, 699 F.2d at 185; *Collier*, 51 F.2d at 19; *infra* notes 110-15 and accompanying text.

110. 51 F.2d at 20-21.

111. *Id.* at 19-20. Specifically, the court stated:

[I]t is no defense to the crime of kidnapping that an accused may have thought that he had a right to arrest and carry the person arrested out of the country or that he did not intend to violate the law. The gist of the offense is the forcible carrying out of the state; and where this intention is shown to have existed, it is immaterial that accused may have thought that he was acting within the law.

*Id.*

United States<sup>112</sup> and acknowledged that “[t]he Canadian court may listen sympathetically to Kear as he seeks to portray himself as someone caught in a complexity of intricate international law beyond his imagination or comprehension.”<sup>113</sup> Nevertheless, since there was “mutuality between the [Canadian and United States] statutes”<sup>114</sup> there were no “grounds for refusing to honor the Canadian request for extradition.”<sup>115</sup>

The problem of whether a writ of habeas corpus can be used to prevent the extradition of a person who alleges that he believed he was acting lawfully was illustrated in 1931 by *Collier*.<sup>116</sup> More than fifty years later, the problem arose again in *Kear* and was handled by the Fourth Circuit in substantially the same manner.<sup>117</sup> The issue to be considered in this Note is whether the *Kear* court was correct.

### III. *CONSIDERING THE FACTORS AS TO KEAR'S EXTRADITION*

Bounty hunters play a critical role in insuring that defendants facing criminal charges will appear in court.<sup>118</sup> As such, bounty hunters have been vested with broad powers by the United States government.<sup>119</sup> Yet these powers stem from a common law right,<sup>120</sup> and are not delineated by statute.<sup>121</sup> Thus, there may be legitimate doubt as to whether these powers extend across international boundaries.<sup>122</sup>

This uncertainty is complicated by factors in the *Kear* case which lend some credence to Kear's argument that he believed he was acting lawfully.<sup>123</sup> Under the Extradition Treaty, Florida could have requested Jaffe's extradition when he failed to

112. See *Kear*, 699 F.2d at 182. For a discussion of the powers of bondsmen in the United States, see *supra* notes 59-63 and accompanying text.

113. *Kear*, 699 F.2d at 185.

114. *Id.* at 184.

115. *Id.* at 185.

116. See *Collier*, 51 F.2d at 19-21; *supra* notes 110-11 and accompanying text.

117. See *Kear*, 699 F.2d at 185; *supra* notes 112-15 and accompanying text.

118. See *supra* note 60.

119. See *supra* notes 59-63 and accompanying text.

120. *Id.*

121. *Id.*

122. Although circumscribed by case law, see *supra* notes 68-69 and accompanying text, and constitutional principles, see *supra* note 63, the powers of bondsmen are “seemingly absolute.” *Maynard*, 474 F. Supp. at 802.

123. See *infra* notes 126-28 and accompanying text.

appear for trial.<sup>124</sup> However, the extradition pleas were twice improperly drawn and rejected by the state.<sup>125</sup> At that point, according to testimony by a lawyer for Accredited Surety & Casualty Co., the surety, "local prosecutors encouraged the company to take the law into its own hands."<sup>126</sup> The company then sent Kear and Johnson to Toronto to bring Jaffe back.<sup>127</sup> While the State of Florida's involvement has never been proven, the possibility exists that Kear went to Toronto not only with the sanction of his employer, but with that of certain state officials.<sup>128</sup>

If so, Kear could have believed he was acting within the law. The question remains, however, whether this defense should have been sufficient to prevent Kear's extradition to Canada, or whether it was merely an issue to be raised in the Canadian proceeding.

#### A. *The Writ of Habeas Corpus and Extradition*

The Extradition Treaty states that extradition shall be granted only if the evidence justifies committal for trial.<sup>129</sup> The Extradition Treaty does not state that the evidence must be sufficient for conviction.<sup>130</sup> In *Benson v. McMahan*,<sup>131</sup> the Supreme Court defined the standard for use of a habeas

124. See *Putnam County vs. Canada*, Time, Aug. 8, 1983, at 58.

125. Press, *The Bounty-Hunter Mutiny*, Newsweek, Aug. 30, 1982, at 58.

126. *Id.*

127. *Id.*; see also *Putnam County vs. Canada*, Time, Aug. 8, 1983, at 58.

128. In a petition for habeas corpus filed in June 1983 with the United States district court in Jacksonville, Florida, the Canadian government asked for Jaffe's release from prison, charging that Kear and Johnson acted "pursuant to a plan promoted by officials of the state of Florida." Posner, *Handcuffs across the border*, Maclean's, July 25, 1983, at 6.

It has also been reported that "one of Jaffe's abductors . . . admitted that he had conferred with the state attorney's office before his trip to Toronto." Posner, *The not-so-happy hunting ground*, Maclean's, Feb. 8, 1982, at 23.

129. Extradition Treaty, *supra* note 1, art. 10(1).

Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found, either to justify his committal for trial if the offense of which he is accused had been committed in its territory or to prove that he is the identical person convicted by the courts of the requesting State.

*Id.*

130. See *id.*

131. 127 U.S. 457 (1888). The issue before the Court was whether there were grounds to justify extradition to Mexico under the terms of the United States' extradition treaty with Mexico, or whether a writ of habeas corpus should be granted.

corpus proceeding in challenging an extradition order.<sup>132</sup> The Court held that the question was not whether the party was guilty or innocent of the specific crime involved, but simply whether there was enough evidence to warrant committal for trial.<sup>133</sup> Several years later, in *Ornelas v. Ruiz*,<sup>134</sup> the Court refined the law even further:

[I]t is settled that a writ of *habeas corpus* cannot perform the office of a writ of error, and that, in extradition proceedings, if . . . the offence charged is within the terms of the treaty of extradition, and the magistrate . . . has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on *habeas corpus*.<sup>135</sup>

In reviewing denials of petitions for writs of habeas corpus to thwart extradition, the courts have not strayed from the guidelines set out in *Benson* and *Ornelas*.<sup>136</sup> The Second Circuit<sup>137</sup> has recently reiterated that on appeal from the denial of habeas corpus, the concern of the court is only whether the "alleged offenses were covered by an extradition treaty and whether an official with jurisdiction was presented with any evidence warranting a finding that there was reasonable ground to believe appellants guilty."<sup>138</sup> Kear's conduct came within the bounds of both the United States and Canadian kidnapping statutes;<sup>139</sup> this was sufficient to establish his "criminality . . . for the purposes of extradition."<sup>140</sup>

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132. See *infra* note 133 and accompanying text.

133. *Benson*, 127 U.S. at 463.

134. 161 U.S. 502 (1896).

135. *Id.* at 508-09.

136. See, e.g., *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *Collins v. Loisel*, 259 U.S. 309, 314-15 (1922); *Charlton v. Kelly*, 229 U.S. 447, 456 (1913); *Terlinden v. Ames*, 184 U.S. 270, 278 (1902); *Melia v. United States*, 667 F.2d 300, 302 (2d Cir. 1981); *Simmons v. Braun*, 627 F.2d 635, 636-37 (2d Cir. 1980).

137. *Messina v. United States*, 728 F.2d 77 (2d Cir. 1984).

138. *Id.* at 79.

139. See *supra* notes 48-82 and accompanying text.

140. *Ornelas*, 161 U.S. at 508-09. The court in *Benson*, 127 U.S. at 463, explained that:

[T]he proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day . . . for the purpose of determining whether a case is made out which justify the holding of the

### B. *The Question of United States-Canadian Relations*

Although the prior case law establishing the grounds for a writ of habeas corpus to prevent extradition presents a strong argument in favor of Kear's extradition, there is another, perhaps even more compelling argument.

Treaty obligations represent "the most consistent and most comprehensive effort . . . to co-operate with other States in the suppression of fugitive criminals."<sup>141</sup> While there is natural anxiety about being sent to a foreign country for trial,<sup>142</sup>

[i]t is upon the spot where the crime is committed that it can best be tried and punished. There are the witnesses, and there can the circumstances be most accurately ascertained and considered. . . . [I]t is at the place where the offence was committed that the greatest interest is felt in its detection and punishment, and the moral effect of retribution most necessary and useful.<sup>143</sup>

The cooperation to suppress fugitive criminals is especially important between Canada and the United States. The ease of travel between the two countries<sup>144</sup> has made the Extradition Treaty crucial "to secure the return of . . . fugitives" to Canada.<sup>145</sup> Were it not for extradition laws, Canadian cities "would be ready targets for [United States] criminals if the United States were not under obligation to surrender them."<sup>146</sup>

The Extradition Treaty is very specific concerning the types of offenses exempt from extradition: those of a "political character,"<sup>147</sup> those barred by lapse of time,<sup>148</sup> and those for

accused . . . to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him.

*Id.*

141. I.A. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 40 (1971).

142. See *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925) (discussing the natural anxiety of an American being sent to Mexico for trial of a crime allegedly covered by the United States' extradition treaty with Mexico).

143. J. MOORE, *A TREATISE ON EXTRADITION AND INTERSTATE RENDITION* 6-7 (1891) (footnote omitted).

144. "[M]odernization of the extradition relations between the United States and Canada is especially important in light of the ease of travel between the two countries." *The President's Message*, *supra* note 24.

145. G.V. LAFORST, *EXTRADITION TO AND FROM CANADA* 121 (1961).

146. *Id.*

147. Extradition Treaty, *supra* note 1, art. 4(1)(iii). The political offense exception provides that:

which the person has already been tried.<sup>149</sup> No other exemptions from extradition are recognized.<sup>150</sup> The controversy over

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Extradition shall not be granted . . . [w]hen the offense in respect of which extradition is requested is of a political character, or the person whose extradition is requested proves that the extradition request has been made for the purpose of trying or punishing him for an offense of the above-mentioned character. If any question arises as to whether a case comes within the provisions of this subparagraph, the authorities of the Government on which the requisition is made shall decide.

*Id.*

Offenses of a political character are not easily defined. G.V. LAFOREST, *supra* note 145, at 44. They must be considered in the context in which they have been committed. *Id.* However, there are some guidelines which may be followed. *Id.*

Offenses of a political character often arise out of political disturbances, such as a political uprising. *Id.* But not every crime committed during a political uprising will be considered a political offense. *Id.* at 45. The act must have been committed "as an incident or in furtherance of a political end." *Id.* Thus, if a shooting occurred during a political uprising, but was motivated by private revenge, extradition could not be waived on the ground that the offense was one of a political character. *Id.* It is not necessary, though, that the offense take place as a result of a political uprising. *Id.* In *Ex Parte Kolczynski*, [1955] 1 Q.B. 540, seven crew members of a Polish fishing vessel overpowered the captain and other crew members and brought the ship into an English port. *Id.* at 542-43. Their purpose was to seek asylum in England so that they could avoid being charged with certain political crimes. *Id.* Although they had committed acts, such as kidnapping, which would otherwise be extraditable under Great Britain's extradition treaty with Poland, these offenses were judged to be of a political character. G.V. LAFOREST, *supra* note 145, at 47.

148. Extradition Treaty, *supra* note 1, art. 4(1)(ii). "Extradition shall not be granted . . . [w]hen the prosecution for the offense has become barred by lapse of time according to the laws of the requesting State." *Id.*

149. *Id.* art. 4(1)(i). "Extradition shall not be granted . . . [w]hen the person whose surrender is sought is being proceeded against, or has been tried and discharged or punished in the territory of the requested State for the offense for which his extradition is requested." *Id.*

150. The ruling of the court is not the final word however. The powers of the Secretary of State in regard to extradition proceedings are expressed in 18 U.S.C. § 3186 (1976), which reads:

The Secretary of State may order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged. Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty. A person so accused who escapes may be retaken in the same manner as any person accused of any offense.

*Id.*

The words "may order the person committed" have been construed as giving the Secretary of State the "discretion to refuse to extradite." See *Escobedo v. United States*, 623 F.2d 1098, 1105 n.20 (5th Cir.), *cert. denied* 449 U.S. 1036 (1980), *cert. denied sub nom.* *Castillo v. Forsht*, United States Marshal, 450 U.S. 922 (1981). The Secretary of State has "the authority to review the proceedings and evidence taken before the committing magistrate with a view to determining in general whether

Jaffe's kidnapping had already threatened "to have a generally deleterious effect on [the United States'] relations with Canada."<sup>151</sup> If the court permitted Kear to escape extradition when there was ample evidence to commit him for trial,<sup>152</sup> the integrity of the United States' extradition agreement with Canada could have been seriously eroded.<sup>153</sup> Canada has been "scrupulously cooperative in complying with [United States] requests for the extradition of fugitives."<sup>154</sup> The United States cannot give any less in return.

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under all the circumstances affecting the case, both of a public and private nature, the warrant of surrender should issue." Memorandum from Chandler P. Anderson, Counselor of the Department of State, to Secretary of State Knox (Feb. 5, 1912) (Department of State file 211.42R67/16), reprinted in M. WHITEMAN, *supra* note 45, at 1027.

It is noted that there are treaties which give the courts broader discretion in deciding when extradition is not warranted. Extradition treaties negotiated by the United States with Norway, Treaty on Extradition, June 9, 1977, United States-Norway, art. 7(2)(b), 31 U.S.T. 5621, 5626, T.I.A.S. No. 9679, at 7-8 [hereinafter cited as Norway Treaty], and with Finland, Treaty on Extradition, June 11, 1976, United States-Finland, art. 7(1)(c), 31 U.S.T. 944, 950, T.I.A.S. No. 9626, at 7 [hereinafter cited as Finland Treaty], provide that extradition "may be refused . . . [if] in special circumstances, having particular regard to the age, health, or personal conditions of the person concerned, the requested State has reason to believe that extradition will be incompatible with humanitarian considerations." Norway Treaty, *supra*, art. 7(2)(a); Finland Treaty, *supra*, art. 7(1)(c). The Treaty on Extradition Between the United States and Denmark, June 22, 1972, United States-Denmark, art. 7(5), 25 U.S.T. 1293, 1301, T.I.A.S. No. 7864, at 9, has the same exception, but is stated in stronger language. The phrase "shall not be granted" rather than "may be refused" is used to preface the provision. *Id.* Perhaps the most liberal exception is provided in the Convention on Extradition Between the United States and Sweden, Oct. 24, 1961, United States-Sweden, art. V(6), 14 U.S.T. 1845, 1849, T.I.A.S. No. 5496, at 5. This agreement states that:

Extradition shall not be granted . . . [if] in the specific case it is found to be obviously incompatible with the requirements of humane treatment, because of, for example, the youth or health of the person sought, taking into account also the nature of the offense and the interest of the requesting State.

*Id.*

151. Strasser, *A One-Man Diplomatic Flap*, Newsweek, Aug. 8, 1983, at 28 (quoting Secretary of State George Shultz). Secretary of State George Shultz "warned that all the sniping 'threatens to have a generally deleterious effect on [the United States'] relations with Canada.'" *Id.*

152. See *supra* notes 48-82 and accompanying text.

153. See Posner, *Handcuffs across the border*, Maclean's, July 25, 1983, at 7 (discussing the effects of Florida's alleged refusal to retrieve Jaffe by following procedures set out in the Extradition Treaty).

154. *Putnam County vs. Canada*, Time, Aug. 8, 1983, at 58.

*CONCLUSION*

The events leading up to the Fourth Circuit's decision in *Kear v. Hilton* were highly dramatic. The kidnapping of a prominent Canadian businessman by two United States bounty hunters provided sensational newspaper and magazine headlines. However, the *Kear* court was correct in not letting the resulting furor obscure its analysis of the issues before it.

There is no doubt that, on its face, *Kear's* conduct violated both the Canadian and United States kidnapping statutes.<sup>155</sup> Under the terms of the Extradition Treaty, this is sufficient for extradition.<sup>156</sup> *Kear*, buttressed by the powers given bounty hunters in the United States<sup>157</sup> and the possible approval of state officials,<sup>158</sup> portrayed himself as having believed he was acting lawfully.<sup>159</sup> However, as far back as 1931, the Fourth Circuit had ruled that such a defense was not enough to prevent extradition when the evidence indicated that an extraditable crime had been committed.<sup>160</sup> Furthermore, the Supreme Court has stated that a writ of habeas corpus may not be used to frustrate extradition when the evidence is sufficient for committal for trial.<sup>161</sup>

Finally, a principal reason for creating the Extradition Treaty was to prevent fugitive criminals from taking advantage of the ease of travel between Canada and the United States by committing a crime in one country and then fleeing to the other.<sup>162</sup> The Extradition Treaty is very specific in its exceptions.<sup>163</sup> Whatever the merits of *Kear's* defense may be,<sup>164</sup> it did not fall under one of the exceptions. The sincerity of the United States' interest in furthering the goals of the Extradition Treaty could have come under serious question if the *Kear* court had not decided in favor of extradition. The decision was mandated not only by prior case law and by the terms of

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155. *See supra* notes 44 & 51.

156. *See supra* notes 48-53 and accompanying text.

157. *See supra* notes 59-63 and accompanying text.

158. *See supra* notes 124-28 and accompanying text.

159. *See supra* notes 112-13 and accompanying text.

160. *See supra* notes 110-11 and accompanying text.

161. *See supra* notes 129-40 and accompanying text.

162. *See supra* notes 144-45 and accompanying text.

163. *See supra* notes 147-50 and accompanying text.

164. *See supra* notes 118-28 and accompanying text.



the Extradition Treaty, but by the policy of cooperation between Canada and the United States that is essential to the Extradition Treaty.

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